NORTH CAROLINA COURT OF APPEALS REPORTS

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1975

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24 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

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NAOMI E. MORRIS
FRANK M. PARKER
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[1] Appointed 31 January 1975.
[2] Appointed 20 March 1975.
[3] Appointed 15 March 1975.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF PRACTICE CITED AND CONSTRUED

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

Case	*Reported*	*Disposition in Supreme Court*
Cline v. Brown	24 N.C. App. 209	Denied, 286 N.C. 412
Comr. of Insurance v. Automobile Rate Case	24 N.C. App. 223	Denied, 286 N.C. 412
Drury v. Drury and Holland v. Drury	24 N.C. App. 246	Denied, 286 N.C. 413
Ellis v. Civic Improvement, Inc.	24 N.C. App. 42	Denied, 286 N.C. 413
Eudy v. Eudy	24 N.C. App. 516	Allowed, 286 N.C. 722
Foods, Inc. v. Super Markets	24 N.C. App. 447	Allowed, 286 N.C. 722
Frazier v. Glasgow	24 N.C. App. 641	Denied, 286 N.C. 722
Highway Comm. v. Manufacturing Co.	24 N.C. App. 478	Denied, 286 N.C. 722 Appeal dismissed
Homes, Inc. v. Peartree	24 N.C. App. 579	Denied, 286 N.C. 722
Hubbard v. Casualty Co.	24 N.C. App. 493	Denied, 286 N.C. 723
In re Custody of Cox	24 N.C. App. 99	Denied, 286 N.C. 414
In re Hogan	24 N.C. App. 51	Denied, 286 N.C. 415
In re Will of Loftin	24 N.C. App. 435	Denied, 286 N.C. 545
Insurance Group v. Parker	24 N.C. App. 452	Allowed, 286 N.C. 723
Jolliff v. Winslow	24 N.C. App. 107	Appeal dismissed, 286 N.C. 545
McCarley v. McCarley	24 N.C. App. 373	Allowed, 286 N.C. 545
McGrady v. Quality Motors	23 N.C. App. 256	Denied, 286 N.C. 545 (Improvidently allowed, 286 N.C. 336)
Nivens v. Tire & Rubber Co.	24 N.C. App. 473	Denied, 286 N.C. 723 Appeal dismissed
Oates v. Dept. of Motor Vehicles	24 N.C. App. 690	Denied, 286 N.C. 723
Piland v. Piland	24 N.C. App. 653	Denied, 286 N.C. 723
Riggs v. Foster & Co. and Hill v. Foster & Co.	24 N.C. App. 377	Denied, 286 N.C. 724
Service Stations v. Pressley	24 N.C. App. 586	Denied, 286 N.C. 724
State v. Adcock	24 N.C. App. 102	Denied, 286 N.C. 416
State v. Bagnard	24 N.C. App. 54	Denied, 286 N.C. 416
State v. Brooks	24 N.C. App. 338	Appeal dismissal denied, 286 N.C. 724

Case	*Reported*	*Disposition in Supreme Court*
State v. Byrd	23 N.C. App. 718	Denied, 286 N.C. 545 Appeal dismissed
State v. Carriker	24 N.C. App. 91	Allowed, 286 N.C. 417
State v. Duffey	23 N.C. App. 515	Denied, 286 N.C. 546
State v. Edwards	24 N.C. App. 393	Denied, 286 N.C. 546
State v. Griffith	24 N.C. App. 250	Denied, 286 N.C. 546
State v. Gunn	24 N.C. App. 561	Denied, 286 N.C. 724
State v. Hood	24 N.C. App. 139	Denied, 286 N.C. 418
State v. Hopkins	24 N.C. App. 687	Denied, 286 N.C. 725
State v. Jarrell	24 N.C. App. 610	Denied, 286 N.C. 725 Appeal dismissed
State v. Lee	23 N.C. App. 560	Denied, 286 N.C. 725
State v. Lee	24 N.C. App. 666	Allowed, 286 N.C. 725
State v. McKinney	24 N.C. App. 259	Allowed, 286 N.C. 418
State v. Mason	24 N.C. App. 568	Denied, 286 N.C. 725
State v. Parks	24 N.C. App. 314	Denied, 286 N.C. 419
State v. Pearson	24 N.C. App. 410	Allowed, 286 N.C. 546
State v. Pope	24 N.C. App. 217	Denied, 286 N.C. 419
State v. Salame	24 N.C. App. 1	Denied, 286 N.C. 419 Appeal dismissed
State v. Sanders	24 N.C. App. 33	Denied, 286 N.C. 420
State v. Smith	24 N.C. App. 97	Denied, 286 N.C. 546
State v. Stanley	24 N.C. App. 323	Allowed, 286 N.C. 547
State v. Teat	24 N.C. App. 621	Denied, 286 N.C. 726
Trust Co. v. Smith	24 N.C. App. 133	Denied, 286 N.C. 420
White v. Alexander	24 N.C. App. 23	Allowed, 286 N.C. 420
Wilmar, Inc. v. Corsillo	24 N.C. App. 271	Denied, 286 N.C. 421

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Canady v. Creech	23 N.C. App. 673	Pending
Hatcheries, Inc. v. Coble	21 N.C. App. 256	286 N.C. 518
Hinson v. Jefferson	24 N.C. App. 231	Pending
Huff v. Thornton	23 N.C. App. 388	287 N.C. 1
In re Campsites Unlimited	23 N.C. App. 250	Pending
Meyer v. McCarley and Co.	24 N.C. App. 418	Pending
Penland v. Greene	24 N.C. App. 240	Pending
Quick v. Insurance Co.	23 N.C. App. 504	287 N.C. 47
Rape v. Lyerly	23 N.C. App. 241	Pending
Setzer v. Annas	21 N.C. App. 632	286 N.C. 534
Sink v. Easter	23 N.C. App. 296	Pending
State v. Crabtree	23 N.C. App. 491	286 N.C. 541
State v. Jackson	24 N.C. App. 394	Pending
State v. McCotter	24 N.C. App. 76	Pending
State v. Pope	24 N.C. App. 644	Pending
Tucker v. Tucker	24 N.C. App. 649	Pending
Utilities Comm. v. Telegraph Co.	24 N.C. App. 327	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ANTONIO SALAME

No. 7318SC713

(Filed 25 November 1974)

1. **Criminal Law § 7— entrapment — intent originally in mind of officer**

Entrapment is a defense and prosecution is barred only when it is established that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the innocent mind of the accused, luring him into commission of an offense which he would not otherwise have committed.

2. **Criminal Law § 7— entrapment — deceit by officers**

The fact that officers or employees of the government merely afforded opportunities or facilities for the commission of an offense does not defeat the prosecution, nor will the mere fact of deceit defeat a prosecution.

3. **Criminal Law § 7; Narcotics § 4— sale of marijuana — entrapment — sufficiency of evidence**

State's evidence tending to show that a police officer and his informant did nothing other than inquire of defendant if he had drugs for sale and thereafter arrange a meeting at which such sale might be made and defendant's own admission that he had made at least one prior illegal sale of marijuana furnished a strong basis for inferring that the intent to distribute marijuana was initially defendant's and was not the result of entrapment.

4. **Criminal Law § 7; Narcotics § 4— sale of cocaine — entrapment — sufficiency of evidence**

Evidence was insufficient to support the defense of entrapment in a prosecution for the sale of cocaine where it tended to show

that defendant agreed to make a sale to an undercover police officer, on the next day the officer and a man pretending to be his boss appeared at defendant's room to complete the sale, and the play acting engaged in by the officer and the third person did nothing more than preserve the officer's role as a person engaged in the drug traffic who was ready and able to purchase the cocaine.

5. **Criminal Law § 88— cross-examination of own witness — denial proper**

Where defendant called as his witness the police informant instrumental in bringing about his arrest and thereafter moved to examine the informant as an adverse or hostile witness, the trial court's denial of such motion was not prejudicial since the evidence did not establish that, at the time of defendant's trial, the informant's interests were opposed to defendant's and since the ruling did not impede the defense in any material respect.

6. **Criminal Law § 34— defendant's guilt of other offenses — evidence admissible**

In a prosecution for felonious distribution of marijuana and felonious distribution of cocaine, testimony concerning defendant's dispensing three "speed" tablets and concerning his conversation and negotiations with police officers at a motel for the sale of one-half pound of cocaine, even though relating to events occurring after the offenses for which he was tried had been committed, were sufficiently closely connected in time and circumstances with the offenses charged as to have a logical relevance to show defendant's predisposition to commit those offenses.

7. **Criminal Law § 85— question as to defendant's character — no prejudice**

Defendant was not prejudiced by the trial court's allowance of a question concerning defendant's character and reputation on a college campus for dealing in drugs where the witness responded that he did not know defendant that well and expressed no opinion as to defendant's character or reputation for dealing in drugs or in any other resepect.

APPEAL by defendant from *Martin (Robert M.), Judge,* 14 May 1973 Session of Superior Court held in GUILFORD County.

By separate bills of indictment, proper in form, defendant was charged with (1) the felonious distribution on 27 February 1973 of more than five grams of marijuana to L. R. Mylan, and (2) the felonious distribution on 1 March 1973 of cocaine to L. R. Mylan. Without objection the two cases were consolidated for trial and defendant pled not guilty to both charges.

The State's evidence showed that on 27 February 1973 L. R. Mylan, a detective with the Greensboro Police Department, purchased 453 grams of marijuana from defendant, for which he paid defendant $190.00, and that on 1 March 1973 he purchased

from defendant 27 grams of a powder containing cocaine, for which he paid defendant $950.00. Defendant testified and admitted the two transactions and relied entirely upon the defense of entrapment. In this connection, the State's evidence showed:

For some time prior to February 1973 one Kenny Lawson worked as an informer giving information to the Greensboro Police pertaining to people selling drugs. Lawson also helped to arrange meetings between police officers and sellers of drugs. For this service the police paid Lawson $10.00 or $20.00 at irregular intervals "after the services were performed—after everybody had been arrested." In February 1973 Mylan's job with the police department was as an undercover agent trying to infiltrate the drug traffic in Greensboro. On 26 February 1973 Mylan and Lawson went to Milner Dormitory at Guilford College to purchase marijuana, but the person from whom they planned to make the purchase was not in. On leaving the dormitory, they met defendant, Antonio Salame, whom Lawson had previously known. Lawson introduced Mylan to defendant and asked defendant if he had any cocaine, to which defendant replied that he had sold out. On the following day, 27 February 1973, Mylan, Lawson and a boy known to Mylan as Mike Stovall, a friend of Lawson's, drove together in an automobile to Hardee's Restaurant across from the Guilford College campus. A few minutes later defendant arrived and came to the car in which Mylan and his companions were seated. Defendant handed a plastic bag through the car window to Mylan and then got into the back seat of the car. After getting into the car, defendant stated that he had eight pounds of marijuana in his room at Guilford College, that he had traveled sixty miles to get this, and that Mylan "would buy" this eight pounds for a little over $1,000.00. Mylan replied that he was unable to purchase eight pounds, whereupon defendant asked the other occupants of the car how much money they could get together. Mylan was the only one with money, and defendant then agreed to take $190.00 for the marijuana in the plastic bag, which amount was paid by Mylan and accepted by defendant. The State's chemist subsequently determined that the plastic bag contained 453 grams of marijuana. Regarding this transaction, Mylan testified:

"At this time, I counted out $190.00 to the defendant and gave it to him and he accepted it. He told me that the man with the rest of the drugs would be in his room at 1

p.m. the next day. . . . He asked me what time I could be in his room. I stated I thought I could be there about 3 p.m. Antonio stated to me that 'you will be there at one.' One o'clock was agreed on and Antonio stated that if we treated him fairly and were honest with him that in the near future he could sell me some cocaine for $5.00 per gram. Antonio stated that he would be going home to his home country of Chile where he had been purchasing the drug. This was also agreed on."

On the following day Mylan and Lawson, accompanied by Detective Hightower of the Greensboro Police Department, went to defendant's room. Hightower was introduced to defendant as Mylan's boss for whom Mylan was purchasing drugs. Hightower pretended to be angry with Mylan for having purchased marijuana, stating that marijuana was "kid stuff," and that he was only interested in cocaine. Hightower asked defendant if he could produce cocaine, and defendant wanted to know in what quantity. Hightower responded that he was interested in pounds. Defendant turned to another person in the room, whose identity was not known to the officers, and asked this person if he thought "the man" could get that quantity and at what price. After conferring with this person, defendant stated he could supply a quantity of cocaine. Defendant was not certain if he could supply pounds, but said he thought he could.

At this meeting in defendant's dormitory room, which took place on 28 February 1973, Hightower, by prearrangement with Mylan, played the part of Mylan's boss and pretended to be a person involved in the drug traffic but who did not handle drugs himself. As part of this pretense, Hightower feigned to be angry with his subordinate, Mylan, for having used Hightower's money to purchase marijuana when he had been instructed to buy cocaine. After making this show of anger, Hightower left the room, slamming the door. Mylan then apologized to defendant for Hightower's conduct and also left.

On the following morning Mylan phoned defendant and arranged to meet him later in the day for the purpose of purchasing cocaine. This phone call was placed from the police station and was recorded. Pursuant to arrangements made in this telephone conversation, Mylan and defendant met on the Guilford College campus, where defendant brought to Mylan's automobile a plastic bag containing a tan and white powder which the State's chemist subsequently analyzed and found to

contain cocaine. Defendant, after offering Mylan an opportunity to test the powder by "snorting" it and after inhaling two spoonsful himself, delivered the powder to Mylan and received from Mylan $950.00 in cash in exchange. After completing this transaction, defendant and Mylan discussed a possible further purchase, Mylan stating he "would like to get a half-pound in about three weeks," and defendant stating that when he got the drugs together he would contact Mylan. Defendant was arrested on 10 April 1973 at the same time a number of other arrests were made in Guilford County.

Defendant's testimony concerning the foregoing events is summarized as follows: When he met Mylan for the first time and was first introduced to him by Lawson, he did not say that he had just sold out of drugs, he said that he didn't have any. He did tell Mylan he would help him find drugs if he wanted them. Before Lawson and Mylan asked him to get marijuana for them, he had sold marijuana only one time, only one ounce, and he didn't make any money off that sale and had no financial interest in it. He got the marijuana which he sold to Officer Mylan from a person whose name he believed was George. This person brought the marijuana to his room. He had called George by phone, but could not remember the number or whether it was a local or long distance call. He had never dealt in cocaine, and believed that Mr. Hightower was mad because he hadn't been able to get any cocaine. After Mr. Hightower left and slammed the door, he was sympathetic with Mr. Mylan and wanted to help him. On the next day a man, whose identity he did not know, came to his room with two other people whom he did not know, and delivered cocaine to his room. Defendant thought he had seen this man in Mylan's car two nights before, and asked him if this were so, but the man answered no. In defendant's opinion he was the same man. This man remained in defendant's room while defendant delivered the cocaine to Detective Mylan. Defendant returned to his room and gave this man all of the money he got from Mylan. The only profit which defendant got was one gram of cocaine.

On cross-examination, defendant testified that no one put any pressure at all on him to get the marijuana, but that "they" asked him for it and he got it. He also admitted that he had told Mylan at the meeting at Hardee's, on 27 February that he would be going to his home country of Chile and could in the near future sell him cocaine for $5.00 a gram, but defendant

testified this was not true, that he had told Mylan this because he wanted to build himself up, to make himself look bigger than he really was. He also admitted meeting with Mylan and Hightower at a motel in downtown Greensboro on 20 March 1973 "to set up a $6,000.00 cocaine buy," but testified that he did not know where he was going to get that cocaine from. He also admitted telling Hightower about smuggling cocaine across the United States border in his belt and sewn in his clothing, but testified that "that was made up too and that was just a big pie in the sky dream," just to make him look bigger than he was. He also admitted telling the officers he could get them a half-pound of cocaine, but testified he did not know whether he could or not and didn't know where he was going to get it.

The jury found defendant guilty in each case, and judgment was entered in each case sentencing defendant to prison for not less than three nor more than five years, the two sentences to run concurrently. Defendant appealed.

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

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd for defendant appellant.

PARKER, Judge.

Prior to arraignment defendant moved to dismiss the charges against him on the grounds that the extent and degree of participation by agents for the State in the commission of the offenses charged resulted in a denial of due process. After conducting a voir dire examination at which Officer Mylan testified concerning the circumstances under which he purchased marijuana and cocaine from defendant and concerning the activities of the police informant, Kenny Lawson, the court denied defendant's motion to dismiss. In this ruling we find no error. We also find no error in the denial of defendant's renewed motion for nonsuit, made at the close of the evidence upon the same grounds of denial of due process.

[1] It is, of course, elementary that the State has no business fostering crime and that it is no part of the duty of law enforcement officers to incite crime for the sole purpose of punishing it. But a "clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution

of a crime of his own conception." *State v. Burnette,* 242 N.C. 164, 169, 87 S.E. 2d 191, 194 (1955). The determinant is the point of origin of the criminal intent. Entrapment is a defense and prosecution is barred only when it is established that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the innocent mind of the accused, luring him into commission of an offense which he would not otherwise have committed. In this State the burden is on the defendant to establish the defense of entrapment to the satisfaction of the jury. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Bland,* 19 N.C. App. 560, 199 S.E. 2d 497 (1973); *State v. Williams,* 14 N.C. App. 431, 188 S.E. 2d 717 (1972).

[2] The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution, nor will the mere fact of deceit defeat a prosecution, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States v. Russell,* 411 U.S. 423, 436, 36 L. Ed. 2d 366, 376, 93 S.Ct. 1637, 1645 (1973). In *Russell* the United States Supreme Court reaffirmed its prior decisions which made defendant's predisposition to commit the crime the central inquiry when the defense of entrapment is raised and a majority of the Court expressly declined to make the defense turn on the type and degree of governmental conduct involved. In that connection the following observation made by Justice Rehnquist in the majority opinion of the Court is pertinent to the case now before us:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California,* 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205, 25 A.L.R. 2d 1396 (1952), the instant case is distinctly not of that breed." 411 U.S. 423, 431-32, 36 L.Ed. 2d 366, 373, 93 S.Ct. 1637, 1643 (1973).

In our opinion the evidence in the case now before us furnishes no stronger basis than did the evidence in *Russell* for invoking due process principles to bar defendant's convictions.

Indeed, many of the circumstances of the present case simply do not constitute illegal entrapment.

> "Included in the list of circumstances which do not constitute illegal entrapment are: the making of 'buys,' from persons reasonably suspect, by law enforcement officials acting through informers, usually narcotic addicts; acts of enforcement officers posing as addicts in order to procure a purchase from persons who previous investigation indicated were engaged in illegal traffic in narcotics; solicitation by officers of sales in the ordinary way as between buyer and seller; procuring by officers of illegal prescriptions from physicians; purchases by officials solicited by narcotics peddlers; decoy letters, etc." Annot., Entrapment —Narcotics Offense, 33 A.L.R. 2d 883, 885.

[3] Applying the foregoing principles to the present case, it is questionable whether the defense of entrapment arises at all upon the evidence insofar as the charge of illegal distribution of marijuana is concerned. Nothing in the State's evidence suggests that either Officer Mylan or his informer, Lawson, did anything other than inquiring of defendant if he had drugs for sale and thereafter arranging a meeting at which such a sale might be made. Defendant, who had the burden of proof, offered no evidence to the contrary, and his own admission to having made at least one prior illegal sale of marijuana, coupled with the uncontradicted evidence showing that he readily acquiesced in selling a substantial amount of marijuana to Mylan, furnishes strong basis for inferring that the intent to commit the offense was initially his.

[4] Evidence of entrapment in the case of the sale of cocaine is scarcely stronger. The playacting engaged in by Hightower and Mylan did nothing more than to preserve Mylan's role as a person engaged in the drug traffic who was ready and able to purchase the cocaine which, on the previous day, defendant had already expressed a willingness to sell. Defendant's testimony that the cocaine which he sold to Mylan was supplied him by some man whom he could not identify but whom he believed to be the same man he had seen in Mylan's car two nights previously, furnishes at most only weak support for the defense theory that some agent for the State supplied defendant with cocaine in order that he might be arrested for selling it. At most this presented a question for the jury and clearly did not compel dismissal by the court as a matter of law. We hold that

defendant's motions for dismissal and for nonsuit were properly denied.

[5] At the close of the State's evidence, the defendant called Kenny Lawson, who had not previously testified, to the witness stand. Thereafter, defense counsel, before and during direct and redirect examination, requested that he be allowed to examine Lawson as an adverse or hostile witness, but the trial court denied these motions. We do not agree with defendant's contention that these determinations require reversal. First, the evidence does not establish that, at the time of defendant's trial, Lawson's interests were opposed to defendant's. For some time Lawson had operated as a part-time undercover agent for the Narcotics Division of the Greensboro Police Department. He was not salaried for this activity but did receive occasional payments ranging as high as $20.00. Although this arrangement provided him with a moderate financial incentive for bringing individuals into incriminating contact with the police, at the time of defendant's trial Lawson's monetary interest in defendant's drug activities was at an end. Lawson had already received such payment as he might expect in defendant's case and could expect no additional remuneration for defendant's subsequent conviction. Second, we are unable to find that the trial court's rulings prejudiced or impeded the defense in any material respect. Even a cursory review of Lawson's testimony upon direct and redirect examination indicates that the court permitted defense counsel to question Lawson at great length upon a wide variety of subjects. A careful review of this testimony reveals that such questioning was, in form and effect, a cross-examination. Lawson was intensively interrogated about his unsavory past, including his own involvement with drugs, as well as about the details of his undercover techniques and remuneration. He appeared to answer all questions freely and with reasonable clarity. We find no prejudicial error on the court's failure to grant defendant's motion that Lawson be formally designated as a hostile witness.

[6] Defendant assigns error to the court's rulings which permitted the State's witnesses, Hightower and Mylan, to testify over defendant's objections concerning a meeting which they had with defendant at a downtown motel on 20 March 1973 at which defendant discussed with the two police officers the possibility of his obtaining and selling to them a half-pound of cocaine for a price of between five and six thousand dollars. At this meeting defendant further described to the officers how

he had once smuggled cocaine across the border. Defendant also assigns error to the court's permitting Lawson to testify over defendant's objections concerning an occasion which took place about the second week in March 1973, when defendant gave Lawson's fourteen-year-old girl friend three "speed" tablets. Defendant challenges the relevancy of all of this evidence as it bears upon his guilt or innocence of the offenses for which he was being tried. It is true that ordinarily 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. 1 Stansbury's N. C. Evidence, § 91 (Brandis Revision, 1973). In this case, however, defendant did not deny that he committed the offenses with which he was charged. He testified himself that he made the sales described in the indictments against him. His sole defense was that he was entrapped by the officers or their agents into making these sales. As above noted, when the defense of entrapment is raised, defendant's predisposition to commit the crime becomes the central inquiry. We hold that the testimony concerning defendant's dispensing the three "speed" tablets and concerning his conversation and negotiations with the officers at the motel on 20 March 1973, even though relating to events occurring after the offenses for which he was tried had been committed, were sufficiently closely connected in time and circumstances with the offenses charged as to have a logical relevance to show defendant's predisposition to commit those offenses. We find no error in the admission of this evidence.

[7] The defense presented the testimony of one Crowell, a fellow student of defendant's at Guilford College, who testified on direct examination concerning Lawson's activities on the campus. On cross-examination the district attorney asked Crowell if he knew defendant's character and reputation on the campus for dealing in drugs. Defendant's counsel interposed an objection, which the court overruled. Defendant's counsel now contends this ruling was error, pointing out that at the time the question was asked defendant had not yet testified or otherwise put his character at issue. If it be conceded that the objection should have been sustained, no prejudice resulted to the defendant in this case. Crowell answered the question simply that he did not know defendant that well and expressed no opinion as to defendant's character or reputation for dealing in drugs or in any other respect.

We have carefully examined all of defendant's remaining assignments of error and find no error sufficiently prejudicial to warrant granting a new trial. The district attorney's argument to the jury, though forceful, did not go beyond proper limits and certainly did not resemble the jury argument condemned in *State v. Smith,* 279 N.C. 163, 181 S.E. 2d 458 (1971), cited by defendant. In the one instance in which defendant's counsel interposed an objection because of the district attorney's misstatement of a portion of Officer Mylan's testimony, the trial judge properly instructed the jury to be governed by their own recollection of the evidence. We find the court's jury charge sufficiently complete and free from prejudicial error. In the trial and judgments appealed from we find

No error.

Chief Judge BROCK and Judge BALEY concur.

ALFRED H. HEILMAN v. MABEL W. HEILMAN

No. 7410DC772

(Filed 25 November 1974)

1. **Divorce and Alimony § 13— separation for statutory period — defense of abandonment**

Defendant may defeat an action for absolute divorce on the ground of one year's separation by affirmatively establishing that the separation was caused by plaintiff's abandonment of her.

2. **Divorce and Alimony § 8— abandonment defined**

Abandonment is the ending of cohabitation without justification, consent or intent to return.

3. **Divorce and Alimony § 8— defense of abandonment — burden of proof**

When defendant asserted the defense of abandonment in an action for absolute divorce based on a year's separation, the burden was on defendant to prove lack of justification for plaintiff's departure.

4. **Divorce and Alimony § 8— abandonment — insufficiency of findings**

Trial court's conclusion that plaintiff left the home of the parties without justification or lawful excuse was not supported by the findings of fact, including a finding that "the relationship, though not ideal, was well within normal ranges."

Judge MORRIS dissenting.

APPEAL by plaintiff from *Winborne, Judge,* 23 May 1974 Session of District Court held in WAKE County. Heard in the Court of Appeals on 17 October 1974.

Plaintiff filed a complaint on 6 February 1974 seeking an absolute divorce from his wife based upon one year's separation. In her answer defendant pleaded abandonment as a bar to plaintiff's action. Plaintiff, by his reply, denied abandoning the defendant. He averred that he had no intention of leaving the defendant but that she "had domineered and nagged the plaintiff about every conceivable thing, causing him mental and physical illness" and finally driving him from their home. He further averred that by her wrongful conduct defendant had willfully abandoned him.

Following presentation of the evidence, the trial judge made findings of fact and concluded that plaintiff had abandoned the defendant, and, therefore, the plaintiff was not entitled to an absolute divorce. From a judgment dismissing his cause of action and ordering that he be taxed with the costs, plaintiff appealed.

Additional facts necessary for decision are set forth in the opinion.

Hatch, Little, Bunn, Jones, Few and Berry, by Harold W. Berry, Jr., and Thomas D. Bunn, for plaintiff appellant.

Adams, Lancaster, Seay, Rouse and Sherrill, by Basil Sherrill, for defendant appellee.

HEDRICK, Judge.

[1, 2] Plaintiff in this action seeks an absolute divorce, pursuant to G.S. 50-6, on the ground of one year's separation. Defendant may defeat the action only by affirmatively establishing that the separation was caused by plaintiff's abandoning her. *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799 (1968); *Pickens v. Pickens,* 258 N.C. 84, 127 S.E. 2d 889 (1962). Abandonment, as an affirmative defense, is conduct by plaintiff such as would entitle defendant to a divorce from bed and board or alimony without divorce. *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761 (1969). In order to prevail, the defendant must prove by the greater weight of the evidence every element of abandonment, which has been defined as the ending of cohabitation without justification, consent, or intent to return. *Panhorst v. Panhorst,* 277 N.C. 664, 671, 178 S.E. 2d 387, 392 (1971).

See Taylor v. Taylor, 257 N.C. 130, 125 S.E. 2d 373 (1962); *McLean v. McLean,* 237 N.C. 122, 74 S.E. 2d 320 (1953). Plaintiff argues that defendant has not carried her burden of proof.

[3] That plaintiff departed without defendant's consent and without intention of renewing cohabitation is not disputed. The issue is whether plaintiff's departure was justified. When defendant asserted the affirmative defense of abandonment, the burden did not shift to plaintiff to justify the separation, *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 466 (1945), for in order to obtain a divorce under G.S. 50-6, plaintiff need allege and prove only separation and domicile. 1 Lee, North Carolina Family Law, § 71, p. 281. It was incumbent upon defendant to prove lack of justification.

Plaintiff testified in substance as follows: Plaintiff and defendant were married on 10 May 1942. The plaintiff was employed as a school teacher until 1950, when he took a job with the United States Post Office in Raleigh. Defendant is presently employed as a public school teacher and has been so employed during most of the marriage. The defendant "nagged plaintiff about various things" during the years they lived together. Although plaintiff has an excellent driving record, defendant particularly criticized the plaintiff about his driving. For no obvious reason defendant would scream, "Jam on the brakes," "Turn," "Watch out," or "Slow Down." On a trip to Pennsylvania in 1970 the defendant told plaintiff "she hoped she would never have to go through that ordeal again and that it was her last trip." The defendant also nagged plaintiff about the attention he gave their dog and was jealous of the plaintiff's sister. Defendant even became enraged and nagged the plaintiff for weeks when the plaintiff, during a rainstorm, walked from church to their car with another woman so that he could use her umbrella. Defendant also complained about the plaintiff going to the YMCA one night a week. Defendant did not understand plaintiff's humor, could not take a joke, did not communicate on any subject with him, and did not like to visit friends or return their invitations. Defendant did not like to cook; therefore, they ate out quite often.

In September of 1970, plaintiff wanted to visit a niece in Virginia who had multiple sclerosis. The defendant, however, did not want to go and even stated that if they went, the niece's family would be visiting them every week. Plaintiff and defendant had not had sexual relations for two years prior to their

separation and had practically no sexual relations for five years prior to their separation because of defendant's lack of interest and desire for having sexual relations with plaintiff and because of defendant's complaints about discomfort during such relations.

Due to defendant's nagging, complaining and negative approach, the plaintiff "became nervous, tense, and began having difficulty sleeping, eating and digesting his food." Because of these difficulties, he had to consult a physician. On 4 September 1971 plaintiff separated from the defendant for about four months and during this period of time "his sleep, eating and digestion gradually improved and the plaintiff ceased using any medication or consulting a doctor." Plaintiff returned home on 31 December 1971. He again separated from the defendant on 31 January 1973 because "of the re-occurrence of defendant wife's same attitude and continually nagging and complaining which brought about a re-occurrence of the nervousness, tenseness, loss of sleep and digestive problems." After this last separation, his physical ailments have disappeared and he is able to sleep and eat without medication or medical treatment.

Defendant testified in substance as follows: She only nagged in a "suggestive way" but had many suggestions. Defendant's driving bothered her and although she made as few suggestions as possible never made a trip out of town with plaintiff without making some suggestions. After a trip to Pennsylvania in 1970, she told the plaintiff she never wanted to go on another trip with him and has not done so since that time. Plaintiff always had stomach trouble and trouble sleeping. The incident of plaintiff walking to the car with another lady in order to use her umbrella was of such a minor nature that she had dismissed it from her mind. It was probably more accurate to say that the plaintiff and defendant had had little or no sex for ten years. However, this had been the plaintiff's choice, and she had never had any physical trouble which would prevent her from having intercourse.

Based on the testimony of the parties, the trial judge made findings relevant to the issue of abandonment as follows:

> "7. During the marriage, in the latter stages, the plaintiff was tense, with stomach trouble and was not sleeping well.

8. After the separation his tenseness and stomach trouble ceased and his sleeping improved.

9. During the latter part of the marriage the parties divided the expenses evenly and each invested their own money for savings.

10. There was no intense bickering or fighting between the parties and the relationship, though not ideal, was well within normal ranges.

11. The defendant did, on occasions, attempt to offer critical advice to the plaintiff, to which he sometimes reacted sensitively."

Upon these findings the court concluded that:

"4. The separation was the result of plaintiff's departure from the home of the parties without justification or lawful excuse.

5. The plaintiff did abandon defendant."

[4] We think the evidence supports the material findings of fact. Our concern is whether the findings support the conclusion that plaintiff left the home of the parties without justification or lawful excuse.

In *Caddell v. Caddell,* 236 N.C. 686, 690-91, 73 S.E. 2d 923, 926 (1953), our North Carolina Supreme Court said:

"This Court . . . has never undertaken to formulate any all-embracing definition . . . of what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect. . . ."

Instead of going forward with evidence in support of her allegation that the plaintiff was not justified in leaving the home, the defendant merely responded to the plaintiff's testimony describing the conditions in the home, particularly the conduct of the defendant, which necessitated his withdrawal from the marriage. In substance, there is very little difference

in the testimony of the plaintiff and the defendant. All of the evidence depicts a marriage totally lacking conjugal harmony. The trial judge responded in kind to this negative evidence when he found:

> "There was no intense bickering or fighting between the parties and the relationship, though not ideal, was well within normal ranges."

Surely the parties to a marriage can expect more than that their discordant relations be "within normal ranges." The parties to a marriage contract have mutual duties and obligations. The defendant offered no evidence tending to show that she was fulfilling her marital duties and obligations when the plaintiff, apparently for the sake of his health and self-respect, chose to break-off the relationship.

In our opinion, the findings made by the trial judge do not support the conclusion that plaintiff was not justified in leaving the defendant. The judgment is

Reversed.

Judge BALEY concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

Plaintiff contends there was insufficient evidence to support the trial judge's finding of abandonment and that the trial court erred in failing to find the plaintiff's course of action was justified. I disagree.

Abandonment has been defined by our courts as follows:

> "One spouse abandons the other, . . . where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." *Panhorst v. Panhorst,* 277 N.C. 664, 670-671, 178 S.E. 2d 387 (1971).

Here the plaintiff himself testified that he separated from his wife and did not return. This testimony, coupled with the testimony of the defendant, clearly establishes that plaintiff brought their cohabitation to an end "without the consent of the other

spouse" and "without the intent of renewing it." The remaining question is whether plaintiff's departure was justified. Plaintiff alleged and offered evidence tending to show that his wife's nagging was excessive and caused him mental and physical illness. Defendant's evidence tended to show that her nagging was not excessive and that plaintiff had always had problems with his health. Her evidence supports the trial judge's finding that her nagging was "well within normal ranges" and that plaintiff's departure from the home was "without justification or lawful excuse." The trial judge's findings are supported by competent evidence and are binding on appeal.

> "Where trial by jury is waived and issues of fact are tried by the court, . . . the court's findings of fact 'have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. . . . '" *Laughter v. Lambert,* 11 N.C. App. 133, 136, 180 S.E. 2d 450 (1971).

For this reason, I would affirm the trial court.

IN THE MATTER OF THE DWELLING LOCATED AT 728 BELMONT AVENUE, CHARLOTTE, NORTH CAROLINA, AND OWNED BY DOUBLE TRIANGLE PROPERTIES, INC.

No. 7426SC746

(Filed 25 November 1974)

1. **Searches and Seizures § 1— standing to object or consent to search**

   Only the person whose privacy is invaded by a search has standing to object or to consent to a search.

2. **Searches and Seizures § 1— rented dwelling — inspection by housing authority — absence of warrant or owner's consent — consent of tenant**

   An administrative search or inspection of a rented dwelling by municipal authorities for detection of violations of a housing code, conducted without a warrant and without permission of the owner of the dwelling, does not violate the owner's constitutional right to be free from unreasonable search when the tenant-occupant consents to the search.

APPEAL by petitioner from *Ervin, Judge,* 29 April 1974 Session of Superior Court held in MECKLENBURG County.

Heard in Court of Appeals 16 October 1974.

Writ of certiorari from the Superior Court to the Housing Appeals Board of the Building Inspection Department, City of Charlotte, to review its order affirming the decision of the Superintendent of Inspections and directing petitioner Double Triangle Properties, Inc., owner of a dwelling located at 728 Belmont Avenue, to repair the dwelling "so as to render it fit for human habitation before the 18th of March, 1974."

After a hearing and review of the record of proceedings before the Housing Appeals Board, Judge Ervin entered the following judgment, which incorporates in the findings of fact a narration of the administrative procedure followed and presents the conclusions of law which are in issue upon this appeal.

"THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding at the Schedule 'B' Non-Jury Term of the Superior Court for the County of Mecklenburg upon Petition for Writ of Certiorari filed March 12, 1974, by Petitioner, Double Triangle Properties, Inc., and after considering the record, stipulations by the parties, oral argument by counsel for the parties, briefs and memoranda of law, and the parties having stipulated that the Order could be signed out of term, the Court hereby makes the following findings of fact:

1. It has been stipulated that on May 24, 1973, attorneys for the petitioner wrote a letter to the Superintendent of the Building Inspection Department of the City of Charlotte advising the Superintendent that personnel of the Building Inspection Department of the City of Charlotte were not to enter the premises of any of the property owned by petitioner without first obtaining an administrative search warrant.

2. On November 6, 1973, the Urban Redevelopment Department of the City of Charlotte requested the City's Building Inspection Department to inspect a residence located at 728 Belmont Avenue in the City and occupied by a Mrs. Annie Geiger.

3. On the afternoon of November 6, 1973, Mr. H. L. Brantley, a Housing Inspector for the City of Charlotte, went to the dwelling located at 728 Belmont Avenue,

knocked on the door and received permission of Mrs. Geiger to inspect the premises. Mrs. Geiger was the tenant in possession of the premises.

4. Mr. Brantley performed an inspection and found certain alleged violations of Chapter 10A, the City Housing Code, as a result of his inspection.

5. The dwelling at 728 Belmont Avenue was owned and is presently owned by the petitioner, Double Triangle Properties, Inc., and it was stipulated by the parties that when Mr. Brantley inspected the dwelling on November 6, 1973, no valid administrative search warrant to inspect the premises had first been obtained.

6. On December 5, 1973, a hearing was held before W. H. Jamison, Superintendent of the Building Inspection Department of the City of Charlotte at which time all parties to this proceeding were present to consider certain alleged housing violations of the Charlotte Housing Code as a result of the inspection performed by Mr. Brantley.

7. The petitioner objected to the introduction of evidence obtained by Mr. Brantley at the hearing on December 5, 1973, but said evidence was allowed into the hearing and was made the basis of a finding of fact and order issued by the Superintendent, Mr. Jamison, on January 7, 1974, that the inspection was constitutionally valid and certain violations of Chapter 10A of the City Code, being the City Housing Code, existed.

8. The petitioner gave notice of appeal in due time to the Charlotte Housing Appeals Board and the hearing was held before the Board on February 12, 1974, at which time the Building Inspection Department offered the same evidence and the petitioner tendered the same objections to the admission of said evidence in that it was obtained as a result of proceeding without a valid administrative search warrant and without the permission of the petitioner.

9. On February 28, 1974, the Housing Appeals Board issued findings of fact and an order affirming the decision of the Superintendent with regard to certain violations of Chapter 10A of the Code of the City of Charlotte found in the dwelling at 728 Belmont Avenue and as to the constitutional validity of the inspection.

10. The petitioner in due time filed a Petition for Writ of Certiorari in the Superior Court of Mecklenburg County from the decision and the findings of fact and order of the Charlotte Housing Appeals Board.

11. The petitioner contends that its constitutional rights as protected by the Fourth Amendment of the U. S. Constitution have been violated in that the premises owned by the petitioner were inspected and certain evidence was obtained without its consent, and without a valid administrative search warrant.

Based upon the foregoing findings of fact, the Court hereby makes the following conclusions of law:

1. The sole issue presented by the petitioner in this case is whether a tenant's consent to a warrantless search, to which the owner of the property in which the tenant resides makes prior objection, meets the requirements of the Fourth Amendment of the U. S. Constitution and its protection against unreasonable search and seizures.

2. The person in possession of the property or premises has standing to consent to an administrative search or inspection notwithstanding the objections of an absent nonconsenting owner.

3. The petitioner, although owning the property, did not occupy the property at the time of the inspection and had placed possession of the premises in its tenant who consented to the entry and inspection of the City's Housing Inspector. Since the petitioner had voluntarily relinquished possession of the property, there was no reasonable expectation of privacy as guaranteed by the Fourth Amendment and therefore the petitioner has no standing to contest the constitutionality of the inspection of the premises in question.

4. The inspection of the premises at 728 Belmont Avenue on November 6, 1973, was valid and meets the requirements of the Fourth Amendment of the U. S. Constitution.

NOW, THEREFORE, IT IS ORDERED AND DECREED:

1. That the decision of the Charlotte Housing Appeals Board is hereby affirmed.

2. That this petition is dismissed.

3. That the petitioner is hereby taxed with the costs of this action.

This the 13th day of May, 1974.

s/ SAM J. ERVIN, III
Judge Presiding"

From this judgment, petitioner has appealed.

Lindsey, Schrimsher, Erwin and Bernhardt, by Lawrence W. Hewitt, for petitioner appellant.

City Attorney W. A. Watts for respondent appellee.

City of Greensboro, by City Attorney Jesse L. Warren and Assistant City Attorney Dale Shepherd, and Legal Aid Society of Mecklenburg County, by Terence Roche, amici curiae.

BALEY, Judge.

Does an administrative search or inspection by municipal authorities for detection of violations of a housing code, conducted without a warrant and without permission of the owner of the dwelling house, violate the owner's constitutional right to be free from unreasonable search when the tenant-occupant consents to such search? The trial court has determined that it does not, and we agree.

[1] The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The protection afforded by this amendment is against *unreasonable* searches and seizures. "The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures." *State v. Craddock,* 272 N.C. 160, 169, 158 S.E. 2d 25, 32; *accord, State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457; *State v. McPeak,* 243 N.C. 243, 90

S.E. 2d 501. Only the person whose privacy is invaded by a search has standing to object or to consent to such a search. *Stoner v. California,* 376 U.S. 483 (1964); *Jones v. United States,* 362 U.S. 257 (1960). *See also* Annot., 78 A.L.R. 2d 246 (1961); Annot., 31 A.L.R. 2d 1078 (1953).

[2] In this case the petitioner surrendered its right to possession of the dwelling by renting it to the tenant, Mrs. Geiger, who was actually occupying the premises. Any intrusion for a search would be a violation of the tenant's right to privacy. Mrs. Geiger was in lawful possession of the dwelling. Clearly she could have objected and demanded that a warrant be secured. *See Camara v. Municipal Court,* 387 U.S. 523 (1967). Instead, she voluntarily consented to the search. Such consent renders a warrantless search valid. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

In search and seizure cases, our North Carolina Supreme Court has consistently given priority to the rights of the tenant in possession. In *State v. Mills,* 246 N.C. 237, 243, 98 S.E. 2d 329, 334, our court quoted the general rule that "[w]here premises are leased or rented to another, and in the possession of such lessee or tenant, the owner may not complain of an unauthorized search made thereupon, even though the officers pass through unleased property. The lessee claiming the property seized may do so. . . ." In *State v. Schaffel,* 229 A. 2d 552 (Conn. 1966), in a situation substantially identical to the facts in this case, tenants invited inspectors to enter apartments which were in their possession and control to inspect for probable violations of the Municipal Housing Code. The court in a well reasoned opinion held that the possession and control of the tenants gave sufficient interest in the privacy of the premises to validate the consent to search, and evidence obtained was properly admissible against the landlord.

With respect to administrative searches of the type in question in this case, the United States Supreme Court in *Camara v. Municipal Court, supra,* held that a tenant had a constitutional right to insist that building inspectors obtain a warrant to search his premises. The owner against whom any evidence of code violations would have been introduced had given prior consent to the search, but the court held that the tenant in possession could require a search warrant. While this is the exact opposite of the present case, it gives rise to the clear implica-

tion that the Supreme Court considered the Fourth Amendment privilege personal to the occupant of the place to be searched. *See Chapman v. United States,* 365 U.S. 610 (1961) (landlord could not validly consent to search of house he had rented to another).

We hold that the consent of the tenant who was in actual possession and control of the premises was sufficient to authorize an inspection by the Housing Inspector of the City of Charlotte. In putting its property in the possession of another person, particularly upon a rental basis, petitioner assumed the risk that the tenant would permit periodic inspections of the property in accordance with the Housing Code. Petitioner as owner had no legitimate expectation of privacy in the condition of his dwelling house which was rented to and occupied by another person, and, therefore, has no standing to contest the constitutionality of an administrative search of the premises.

Affirmed.

Judges MORRIS and HEDRICK concur.

SAMUEL WHITE, MARY WHITE RAMSEY, GEORGE LYNCH AND LUCILLE LYNCH THOMPSON v. BILLY ROY ALEXANDER AND IVA WHITE

No. 7428SC835

(Filed 25 November 1974)

1. **Wills §§ 28, 35— heirs given remainder interest — determination of of class at death of testatrix**

In the absence of a contrary intention clearly expressed in the will or derived from its context in the light of surrounding circumstances, the general rule of testamentary construction supported by the weight of authority is that the class described as heirs of the testatrix to whom a reminder or executory interest is given by will is to be ascertained at the death of the testatrix.

2. **Wills § 35— heirs given remainder interest — contingency upon future event — determination of class at testatrix's death**

The fact that the life tenant will be one of the class of heirs of the testatrix does not prevent the ascertainment of the membership of the class at the time of the testatrix's death, nor does the fact that the gift to heirs is contingent upon a future event which may or may not happen postpone the determination of the heirs until the occurrence of the event.

3. Wills § 35— estate involving contingency of event — roll call at death of testatrix

Where testatrix devised to her son a life estate and in the event of his death without children an estate to his wife during her widowhood and remainder to the heirs of testatrix, the estate conveyed involved only a contingency of event and not of persons, and the roll should have been called as of the death of the testatrix.

APPEAL by plaintiffs from *Smith, Judge,* 25 March 1974 Session of Superior Court held in BUNCOMBE County.

Heard in Court of Appeals 23 October 1974.

This action was instituted by plaintiffs, pursuant to the Uniform Declaratory Judgment Act, seeking construction of the will of Harriet M. Stokes, which reads in pertinent part:

> "*Item 2.* I give, devise and bequeath to my son, Samuel Stokes, that certain boundary of land owned by me consisting of thirty-six and three-fourths (36¾) acres, located in Swannanoa Township on the waters of the Swannanoa River adjoining the Farm School lands, Matthews Shope, Allen Coggins and others, and being the same land upon which I now reside, to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body, then it is my will and desire, and I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs. The said land so devised to my said son and to his said wife in case my said son shall have no child or children shall be chargeable with the reasonable expense for the support of my husband, Julius Stokes, and my said son and his said wife either or both of them who shall be in control of said land under this will and during the lifetime of my said husband, shall see to it that my said husband, Julius Stokes shall not want for any of the necessities of life, such as good wholesome food, good warm clothing, necessary medical attention and medicine."

The facts in this case are set out in the pleadings, stipulations, and admissions and are not in dispute.

Harriet M. Stokes died in Buncombe County on 25 March 1925 leaving a husband, Julius Stokes, who died 3 June 1939, and three living children, Hattie Stokes White, Cora Stokes

Lynch, and Samuel Stokes. Her son, W. B. Stokes, predeceased her leaving no heirs.

Hattie Stokes White died testate 15 December 1961 leaving all her estate to three children: Samuel White (plaintiff), Mary White Ramsey (plaintiff), and Everette White, who later died intestate in October 1964, without children but survived by his widow, Iva White (defendant).

Cora Stokes Lynch died intestate 26 May 1971 leaving two living children: George Lynch (plaintiff), Lucille Lynch Thompson (plaintiff). Her daughter, Carrie Lynch, died intestate in 1938 without heirs.

Samuel Stokes died intestate 24 March 1970 without children but survived by his widow, Emma Stokes, who subsequently died intestate on 22 August 1971, never having remarried. Emma Stokes was survived by her nephew, Billy Roy Alexander (defendant), who was her only heir at law.

At the time of her death Harriet M. Stokes owned in fee a 36-3/4 acre tract of land in Swannanoa Township, Buncombe County, which is the subject of the devise set out in Item 2 of her will. The reasonable expenses for support of her husband, Julius Stokes, referred to in Item 2, were paid by his children, and there is no charge for such support enforceable against the land.

Based upon the undisputed facts, the trial court determined as a matter of law that the heirs of Harriet M. Stokes as referred to in Item 2 of her will are determined at the date of her death and awarded judgment as follows:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Billy Roy Alexander, be and he is hereby declared to be the owner of a fee simple, one-third undivided interest in the aforementioned 36.75 acre tract of land, that George Lynch and Lucille L. Thompson be and they are each hereby declared to be the owner of a fee simple, one-sixth undivided interest in and to the aforementioned 36.75 acre tract of land and Iva White, Mary White Ramsey and Samuel White, be and they are each hereby declared to be the owner of a one-ninth fee simple, undivided interest in the aforementioned 36.75 acre tract of land."

From this judgment, plaintiffs have appealed.

Adams, Hendon & Carson, P.A., by James Gary Rowe and George Ward Hendon, for plaintiff appellants.

Morris, Golding, Blue and Phillips, by James F. Blue III, for defendant appellee Billy Roy Alexander.

BALEY, Judge.

The question for decision in this appeal is whether the heirs of the testatrix are to be determined at the date of the death of the testatrix, Harriet Stokes, or at the date of death of the holder of the intervening life estate, her son Samuel Stokes. We are of the opinion that the roll must be called at the date of the testatrix's death and, therefore, affirm the judgment entered by the trial court.

[1, 2] In the absence of a contrary intention clearly expressed in the will or derived from its context in the light of surrounding circumstances, the general rule of testamentary construction supported by the weight of authority is that the class described as heirs of the testatrix to whom a remainder or executory interest is given by will is to be ascertained at the death of the testatrix. *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482; *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431; *Jenkins v. Lambeth,* 172 N.C. 466, 90 S.E. 513; *Jones v. Oliver,* 38 N.C. 369; *see* Annot., 49 A.L.R. 174 (1927). The fact that the first taker of an intermediate estate, the life tenant, will be one of the class of heirs of the testatrix does not prevent the ascertainment of the membership of the class at the time of the testatrix's death. *Baugham v. Trust Co., supra;* Annot., 13 A.L.R. 615 (1921) and supplementary annotations. Nor does the fact that the gift to heirs is contingent upon a future event which may or may not happen postpone the determination of the heirs until the occurrence of the event. Annot., 49 A.L.R., *supra* at 185.

In this case testatrix conveyed to her son, Samuel Stokes, the tract of land on which she resided "to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body . . . his wife . . . shall use . . . during her widowhood . . . and at her death or remarriage . . . shall go *to my heirs.*" Other references to children in the will indicate that "heirs of the body" clearly referred to his children, and the Rule in Shelley's Case therefore does not operate. This devise conveyed to Samuel Stokes a life estate and in the event of his death without children an estate to his wife during her widowhood and remainder to the heirs of testatrix.

[3] By the will the heirs of the testatrix acquired an estate which could not be taken away, and it was both transferable and inheritable.

> "[D]ecisions of this Court hold that the interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends. *Lewis v. Smith,* 23 N.C. 145; *Fortescue v. Satterthwaite,* 23 N.C. 566; *Moore v. Barrow,* 24 N.C. 436; *Weeks v. Weeks,* 40 N.C. 111; *Sanderlin v. DeFord,* 47 N.C. 75; *Newkirk v. Hawes,* 58 N.C. 265; *Mayhew v. Davidson,* 62 N.C. 47. [citations omitted.]
>
> In the *Fortescue case, supra,* referring to a cited case, it is said; ' . . . The judges seem to have considered it as settled that contingent interests, such as executory devises to persons who are certain, were assignable. They may be assigned both in real and personal property, and by any mode of conveyance by which they might be transferred had they been vested remainders.'
>
> Also in the *Mayhew case, supra,* it is said: 'We have here then a contingent limitation, where the persons are certain and the event uncertain. Interests of this sort, if in land, are transmissible by descent; if in personalty, devolve upon the personal representative,' citing the *Newkirk case, supra." Seawell v. Cheshire,* 241 N.C. 629, 637, 86 S.E. 2d 256, 261-62.

They acquired such estate at the time of testatrix's death. It was contingent upon the happening of a future event which may or may not happen, that is, the death of Samuel Stokes without children. The gift to a class "my heirs" contingent upon an event, not upon the identity of the persons who took upon the happening of that event, does not import any uncertainty as to the membership of the class itself, but only uncertainty as to the happening of the future event. The persons who took the remainder were the heirs of the testatrix, and they were ascertainable at her death. The will does not say that the remainder is limited to the heirs of the testatrix then living but says simply "to my heirs." *See Newkirk v. Hawes,* 58 N.C. 265. There is no language in the will which indicates any contrary intent. Since the estate conveyed in the will involves only a contingency of event and not of persons, the roll is to be called as of the death of the testatrix. This comports with the general

rule of testamentary construction which applies to remainders contingent only on an event. *See Witty v. Witty, supra; Jenkins v. Lambeth, supra; Jones v. Oliver, supra.*

The case of *Burden v. Lipsitz,* 166 N.C. 523, 82 S.E. 863, cited by appellants, is distinguishable. There the testator devised a fee simple, defeasible upon the devisee's dying without issue. The court held that the heirs, who took directly from the testator when the devisee of the fee died without issue, were to be determined as of the happening of that event. In the case at bar, the devisee acquired at the testatrix's death a life interest and no more, and this life interest coexisted with the remainder estate conveyed at the same time to the heirs of testatrix.

However the interest conveyed by testatrix to her heirs may be denominated, it passed at her death, and the heirs must be determined as of the date of her death.

Affirmed.

Judges MORRIS and HEDRICK concur.

IN THE MATTER OF FELIX SIMMONS, MINOR

No. 7413DC387

(Filed 25 November 1974)

1. **Telephone and Telegraph Companies § 5— statute prohibiting vulgar language over telephone — constitutionality**

The statute making it unlawful to use in telephonic communications "any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation" is not vague and overbroad and does not violate privileges protected by the First and Fourteenth Amendments. G.S. 14-196(a)(1).

2. **Criminal Law § 75— confession to private individual — absence of Miranda warnings**

Although the voluntariness requirement applies to statements made to private individuals, such statements are not inadmissible by reason of the private individual's failure to give the accused the *Miranda* warnings.

3. **Infants § 10— involuntary confession of child**

An involuntary confession made by a child is no more admissible than would be an involuntary confession of an adult accused of the

same criminal offense, and basic requirements of due process apply to juvenile proceedings.

4. **Infants § 10— juvenile proceeding — confessions to private individuals — failure of court to find facts**

While it would have been the better practice for the district judge in a juvenile proceeding to have made express findings of fact as to the circumstances under which the juvenile's confessions were made to private individuals, the judge's failure to make such findings was not error where the evidence was not in conflict, and his overruling of the juvenile's objections to admission of the confessions amounted to an implied finding that they had been voluntarily made.

APPEAL by respondent from *Walton, District Judge,* 13 December 1973 Session of District Court held in BRUNSWICK County.

This juvenile proceeding was commenced by a petition signed by Julie and David Robinson in which petitioners alleged that respondent, a 14-year-old boy, was a delinquent child as defined by G.S. 7A-278(2) in that "the child did unlawfully use in telephonic communications with Julie Robinson certain words and language which were profane, vulgar, lewd, lascivious, indecent in nature and connotation . . . constituting harassment by telephone" in violation of G.S. 14-196(a) (1). The petition set forth the particular words respondent was charged with having used and the dates the telephone calls were alleged to have been made. After a hearing at which respondent was represented by counsel and his parents were present, the court entered an order finding as a fact that respondent "did unlawfully call by telephonic communications Mrs. Julie Robinson and did use words of a profane, vulgar and lewd nature in violation of G.S. 14-196(a) (1)." On this finding, the court concluded that respondent was a delinquent child, and entered judgment placing respondent on probation for a period of two years upon certain conditions. Respondent appealed.

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

James J. Wall for respondent appellant.

PARKER, Judge.

[1] At the hearing before the District Judge respondent's counsel by timely motions attacked the constitutionality of G.S. 14-196(a) (1) on the grounds that the statute is vague and over-

broad and violates the First and Fourteenth Amendments. The District Judge denied the motions and in this we find no error. G.S. 14-196(a) (1) is as follows:

> "G.S. 14-196(a). It shall be unlawful for any person:
>
> "(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation."

Admittedly the language of the statute is broad, but we find it neither so vague as to be easily misunderstood nor so broad as to reach beyond the State's power to enact. We shall not repeat in this opinion the words respondent was charged with having used in the telephone calls to Mrs. Robinson. Suffice it to say they were lewd, lascivious and indecent as those words are commonly defined and generally understood. As to respondent's contention that the statute violates privileges protected by the First and Fourteenth Amendments, we find the following observations made by Justice Harlan in writing the majority opinion in *Cohen v. California,* 403 U.S. 15, 29 L.Ed. 2d 284, 91 S.Ct. 1780 (1971) to be pertinent:

> "[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses . . . .
>
> * * * * *
>
> "[T]his Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. . . . The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."

Id. at 19, 21, 29 L.Ed. 2d at 290, 291, 91 S.Ct. at 1785, 1786.

Use of one's telephone clearly involves substantial privacy interests which the State may recognize and protect. G.S. 14-196(a) (1) seeks to protect that interest from an invasion made in an essentially intolerable manner. The means chosen by the Legislature were both appropriate and sufficiently narrowed to achieving the legitimate ends sought to be attained. Our Su-

preme Court in *State v. Coleman,* 270 N.C. 357, 154 S.E. 2d 485 (1967), sustained a conviction under former G.S. 14-196.1 which made it unlawful for any person "to use any lewd or profane language or words of any vulgarity or indecency over the telephone to any female person," noting no constitutional infirmity in that statute. We find the present statute also constitutional.

Respondent assigns error to the admission in evidence over his objections of testimony concerning his extrajudicial statements to Mr. and Mrs. Robinson in which he admitted making one of the telephone calls. Evidence at the hearing showed the following: On 10 September 1973 Mrs. Robinson received a telephone call at her home from an unknown person. She recognized the voice of the caller as that of the person who had previously made similar calls. She could tell that all calls came from a pay telephone because she heard the money being deposited when she answered. She signaled to her husband, who told her to keep the caller talking. Mr. Robinson drove to a pay telephone located in the yard of a small grocery store near their home. He saw respondent in the booth holding the receiver to his ear. No one else was present. Mr. Robinson approached the booth and waited until the respondent hung up the telephone. Robinson then accosted respondent and accused him of calling Mrs. Robinson. Respondent at first denied placing the telephone calls to Mrs. Robinson, but after Mr. Robinson continued to question him, he admitted doing so. Robinson testified that he did not strike or threaten respondent, but he may have shook his finger at him. Mr. Robinson returned home, picked up Mrs. Robinson, and brought her back to confront respondent, who again admitted that he had called her. Mrs. Robinson testified that her husband did not, at that time, threaten or try to coerce respondent in any way. A witness presented by respondent testified that he was sitting in his car at the grocery store parking lot and observed the first confrontation between Mr. Robinson and respondent, though he was too far away to hear what was said, that Robinson appeared to be agitated and very angry, and that he continuously shook his finger in respondent's face in a vigorous and aggressive manner. The District Judge overruled all of respondent's objections to testimony concerning his confessions to Mr. and Mrs. Robinson.

[2] At the hearing, respondent's counsel stated as one ground for objection to admission of evidence concerning respondent's inculpatory extrajudicial statements that there was no showing

that respondent had first been warned of his rights. No such showing was necessary. The statements were made to private individuals, not to officers. Although the voluntariness requirement applies to statements made to private individuals as well as to those made to public officials, it is generally accepted that a statement made to a private individual is not inadmissible by virtue of the private individual's failure to warn the accused in terms of the *Miranda* requirements. McCormick's Handbook on the Law of Evidence § 162 (2d Ed. 1972).

Respondent also contends the District Court erred in failing to conduct a voir dire examination and in failing to make express findings as to voluntariness before admitting testimony as to the statements. In a criminal case tried before judge and jury when objection is made to introduction of evidence as to an accused's extrajudicial confession, it is the duty of the judge to conduct a hearing in the absence of the jury at which the State has the burden of demonstrating that the confession was voluntarily and understandingly made. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481 (1968). If conflicting evidence is presented at the voir dire hearing and the judge overrules the objection, he must make findings of fact which support his ruling. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344 (1965). If no conflicting testimony is presented, no findings of fact need be made, *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841 (1966), although "it is always the better practice for the court to find the facts upon which it concludes any confession is admissible." *State v. Lynch,* 279 N.C. 1, 15, 181 S.E. 2d 561, 570 (1971).

[3, 4] Certainly an involuntary confession made by a child is no more admissible than would be an involuntary confession of an adult accused of the same criminal offense, *In re Ingram,* 8 N.C. App. 266, 174 S.E. 2d 89 (1970), and basic requirements of due process apply to juvenile proceedings. *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969). Nevertheless, there are significant differences between a juvenile proceeding and a criminal trial in the superior court. The absence of a jury and the fact that the District Judge rules on admissibility as well as on credibility and weight of evidence, make largely artificial and meaningless any clear-cut distinction between that portion of the juvenile hearing during which the District Judge is hearing testimony bearing upon the admissibility of evidence and portions of the hearing when he receives and considers the evi-

dence as it bears upon the ultimate factual issues presented for his determination. In the present case, we find no conflict in the evidence as it bears upon the circumstances under which respondent's confessions to Mr. and Mrs. Robinson were made. While it would have been the better practice for the District Judge to make express findings of fact as to those circumstances, since there was no conflict in the evidence it was not essential that he do so, and the Judge's overruling of respondent's objections amounted to an implied finding that respondent's confessions had been voluntarily made. Respondent's assignments of error directed to the court's admission of his confessions are overruled.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. WARREN SANDERS

No. 7410SC777

(Filed 25 November 1974)

1. **Criminal Law § 76— admissibility of in-custody statement**

The trial court properly admitted defendant's in-custody statement made to the arresting officer where the court found upon supporting *voir dire* evidence that the statement was freely, understandingly and voluntarily made.

2. **Criminal Law §§ 84, 169; Searches and Seizures § 1— search incident to unlawful arrest — admission of articles seized — harmless error**

Although the record in this homicide case was insufficient to show that the arrest of defendant without a warrant was lawful and that a search of defendant at the time of the arrest was therefore lawful, the admission of a butcher knife and shotgun shells found in defendant's coat pocket during the search was harmless error where defendant admitted that he shot deceased with a shotgun but contended that he acted in self-defense.

3. **Homicide § 28— insanity — self-defense — erroneous instruction on effect — harmless error**

In this second degree murder case, the trial court's erroneous instruction in its supplemental instructions that the burden of proving the defenses of insanity and self-defense "in mitigation of murder in the second degree so as to make it voluntary manslaughter is

on the defendant" did not constitute prejudicial error where the jury found defendant guilty of second degree murder, since it is clear that defendant failed to satisfy the jury that he was insane at the time of the crime or that he acted in self-defense.

APPEAL by defendant from *McLelland, Judge,* 3 June 1974 Session of Superior Court held in WAKE County. Heard in the Court of Appeals on 21 October 1974.

This is a criminal prosecution wherein the defendant, Warren Sanders, was charged in a bill of indictment, proper in form, with first degree murder. When the case was called for trial, the State announced that it would not prosecute the defendant for first degree murder but would proceed on the charge of murder in the second degree.

The State offered evidence tending to establish the following:

Officer W. M. Perry of the Zebulon Police Department, in response to a telephone call, went to the home of Warren Sanders on 21 December 1973. Mrs. Sanders, the wife of the defendant, met Perry at the door. She was hollering and seemed hysterical. The defendant was intoxicated and was lying on a bed in the front part of the house. Mrs. Sanders directed Perry to the kitchen, where he found a dead man, Clarence Fowler, sitting in a chair. Perry called the Wake County Sheriff's Department.

J. H. Hilliard of the Wake County Sheriff's Department arrived at the Sanders' residence about ten minutes later. When he arrived, both the defendant and Mrs. Sanders were in the front room of the house. He noticed that the defendant was intoxicated and told the defendant to have a seat. The defendant, however, followed Hilliard into the kitchen. Hilliard again asked the defendant to go into the living room and sit down. When the defendant "insisted on hanging around," Hilliard searched the defendant, finding four shotgun shells and an eight-inch butcher knife in the defendant's right coat pocket. He then put the defendant in the police car until he could finish his investigation. After completing his investigation, Hilliard went out to the police car, advised the defendant of his constitutional rights, and told the defendant that he would be charged with murder. When the coroner arrived, Hilliard took the defendant to the Wake County Jail.

The next morning the defendant was taken to the interrogation room and fully advised of his constitutional rights. He then executed a statement, by making his mark thereon, to the effect that he understood his rights, was willing to make a statement and answer questions, did not want a lawyer at that time, had not been pressured, coerced, or threatened, and knew and understood what he was doing. The defendant signed the statement after he was given an opportunity to read it and after it was read to him. The defendant then told Deputy Hilliard that Clarence Fowler had tried to make him drink some wine. Since the defendant drank whiskey and not wine, he refused and the two men got into an argument. He further told Hilliard that Fowler picked up a piece of wood from the wood box and that he [the defendant] got his shotgun from his bedroom and shot Fowler.

Deputy Hilliard further testified that the deceased had one gunshot wound in his left breast. He also stated that he found a spent twelve-gauge shotgun shell about six feet from Fowler's body and an unloaded shotgun between the mattress and springs of a bed in one of the rooms of the house.

The defendant offered evidence tending to show that he was insane at the time of the alleged crime and that he did not know the difference between right and wrong. His daughter-in-law testified that the defendant had been having hallucinations and at times thought people were "after him." From 7 July 1973 until 11 July 1973, the defendant was a voluntary mental patient at Dorothea Dix Hospital.

The State offered the rebuttal testimony of Laverne McLean, the defendant's son, who stated that his father acted "crazy" sometimes and sometimes he did not.

The defendant was found guilty of second degree murder; and from a judgment imposing a prison sentence of twenty (20) years, he appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Thomas B. Wood for the State.

Maupin, Taylor & Ellis by Thomas W. H. Alexander for defendant appellant.

HEDRICK, Judge.

Defendant contends the court erred in denying his motion for judgment as of nonsuit. When the evidence is considered in the light most favorable to the State, it is clearly sufficient to require submission of this case to the jury.

[1] Defendant assigns as error the admission into evidence of the defendant's in-custody statement made to the arresting officer the day after the alleged crime. Before admitting the defendant's in-custody statement into evidence, the able trial judge conducted an extensive voir dire in the absence of the jury as to whether the statement was understandingly and voluntarily made. At the conclusion of the voir dire examination, the court made extensive findings of fact and concluded that the statement was "freely, understandingly and voluntarily made." There is plenary competent evidence in the record to support the facts found which, in turn, support the conclusions made. This assignment of error is overruled.

[2] Defendant further contends that the court erred in allowing Deputy Hilliard to testify over defendant's general objection that he found a butcher knife and four shotgun shells in defendant's coat pocket when he searched the defendant immediately before he put the defendant in the patrol car. If the search of defendant's person was incidental to a lawful arrest, the challenged testimony was admissible. *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971); *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967). If Deputy Hilliard had reasonable grounds to believe the defendant committed a felony and that the defendant would evade arrest if not immediately taken into custody, he would have had the authority to arrest the defendant without a warrant. G.S. 15-41(2). Obviously the officer had reasonable grounds to believe that a felonious homicide had been committed in the defendant's house. Whether the evidence in this record is sufficient to show that he had reasonable grounds to believe that the defendant killed Fowler and would escape if not taken into immediate custody so as to justify a warrantless arrest is questionable. Upon this record we cannot say that the search of the defendant's person at the particular time described was *legally* justified as contended by the State. Assuming, therefore, that the court erred in allowing the officer to testify that he found a butcher knife and four shotgun shells in the defendant's coat pocket, we are of the opinion that the circumstances of this case call for an application of the rule that some federal

constitutional errors in the setting of a particular case are so unimportant and insignificant that they may be deemed harmless, not requiring the automatic reversal of the conviction. *Chapman v. California,* 386 U.S. 18 (1967); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970). The test is that "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California, supra* at 24. Here, the testimony complained of could have added nothing to the State's case. The defendant's admission that he shot Fowler precludes any possibility that the error complained of might have contributed to the jury's verdict. We hold, therefore, that the error assigned was harmless beyond a reasonable doubt.

[3] Assignments of error 7, 8, and 9, based on exceptions duly noted in the record, relate to supplementary instructions given to the jury by the judge *ex mero motu* after the jury had deliberated for a "number of hours." When the charge is considered contextually as a whole, we conclude each of these assignments of error to be without merit. However, the exception challenging that portion of the supplementary instructions stating that the burden of proving the defenses of insanity and self-defense "in mitigation of murder in the second degree so as to make it voluntary manslaughter is on the defendant" merits further discussion. Clearly the challenged instruction is erroneous, for insanity and self-defense, if proven to the satisfaction of the jury, would entitle the defendant to an acquittal. *State v. Swink,* 229 N.C. 123, 47 S.E. 2d 852 (1948); *State v. Weaver,* 1 N.C. App. 436, 161 S.E. 2d 755 (1968). The initial instructions on insanity and self-defense were correct, and the defendant does not contend otherwise. He does contend, however, that since the erroneous instructions came near the end of the supplementary instructions, the error was prejudicial and entitled him to a new trial. Since the jury found the defendant guilty of second degree murder, it is clear the defendant failed to satisfy the jury that he was insane at the time he shot Fowler or that he acted in self-defense. Had the jury found the defendant guilty of manslaughter, as in *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277 (1955), the prejudicial effect of the erroneous instruction would be apparent.

Defendant's other assignments of error are formal in nature and require no discussion. We conclude that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and BALEY concur.

STATE OF NORTH CAROLINA v. JOSEPH E. FULLER

No. 7415SC768

(Filed 25 November 1974)

1. **Indictment and Warrant § 8— one warrant — two offenses charged**

A warrant containing two separate counts and charging all the essential elements of driving under the influence and reckless driving was sufficient to charge defendant with those crimes.

2. **Automobiles § 127— driving under influence — reckless driving — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence and reckless driving where it tended to show a high speed chase with defendant driving at speeds over 100 mph on the wrong side of the road and failing to stop at intersections, and where it tended to show that defendant had a strong odor of alcohol about him and the results of the breathalyzer test were .16.

3. **Automobiles § 126— breathalyzer test — warning to be given defendant**

A defendant being given a breathalyzer test must be informed that he has a right to refuse to take the test but refusal will result in the revocation of his driver's license for six months, defendant may have any qualified person of his choosing administer a chemical test in addition to any administered by the law enforcement officer, and defendant has the right to call an attorney and select a witness to view the procedure. G.S. 20-16.2.

4. **Automobiles § 126— breathalyzer test — failure to advise defendant of rights — results inadmissible**

Failure of the State to establish that defendant was advised that he had the right to have an additional test administered by a qualified person of his own choosing rendered the results of the breathalyzer test administered by a law enforcement officer inadmissible.

APPEAL by defendant from *Clark, Judge,* 6 May 1974 Session of Superior Court held in ALAMANCE County. Heard in the Court of Appeals 21 October 1974.

Defendant was charged with careless and reckless driving in violation of G.S. 20-140, driving under the influence of intoxicating liquors in violation of G.S. 20-138 and resisting an

officer in violation of G.S. 14-223. After hearing the evidence, the jury returned verdicts of guilty as charged. From a judgment imposing a sentence of not less than four nor more than six months for the crimes of driving under the influence of intoxicating liquors and resisting an officer, defendant appealed. Prayer for judgment was continued for five years on the charge of careless and reckless driving.

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

David M. Dansby, Jr., for defendant appellant.

MORRIS, Judge.

Defendant failed to docket his appeal within the time provided by our rules. In other respects he has failed to comply with the rules, i.e., failing to set out in his brief the exceptions on which he relies with a reference to the page in the record where the exception can be found. We have, however, elected to treat his appeal as a petition for a writ of certiorari and grant review of his trial.

[1] He first contends that his motion to quash the warrant, timely made on the ground that it was duplicitous, should have been granted. He complains that the warrant charged the defendant with driving under the influence and reckless driving. These were separate and distinct violations of the law, of the same class, and growing out of the same transaction. "The separate offenses charged in the same warrant or indictment are to be considered and treated as separate counts." *State v. Jarrett,* 189 N.C. 516, 519, 127 S.E. 590 (1925). Where the warrant or indictment contains separate counts, each count should be complete in itself. *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969). Here each count charged all the essential elements constituting the violation of law charged. This assignment of error is overruled.

[2] Defendant also contends that the denial of his motions for judgments as of nonsuit constituted prejudicial error. We do not see the necessity for going into lengthy detail with respect to the evidence. Suffice it to say that the evidence presented was more than sufficient to take the charges to the jury. The State's evidence disclosed a high speed chase with defendant driving at speeds over 100 miles per hour on the wrong side of the road, and failing to stop at intersections. It further tended to show

that defendant, who had a knife in his right hand pants pocket and had his hand in that pocket when ordered to stop by the officer, had gotten out of his car and had run back of the house and actively resisted the officer's attempt to handcuff him. Further, the evidence was that defendant had a strong odor of alcohol about him and the results of the breathalyzer test were .16. This assignment of error is feckless.

Defendant urges that the court erred in allowing into evidence the results of the breathalyzer test because the defendant was not advised by the law enforcement officers of his right to have a test of his own choosing administered. Defendant cites in his brief and apparently relies upon G.S. 20-139.1(d). However, he omits from his quotation of the statute a very important sentence. The entire statutory provision, with the portion omitted by defendant underlined, is as follows:

> "The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer. *The failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer.* Any law-enforcement officer having in his charge any person who has submitted to the chemical test under the provisions of G.S. 20-16.2 shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test."

[3] G.S. 20-16.2, as amended in 1969, provides that any person who operates a motor vehicle upon the highways of this State is deemed to have given consent to having administered to him a breathalyzer test. That statute also provides that the person authorized to administer the chemical test shall advise the person arrested "both verbally and in writing and shall furnish the person a signed document setting out: (1) That he has a right to refuse to take the test; (2) That refusal to take the test will result in revocation of his driving privilege for six months; (3) That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law enforcement officer; and (4) That he has the right to call an attorney and

select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights." Prior to the 1969 amendment requiring that the arrested person shall be advised of his right to have another test administered, this court in *State v. McCabe,* 1 N.C. App. 237, 161 S.E. 2d 42 (1968), in an opinion written by Campbell, Judge, held that the arrested person had, as the operator of a motor vehicle, given his implied consent for the test to be administered and the failure of the officers before the test was administered to advise the defendant that he had a right to refuse to take the test was not error.

After the 1969 amendment, this Court, in *State v. Allen,* 14 N.C. App. 485, 188 S.E. 2d 568 (1972), in an opinion by Campbell, Judge, concurred in by Chief Judge Mallard and Judge Brock (now Chief Judge), said again that where defendant was not advised of his right to refuse to take the breathalyzer test, the results were admissible in evidence, citing *McCabe.*

In *State v. Shadding,* 17 N.C. App. 279, 194 S.E. 2d 55 (1973), cert. denied 283 N.C. 108 (1973), the defendant contended that the breathalyzer test results were inadmissible because there was no evidence that the defendant was advised of his right to have counsel or a witness present to view the taking of the test. In an opinion by Brock, Judge (now Chief Judge), joined by Chief Judge Mallard and Britt, Judge, this Court held:

> "If defendant was not notified of such rights, the results of the test are not admissible in evidence."

The Court granted defendant a new trial, and the cause was remanded for determination to be made after a hearing to be conducted by the trial court. The defendant did not base his contention on constitutional rights but upon the fact that the right of a defendant to be so advised is a right specifically required by statute. These rights were accorded by the 1969 General Assembly to a person arrested for driving a motor vehicle while under the influence of alcohol. The *McCabe* holding is, therefore, not in conflict with *Shadding. State v. Allen* does appear to be in conflict. It, however, did not refer to G.S. 20-16.2 and relied entirely on *McCabe* and the philosophy therein expressed by Judges Campbell, Brock and Parker. The Court there noted that there was no violence used in making

the test and there was no conduct that "shocks the conscience" or "offends a sense of justice." While we agree with that reasoning, we must agree, as is pointed out in *Shadding, supra,* that the General Assembly now requires that a defendant in a situation such as the one presented by this case *must* be advised of the rights set out in G.S. 20-16.2 by the "person authorized" to give the test. If the failure to give them is not going to preclude the admission in evidence of the test results, the General Assembly must delete the requirement.

[4] In the case before us the officer who administered the test testified that he advised the defendant of his right to refuse to take the test, of his right to have witnesses present, of his right to have an attorney present and that he would be given 30 minutes to get the witness. However, the record is silent as to whether he advised defendant of his right to have an additional test administered by a qualified person of his own choosing as provided by G.S. 20-16.2.

Should it be established that defendant was advised of his right to have another test, and he failed to obtain one or was unable to obtain one, G.S. 20-139.1(d) provides that the admissibility in evidence of the results of the test administered is not precluded.

The failure of the State to establish that defendant was accorded this statutory right, in addition to the others which he was properly accorded, rendered the results of the breathalyzer test inadmissible in evidence. Its admission over objection constituted prejudicial error.

New trial.

Judges HEDRICK and BALEY concur.

WILLIAM W. ELLIS v. CIVIC IMPROVEMENT, INC.

No. 7417SC764

(Filed 25 November 1974)

1. Corporations § 28— inability to conduct business to advantage of all shareholders — liquidation proper

Under G.S. 55-125(a)(1) irreconcilable deadlock of the directorate or shareholders is not sufficient basis for an order of liquidation with-

out a supported finding or conclusion that the shareholders are so deadlocked that the corporation's business can no longer be conducted with advantage to all the shareholders.

2. **Corporations § 28— building sole asset of corporation — control in one director — liquidation proper**

In an action for liquidation of a corporation where the evidence tended to show that the corporation's assets consisted of a building designed for use by doctors and dentists, that respondent set his own rent for use of the entire building at the same amount he was paying in 1968 for two-thirds of the space, that petitioner was unable to cause a change since he had not participated in management since 1968, and that a meeting of the Board of Directors would be merely an exercise in futility, such evidence was sufficient to support the trial court's conclusion that the business of the corporation could no longer be conducted to the advantage of all the shareholders.

APPEAL by defendant from *Rousseau, Judge,* 20 May 1974 Session of Superior Court held in ROCKINGHAM County. Heard in the Court of Appeals 17 October 1974.

Petitioner instituted this action seeking liquidation of the corporate respondent under the provisions of N.C.G.S. 55-125(a)(1) and (4). He alleged that he is the owner of 50% of the stock of the respondent and that the remaining 50% is owned by Thomas B. Clay; that no stockholders' meeting had been held for a period of more than five years; that no directors or officers of the corporation had been elected since 1968; that no accounting or reports had been made to petitioner as required by the corporation's by-laws; that Clay had had sole control and management of the corporation since 1968 and petitioner had had no voice in its management; that the corporation owns a building reasonably worth $40,000 which houses a medical clinic in Mayodan, N. C.; that the building is used and occupied by Clay; that the rights and interests of petitioner in the corporation have not been protected; that the petitioner and Clay are deadlocked in voting power, and that the continued existence of the corporate respondent will severely damage and impair the rights and interests of petitioner-stockholder. He prayed "That Civic Improvement, Inc., the corporate respondent, be liquidated under the supervision of the Court as provided by N.C.G.S. 55-125(A)(1) and N.C.G.S. 55-125(A)(4) as such action is reasonably necessary for the protection of the rights and interest of the petitioner shareholder and the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that the business can no longer be conducted to advantage of all shareholders."

Respondent answered, admitting that petitioner and Clay each own 50% of the stock of Civic Improvement, Inc.; that there have been no shareholders' meetings for five years; that no directors or officers have been elected since 1968; and that no accounting or reports have been delivered to petitioner during that time. All other allegations were denied.

The matter was heard by the court without a jury. After all the evidence had been presented the court made the following findings of fact:

"(1.) That the respondent is a North Carolina corporation having its principal place of business in the town of Mayodan, Rockingham County, North Carolina.

(2.) That the defendant corporation's only asset is a lot and building, which building contains approximately 1,800 square feet of rental space, suitable primarily for doctors' and dentists' offices; that this lot is located in the town of Mayodan.

(3.) That in 1966 the petitioner, Dr. William W. Ellis, and Dr. Thomas B. Clay became the sole stockholders of said corporation, each owning fifty per cent of the stock; that at the time of the purchase of said stock the corporation borrowed $20,000.00 and each stockholder gave a note to the corporation in the approximate amount of $10,000.00 each.

(4.) That each stockholder and his respective wife was elected to the Board of Directors; that Dr. Clay was elected President of the corporation and Dr. Ellis was elected Treasurer of the corporation; that no official meeting of the Board of Directors or stockholders has been held since the reorganization of the corporation.

(5.) That the two stockholders were to use the building to carry on their profession, Dr. Clay being a medical doctor and Dr. Ellis being a dentist; that each of the stockholders was to pay rent to the corporation which in turn was to pay all utilities, taxes, insurance, upkeep, and the mortgage given to secure the $20,000.00 that was originally borrowed; that Dr. Ellis rented approximately 600 square feet for his dental office and paid $180.00 per month as rent; that Dr. Clay rented approximately 1,200 square feet for his medical office and paid $360.00 per month as rent.

(6.) That there was no written or oral lease or agreement as to how long each of the stockholders was to lease said office space.

(7.) That during the year of 1968 Dr. Ellis moved from the Town of Mayodan to the Town of Chapel Hill where he now maintains his dental practice; that since moving to Chapel Hill Dr. Ellis has not leased any portion of said building nor paid any rent to the corporation except as ordered in a prior Judgment heretofore entered in this court; that Dr. Clay is now using almost the entire building for his medical office and has continued to pay the same monthly rental as originally agreed, to wit: $360.00 per month.

(8.) That the two stockholders have talked from time to time about a buy or sell agreement, but have not been able to agree on any definite terms; that each stockholder stated that he did not call a meeting of the Board of Directors because each felt that such a meeting would be useless inasmuch as they could not agree and that such a meeting would be a waste of time.

(9.) That since Dr. Ellis's departure in 1968 Dr. Clay has controlled and operated the corporation, that is Dr. Clay has paid the utilities, taxes, insurance and upkeep, has employed an accountant to file income taxes, and has set his monthly rent in the amount of $360.00; that Dr. Clay has not consulted Dr. Ellis on any of these matters nor has Dr. Ellis attempted to exert any control or say-so over the corporation.

(10.) That all monies received by the corporation have been spent for corporate purposes; that Dr. Ellis has received nothing from the corporation since 1968.

(11.) That all of the necessary parties to this proceeding are now properly before the court.

(12.) That the petitioner has prayed the court to dissolve the corporation under the provisions of G.S. 55-125(a)(1); that no other relief has been prayed for by either party."

Based upon the foregoing findings of fact the court concluded "[t]hat the Board of Directors of the defendant corporation are (sic) deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock so

that the business of the corporation can no longer be conducted to the advantage of all of the shareholders." The court appointed a permanent receiver to liquidate the corporation and required of him a surety bond. Respondent gave notice of appeal in which he excepted to each of the findings of fact and to the signing of the judgment.

Clark M. Holt for petitioner appellee.

Harrington, Stultz and Maddrey, by Joseph G. Maddrey, for respondent appellant.

MORRIS, Judge.

Although appellant states in its notice of appeal that it "excepts to each of the Findings of Fact and the signing of the Judgment," no exceptions appear anywhere in the record. No. (1) under "Exceptions and Assignments of Error" reads as follows:

> "(1) For his first exception and assignment of error, the Defendant Appellant says His Honor erred in ruling that the findings of fact supported his conclusion of law that pursuant to N.C.G.S. 55-125(a) (1) the Board of Directors of the Defendant Corporation was deadlocked in the management of the corporate affairs. Furthermore Defendant Appellant contends the evidence does not support such a finding of fact."

Nos. (2) and (3) are similar. No. (2) refers to the court's conclusion that the shareholders were unable to break the deadlock and No. (3) to the conclusion that the business can no longer be conducted to the advantage of all the shareholders. Even though the question of whether there is competent evidence to support the findings of fact is not before us, our review of the evidence convinces us that the findings of fact are supported by competent evidence.

We turn then to the question of whether the findings are sufficient to support the court's conclusions. G.S. 55-125(a) (1) provides:

> "The superior court shall have the power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that: The directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that

the business can no longer be conducted to the advantage of all the shareholders; . . . "

[1] As a general rule, the court would have no power, absent statutory direction, to order the dissolution of a corporation simply on the grounds that there was a deadlock or dissention among the directors or stockholders. 19 Am. Jur. 2d, Corporations, § 1610. Under the statutory authority upon which petitioner relies, irreconcilable deadlock of the directorate or shareholders, as here, is not sufficient basis for an order of liquidation without a supported finding or conclusion that the shareholders are so deadlocked that its business can no longer be conducted with advantage to all the shareholders. Robinson, North Carolina Corp. Law, 2d Ed., §§ 29.7-29.9 (1974); *Re Lakeland Development Corp.*, 277 Minn. 432, 152 N.W. 2d 758 (1967). See also 13 A.L.R. 2d 1266 and cases there cited.

[2] It seems obvious that if Dr. Clay continues to set his own rent for the entire building at the same amount he was paying in 1968 for two-thirds of the space, the corporation cannot be operated to the advantage of *all* the stockholders. Petitioner is unable to cause a change by reason of the fact that he has not participated in management since 1968, and the undisputed evidence is that a meeting of the Board of Directors would be merely an exercise in futility. Though the court did not so find, the undisputed evidence was that there were four directors—petitioner and his wife and Dr. Clay and his wife. Both petitioner and Dr. Clay testified that neither would vote for a fifth director unless that fifth director would vote with him on all questions. The election of a fifth director is, therefore, a virtual impossibility.

We note that the court could have made, from the evidence, other findings of fact which would have added support to his conclusions. Nevertheless, although the findings made are minimal, we are of the opinion that they are sufficient to support the court's conclusions.

It appears that the most practical solution to this dilemma is the appointment of a receiver to proceed with the liquidation of the corporation as the only possible equitable manner of operation to the advantage of all the stockholders.

Affirmed.

Judges HEDRICK and BALEY concur.

ROBERT L. YOUNT AND WILLIAM E. BUTNER, INDIVIDUALLY, AND ROBERT L. YOUNT AND WILLIAM E. BUTNER, t/d/b/a WILKES INDUSTRIAL PARK, A PARTNERSHIP, PLAINTIFFS v. ELMER LOWE

No. 7423SC762

(Filed 25 November 1974)

Easements § 8; Highways and Cartways § 13— cartway proceeding — consent judgment — easement — uses not limited to cartway purposes

Where a consent judgment in a cartway proceeding between defendant and plaintiffs' predecessor in title granted to defendant and his successors in title a perpetual right and easement over the lands now owned by plaintiffs and made such easement appurtenant to and running with defendant's land, defendant's use of the easement was not limited to the uses for which a landlocked property owner may obtain a cartway under G.S. 136-69.

Judge MORRIS dissents.

APPEAL by plaintiffs from *Collier, Judge,* 18 March 1974 Session of Superior Court held in WILKES County.

Heard in Court of Appeals 17 October 1974.

Plaintiffs brought this action on 2 January 1974 to enjoin defendant from using a passageway over their property for any purpose other than those specifically set out in G.S. 136-69, which provides the procedure for obtaining a cartway. Defendant filed answer in which he claims an easement over the property of plaintiffs in accordance with a consent judgment entered into by defendant and Paul Rhodes, plaintiffs' predecessor in title.

The consent judgment in pertinent part is as follows:

"1. The petitioner, Elmer Lowe, is hereby granted a 3/ cartway across the lands of the defendant and extending from the eastern boundary of the tract of land deeded to the petitioner by Joe O. Brewer, T. R. Bryan, Sr. and Ralph Davis, Commissioners, said deed being recorded in book 496 page 63 Office of the Wilkes County Registry across the lands of the defendant to the western boundary of secondary road #1001, more commonly known as the Oakwoods or Brushy Mountain Road. By the granting of this cartway, 4/ the petitioner and his successors in title forever are given a perpetual right and easement of egress, ingress and regress over and upon the said cartway, 5/ as hereinafter described, and the said cartway 6/ or easement herein

granted is appurtenant to and runs with the petitioner's land as above described. 7/ The cartway herein granted is described as follows: Lying and being in Wilkesboro Township, Wilkes County, North Carolina and more particularly described as follows:

> BEGINNING On a Stake in the west margin of the right-of-way of the Oakwood Road, said stake being 15.6 feet; south of a right-of-way marker and running thence S. 54° 30′ E 25 feet to a stake; thence N. 67° 30′ W 379 feet to a stake; thence N 63° 30′ W 391 feet to a stake in Elmer Lowe's line at a Poplar; thence S 87° E 48 feet to a stake; thence S 63° 30′ E 345 feet to a stake; thence S 67° 30′ E 362 feet to the beginning, containing 14,760 square feet.

2. In full and complete consideration for the granting of the cartway 8/ herein given to the petitioner, the defendant shall have and recover of the petitioner the sum of Two Thousand ($2,000.00) Dollars in full and final settlement of all matters in controversy arising out of this action, and in full and final settlement for the conveyance of the cartway 9/ herein granted to the petitioner."

Plaintiffs allege that defendant is using the access to his property granted in the consent judgment for the construction of a private residence and not for any purpose for which a cartway could be obtained under G.S. 136-69.

After pleadings were filed defendant made a motion for summary judgment under Rule 56(b) of the Rules of Civil Procedure. In support of his motion he submitted:

> 1. Consent judgment entered in the proceeding entitled "Elmer Lowe, Petitioner v. Paul Rhodes, Defendant" on 11 November, 1970, recorded in the office of the Clerk of Superior Court of Wilkes County and in the office of the Register of Deeds of Wilkes County in Book 512, Page .....

> 2. Certified copy of Deed from Paul Rhodes to J. H. Pearson, covering the lands on which the easement was claimed, dated 5 April 1972, recorded in Deed Book 517, Page 310, in the office of the Wilkes County Registry. This deed provided that the property conveyed was subject to certain exceptions which included: "Right of easement in

favor of Elmer Lowe, dated November 11, 1970, and recorded in book 512, page 1648, Wilkes County Public Registry, together with any and all rights of way or easements recorded or unrecorded."

3. Certified copy of Deed from J. H. Pearson and others to Wilkes Industrial Park, a partnership, dated 3 October 1973, recorded in Book 527, Page 026, in the office of the Wilkes County Registry.

4. Affidavit of Elmer L. Lowe showing the construction of a home on his property at a contract price of over $60,000.00 upon which $55,000.00 had already been paid, the construction of a road, farm pond stocked with fish, the planting of an orchard, and extensive cultivation of land.

Plaintiffs answered the motion for summary judgment and asserted that there were issues of fact for determination by the jury. Affidavits were filed showing a difference of opinion concerning the use of the defendant's property.

The trial court granted summary judgment in favor of defendant and dismissed the action.

From this judgment, plaintiffs appeal.

Butner and Gaither, by J. Richardson Rudisill, Jr., for plaintiff appellants.

E. James Moore and Vannoy, Moore and Colvard, by J. Gary Vannoy, for defendant appellee.

BALEY, Judge.

The sole question presented by this appeal is whether the trial court erred in granting summary judgment for defendent. Summary judgment is properly granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). "The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829. *See also Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400; 2 McIntosh, N. C. Practice 2d, § 1660.5.

Upon hearing on defendant's motion, the trial court had before it copies of the consent judgment entered into by Elmer Lowe and Paul Rhodes and a deed from Paul Rhodes to plaintiffs' immediate predecessors in title. The consent judgment granted to defendant and his successors in title forever a perpetual right and easement over the lands now owned by plaintiffs and made such easement appurtenant to and running with defendant's land. The easement was particularly described and located across plaintiffs' property. The deed from Paul Rhodes which recognized the right of easement in favor of defendant demonstrated beyond question his intent in the consent judgment granting the easement.

A consent judgment is a contract between the parties. *Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425; *Stanley v. Cox*, 253 N.C. 620, 117 S.E. 2d 826. Its terms are not controlled by the statute under which the action originally was brought. This statute, G.S. 136-69, covers the acquisition and not the continuance of a cartway. It lists the uses for which a landlocked property owner may secure access to a public highway. It does not limit the uses of the property once the cartway has been acquired. Plaintiffs are bound by the consent judgment entered with their predecessor in title.

There being no genuine issue of material fact, we hold that defendant is entitled to summary judgment as a matter of law and that the trial court was correct in bringing this litigation to an early end.

Affirmed.

Judge HEDRICK concurs.

Judge MORRIS dissents.

IN THE MATTER OF MYRTLE HOGAN, RESPONDENT-DEFENDANT

No. 7414SC222

(Filed 25 November 1974)

1. Contempt of Court § 6— contempt proceeding — no right to jury trial

Defendant was not entitled to a jury trial for contempt of court for contacting and attempting to influence a juror in a pending criminal case.

2. **Contempt of Court § 6— attempting to influence juror — violation of court order**

Where a spectator at a criminal trial was present in the courtroom when the court instructed the jury not to discuss the case with anyone, the court's order was binding upon her as well as upon the jurors to whom it was expressly directed, and the court properly found the spectator guilty of contempt for wilful disobedience of the order by making a telephone call to a juror whom she knew and telling the juror that the defendant in the pending case was not guilty and did not live in the house in which heroin was found. G.S. 5-1(4).

APPEAL by respondent from *Clark, Judge,* 1 October 1973 Session of Superior Court held in Durham County.

On 27 September 1973 Judge Edward E. Clark, presiding and holding the courts of the Fourteenth Judicial District, issued an order that the respondent, Myrtle Hogan, appear before him and show cause why she should not be attached for contempt of court for contacting and attempting to influence a juror in a pending criminal case over which Judge Clark was presiding. At the hearing held on return of the show cause order both the State and respondent presented evidence. Following the hearing, the court entered judgment making findings of fact which are summarized as follows:

On 26 September 1973 the court was engaged in the trial of a criminal case in which one Levi Whitted was charged with possession and manufacture of heroin. In that case the State relied primarily on a showing of constructive possession, offering evidence to show that Whitted resided in a certain dwelling wherein the heroin had been found after a search under a search warrant. At the voir dire to determine admissibility of evidence, the attorney for defendant Whitted began to offer evidence tending to show that Whitted did not reside in the dwelling, but elected not to offer such evidence. At the conclusion of the State's evidence and before recessing for the day at 5:00 p.m., the court instructed the jury not to discuss the case with anyone and that in event anyone made an effort to contact any juror about the case, to report it to the court. At that time Myrtle Hogan, the respondent in the present proceeding, was present in the courtroom as an interested spectator, she being the mother-in-law of defendant Whitted's son. Respondent heard the instructions which the court gave to the jury. One of the jurors, Mrs. Grace W. Jones, had worked with Myrtle Hogan at Duke Hospital for approximately three and one-half years until July 1973, when Myrtle Hogan was trans-

ferred to another department. Mrs. Jones and Mrs. Hogan left the courtroom at the same time and greeted each other with smiles and waves of the hand. About 7:00 p.m. on the same day, Myrtle Hogan made a telephone call to Mrs. Jones, and asked about a book which Mrs. Hogan had previously loaned to Mrs. Jones and made arrangements to secure its return. Mrs. Hogan mentioned that she had seen Mrs. Jones in court that day, stated that Levi Whitted was innocent and did not live in the house in question, and when Mrs. Jones told Mrs. Hogan that the judge had instructed the jurors not to discuss the case, Mrs. Hogan replied, "Well, he is not guilty. I'll see you. And this is just between you and me." Mrs. Hogan then hung up the receiver. Mrs. Jones reported the telephone call to the judge before the opening of court on the following morning, and the judge in turn transmitted this information to the attorney for defendant Whitted and to the district attorney. The attorney for defendant Whitted then moved for a mistrial, which motion was granted.

On these findings of fact, the court concluded that the acts of respondent, Myrtle Hogan, "impeded and obstructed the Court and the process of justice, was knowingly, willfully, and deliberately done by her," and that she was in contempt of court. The judgment directed that respondent be confined in the common jail of Durham County for a term of 30 days. From this judgment respondent appealed.

Attorney General Morgan by Assistant Attorney General John M. Silverstein for the State.

Taylor & Upperman by Herman L. Taylor and Leroy W. Upperman, Jr., for respondent appellant.

PARKER, Judge.

[1, 2] Appellant's demand for a jury trial was properly denied. *Blue Jeans Corp. v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867 (1969). Evidence presented at the hearing on return of the show cause order fully supports the court's findings of fact, and the only question presented by this appeal is whether those findings in turn support the judgment rendered. We hold that they do. G.S. 5-1(4) is as follows:

G.S. 5-1. "Any person guilty of any of the following acts may be punished for contempt:

* * * *

"(4) Willful disobedience of any process or order lawfully issued by any court."

Respondent admitted she was present in court and heard Judge Clark order the jurors not to discuss the pending criminal case with anyone. She also admitted her relationship to the defendant in that case and her acquaintanceship with one of the jurors. Her defense was simply to deny she had made any telephone call to the juror. On competent evidence the court found to the contrary. Her conduct in making the call was a direct violation of the court's order given in open court while she was present and of which she was fully aware. We hold that that order was binding upon her as well as upon the jurors to whom it was expressly directed. The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge BALEY concur.

STATE OF NORTH CAROLINA v. VAUGHN L. BAGNARD

No. 743SC708

(Filed 4 December 1974)

1. **Searches and Seizures § 1— evidence in plain view — warrantless seizure permissible**

When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime.

2. **Searches and Seizures § 1— marijuana in plain view in vehicle — warrantless seizure proper**

Marijuana seized by a state trooper from defendant's car without a warrant was admissible in a prosecution for felonious possession of more than five grams of marijuana with intent to distribute where the trooper stopped defendant to check his vehicle registration, defendant could produce no registration card, the trooper legitimately opened the driver's door to obtain the serial number of the car for his official report, he then saw a bag in plain view within fifteen inches of where the serial number was located, and he could see marijuana through the holes in the bag.

3. **Criminal Law § 50; Narcotics § 3— substance as marijuana — officer's opinion not prejudicial**

Even if the trial court erred in allowing the arresting officer to give his opinion that bags found in the car defendant was operating contained marijuana, defendant was not prejudiced since a lab report was introduced into evidence which identified the substance as marijuana.

4. **Narcotics § 3— dog tags and cigarette papers seized in warrantless arrest — admissibility**

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in allowing into evidence defendant's "dog tags" and cigarette papers seized without a warrant from the vehicle which defendant was operating at the time of his arrest.

5. **Narcotics § 4— constructive possession of marijuana — sufficiency of evidence**

Evidence was sufficient for the jury to find that defendant had both the power and the intent to control the disposition and use of marijuana so as to have it in his constructive possession where such evidence tended to show that defendant had been given the keys and the custody of a vehicle by its owner, there were 443.1 grams of marijuana found in the car while defendant was the driver, and one of the two bags of marijuana was located just inside the car's door on the driver's side, unobstructed by the seat.

6. **Criminal Law § 124— two defendants — inconsistent verdicts — no error**

Criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency; therefore, it was not error for the trial court to allow an inconsistent jury verdict which found a codefendant guilty of possession of marijuana but defendant guilty of possession with intent to distribute.

APPEAL by defendant from *Peel, Judge,* 11 March 1974 Session of Superior Court held in CRAVEN County. Heard in the Court of Appeals on 12 November 1974.

Defendant was tried upon a bill of indictment charging him with felonious possession of more than five grams of marijuana with intent to distribute.

Evidence for the State tended to show that Trooper DeBose of the North Carolina Highway Patrol stopped a 1962 Ford vehicle driven by defendant and requested to see a driver's license and registration card. Defendant failed to produce a registration card. Trooper DeBose informed defendant that he had information that the vehicle was improperly registered and immediately placed defendant under arrest for operating a vehicle with improper registration. After arresting defendant,

Trooper DeBose opened the door on the driver's side of the car to obtain the serial number of the car located on the door jamb. DeBose noticed a plastic bag on the floor of the car which he immediately recognized as containing marijuana. A further search of the car revealed another bag of marijuana situated under the front passenger's seat, a military "dog tag" bearing defendant's name and two packets of cigarette papers. The report of a chemist was introduced into evidence without objection, and it identified the first and second bags as containing 19.9 grams and 423.2 grams of marijuana, respectively.

Defendant's evidence tended to show that the car belonged to a Marvin Martin and that Martin frequently allowed other people to borrow the car. According to defendant, Martin was leaving the country and had left the car in defendant's custody. On that same day, defendant had gone to a local bar and stayed there until shortly before 2:00 a.m. at which time defendant and Michael Huckaby left the bar. Neither defendant nor Huckaby had transportation home until defendant saw Martin's car parked near the bar. It was dark at the time and both defendant and Huckaby testified that they did not see the marijuana when they got into the car and drove away.

From a verdict of guilty as charged and a sentence of two years in the State prison camp for youthful offenders, defendant appealed.

Attorney General Carson, by Assistant Attorney General T. Buie Costen, for the State.

Charles K. McCotter, Jr., for defendant appellant.

MARTIN, Judge.

For his first assignment of error, defendant contends the trial court erred in overruling defendant's motion to suppress evidence obtained by Trooper DeBose's warrantless search of the car. In support of his contention defendant argues that (1) he was not under arrest when Trooper DeBose initially opened the car door and saw the marijuana and such action by Trooper DeBose constituted an unlawful search and (2) even if he was under arrest at the time the marijuana was found, the arrest was unlawful and any search incident thereto was unlawful. Since we hold that the search was not unreasonable, regardless of whether defendant was under lawful arrest or not, we do not reach the issue of defendant's arrest.

[1, 2] "When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime, even though the 'incident to arrest' doctrine would not apply; and such evidence is admissible." 1 Stansbury, N. C. Evidence (Brandis' Revision), § 121 a, p. 372. After voir dire examination, the trial court made findings of fact which can be summarized in part as follows: Trooper Spainhour was investigating a hit and run offense and had linked evidence from the scene to the Ford which defendant was later found driving. Spainhour checked the license tag on the Ford and determined that it belonged to a later model Chevrolet. Spainhour gave this information to Trooper DeBose and asked him to watch the Ford and stop the vehicle for purposes of Spainhour's investigation. DeBose did stop the vehicle and asked defendant Bagnard for the registration card. Being unable to produce it, DeBose placed Bagnard under arrest for improper registration and opened the driver's door to obtain the serial number of the car for his official report. As DeBose looked for the serial number on the door jamb, he saw a bag in plain view and within fifteen inches of where the serial number was located. DeBose could see marijuana through the holes in the bag. He arrested defendant for possession of marijuana and thereafter searched the rest of the car. The findings of fact were amply supported by competent evidence on voir dire, and, therefore, they are conclusive.

Since it is obvious and uncontested that Trooper DeBose inadvertently discovered the bag of marijuana in plain sight and reasonably believed that it was marijuana, then the only question remaining is whether his presence next to the front seat of the car while looking for the serial number of the car was lawful.

> "Inspection of a car's identification number differs from a search of a vehicle and seizure of its contents in one important aspect. The occupants of the car cannot harbor an expectation of privacy concerning the identification of the vehicle. The state requires manufacturers to identify vehicles by affixing identification numbers which are also recorded in registries where the police and any interested person may inspect them. Since identification numbers are, at the least, quasi-public information, a search of that part

> of the car displaying the number is but a minimal invasion of a person's privacy. A police officer, therefore, should be freer to inspect the number without a warrant than he is to search a car for purely private property." *United States v. Powers* (CA4 N.C.) 439 F. 2d 373, *cert. denied,* 402 U.S. 1011, 29 L.Ed. 2d 434, 91 S.Ct. 2198 (1971).

The Court in *Powers* holds that an inspection for the identification number of a car constitutes a search under the Fourth Amendment and then discusses the proper standard by which to test the reasonableness of the search. It adopts the objective standard contained in *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968) where the Court poses the question:

> "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"

Such a standard focuses on the facts as they appeared to the officer and as they would be acted upon by a man of reasonable caution. "This standard can be met . . . when the officer has a legitimate ground for checking the identification number." *United States v. Powers, supra.* We believe *Powers* to be a sound approach to the immediate issue.

After voir dire examination, the trial court found that the vehicle driven by defendant had been previously investigated by Trooper Spainhour in connection with a hit and run offense in another county. The investigation indicated that the license plate on the car was not registered to that car. Trooper Spainhour gave this information to Trooper DeBose and asked that he stop the vehicle. Under these circumstances, Trooper DeBose had a legitimate reason for checking the car's serial number on the door jamb, and his action was clearly appropriate. While lawfully present checking the serial number, Trooper DeBose discovered the marijuana in plain sight on the floor of the car. Therefore, this evidence was admissible and not the result of an unreasonable search, and the trial court properly overruled defendant's motion to suppress it.

[3] Defendant also contends it was error to allow Trooper DeBose's opinion testimony that the bags found in the car contained marijuana. Assuming, without deciding, that his testimony was inadmissible, we fail to see how defendant was

prejudiced thereby since a lab report was introduced into evidence which identified the substance as marijuana, and nowhere in the record is this conclusion questioned.

[4] The State introduced into evidence defendant's "dog tags" and cigarette papers found in the vehicle, and defendant contends there were inadmissible because they are not contraband and, thus, not subject to seizure. We disagree. In *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642 (1967), the Supreme Court rejected the old distinction between "mere evidence" and contraband where there was a warrantless search subsequent to a "hot pursuit." Defendant cites *Marron v. United States,* 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927). *Marron* involves a search pursuant to a search warrant, and while it may still have some validity where items amounting to "mere evidence" are seized under a search warrant naming other items, it clearly does not apply to the present case. *See State v. Zimmerman,* 23 N.C. App. 396, 209 S.E. 2d 350 (1974).

[5] Next, defendant argues it was error to deny defendant's motion for nonsuit on the charge of unlawful possession of marijuana with intent to distribute because there was no evidence that defendant knew of the presence of marijuana.

> "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. . . . [T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' [Citations]." *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972).

In the instant case, defendant had been given the keys and the custody of the vehicle by its owner. There were 443.1 grams of marijuana found in the car while defendant was the driver. One of the two bags of marijuana was located just inside the car's door on the driver's side, unobstructed by the seat. Viewing the evidence in a light most favorable to the State, the jury could find that defendant had both the power and the intent to control its disposition or use so as to have it in his constructive possession. The trial court correctly overruled defendant's motion for nonsuit.

[6] Finally, defendant argues it was error for the trial court to allow an inconsistent jury verdict which found a codefendant, Michael Huckaby, guilty of possession of marijuana while the same jury found defendant guilty of possession with intent to distribute. Defendant has not shown us in the record where he made a motion based on the foregoing grounds. Nevertheless, most modern authorities agree that criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency. *State v. Stitt,* 18 N.C. App. 217, 196 S.E. 2d 532 (1973). Thus, assuming that the jury verdict was inconsistent, defendant's argument still lacks merit.

We have reviewed defendant's other assignments of error, and we hold that they are also without merit.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. DEVOYD EUGENE GLAZE

No. 7429SC840

(Filed 4 December 1974)

1. **Criminal Law § 84; Searches and Seizures § 2— consent to search — burden of showing voluntariness**

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact voluntarily given and was not the result of duress or coercion, express or implied.

2. **Criminal Law § 84; Searches and Seizures § 2— consent to search — absence of specific finding of voluntariness — sufficiency of findings**

The trial court's findings were adequate to show defendant's voluntary consent to a search of his automobile, although they do not refer specifically to the voluntariness of consent, where the court found that an officer asked defendant if he could search defendant's car, to which defendant replied "I don't care," that the officer made no promises or threats to defendant, that defendant understood what the officer said to him, and that defendant was not placed under arrest before the search was conducted.

3. **Burglary and Unlawful Breakings § 10— possession of burglary tools — testimony that tools not required by defendant's employment**

In a prosecution for unlawful possession of burglary tools, testimony by two officers that defendant was not engaged in any employ-

ment requiring the use of the tools found in his car did not constitute prejudicial error.

4. **Burglary and Unlawful Breakings § 10— possession of burglary tools — automobile driven but not owned by defendant**

In a prosecution for possession of burglary tools, evidence that the tools were found under the hood of an automobile defendant was driving but did not own was sufficient to raise an inference of knowledge and possession and to carry the case to the jury.

APPEAL by defendant from *Martin (Harry C.), Judge,* 20 May 1974 Session of Superior Court held in RUTHERFORD County. Argued before the Court of Appeals 21 November 1974.

Defendant, Roy Lee Ledford, Howard Mashburn, and Kenneth Larry Stafford were arrested for possession of burglary tools. At trial a plea of not guilty was entered by the defendant, and a verdict of guilty as charged was returned. From an active sentence of not less than five years nor more than seven years imposed thereon, the defendant gave notice of appeal to this Court.

On 29 October 1973 at 3:00 a.m., Carol Guest, Deputy Sheriff of Rutherford County, saw a 1971 Maverick backed against the steps of the Tri-Community Drugstore in Henrietta. Guest later stopped the car. Inside were the defendant, who was driving, and three companions. Guest asked each for identification and returned to his car to radio for assistance. Keith Mitchem, Deputy Sheriff of Rutherford County, arrived, and Guest returned to the Maverick to ask defendant's permission to search the car for burglary tools. Defendant opened the trunk, but Guest found nothing. On *voir dire* Guest testified:

> "After I looked in the trunk we stepped back around to the side of the vehicle and I asked Mr. Glaze if he would mind for me to look under the hood and Mr. Glaze stated something like 'I don't care,' and got back in the car and sat down."

Guest found, under the hood, various burglary tools including two hammers, one pick, one pick handle, gloves, one brace and bit, one file, two wood bits, one screwdriver, one flashlight, one pair of tin snips, one pair of wire cutters, two saw blades, and one mechanical mirror.

After defendant testified on *voir dire* that he had not given Guest permission to look under the hood, the trial judge made findings of fact concluding that defendant had consented to the search; that none of defendant's constitutional rights had been violated; and that the fruits of the search were competent and admissible. When the jury returned, Guest described the items which had been seized in the search.

Keith Mitchem, Deputy Sheriff of Rutherford County, testified for the State and substantiated Deputy Guest's testimony. Alex Williams and Bert Homesley, police officers with the Gaston County Rural Police, were allowed to testify before the jury after examination on *voir dire.* Williams stated that he had known the defendant for ten to twelve years, and, during this time, he had never known the defendant to be engaged in any kind of employment requiring the use of the tools found under the hood of the car. Homesley made similar statements.

Defendant testified only on *voir dire,* stating that he had not consented to the search of the car. Defendant also stated that he was not the owner of the car, but had found the keys in the car which was parked in his front yard. He offered no evidence before the jury.

From a verdict of guilty as charged, defendant appeals, setting forth ten assignments of error.

Attorney General Carson, by Associate Attorney Wallace, for the State.

Robert C. Powell, for the defendant-appellant.

BROCK, Chief Judge.

Because the findings of fact made by the trial judge do not specifically deal with the issue of the voluntariness of defendant's consent to the search of the car, defendant contends that they are insufficient to hold the fruits of the search admissible.

[1] "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina,* 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed. 2d 797. When consent is achieved through implicit coercion, by implied threat or covert force, it is "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth v. Bustamonte,* 412 U.S. 218,

228, 93 S.Ct. 2041, 36 L.Ed. 2d 854. Thus, the Fourth and Fourteenth Amendments require a demonstration "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth v. Bustamonte, supra* at 248, 93 S.Ct. 2041, 36 L.Ed. 2d 854.

[2] In the case at bar the trial judge set forth the circumstances surrounding Deputy Guest's search of the car: that Guest asked defendant if he could search the car, to which defendant replied "I don't care," or words to that effect; that Guest made no promises or threats to defendant; that defendant understood what Guest said to him; and that defendant was not placed under arrest before the search was conducted.

While we believe that it is better practice for findings of fact to refer specifically to the voluntariness of consent to a search, it is our opinion that the findings of fact questioned by defendant are adequate to show defendant's voluntary consent to the search. Specific findings of voluntariness are not constitutionally required, but any finding of voluntariness must be supported by competent evidence. "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth v. Bustamonte, supra* at 248, 249, 93 S.Ct. 2041, 36 L.Ed. 2d 854. The defendant's first assignment of error is overruled.

[3] Defendant, by his seventh assignment of error, argues that the testimony of Gaston County Rural Policemen Williams and Homesley, that defendant was not engaged in any employment requiring the use of the tools found in the search, constituted prejudicial and reversible error. The State concedes that this portion of the officers' testimony was irrelevant and "far afield" of the purpose for which the officers were allowed to testify. However, we believe that this testimony does not rise to the level of prejudicial and reversible error.

To be relevant, evidence must have a logical tendency to prove the fact at issue in the case. *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423. The testimony of the officers in regard to the lack of defendant's need for these tools in his employment may be competent evidence of possession of burglary tools without lawful excuse within G.S. 14-55. Certainly no lawful excuse for

their possession appears from the evidence, and defendant undertook to show none. We are persuaded that the jury would not have reached a different verdict had the evidence been excluded. This assignment of error is overruled.

[4] Defendant, by his eighth assignment of error, argues that his motions for nonsuit made at the end of the State's evidence and at the end of all the evidence should have been granted. He argues that the evidence in this case shows only that the burglary tools were found under the hood of a car which defendant was driving, but did not own. Had defendant owned the car, this would create an inference that defendant was in constructive possession of the tools, as "[o]ne who has the requisite power to control and intent to control access to and use of a vehicle . . . has also the possession of the known contents thereof." *State v. Eppley,* 282 N.C. 249, 254, 192 S.E. 2d 441. Because the owner of the car could have placed the burglary tools under the hood of the car, defendant contends the inference should not be allowed in this case. We disagree.

The driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the owner of a vehicle loans it to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.

In the case at bar defendant offered no evidence concerning his knowledge of the contents of the car. In fact, the evidence indicates that defendant had control over the car and its contents. We believe, accordingly, that the State may overcome a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the contraband as to justify the jury in concluding that the contraband was in the accused's possession. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706. Defendant's motion for nonsuit was properly denied. This assignment of error is overruled.

We have carefully considered defendant's seven remaining assignments of error and find them to be without substantial merit.

In our opinion defendant had a fair trial free from prejudicial and reversible error.

No error.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN T. CATES

No. 7414SC647

(Filed 4 December 1974)

Criminal Law § 114; Kidnapping § 1— prejudicial jury instructions

In a prosecution for kidnapping where the evidence tended to show that defendant picked up a university student who was hitchhiking, the trial court's instruction which included the words, "the court instructs you *that the fact that . . .*," was prejudicial to defendant, since the jury could have understood the judge to mean that the most crucial facts at issue were established.

APPEAL by defendant from *Brewer, Judge,* 4 February 1974 Session of Superior Court held in DURHAM County.

Defendant was originally arrested on a warrant issued 28 November 1973 on the alleged victim's complaint. The warrant charged defendant with assault on a female "by pulling her to him by the knees and shoulders putting her in fear of bodily harm."

Later an indictment was submitted to the grand jury charging defendant with kidnapping and the grand jury returned a true bill of indictment on 7 January 1974. Apparently defendant was never tried on the original charge contained in the warrant.

Evidence for the State tended to show the following. The victim of the alleged assault and kidnapping was a female student at Duke University. About 7:20 p.m. on 27 November 1973, she was attempting to hitchhike a ride from passing motorists. As defendant approached she solicited a ride by signaling with her thumb. Defendant stopped and the female student got in his car. For some time they rode along with nothing being said about their respective destinations. The pair talked generally about defendant's employment in the construction industry and

the student's field of study. On one occasion the car stalled at a stoplight and this prompted conversation about the general condition of the automobile. After they passed Chapel Drive on the university campus, the student told defendant that he could let her out at the corner. The student testified that after she told defendant he could let her out at the corner:

> "He said he'd let me out a little further up. Then when we passed the exit that goes to the new dorms, I said he could let me out there, and he said, 'Is this where you are going'? And I said yes. He said, 'I'll let you out up there where it leads out to University Drive,' and I said, 'This is fine, this is where I am going.' Then he said he'd let me off a little further up. At this time we were near the stop sign.
>
> The stop sign is on the corner of Campus Drive Extension and University Drive, at Duke University. The Defendant didn't stop his car at the corner and turned right onto Duke University Drive. That is towards 751. I knew we were going away from the campus, and I asked him to please let me out, but he said that he would let me out further up. He asked me if I had a boyfriend, and I said yes and told him his name.
>
> At this point, I was sitting very near the door on the passenger side, and he put his hand on my knees and tried to pull me toward him, and I immediately pulled away. His other hand was on the steering column. I told him again [what] my boyfriend's name was . . . and that I was supposed to be meeting him that night. He took his hand away from my knees, took his eyes off the road and looked at me for a second. As we passed the road that goes toward the gymnasium, I said, 'Please let me out here, I am meeting [my boyfriend] and he is waiting for me.' There was no response from the Defendant, and as we passed that street, I said 'Please let me out,' and again no response from the Defendant.
>
> At that point he put one hand again on the steering wheel and put his arm around my shoulders and tried to pull me toward him again. When I pulled away this time, I didn't get as far to the door as I did the first time, and I asked him to please let me out. There was no response, and we were nearing the 751 junction.

University Drive deadends against 751. I realized the car would have to stop as we neared the intersection, so I opened the door ajar a little bit, so that when the car came to a stop, I got out immediately. I just stepped out in the intersection. There was a Volkswagen behind us at that time. I walked directly away from the car to my right to a grassy sort of a traffic intersection, and I walked towards that triangle. When I got out of the car, he pointed back of the car towards some woods and made a comment that the University was back towards the woods, but I didn't make any response. I stood on the grassy triangle for a few moments and then I recognized the car behind the Defendant's car as being one of the Duke University students. I walked towards the car, and recognized the two occupants as my friends at Duke, so I got into their car and asked them to take me back towards the University to West Campus so that I could call the police. I talked to Sergeant Davis of the Duke University police."

The student was then asked the approximate distance between where she first made her request to leave the car and where she got out at the intersection. She replied:

"I would say it was perhaps five or ten minutes of driving, and perhaps more than a mile. I got in the car at approximately 7:25 o'clock p.m. at East Campus and got out of the car at the corner of Duke University Road and 751 at approximately 7:35 or 7:40 o'clock, p.m."

Defendant testified that he was en route from Durham to his home in Orange County and that the quickest route was through Duke campus to Highway 751 and then to U.S. 70. His testimony continued:

"I saw [the student] at the bus stop hitch-hiking, so I stopped and she got in the car. I knew that she was hitch-hiking because she was standing on the curbing of the sidewalk with her thumb out like this. I stopped and gave her a ride, and she said hello when she got in the car. She did not say anything at that time about where she wanted to go. I then proceeded down the street which comes out at Duke Circle and leads to the West Campus.

As we proceeded towards the West Campus, we talked about school and about how long she had been a student there. I told her that I was not a student, but that I was

working at the construction site where they were constructing a bridge on the campus over one of the streets. We stopped at the stoplight beyond the Police Department on Duke Campus, and she still did not say anything to me about where she wanted to go. I proceeded on down towards the circle and passed the road that goes to Duke Chapel.

After we had passed the road leading to Duke Chapel, she said that she wanted to go to the Chapel. We were right there at a bench between the road that I went down and the road that leads to the tennis court, and I told her that I would let her out down at the stop sign at Campus Drive Extension and University Drive. When I told her this, she said okay. She never told me to let her out.

A. On the way down, I told her, I said 'It would be nearer for you to cut by the football field,' and I told her, I said, 'I will let you off on the football field,' and she said no, and I said that it would be closer.

Q. And what did she say?

A. She said okay. So I stopped at the stop sign.

We were then approaching the intersection of Campus Drive Extension and University Drive.

Q. What, if anything, did you do upon reaching that intersection? What, if anything, did you do?

A. I didn't do nothing.

Q. Well, did you stop the car or turn left or right?

A. I turned to the right there.

Q. University Drive?

A. Yes, sir.

Q. Does that proceed down to 751?

A. Yes, sir, right.

Well, after I had turned the corner and shifted the gears, I put my hand on her leg. I was just getting fresh with her. She told me not to do that, and when I tried to put my arm around her shoulders, she told me no again. I guess I was being persistent. After she told me no, I didn't touch her no more.

Then I told her that I would let her out at the stop sign that goes to Highway 70 from 751.

I intended to let her off where University Drive runs into 751.

A. Yes, sir. After I got fresh with her, I told her I would let her out at the stop sign.

I then proceeded to the stop sign, and she got out of the car, and I told her that the campus was back that way, but she didn't say anything. I did not try to go after her but proceeded on my way. Miss Withers had on a sweater and a skirt or it could have been a dress, I'm not sure. She is red headed and a very nice attractive girl."

The jury returned a verdict of guilty as charged and judgment imposing a prison sentence of not less than five nor more than ten years was entered.

Attorney General James H. Carson, Jr., by Assistant Attorney General William Woodward Webb and Associate Attorney James Wallace, Jr., for the State.

David Q. LaBarre for defendant appellant.

VAUGHN, Judge.

Defendant brings forward numerous assignments of error including several which are directed to the judge's charge. "No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven. . . . " G.S. 1-180.

The court gave the following instructions as to the elements of the crime:

"I now instruct you, members of the Jury, for you to find the Defendant guilty of kidnapping, the State must prove three things beyond a reasonable doubt.

First, that the Defendant took [the student] and carried her from one place to another; and, second, that the taking and carrying away of [the student] was without lawful authority; and, third, that the taking and carrying away of [the student] was by force and against her will and against the will of [the student]. Actual physical force need not have been used. A threat of force would be sufficient.

The Court instructs you, members of the Jury, that this term of 'force' as set out in the elements of this crime, means any force that may have been exerted by the Defendant."

Immediately after the foregoing the court told the jury:

"(The Court instructs you *that the fact that* this was a moving automobile and was being driven on the road at a time that [the student] could not have gotten out of the automobile because it was a moving automobile, without subjecting herself to injury, at the time the automobile was first in the streets there, the University Road and the other streets, or after [the student] had requested that he let her out some, I believe, according to her testimony, some ten or twelve times, and that finally when the car stopped at a stop sign she jumped out of the car when it was not being operated.)" (Emphasis added.)

Nothing follows that part of the judge's charge enclosed in parenthesis which would shed light on its meaning. We cannot know whether the paragraph is unclear through oversight of the able trial judge or by error in transcription. In any event, we must take the record as we find it. *State v. Snead,* 228 N.C. 37, 44 S.E. 2d 359.

Most of the conflicts in the testimony involve the events which, in the last quoted paragraph, the judge is reported to have described as facts. An assumption by the court that any fact, contradicted by defendant's plea of not guilty, has been established is prejudicial error. *State v. Swaringen,* 249 N.C. 38, 105 S.E. 2d 99. It appears to us that the jury might well have understood the judge to mean that the most crucial facts at issue were established when, of course, there was merely evidence tending to show those facts and this evidence was contradicted by defendant.

We cannot say that the error was harmless. The jury had some difficulty in arriving at a verdict. On one occasion the jury returned to the courtroom and received permission to take the written instructions on the elements of the crime with them into the jury room. The case was a close one and the error may very well have tipped the scales against defendant.

Since there must be a new trial we will not discuss the other matters which defendant assigned or might have assigned as error.

New trial.

Judges CAMPBELL and BRITT concur.

JANE S. LUTHER v. WILLIAM K. HAUSER, T/A SOUTHEASTERN CONSTRUCTION CO.

No. 741DC583

(Filed 4 December 1974)

1. **Landlord and Tenant § 19— action for past due rent — sufficiency of complaint**

Plaintiff's complaint in an action to recover past due rent gave defendant sufficient notice of the transactions to enable defendant to understand the nature and basis of the claim.

2. **Landlord and Tenant § 19; Payment § 3— application of payments to past due rent**

Rental checks not earmarked by the tenant for application to a particular month's rental were properly applied by the landlord to past due rental claims; therefore, there is no merit in the tenant's contention that he is not liable for back rent because payments made during the preceding three years were sufficient to pay the rent for those years and should have been applied to the rent for those years rather than to back rent, and because any action for rent for prior years was barred by the statute of limitations.

APPEAL by defendant from *Walker, Judge,* 4 March 1974 Session of District Court held in PASQUOTANK County. Heard in the Court of Appeals 12 November 1974.

This is a civil action to recover past due rent. Plaintiff's complaint was filed 29 June 1972, and the case was tried without a jury. From a judgment awarding plaintiff $1,380, defendant appealed.

Plaintiff's evidence tended to show that she was the owner of the premises designated as 1203A Hillsborough Street, Raleigh, Wake County, North Carolina; that through her agent, the Faucette Realty Company, plaintiff leased a portion of the building on the premises to the defendant in June 1962, at a monthly rental of $80 in advance; that the monthly rental was raised to $120 in March 1963, when the defendant took over the basement area of the building which he previously had not occupied; and that the monthly rental was raised to $130 in

May 1970, when the defendant took over additional space which he previously had not occupied. Other evidence introduced by the plaintiff tended to show that between July 1965 and December 1969 the defendant became in arrears in his payment of rent by a substantial amount; that after December 1969 defendant paid the monthly rental and occasionally made an additional payments to reduce the arrears in his rent; that on 1 March 1972, defendant wrote plaintiff's rental agent, the Faucette Realty Company, that he would "be willing to pay $120.00 and $30.00 on back rent as long as I stay here per month" but that the defendant vacated the premises in June 1972, and remains in arrears in the payment of back rent by $1,560.

Defendant introduced certain exhibits into evidence but offered no testimony. His motions for dismissal pursuant to Rule 41(b) and for judgment notwithstanding the verdict pursuant to Rule 50(b) were denied.

Additional facts necessary for decision are set forth in the opinion.

Twiford, Abbott & Seawell, by C. Everett Thompson, for plaintiff appellee.

Carl E. Gaddy, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error relates to the denial of his motions to dismiss pursuant to Rule 41(b) at the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence. He maintains that plaintiff's cause of action should be dismissed for the following reasons:

1. The complaint is totally insufficient to state a cause upon which relief could be granted.

2. The plaintiff's claim is barred by the statute of limitations.

We find no merit in defendant's first contention.

> "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." *Sutton v. Duke,* 277 N.C. 94, 102, 176 S.E. 2d 161 (1970).

On the basis of the foregoing authority, defendant's contention that "the complaint in this action does not give sufficient notice of the transactions to enable the defendant to understand the nature of it and the basis of it" as required by G.S. 1A-1, Rule 8(a), is without merit. Plaintiff's complaint appears to give notice of the nature and basis of plaintiff's claim, the type of case brought and generally to allege that a lease agreement was entered into by the parties and subsequently breached by nonpayment of rent. If the defendant desired more specific information, he should have moved for a more definite statement pursuant to Rule 12(e) or filed interrogatories pursuant to Rule 33.

[2] Defendant next contends it was error to deny his motion to dismiss since plaintiff's claim was barred by the three-year statute of limitations set forth in G.S. 1-52. Under this statute, any action by the plaintiff for rent due and payable before 29 June 1969 would be barred since plaintiff's complaint was not filed until 29 June 1972.

Evidence adduced at the trial shows that the defendant paid plaintiff the following amounts between 1962 and 1972:

YEAR	RENT DUE	RENT PAID	DIFFERENCE
1962	$ 520	$ 520	
1963	1360	1360	
1964	1440	1440	
1965	1440	1320	($120)
1966	1440	960	($480)
1967	1440	840	($600)
1968	1440	1320	($120)
1969	1440	960	($480)
1970	1520	1900	$380
1971	1560	1560	
1972	750	810	$ 60
			($1360)

Between 29 June 1969 and 29 June 1972 defendant paid plaintiff the following amounts:

YEAR	RENT DUE	RENT PAID	DIFFERENCE
1969	$ 720	$ 480	($240)
1970	1520	1900	$380
1971	1560	1560	
1972	750	810	$ 60
			$200

Defendant contends that if the amounts received from him during the years 1969, 1970, 1971 and 1972 had been applied to the payment of rent for those years, he could not have owed any rent for those years and that under G.S. 1-52 any action for rent for months in prior years would be barred by the three-year statute of limitations. We agree that if the amounts received from the defendant during the years 1969, 1970, 1971 and 1972 had been applied to the payment of rent for those years, defendant would not owe any back rent for those years and any claim for back rent for prior years would be barred by G.S. 1-52. However, the record does not show that payments received by the plaintiff were applied to rent due in those years. To the contrary, plaintiff's evidence shows that payments received in those years were first applied to back rent from prior years. Some of the checks received from the defendant were earmarked for application to a particular month's rental, but others were not. We are of the opinion, and so hold, that where the tenant fails to direct application of his rental payments, the landlord may apply them to whichever past due rental claims he pleases.

> "The application of rental payments may be controlled by a direction from the tenant or the contract or custom of the parties. However, *in the absence of any direction from the tenant or agreement of the parties as to the application of a voluntary payment as between a number of claims for rent, the landlord may ordinarily apply the payment to whichever claim he pleases.*" (Emphasis supplied.) 52 C.J.S., Landlord and Tenant, § 544, p. 530; *accord, 2765 Ocean Ave. v. Roth,* 33 N.Y.S. 2d 418 (1942), *Page v. Wilson,* 150 Pa. Super. 427, 28 A. 2d 706 (1942). *Cf.* 6 Strong, N. C. Index, Payments, § 3, p. 239.

The record shows that several rental checks received from the defendant were earmarked for application to a particular

month's rental and, therefore, would have to be applied to the months designated. C.J.S., supra. The record, however, also indicates that several checks were not earmarked for application to a particular month, but the record is devoid of evidence as to the number of checks of this nature received. We, therefore, find it necessary to remand this case for findings as to the number of checks not specifying the month to which they were to be applied. To the extent rental checks were not earmarked for application to a particular month, such checks could be applied to rent due for months in prior years.

We also find it necessary to remand this case for findings of fact. In his final assignment of error defendant contends it was error for the trial judge to fail to find facts and make conclusions of law as required by G.S. 1A-1, Rule 52(a). We agree. G.S. 1A-1, Rule 52, provides as follows:

> "(a) *Findings.* —
>
> (1) In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

Thus, it seems clear that "[i]n cases in which the trial court passes on the facts, the court is required ' "to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly." . . . ' " *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971); *Williams v. Williams,* 13 N.C. App. 468, 186 S.E. 2d 210 (1972); *Littlejohn v. Hamrick,* 15 N.C. App. 461, 190 S.E. 2d 299 (1972).

For the trial judge's failure to find facts and for the reasons previously stated, this case is remanded.

Remanded.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. SAMUEL McCOTTER

No. 743SC657

(Filed 4 December 1974)

Criminal Law § 22— failure to enter formal arraignment and plea — defendant entitled to new trial

Where the record was silent as to arraignment and plea with the exception that the court in its charge to the jury stated that defendant had entered a plea of not guilty to the charge, defendant is entitled to a new trial, despite the fact that the record was replete with indications that defendant was well aware of and understood the charges against him, that the jury was aware of the charges and understood them, that the entry of a formal arraignment and plea of not guilty would not have affected the outcome of the case, and that objection to the procedure followed appeared for the first time on appeal.

Judge VAUGHN dissents.

APPEAL by defendant from *Exum, Judge,* 25 February 1974 Session of Superior Court held in CRAVEN County. Heard in Court of Appeals 12 November 1974.

Defendant was convicted, upon indictment proper in form, of conspiracy to commit murder.

From judgment entered on the verdict of the jury, defendant appealed. Facts necessary for decision appear in the opinion.

Attorney General Carson, by Deputy Attorney General White and Assistant Attorney General Guice, for the State.

Michael P. Flanagan for defendant appellant.

MORRIS, Judge.

Defendant's first assginment of error presents the question of whether a defendant who was never arraigned and entered no plea at trial is entitled to a new trial. Defendant relies on *State v. Lueders,* 214 N.C. 558, 200 S.E. 22 (1938), where a unanimous Court, speaking through Chief Justice Stacy, said:

> " . . . In the absence of a plea to the indictment or charge, there was nothing for the jury to determine. See *S. v. Camby,* 209 N.C., 50, 182 S.E., 715.

> Speaking to a similar situation in *S. v. Cunningham,* 94 N.C., 824, *Ashe, J.,* delivering the opinion of the Court, said: 'There is manifest error in the judgment of the Superior Court. First, for the reason that there was no plea filed by the defendant, and therefore no issue to be submitted to the jury, and consequently the verdict returned by them was a nullity; and it must follow, as a necessary consequence, that no judgment could be pronounced upon such a verdict.' See *S. v. Beal,* 199 N.C., 278, 154 S.E., 604; *S. v. Walters,* 208 N.C., 391, 180 S.E., 664; *S. v. Stewart,* 89 N.C., 563."

An analysis of the cases to which the court refers reveals that the *Stewart* and *Walters* cases involved a situation where the defendant, upon a plea of not guilty, waived a trial by jury and was tried by the court, in one instance upon an agreed statement of facts. This, the Court said, constituted error. In *Beal* the defendants entered pleas of not guilty to the principal bill of indictment charging murder. Counts were added to the bill, without objection from defendant, all of which related to the same transaction. Defendants did not plead to the added counts, and the Court refused to find error. In the *Lueders* case, it does not appear that any circumstances were present except a failure to arraign and the absence of a plea.

We are aware of *Garland v. Washington,* 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914). There defendant was charged with larceny of "one thousand dollars ($1,000.00) in lawful money of the United States." Upon that information he was arraigned, entered a plea of not guilty, was tried and convicted. Thereafter, he was awarded a new trial, and a new information filed, making the same charges. To that information defendant directed certain motions, all of which were denied. No arraignment was had or plea entered on that information. After the jury was impaneled, defendant objected to the introduction of evidence on the general ground that the State had no right to try defendant on that information. The objection was overruled, the trial proceeded, and the jury convicted defendant. He appealed. The Supreme Court of Washington held that he was not entitled to a new trial for failure to have arraignment and plea. Upon appeal, the Supreme Court of the United States affirmed, saying:

> "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so

long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution."

The Court noted that in affirming the Supreme Court of Washington it was overuling its own holding in *Crain v. United States,* 162 U.S. 625, 40 L.Ed. 1097, 16 S.Ct. Rep. 952, that in a federal court no valid trial could be had without the requisite arraignment and plea, and approving a number of earlier cases in the state courts which had held that such form of arraignment entered of record was essential to a valid trial. The *Garland* Court adopted the view of the minority in *Crain* which had said:

". . . A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court." *Garland v. Washington, supra,* 58 L.Ed. at 775.

Thus it appears that in *Crain,* the defendant had entered a plea of not guilty but had not been arraigned and in *Garland,* the defendant had once pled to the same charge and upon a second trial entered motions with respect to the information and even a general objection to the introduction of evidence. There can be no doubt but that in these two cases, the defendants were completely aware of the charges against them. In *Beaty v. United States,* 203 F. 2d 652 (U.S. Ct. App. 4th Circ. 1953), Chief Judge Parker writing for the Court said:

"The first ground urged is that the court proceeded with the trial without a formal arraignment and without a plea to the bill of indictment. This contention seems to be based upon the fact that the arraignment and plea do not appear in the stenographer's notes of the trial. The District Judge has specifically found, however, that plea of not guilty was duly entered by defendant upon his arraignment in open court, that such plea was entered by the clerk upon his original record and was referred to by the judge in his charge to the jury. We are bound by this finding; but,

even if this were not so, it is well settled that arraignment and plea were waived by going to trial. *Garland v. State of Washington,* 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772; *Rulovitch v. United States,* 3 Cir., 286 F. 315; *Williams v. United States,* 6 Cir., 3 F. 2d 933; *King v. United States,* 6 Cir., 25 F. 2d 242."

In the case before us, defendant, at trial and in open court, moved to quash the indictment and moved for a continuance for the appointment of additional counsel. The record indicates that the indictment was read out of the presence of the jury but in the presence of defendant. The record further shows that immediately thereafter the defendant, in *propria persona,* carried on a conversation with the trial judge and informed the judge that he simply did not want to be tried at that time until he could "get some help from somebody." The record is silent as to arraignment and plea with the exception that the court in its charge to the jury stated that defendant had entered a plea of not guilty to the charge. Despite the fact that the record is replete with indications that defendant was well aware of and understood the charges against him, that the jury was aware of the charges and understood them, that the entry of a formal arraignment and plea of not guilty would not have affected the outcome of the case, and further that objection to the procedure appears for the first time on appeal, we are bound by the prior decisions of the Supreme Court of this State, and particularly by *State v. Lueders, supra.*

For the reasons stated defendant must be granted a

New trial.

Judge CAMPBELL concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. LEO COBLE

No. 7419SC826

(Filed 4 December 1974)

1. Homicide § 21— second degree murder — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that defendant and

deceased engaged in an altercation at defendant's house concerning payment for a drink of liquor defendant gave deceased, that defendant sat in the front door with his rifle and said if deceased came back he was going to kill him, that deceased returned to defendant's house and told defendant, "You can shoot me if you want to," that gunshots were heard, that deceased's body was found in the front yard of defendant's house, and that the investigating officer found under defendant's bed a rifle that had been recently fired.

2. **Criminal Law § 118; Homicide § 23— statement of State's contentions — inferences from evidence**

In this homicide case, the State's evidence supported inferences related by the court that the State contended defendant was in the unlawful business of selling liquor, that defendant was not in danger of great bodily harm from deceased, and that defendant got his gun and sat facing the door "ready to crack down on whoever came in or if this man came in, this particular man."

APPEAL by defendant from *Crissman, Judge,* 10 June 1974 Session of Superior Court held in RANDOLPH County. Heard in the Court of Appeals 19 November 1974.

Defendant was charged with the offense of second degree murder. Upon a plea of not guilty, the jury returned a verdict of guilty of voluntary manslaughter. From judgment entered on the verdict, defendant appealed.

State's evidence tended to show that the deceased, Tommy Freeland, came to the defendant's house and wanted a drink of liquor; that defendant poured him the drink and asked to be paid but deceased said he wasn't going to pay for it; that a fight ensued when defendant slapped the drink from the deceased's hand, and the deceased slapped back; that defendant brought a pistol from his pocket, fired it into the floor and asked deceased to leave his house; that another individual present finally persuaded deceased to leave and attempted to calm down the defendant who "was very upset at that time." Other evidence offered by the State showed that defendant said he was getting tired of deceased coming in and running over him all the time; that the defendant got a rifle and went outside and shot it into the air about three or four times and returned saying, "I didn't hit nothing"; that when defendant came back into his house he sat in front of the door with the rifle lying across his legs and said that if the deceased came back he was going to kill him, he was going to shoot him. Witnesses for the State testified that the deceased later returned to the defendant's house and walked in saying to the defendant, "You can

shoot me. You can shoot me if you want to"; and that although none of the witnesses actually saw the shooting, one witness testified that he heard gunshots going off, more than two and perhaps as many as six. The investigating officer further testified that he found the deceased lying face up in the front yard of defendant's house and that he found under a bed in defendant's house a .22 automatic rifle which had been fired recently. Defendant offered no evidence. His motions for a dismissal and judgment as of nonsuit at the conclusion of the State's evidence and at the conclusion of all of the evidence were denied.

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

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

MORRIS, Judge.

[1] By defendant's first two assignments of error, he contends it was error to deny his motions for dismissal and judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. We disagree. It is well settled in this State that " . . . in passing upon a motion for nonsuit in a criminal case, the court must consider the evidence in the light most favorable to the State and give the State benefit of every reasonable inference which may be legitimately drawn therefrom. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. If when so considered there is substantial evidence, whether direct, circumstantial, or both, of all material elements of the offense charged, then the motion for nonsuit must be denied and it is then for the jury to determine whether the evidence establishes guilt beyond a reasonable doubt. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431." *State v. Locklear,* 7 N.C. App. 493, 496, 172 S.E. 2d 924 (1970). After carefully reviewing the record, we hold that the court properly ruled that the evidence in this case was sufficient to withstand defendant's motions for nonsuit.

[2] Defendant's third and fourth assignments of error deal with two portions of the trial court's charge to the jury. The challenged instructions are as follows:

> 1. "The State says and contends that this defendant was in an unlawful business there, selling liquor. The State says and contends that this defendant struck the first blow that

was struck by knocking the liquor out of the hand of this man that he had poured the liquor for, and brought all this on."

2. "The State says and contends, that there is no evidence here to the affect (sic) that this defendant was in danger of any great bodily harm at the hands of this man who was coming in. The State says and contends this defendant got his gun and sat facing the door with it on his lap ready to crack down on whoever came in or if this man came in, this particular man.

So the State says and contends, members of the jury, there wasn't any self defense in this; that he wasn't justified because a man is doing a lot of cursing, and under these circumstances there ought not be any question in your mind about it."

Defendant argues that the trial court misstated the contentions of the State in these portions of the charge, to his prejudice. For example, he notes that the State did not contend that the defendant was in an unlawful business nor did the State contend there was no evidence that defendant was in danger of great bodily harm. Defendant also maintains that there is nothing in the record indicating that the defendant got his gun and sat facing the door "[r]eady to crack down on whoever came in or if this man came in, this particular man." We find defendant's argument unpersuasive.

Although the record does not contain the closing argument of either the solicitor or defense counsel, we are of the opinion that the State presented competent evidence from which the trial judge could legitimately, fairly and logically infer such contentions. Where an examination of the record discloses evidence from which inferences related by the court as a contention of the State could legitimately, fairly and logically be drawn by the jury, such a statement of a valid contention based on competent evidence is not error. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970) citing *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198 (1966).

Furthermore, there is nothing in the record before us to indicate that the defendant made any objection to the trial court's statement of the State's contentions and, therefore, defendant has waived such objections.

"[I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal. (Citations omitted.)" *State v. Virgil, supra,* at 230.

We have carefully reviewed the record and conclude that the defendant received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

DUKE POWER COMPANY, PETITIONER v. CHARLES M. LADD AND WIFE, INEVA H. LADD, RESPONDENTS

No. 7414SC784

(Filed 4 December 1974)

1. **Eminent Domain § 6— condemnation of easement — offer to purchase made after taking — testimony stricken by court**

In a power company's action to condemn an easement, petitioner was not prejudiced by testimony by the landowner and by the landowner's witness on cross-examination relating to a purchase offer made by the witness after the taking where the court sustained an objection to the landowner's testimony and struck it from the record and where the court allowed petitioner's motion to strike the witness's testimony and instructed the jury to disregard it.

2. **Evidence § 48— ruling that witness was real estate expert**

In a power company's action to condemn an easement, the trial court did not err in ruling that respondents' witness was an expert in the development of real estate.

3. **Eminent Domain § 6— testimony that property with power line easement is hard to sell**

In a power company's action to condemn an easement, the trial court did not err in allowing respondents' expert witness to testify that property with a power line easement is "definitely hard to sell."

4. **Eminent Domain § 7— witnesses who served as commissioners — no evidence before jury**

In a power company's action to condemn an easement, there was no evidence that would have communicated to the jury that respondents' witnesses had served as commissioners of the court to assess damages.

APPEAL by petitioner from *Brewer, Judge,* 25 March 1974 Session of Superior Court held in DURHAM County.

This proceeding was instituted by petitioner to condemn an easement across a 113-acre tract of land belonging to respondents in Lebanon Township, Durham County. All issues raised by the pleadings were determined by consent order except the issue of just compensation to respondents.

The right-of-way which petitioner condemns is 150 feet wide, contains 9.28 acres, and extends approximately through the middle of the 113-acre tract for a distance of some 3,000 feet. Petitioner proposes to erect transmission lines on, and otherwise use, the right-of-way in connection with its business of generating, transmitting and distributing electric power. The date of taking was 25 September 1972. The evidence tended to show that at the time of the taking, and for many years prior thereto, the land was used primarily for agricultural purposes, particularly poultry raising.

Respondents' testimony as to value was provided by the male respondent (Mr. Ladd) and by witnesses Earl Fields, Albert Hight and H. O. Chesson. Their testimony tended to show that land in the general area of the subject property was being developed for residential purposes; that the highest and best use of the property would be residential development for family type homes; that the fair market value of the 113-acre tract prior to the taking was $226,000 or $2,000 per acre; and that the fair market value after the taking was $150,000 to $156,000, a difference of from $70,000 to $76,000.

Petitioner presented five witnesses who generally agreed that the property was worth approximately $2,000 per acre prior to the taking. However, their opinions as to damages to the property varied from a low of $18,500 to a high of $26,295.

The jury answered the issue of just compensation in the sum of $70,000, and from judgment predicated on the verdict, petitioner appealed.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by James L. Newsom and James T. Hedrick, for petitioner appellant.

Hofler, Mount, White & Long, by W. O. King and R. Hayes Hofler III, for respondent appellees.

BRITT, Judge.

By assignments of error 1 and 6, petitioner contends the court erred in permitting Mr. Ladd and his witness Chesson "to testify as to a purchase offer made by Chesson to Ladd after the taking."

[1] We consider first the testimony challenged by assignment #1. On redirect examination, over petitioner's objections, Mr. Ladd testified that he had conversed with others, including his neighbors, about the development of his property, and that in about June of 1972 he talked with Chesson, a developer. The record then reveals:

> Q. Mr. Ladd, were there any other factors that you considered when you gave your figures of $226,000.00 before and $150,000.00 after? Were there any other factors other that what you have already mentioned that caused you to use those figures?
>
> A. Yes, sir.
>
> Q. (Mr. King) What factors?
>
> A. Well frankly it was what I was offered for it before the right of way and what I was offered for it—
>
> MR. NEWSOM: Objection.
>
> THE COURT: Sustained.
>
> . . . .
>
> THE COURT: Sustained. Motion to strike allowed.

Subsequently, on voir dire in the absence of the jury, Mr. Ladd testfied that a factor which he considered in forming his opinion as to value was what Mr. Chesson had offered him for the property before the taking ($226,000.00) and after the taking ($150,000.00).

Since the court sustained petitioner's objection to Mr. Ladd's testimony as to receiving an unspecified offer for his property, and his only testimony as to the amounts of the offers was given in the absence of the jury, we perceive no prejudice to petitioner.

The testimony of witness Chesson challenged by assignment #6 was given on cross-examination. The record reveals (page 80):

> Q. Now how did you compute, Mr. Chesson, and will you tell us how you arrived at the difference between the $151,000.00 which you testified was your opinion as to the fair market value of the entire tract after the taking, and the $18,400.00 which you allocated to the 9.2 acres in the right of way.
>
> A. Very simply the way I arrived at it, I offered Mr. Ladd $225,000.00.
>
> MR. NEWSOM: Motion to strike.
>
> THE COURT: Motion to strike allowed.
>
> MR. NEWSOM: We move to strike the witness's testimony as to his opinion of the fair market value afterwards. He has made it clear he is relating it all to some offer.
>
> THE COURT: Motion denied. Members of the jury, you will disregard anything stated by this witness as to what he offered Mr. Ladd in connection with the purchase of this property after the taking.

The testimony given by Chesson as to what he offered for the property was prompted by a question asked by petitioner's counsel. In allowing petitioner's motion to strike, and instructing the jury to disregard the testimony, the court did all it could to remove the testimony from jury consideration. As to the motion to strike all of Chesson's testimony, the record discloses that his opinion as to values was based on considerations other than offers to purchase. Assignments of error 1 and 6 are overruled.

[2] In his assignment of error #4, petitioner contends that the court erred in ruling that respondents' witness Chesson was an expert in the development of real estate. We disagree. "Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . . It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject." 1 Stansbury's North Carolina Evidence § 133, at 428-29 (1973).

"A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion." Stansbury, *supra* at 430. We hold that the evidence supports the finding and the judge did not abuse his discretion. The assignment of error is overruled.

[3] By assignment of error #5, petitioner contends that the trial judge erred in allowing the witness Chesson to testify that property with a power line easement was "definitely hard to sell." In *Highway Commission v. Phillips,* 267 N.C. 369, 374, 148 S.E. 2d 282 (1966), the court said: "In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner. . . . 'The compensation must be full and complete and include everything which affects the value of the property and in relation to the entire property affected.' *Abernathy v. R. R.,* 150 N.C. 97, 63 S.E. 180." Since Chesson had been tendered and accepted as an expert in real estate development, on the facts appearing in this case, we hold that the testimony "affects the value of the property" and was not improper. The assignment of error is overruled.

[4] By assignments of error 2 and 3, petitioner contends the court erred in admitting evidence tending to "establish to the jury" that respondents' witnesses Fields and Hight had served as commissioners of the court to assess damages. We have carefully reviewed the record with respect to this contention but fail to find any evidence that would have communicated that information to the jury. The assignments of error are overruled.

We have considered the other contentions argued in petitioner's brief but find them also to be without merit.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD T. RITZEL

No. 744SC814

(Filed 4 December 1974)

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

Evidence in a prosecution for breaking or entering and larceny was sufficient to be submitted to the jury where it tended to show that an officer observed defendant near the county courthouse carrying a package on one occasion and counting money on another, officers approached defendant and arrested him for public intoxication, an officer observed a calculator lying on the floorboard of defendant's car, then discovered that the courthouse had been broken into and calculators and typewriters were missing, defendant was then placed under arrest for breaking or entering and larceny, a further search of his vehicle revealed typewriters which were subsequently shown to have the same serial numbers as those taken from the courthouse, and defendant admitted having entered the courthouse and taken the machines.

2. **Criminal Law § 173— testimony elicited by defendant on cross-examination — motion to strike properly denied**

There was no error in the trial court's denial of defendant's motion to strike testimony concerning typewriters found in the trunk of defendant's vehicle where all of the testimony complained of was elicited by defendant's counsel on cross-examination and no objection to such testimony was made until it had been repeated several times.

3. **Criminal Law § 169— motion to suppress testimony — similar testimony given earlier**

Defendant's motion to suppress testimony relating to what was found as a result of a warrantless search of his vehicle was not timely where similar testimony had previously been admitted without objection.

APPEAL by defendant from *Cowper, Judge,* 11 June 1974 Session of Superior Court held in ONSLOW County. Heard in the Court of Appeals on 14 November 1974.

This is a criminal prosecution on a bill of indictment, proper in form, charging the defendant, Donald T. Ritzel, with the felonies of breaking or entering, larceny, and receiving. The defendant pleaded not guilty. He was found guilty of breaking or entering and larceny. From judgments imposing a prison sentence of ten (10) years on each count to run concurrently, the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles J. Murray for the State.

Grady Mercer, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. The evidence offered by the State tended to show the following:

Officer Joe Robert Brackeen of the Jacksonville Police Department, in the early morning hours of 25 May 1974, observed the defendant in an alleyway that leads from the district courthouse in Jacksonville, N. C., to Tallman Street. The defendant was walking away from the courthouse and was carrying something "about the size of a case of beer." The defendant placed this "package" into the trunk of a blue Pontiac which was parked on Tallman Street near the entrance to the alley. About an hour and a half later, Officer Brackeen again observed the defendant. At this time the defendant was standing on the corner of Waldroff and Court Streets, about half a block from the courthouse, counting some money. Officer Brackeen contacted Officers Delma G. Collins and Jerry C. Reed. The three officers approached the defendant, who had returned to the automobile and, observing that the defendant had been drinking, placed him under arrest for public intoxication. Officer Collins shined his flashlight inside the automobile and observed a calculator lying on the floorboard behind the front seat. He then walked down the alley towards the courthouse. Officer Collins noticed that the screen to a second floor window of the courthouse was lying on the ground and that the window was broken. He entered the courthouse, and, upon investigation, observed "that the calculators and typewriters were missing from the desk[s] of Pat Hall and Edith White." He further noticed that the desk drawers were open, that papers were scattered on the floor, and that some of the file cabinets were open. He advised Officer Reed by walkie-talkie that someone had broken into the district courtroom and told Reed what property he thought was missing. Since Officer Reed recognized the calculator in the back seat of the automobile by its odd color as the one his wife had used for two years when she worked at the courthouse, he placed the defendant under arrest for breaking or entering and larceny. Officer Brackeen then searched the automobile, finding two large electric typewriters in the trunk of

the car. After being taken to the police station and advised of his constitutional rights, the defendant admitted entering the courthouse, told the officers what he had done while inside, and made the comment that "[t]his was a burglar's paradise." The State further offered evidence tending to show that the serial numbers on the calculator and two typewriters taken from the defendant's vehicle matched the serial numbers on the calculator and typewriters owned by the State of North Carolina and being used at the district courthouse in Jacksonville. The State also offered evidence tending to show that these machines had a value of $1,300.00. Clearly, the foregoing evidence is sufficient to require submission of the case to the jury and to support the verdict.

[2] Defendant assigns as error the denial of his motion to strike the testimony of Officer Brackeen on cross-examination relating to the two typewriters having been found in the trunk of defendant's automobile. "Defendant may not complain of the admission of testimony brought out by his counsel in the cross-examination of a witness for the state . . . . " 3 Strong's Index 2d, Criminal Law, § 173, p. 145. Officer Brackeen did not testify regarding the two typewriters on direct examination. All of the testimony complained of was elicited by defendant's counsel on cross-examination. No objection to such testimony was made until it had been repeated several times. Under the circumstances, there was no error in the court's denial of the motion to strike.

[3] Defendant contends the court erred in denying his motion to suppress testimony relating to what was found as a result of a warrantless search of his vehicle and in not conducting a voir dire hearing to determine the competency of such evidence. We do not agree. This exception challenges the testimony of Officer Reed. Before the defendant moved to suppress the testimony of Officer Reed, Officers Brackeen, Collins, and Reed testified without objection that they had seen the calculator in the back seat of defendant's vehicle, and the defendant had already elicited from Officer Brackeen on cross-examination evidence relating to the two typewriters in the trunk of the vehicle. Thus, defendant's motion to suppress was not timely. It having already been clearly established that the evidence obtained as a result of the warrantless search of the defendant's vehicle was admissible, there was no necessity for the court to conduct a voir dire in the absence of the jury to determine the competency of

such evidence. See *State v. Woody*, 277 N.C. 646, 178 S.E. 2d 407 (1971).

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. TEDDY LEE CARRIKER

No. 7422SC794

(Filed 4 December 1974)

1. **Criminal Law § 91— motion for continuance — court's remarks in passing sentence in prior case**

In a prosecution for distributing marijuana to a minor, the trial court did not err in the denial of defendant's motion for continuance based on remarks made by the trial court in passing sentence in a a previous case that it was his experience with persons using marijuana who had been tried before him that they would do anything to get the stuff and that a lot of them get religion when they come into the courtroom where there is nothing in the record to show that the remarks were directed toward this defendant or that any person chosen to sit on the jury in defendant's trial actually heard the remarks.

2. **Narcotics § 4.5— distributing marijuana to minor — failure to submit lesser offenses**

In a prosecution for distributing marijuana to a minor, the trial court did not err in failing to submit to the jury the lesser included offenses of possession with intent to distribute, attempted distribution and possession of less than five grams where the evidence was uncontroverted except for evidence concerning the identity of the person who sold marijuana to the minor.

APPEAL by defendant from *Gambill, Emergency Judge*, Special Criminal Session, DAVIDSON County Superior Court. Heard in the Court of Appeals 18 November 1974.

Defendant was charged in a bill of indictment with the wilful and felonious distribution of a controlled substance to a minor under G.S. 90-95(a)(1), (a)(3) and (i). The defendant pleaded not guilty.

Martha King, a young girl of fifteen years at the time of trial, testified that on 25 September 1973, when she was fourteen

years of age, she went to the defendant's trailer to buy a nickel bag of marijuana. At the trailer, the defendant was outside talking to some boys. She told the defendant she wanted to buy a nickel bag whereupon he said "Okay" and hollered into the trailer for someone to bring out a bag. Someone brought it out, and the defendant handed her the bag and took $4.95 from her.

Later, at school, Miss King was found smoking marijuana in a restroom and was summoned to the principal's office. The police and her mother were called, whereupon Miss King told the officers from whom she had obtained the marijuana and where the rest of it was.

One of the police officers testified that he confiscated the marijuana. He identified the marijuana shown to him at trial as the same he had taken from Miss King that day in the principal's office. Another police officer verified that the defendant's birthday was October 29, 1949.

The defendant's evidence was sharply contradictory to that of the State. The defendant's wife sought to refute Miss King's accusation that it was the defendant who had sold her the marijuana. She testified that the defendant told Miss King that he did not have any marijuana to sell and that she must have gotten it from someone else.

Another witness for the defendant testified that a Phil Presley, whose wherabouts during trial was unknown, had sold her the marijuana and not the defendant.

The defendant testified denying that he had sold Miss King the marijuana. The jury returned a verdict of guilty as charged in the bill of indictment and from a judgment sentencing the defendant to not less than fifteen nor more than thirty years in the State Prison, the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General James E. Magner, Jr., for the State.

Clarence C. Boyan for defendant appellant.

CAMPBELL, Judge.

[1] The appellant contends that the trial court erred in denying his motion to continue the trial for the reason that remarks made by the court before the jury panel had prejudiced the right of the defendant to a fair trial. Specifically, the appellant

contends that the court prejudiced him in the minds of prospective jurors through remarks made in sentencing a defendant in a marijuana possession case heard prior to his own.

In the previous case after a plea of guilty and before passing sentence, the trial judge had remarked that it was his experience with persons using marijuana who had been tried before him that they would do anything to get the stuff. He further remarked as the prior defendant was leaving the courtroom that a lot of them get religion when they come in the courtroom. These remarks, allegedly being made before the jury panel who would try him, were, the appellant contends, prejudicial.

There is nothing in the record to indicate that these remarks were directed toward the defendant in the case at bar and there is no showing that any of the panel who were chosen to sit in this trial had heard the remarks. We do not condone the practice complained of here and think that trial judges should be extremely careful in making remarks or comments in the courtroom before prospective jurors which might cause prejudice to subsequent litigants on the calendar. While the remarks in the instant case were unfelicitous, we fail to see how the minds of the jury which tried the defendant were affected so that a fair and impartial trial could not be had. Consequently, we hold that it was not error in this case.

[2] Next, the appellant contends that the trial court erred in submitting to the jury the possibility of returning only one of two verdicts, to wit, guilty of feloniously selling controlled substances to a minor, he being over twenty-one, or not guilty. The appellant asserts that the court should have submitted the lesser included offenses of possession with intent to distribute under G.S. 90-95(a)(1), attempted distribution and possession of less than five grams of marijuana.

It is established that a court is not required to submit a lesser included offense to the jury when there is no evidence to support such a charge. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). The evidence in this case was uncontroverted except for evidence concerning the identity of the person who sold the marijuana to Miss King. It was established that she was under the age of eighteen and that the defendant was over the age of twenty-one. It was also generally uncontested that a sale took place. Under this evidence, the defendant either committed the crime as described in G.S. 90-95(i) (Supp. 1971) or

he committed no crime at all. Consequently, there was no evidence of any lesser included offenses to support a charge thereon.

On the sharply divided testimony, it was a question for the twelve, and we find no prejudicial error committed in the trial below.

No error.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES BOSWELL, JR.

No. 747SC612

(Filed 4 December 1974)

1. **Homicide § 9— assault on defendant in his home — duty to retreat**

Ordinarily, when a person who is free from fault in bringing on a difficulty is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense, regardless of the character of the assault, but he is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm.

2. **Homicide § 28— duty of defendant to retreat in own home — erroneous instruction**

Defendant in a murder prosecution is entitled to a new trial where the jury could have logically deduced from the trial court's instruction that defendant was under a duty to retreat in his own home if deceased's assault upon him was not murderous.

ON *certiorari* to review defendant's trial before *Lanier, Judge,* 27 November 1973 Session of Superior Court held in WILSON County. Heard in the Court of Appeals 12 November 1974.

Defendant was indicted and tried for the murder of Luther Mason.

The State called two witnesses who testified that on the day Luther Mason was killed they heard defendant make the following comments. One witness stated defendant referred to the deceased as "the one I'm going to get," and the other witness overheard defendant tell the deceased, "I'm going to kill

you" and "I got a hollow point bullet at the house waiting for you." These witnesses, along with defendant and the deceased, had been harvesting a tobacco crop belonging to the deceased. Ray Mason, the deceased's brother, testified he was working in his father's yard when defendant approached the yard carrying a rifle and stated he'd just shot Luther Mason. Upon hearing this, Ray Mason took the rifle from defendant. There was also evidence tending to show that both the deceased and defendant had consumed some alcoholic beverages on the day of the killing. A medical doctor testified as an expert that the deceased had died as a result of a single gunshot wound in the chest. Finally, according to a deputy sheriff, defendant told the deputy that he had shot the deceased in the chest when the deceased entered defendants' house and was coming toward him in defiance of defendant's warning.

Defendant's evidence tended to show the following. On the day of the shooting, according to defendant, Luther Mason threatened to kill defendant because Mason blamed him for a fire that had burned a tractor. Defendant denied threatening Mason. Following a day of "barning tobacco," defendant was bathing at home when Mason entered the house threatening to kill defendant. Defendant told Mason, "[L]et's not have it that way," but Mason was making his way for defendant's rifle. Defendant got to the rifle first and intended to shoot Mason in the arm. However, Mason stumbled, and the movement caused the fatal chest wound. Defendant stated he was afraid of Mason and believed that Mason would have used the rifle against him. Defendant's wife testified that her husband had said he didn't intend to kill Mason.

The jury found defendant guilty of second degree murder and he was sentenced to prison for eighteen to twenty years.

Attorney General Carson, by Associate Attorney Robert W. Kaylor, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellant.

MARTIN, Judge.

Defendant contends that the following charge given to the jury on self-defense amounts to prejudicial error:

> "If the defendant was not the aggressor and he reasonably believed that a murderous assault was being made upon

him, if he was in his own home, he was not required to retreat but could stand his ground and use whatever force he reasonably believed to be necessary to save himself from death or great bodily harm. It is for you, the Jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time."

[1] In the present case, the evidence tends to show defendant was in his own home at the time of the killing and Luther Mason was heading for defendant's rifle after threatening defendant. Mason was found on the floor of defendant's home just inside the front door. Also, defendant and his wife testified that they were afraid of Mason. "Ordinarily, when a person who is free from fault in bringing on a difficulty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, *regardless of the character of the assault,* but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary. [Citations.]" *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84 (1964) (emphasis added).

[2] Because the jury in the instant case could have logically deduced from the quoted portion of the charge and the charge as a whole that defendant *was under a duty to retreat in his own home if the assault upon him was not murderous,* we hold defendant deserves a new trial due to error in the charge.

Discussion of defendant's other assignments of error is unnecessary since the asserted errors to which they relate may not recur at the next trial.

New trial.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. DELBERT RAY SMITH

No. 7419SC805

(Filed 4 December 1974)

Criminal Law § 99— instruction of court to witness — no expression of opinion

Trial court's instruction to a witness who was testifying with respect to breathalyzer test results to "Tell him the reading. Loud and clear." served only to clarify the testimony of the witness and did not amount to an expression of opinion by the court.

APPEAL by defendant from *Crissman, Judge,* 25 March 1974 Session of Superior Court held in RANDOLPH County. Heard in the Court of Appeals 18 November 1974.

Defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor. Upon the jury's verdict of guilty as charged, judgment was entered, and defendant appealed.

The State's evidence tended to show that the arresting officer observed the defendant operating a 1968 Cadillac coming off the Route 220 Bypass onto Sunset Street in Asheboro on 15 September 1973; that the movement of his vehicle was erratic as he made a series of turns and crossed over the center line into the line of oncoming traffic; that defendant was asked to perform several tests at the scene where he was stopped; that the officer detected a strong odor of alcohol upon defendant's breath and defendant's face was flushed, his eyes were glassy, and he was not able to walk without assistance. Other evidence introduced by the State showed that following the defendant's arrest additional balance tests were performed and a breathalyzer test was administered. The results indicated that the defendant's blood alcohol level was 20%. The arresting officer testified that in his opinion the defendant was under the influence of some intoxicating beverage.

Defendant denied he was under the influence of intoxicating liquor at the time of his arrest and stated that he performed the balance tests at the scene of the accident in a normal manner. Defendant admitted that he was operating the vehicle on the day in question and that he may have crossed the center line but he claimed he only did so to avoid some people on bicycles on the right side of the road. Defendant further testified that

he was promised a blood test if he would take the breathalyzer test, but one was not given to him after he submitted to the breathalyzer test. On cross-examination, the defendant denied taking any balance tests at the jail. Testimony of additional witnesses was introduced by the defendant which tended to corroborate his version of what happened.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Carson, by Assistant Attorney General Dew, and Associate Attorney Morgan, for the State.

Ottway Burton for defendant appellant.

MORRIS, Judge.

Defendant has abandoned assignments of error Nos. 1, 2, 6 and 9 for failure to argue them in his brief. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In his third assignment of error defendant asserts that the trial judge violated G.S. 1-180 when he directed the witness to tell him the breathalyzer reading "Loud and clear" after the witness had already given the reading twice. Appellant characterizes this comment as the equivalent of a directed verdict of guilty by the trial judge. We find no merit in defendant's contention. The record clearly shows that there was honest confusion about the meaning of the witness's testimony. When asked the breathalyzer reading, the witness first testified that the defendant's "blood alcohol level was twenty-one hundreds percent blood alcohol." Both the district attorney and the trial judge were uncertain whether the reading was 0.20 or 0.21. The witness, therefore, tried to clarify his prior testimony by stating the reading as before. The district attorney, apparently still confused, asked whether the witness was testifying that the reading was 0.20. At this time, over defendant's objection, the trial judge after expressing doubt that the solicitor could hear the testimony, asked the witness again to "Tell him the reading. Loud and clear." Only then did it become apparent that the reading actually was 0.20. We fail to see how defendant was prejudiced by this testimony. The trial judge's statement served only to clarify the testimony of the witness and did not amount to an expression of opinion by him. Defendant's assignment of error is, therefore, overruled.

We have carefully reviewed the defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and MARTIN concur.

IN THE MATTER OF THE CUSTODY OF MELVIN COX, JR., SUSAN DIANNE COX AND JAMES EARL COX

No. 7419DC473

(Filed 4 December 1974)

1. **Divorce and Alimony § 23— contempt for failure to pay child support — failure to provide court reporter**

   Respondent was not prejudiced by the trial judge's failure to provide a court reporter for a hearing on petitioner's motion that he be purged of contempt for failing to make child support payments.

2. **Judges § 5— motion that judge disqualify himself**

   The trial judge did not err in the denial of respondent's motion that the judge disqualify himself from hearing petitioner's motion to purge himself of contempt for failure to make child support payments on the ground that the trial judge had ruled against petitioner on every discretionary ruling in this cause.

3. **Habeas Corpus § 1— confinement under district court order — issuance by superior court**

   A superior court judge properly issued a writ of habeas corpus for a petitioner confined in jail pursuant to an order of the district court adjudging him in contempt for failure to make child support payments. G.S. 17-6.

APPEAL by respondent from *Sapp, Judge,* 4 December 1973 Session of District Court held in RANDOLPH County. Argued before the Court of Appeals 5 September 1974.

The matter of custody and child support with respect to Melvin Cox, Jr., Susan Dianne Cox, and James Earl Cox has been the subject of litigation in the courts of Randolph County since 1961. Prior to 2 May 1972 custody of the children was in the mother, respondent, Virginia Minton Cox (now Virginia Mae Minton). Melvin Cox, the father, was ordered on 17 October 1964 to pay $17.50 per week for their support. On 31 August

1972 he was adjudged in contempt for failure to make the support payments as ordered. After a hearing on 28 September 1972 and the placement of the children in the custody of the Randolph County Department of Social Services, respondent appealed to this Court. We affirmed the trial tribunal's order. *In Re Cox,* 17 N.C. App. 687, 195 S.E. 2d 132 (1973), *cert. denied,* 283 N.C. 585, 196 S.E. 2d 809 (1973). After affirmance, petitioner Melvin Cox was jailed, on 19 April 1973, on the prior finding of contempt. Petitioner protested that he had no means to comply with an order requiring him to pay $6,460.00, the amount of arrearage in his support payments, and on 14 May 1972 the court entered an order to that effect. Without giving respondent an opportunity to offer evidence, the court found that petitioner's confinement and the payment of $2,000.00 into the office of the clerk would be sufficient to purge him completely of any wilful contempt of the orders entered in the cause. Respondent appealed. We vacated the order and remanded this action to the trial court on the grounds that the trial court failed to conduct a proper hearing before signing and entering the order purging petitioner of contempt and ordering his discharge from custody. *In Re Cox,* 19 N.C. App. 657, 199 S.E. 2d 711 (1973).

After remand, an order was entered on 14 November 1973, without a hearing, confining petitioner to the Randolph County Jail for compliance with the 31 August 1972 order adjudging petitioner in contempt for failure to make support payments. The next day petitioner made application for a writ of habeas corpus. The writ was issued, and petitioner was released from custody by Superior Court Judge Seay. A hearing was held in District Court on 4 December 1973, and judgment entered on 24 January 1974. After the court heard evidence from petitioner and respondent, petitioner was purged of all wilful contempt of any orders entered in this cause, and the 14 November 1973 order was vacated. The judgment further provided that any sum remaining unpaid, after credit of $2,000.00 was paid into the office of the clerk, would constitute a judgment against the property or estate of Melvin Lee Cox. Respondent brings her third appeal to this Court.

Ottway Burton, for the respondent-appellant.

No counsel contra.

BROCK, Chief Judge.

[1] Respondent contends that her due process rights were infringed when the trial judge refused to provide a court reporter. In *McAlister v. McAlister,* 14 N.C. App. 159, 187 S.E. 2d 449, *cert. denied,* 281 N.C. 315, 188 S.E. 2d 898, a case of first impression in North Carolina, we held that failure to provide a court reporter, where a court reporter was unavailable, was not fatal where there was no showing of prejudice. No prejudice has been shown. This assignment of error is without merit and is overruled.

[2] Respondent assigns as error that the trial judge should have disqualified himself from hearing the cause by reason of interest or prejudice. Respondent filed a motion requesting Judge Sapp to disqualify himself and to transfer the case to another judge. The motion was denied. Respondent argues that on every discretionary ruling in this cause, the trial judge has ruled against her. We have carefully examined the record, the record of this case on its prior two appeals to this Court, and the allegations of respondent contained in her motion to remove the trial judge. There is no substantial evidence to support either respondent's allegations or respondent's arguments. This assignment of error is overruled.

[3] Respondent argues that it was error for Superior Court Judge Seay to issue a writ of habeas corpus for petitioner. A simple reading of G.S. 17-6 disposes of respondent's argument:

> "Application for the writ shall be made in writing, signed by the applicant—(1) To any one of the justices or judges of the Appellate Division. (2) To any one of the superior court judges, either during a session or on vacation."

We have carefully considered each of respondent's three remaining assignments of error and feel that no useful purpose can be served by an *ad seriatum* discussion. In our opinion respondent had a fair hearing free from prejudicial error.

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. DON PATRICK ADCOCK

No. 7424SC825

(Filed 4 December 1974)

1. **Homicide § 21— manslaughter — death from pistol shooting — sufficiency of evidence**

The trial court in a prosecution for manslaughter properly denied defendant's motion for nonsuit where the evidence tended to show that defendant's wife loaded and unloaded a pistol while he cleaned the holster, and defendant took the pistol, thinking it was unloaded, and pulled the trigger, fatally wounding his wife.

2. **Criminal Law § 76— voluntariness of confession — determination for trial court**

Conflicting testimony concerning voluntariness of defendant's confession presented a question for the trial judge to resolve.

3. **Criminal Law § 86— acts tending to impeach defendant's character — cross-examination proper**

When a defendant testifies in his own behalf, he may be questioned with respect to specific acts of criminal and degrading conduct and with respect to any act which tends to impeach his character.

ON *certiorari* to review judgment of *Thornburg, Judge,* entered at the 1 April 1974 Session of Superior Court held in WATAUGA County. Certiorari was allowed on 31 July 1974 and the case was argued in the Court of Appeals on 21 November 1974.

Defendant was indicted for the manslaughter of his wife on 3 March 1973. He pleaded not guilty, the jury returned a verdict of guilty of involuntary manslaughter, and from judgment imposing prison sentence of four years, defendant appeals.

Attorney General James H. Carson, Jr., by Assistant Attorneys General William W. Melvin and William B. Ray, for the State.

Stacy C. Eggers, Jr., by Stacy C. Eggers III, for the defendant appellant.

BRITT, Judge.

[1] Defendant contends the court erred in denying his motion for judgment as of nonsuit. The evidence, considered in the light most favorable to the State, tended to show:

On the night of 2 March 1973, at approximately 11:30 p.m., defendant and his wife, Betty, were at home and defendant

decided to work on his gun holster. As defendant worked on his holster, Betty had the gun (a .22 caliber pistol) and was loading and unloading it. Betty heard a noise in the baby's room and went to see about the baby. When she returned, defendant asked her if she left the shells in the bedroom, and she said, "Yes." Betty then sat down on the couch, which was under and somewhat to one side of a window. Defendant, thinking the gun was unloaded, pointed it in the direction of her face and snapped it. The gun discharged and the bullet entered Betty's left cheek, immediately beneath her eye; she died as a result of the wound.

In *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889 (1963), we find:

> It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. (Citations omitted.)

We hold that the evidence was sufficient to support a verdict of involuntary manslaughter, therefore, the motion for nonsuit was properly denied.

[2] Defendant contends that the trial judge erred in his findings of fact, following a voir dire examination, that a confession by defendant was voluntary. In *State v. Barnes,* 264 N.C. 517, 521, 142 S.E. 2d 344 (1965), our Supreme Court said:

> In the establishment of a factual background by which to determine whether a confession meets the tests of admissibility, the trial court must make the findings of fact. When the facts so found are supported by competent evidence, they are conclusive on appellate courts, both State and Federal. (Citing *Watts v. Indiana,* 338 U.S. 49 and other cases). Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts. In *Watts,* the principle is stated concisely: "(I)n all the cases which have come here . . . from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, *there has been complete agreement that any conflict in testimony as to what actually led to a contested confession*

is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication." A statement, to be voluntary, of course, need not be volunteered. (Emphasis added.)

In this case there was competent evidence to support the trial judge's findings of fact. While the testimony was conflicting, that presented a question for the trial judge to resolve. We hold that the contention is without merit.

[3] Defendant contends that certain questions propounded to defendant on cross-examination were improper. We disagree. In *State v. Foster,* 284 N.C. 259, 275, 200 S.E. 2d 782 (1973), the court stated the applicable rule as follows:

> When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such "cross-examination for the purpose of impeachment is not limited to conviction of crimes. *Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination."* (Citation omitted.) (Emphasis added.)

We hold that the questions propounded were not improper.

We have carefully considered the other contentions argued in defendant's brief but find them also to be without merit.

No error.

Judges HEDRICK and MARTIN concur.

KATTIRE F. SMITH v. CHARLES JOHNSON GOFORTH, D/B/A YELLOW CAB COMPANY AND BETTY HARMON

No. 7429SC642

(Filed 4 December 1974)

1. Carriers § 19— duty of taxicab company to passenger — opportunity to alight in safety at safe place

The duty that defendant, a common carrier, owes its passengers in its taxicabs to observe the highest degree of care for their safety,

consistent with the practical operations and conduct of its business, includes the duty to provide an opportunity to alight in safety at a safe place, and that duty is satisfied only if defendant exercises the highest degree of care and skill which reasonably can be expected of intelligent and prudent persons engaged in the taxicab business.

2. **Carriers § 19— alighting from taxicab — sufficiency of evidence of negligence**

In an action to recover for personal injuries suffered by plaintiff while she attempted to alight from defendant's taxicab in front of a grocery store, plaintiff's evidence was sufficient to be submitted to the jury where it tended to show that the weather was rainy and foggy on the day of the accident and plaintiff could not see well out of the cab windows which were fogged up, when the cab stopped, plaintiff thought it was in a safe place, defendant did not stop the cab in a no parking zone at the end of a walkway leading to the store but instead stopped behind a parked car located in a parking area, and as plaintiff placed her right foot outside the cab, another vehicle backed into the cab door and mashed her leg.

APPEAL by plaintiff from *Martin, (Harry C.), Judge,* 29 April 1974 Session of Superior Court held in RUTHERFORD County.

This is an action for damages for personal injuries suffered while attempting to alight from defendant's taxicab in front of a grocery store.

At the close of plaintiff's evidence the judge directed a verdict in favor of defendant, Charles Johnson Goforth.

Hamrick & Hamrick by J. Nat Hamrick for plaintiff appellant.

Mullen, Holland & Harrell, P.A. by Graham C. Mullen for defendant appellee.

VAUGHN, Judge.

The judgment directing the verdict in defendant's favor must be reversed unless plaintiff's evidence when considered in the light most favorable to her shows that, as a matter of law, she is not entitled to recover.

[1] Defendant, a common carrier, owes passengers in its taxicabs the highest degree of care for their safety, consistent with the practical operations and conduct of its business. *Mann v. Transportation Co.* and *Tillett v. Transportation Co.,* 283 N.C. 734, 198 S.E. 2d 558; *Hardy v. Ingram,* 257 N.C. 473,

126 S.E. 2d 55. This includes the duty to provide an opportunity to alight in safety at a safe place, and that duty is satisfied only if defendant exercises the highest degree of care and skill which reasonably can be expected of intelligent and prudent persons engaged in the taxicab business. *White v. Chappell,* 219 N.C. 652, 14 S.E. 2d 843.

[2] Plaintiff offered evidence which would permit, but not compel, the jury to find the following. Plaintiff was a passenger in defendant's taxicab which had been engaged to take plaintiff to a grocery store. The weather was rainy and foggy. The cab was "sort of fogged up inside" and plaintiff could not see well out of the cab windows. When the cab stopped she thought it was in a safe place. She opened the door and, as she placed her right foot out, another vehicle backed into the cab door and mashed her leg. There is no parking zone located at the end of a covered walkway leading from the store. The walkway is "where they bring groceries out in a cart and where people walk in. That is a no parking area." Defendant did not stop at the end of the walkway and ramp where groceries are brought out but stopped behind a parked car located in a parking area. Defendant stopped four or five feet from the walkway.

Plaintiff called the male defendant as a witness and his testimony conflicted sharply with the other evidence offered by plaintiff. He testified that: it was a beautiful day; the sun was shining and there was no fog; the walkway was the place to let the passengers get out to go in the store and that is where he stopped; he didn't let plaintiff out in front of a parked car and that he doesn't know whether a parked car backed into his cab. He didn't see any car until the collision.

In a negligence case it is proper to direct a verdict against plaintiff: (1) where all the evidence, taken in its most favorable light for plaintiff fails to show actionable negligence by defendant; (2) when it clearly appears from the evidence that the injury was independently and proximately caused by the wrongful act, neglect or default of an outside agency or responsible third person; (3) where contributory negligence is established by plaintiff's own evidence. *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108.

When all contradictions in the evidence are resolved in plaintiff's favor and when plaintiff is given the benefit of every reasonable inference which might legitimately be drawn there-

from, we conclude that plaintiff's evidence is sufficient to surmount the foregoing three hurdles and that the case is one for the jury.

The judgment directing the verdict against plaintiff is reversed.

Reversed.

Judges CAMPBELL and BRITT concur.

HANNAH S. JOLLIFF AND W. SAVAGE JOLLIFF v. CORTEZ WINSLOW

No. 741DC668

(Filed 4 December 1974)

1. **Injunctions § 12; Rules of Civil Procedure § 65— statute permitting temporary restraining order — constitutionality**

Provisions of G.S. 1A-1, Rule 65(b), permitting the entry of a temporary restraining order without notice to the adverse party do not violate the equal protection and due process clauses of the State and Federal Constitutions.

2. **Injunctions § 12— statute permitting preliminary injunction — constitutionality**

The statute authorizing preliminary injunctions, G.S. 1-485, is not unconstitutional.

APPEAL by defendant from *Horner, District Court Judge,* 8 April 1974 Session of District Court held in PERQUIMANS County. Argued before the Court of Appeals 14 November 1974.

On 1 April 1974 plaintiffs filed a complaint alleging that they have interests in certain lands separated from a highway by defendant's land; that they own an easement across defendant's land to the highway; that defendant has obstructed the easement; and that plaintiffs need the use of the easement to manage and enjoy their land. The complaint contains a prayer for an order declaring plaintiffs to be owners of an easement by prescription, and an injunction directing defendant to remove the obstructions from the easement. On 1 April 1974 a temporary restraining order was entered, enjoining defendant from obstructing the easement. Defendant subsequently excepted and moved to dissolve the temporary restraining order.

After a hearing on 8 April 1974, Judge Horner found facts favorable to plaintiffs, granted plaintiffs a preliminary injunction, and denied defendant's motion to dissolve. Defendant appealed the entry of the temporary restraining order and the denial of the motion to dissolve to this Court on 18 April 1974. On 30 April 1974 defendant, after being served with the order of 8 April 1974 and preliminary injunction, gave notice of appeal to this Court.

James R. Walker, Jr., for the defendant-appellant.

No counsel contra.

BROCK, Chief Judge.

By way of five assignments of error, defendant essentially advances two arguments: first, that G.S. 1A-1, Rule 65(b) of the North Carolina Rules of Civil Procedure violates the equal protection and due process clauses of the State and Federal Constitutions, and, second, that G.S. 1-485, authorizing preliminary injunctions, is unconstitutional because it too violates those provisions of the State and Federal Constitutions.

[1] Rule 65(b) of the North Carolina Rules of Civil Procedure permits the issuance of temporary restraining orders "without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." Because a temporary restraining order is an immediate remedy, Rule 65 carefully sets forth several protections designed to check the extent of use of the remedy.

Defendant contends that Rule 65(b) is unconstitutional because it permits the invasion of property rights upon a showing of "possible injury, loss, or damage" and because it authorizes the entry of a temporary restraining order without notice to the adverse party.

A temporary restraining order is not predicated upon illusory injury, loss, or damage, as is stated by defendant, but is entered only upon a showing of immediate and irreparable injury, loss, or damage. Because it is an *ex parte* injunction, a temporary restraining order, by its nature, necessarily issues upon plaintiff's evidence either by affidavit or by verified complaint. Such an order is to be entered only when plaintiff

can "show a need for relief so compelling that there is no time for notice and hearing." Dobbs on Remedies, § 2.10 (1973).

We see nothing unconstitutional about a rule that permits the issuance of a temporary restraining order. The entry of such an order does not determine the respective rights of the parties but preserves the status quo until a motion for a preliminary injunction can, after notice, be heard, affording the parties a full and fair investigation and determination according to strict legal proofs and the principles of equity. Defendant's first argument is without merit.

[2] Defendant argues that G.S. 1-485, authorizing the issuance of a preliminary injunction, is also void and unconstitutional on its face and as it is applied. A preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. G.S. 1A-1, Rule 65 N.C. R. Civ. P.; *Lambe v. Smith,* 11 N.C. App. 580, 181 S.E. 2d 783. The preliminary injunction "serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F. 2d 738, 742 (2d Cir. 1953). *See generally* Dobbs on Remedies, § 2.10 (1973). We fail to see how G.S. 1-485, authorizing preliminary injunctions, is unconstitutional. Defendant's second argument is without merit.

A preliminary mandatory injunction may be issued when an easement into one's property has been obstructed. *Leaksville Woolen Mills v. Land Company,* 183 N.C. 511, 112 S.E. 24. In the case at bar, the trial judge heard evidence before issuing the preliminary injunction. Defendant has not preserved this evidence in the record on appeal; consequently, we must presume that the evidence supported the findings and rendered the findings conclusive. *In Re Reassignment of Albright,* 278 N.C. 664, 180 S.E. 2d 798.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

THOMAS PATTERSON BOWMAN AND WIFE, PEGGY MOON BOWMAN v. JACK W. BARKER AND DEANE F. BELL, SUBSTITUTE TRUSTEE

No. 7419SC804

(Filed 4 December 1974)

Mortgages and Deeds of Trust § 20— action to enjoin foreclosure of deed of trust — trustee necessary party

Where plaintiffs purchased a house and lot from defendant Barker and gave him a note secured by a second deed of trust on the property, the trustee named in the deed of trust was a necessary and indispensable party in an action to have the deed of trust declared null and void and the defendant Barker restrained from further actions with regard to selling the house and lot of plaintiffs.

APPEAL by plaintiffs from *Crissman, Judge,* 3 June 1974 Civil Session of RANDOLPH County Superior Court. Heard in the Court of Appeals 18 November 1974.

Plaintiffs instituted this action 5 June 1972, alleging that in October 1965, the plaintiffs purchased a house and lot situate in Randolph County, North Carolina, from the defendant, Jack W. Barker. For the purchase price, the plaintiffs executed a note to a building and loan association secured by a first deed of trust on the property. In addition to this, the plaintiffs gave a note in the amount of $650 to Jack W. Barker and secured same by a second deed of trust on the property. This second deed of trust named J. Harvey Luck as trustee. Luck died, and the defendant Deane F. Bell was duly appointed substitute trustee on 7 August 1969. Plaintiffs alleged that at the time of giving the note of $650 secured by the second deed of trust, the defendant Barker promised to do certain additional work on the house; that despite repeated demands therefor, the defendant Barker has failed and refused to do any additional work on the house; that the defendants Barker and Bell have threatened and harassed the plaintiffs, thereby causing the plaintiffs to pay an additional sum of $100 which was not due; that on 25 May 1972, the defendants wrongfully sold the plaintiffs' house and lot at a purported foreclosure sale; that said sale is null and void and of no legal effect and the plaintiffs wish it so declared; that the defendants have placed the plaintiffs in fear and have caused the plaintiffs to suffer mental anguish. The plaintiffs thereupon seek monetary damages, a declaration that the deed of trust is null and void, and that the defendants be restrained from any further actions towards completion of the sale of plaintiffs' house and lot.

The plaintiffs procured a temporary restraining order on 14 June 1972, restraining the defendants from any further proceedings towards selling the house and lot. This temporary restraining order was continued from time to time until 28 September 1972, when it was continued until final judgment in the cause. The original defendant Barker died, and his administratrix adopted the pleadings filed in his behalf on 13 May 1974.

On 15 May 1974, the defendants moved for judgment on the pleadings or a summary judgment for that the complaint fails to state a cause of action and that the statute of limitations bars any action based upon the contract purportedly entered into 6 October 1965.

On 6 June 1974, the motion for judgment on the pleadings or summary judgment was heard, and the court adjudicated that the plaintiffs had failed to state a claim for relief against the defendant Bell, and it was adjudged that the motion for summary judgment as it related to the defendant Bell, substitute trustee, should be allowed. It was further adjudged that the plaintiffs have and recover nothing of the defendant Bell and that the action as to the defendant Bell be dismissed.

From this judgment, plaintiffs appealed.

Ottway Burton for plaintiff appellants.

Bell, Ogburn & Redding by J. Howard Redding for defendant appellees.

CAMPBELL, Judge.

The present status of this case reveals not only an action for monetary damages against the defendant Barker but likewise an action to have a deed of trust securing a note declared null and void and the defendant Barker restrained from further actions with regard to selling the house and lot of the plaintiffs. In this situation, the trustee in the deed of trust is a necessary and indispensable party. *Smith v. Bank*, 223 N.C. 249, 25 S.E. 2d 859 (1943); *Grady v. Parker*, 228 N.C. 54, 44 S.E. 2d 449 (1947). The judgment dismissing the action as to Bell, substitute trustee, is erroneous.

Reversed.

Judges MORRIS and MARTIN concur.

BETSY FITCH v. JOE DENNIS FITCH

No. 7426DC781

(Filed 4 December 1974)

Appeal and Error § 44— failure to file brief within 20 days after appeal docketed

Where appellant failed to file his brief within 20 days after the appeal was docketed as required by Court of Appeals Rule 28, he is deemed to have abandoned all assignments of error except those appearing on the face of the record proper.

APPEAL by defendant from *Griffin, District Judge,* 21 March 1974 Session of MECKLENBURG County, the General Court of Justice, District Court Division. Heard in the Court of Appeals 14 November 1974.

This appeal arose out of litigation between the parties covering a period of five and one-half years. In November, 1968, the plaintiff filed a complaint against her husband praying for reasonable subsistence, care and custody of their minor children, possession of their home, reasonable attorney's fees, and an injunction to prevent the defendant from molesting or bothering her. After the hearing the court ordered the defendant to convey his interest in their home to the plaintiff and assume any indebtedness thereon, to pay Forty-Five Dollars ($45.00) per week child support and pay One Hundred Fifty Dollars ($150.00) in attorney's fees. From this judgment, no appeal was taken.

On 4 September 1973, the plaintiff filed a motion for an increase in payments alleging that a substantial change in circumstances and cost of living and an increase in defendant's income required and justified increased support payments for her two unemancipated children. A third child had become emancipated by that time. The defendant was ordered to appear at the 23 October Session of District Court. The matter came on for hearing on 26 October 1973, and by order of 2 November 1973, the defendant was ordered to pay stipulated arrearages in child support of $825.00, $40.00 per week for future child support, and certain medical expenses and attorney's fees. From this order, no appeal was taken.

On 23 January 1974, upon motion of plaintiff, an order was entered directed to the defendant to show cause on 14 February 1974 why he should not be held in contempt. At this time

the defendant changed lawyers and filed a motion dated 5 March 1974, which is nineteen days after he was to appear, seeking for the first time to set aside the 2 November 1973 order.

After a hearing, the district court entered an order on 21 March 1974, finding there was no justification for setting the order aside and this finding was supported by ample and sufficient evidence. The court, in this order of 21 March 1974, refused to set aside the order of November 2, 1973. From this last order, the defendant appealed.

Mraz, Aycock, Casstevens and Davis by Nelson M. Casstevens and Robert P. Hanner II, for plaintiff appellee.

Lila Bellar for defendant appellant.

CAMPBELL, Judge.

The appellant filed his brief on 21 October 1974 after having docketed the appeal on 19 August 1974. Under Court of Appeals Rule 28 which became effective 24 July 1974, the appellant's brief must be filed within twenty days after the appeal is docketed. This the appellant failed to do. Consequently, the appellant is deemed to have abandoned all assignments of error except those appearing on the face of the record proper which are cognizable *ex mero motu*. See *Land v. Land*, 4 N.C. App. 115, 165 S.E. 2d 692 (1969); *Fetherbay v. Motor Lines*, 8 N.C. App. 58, 173 S.E. 2d 589 (1970). We find no error on the face of the record.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

JAMES BURGESS McMAHAN, EMPLOYEE v. HICKEY'S SUPERMARKET, AND IOWA MUTUAL INSURANCE CO., EMPLOYER AND CARRIER

No. 7424IC813

(Filed 4 December 1974)

Master and Servant § 65— workmen's compensation — hernia sustained while lifting dog food

Evidence was sufficient to support findings of fact and conclusions by the Industrial Commission that plaintiff employee suffered an in-

jury by accident arising out of and in the course of his employment with defendant grocery store when he sustained a hernia as he lifted a case of dog food and placed it in a customer's car.

APPEAL by defendant from an award of the North Carolina Industrial Commission filed 24 June 1974.

The parties stipulated that they were subject to the Workmen's Compensation Act, the employment relationship and the employees' average weekly wage.

Pertinent findings and conclusions of the Commission are as follows:

"FINDINGS OF FACT

1. Plaintiff is a white married male age 21 and was on September 23, 1972 and three months prior thereto became employed by the defendant as a stock clerk and bag boy.

2. On September 23, 1972 about 11:30 a.m. the plaintiff was stocking the shelves in the defendant employer's stock room. He had been doing this all the morning. He was asked to deliver a case of dog food to a customer's car from the stock room. This case of dog food was not in the same bin as the other dog food but flat on the floor. On the occasion in question plaintiff reached down and picked up the case of dog food off the floor at which time he felt a stinging pain in his left groin. Plaintiff then put the box on another box and waited three or four minutes before he picked it up again. He then carried the box of dog food out to a customer's car and put it on the back seat. The car was a two door hardtop model. The customer requested the dog food be placed on the back seat. In order to get the dog food on the back seat it was necessary for him to bend over, place one foot in the floorboard of the back seat and one foot on the ground placing him in a cramped position by standing and reaching to place the case of dog food on the back seat. As he was doing this he felt a tear in his groin. The box of dog food would weigh between 50 and 60 pounds. At about 12 o'clock noon the plaintiff noticed a swelling in his groin on the left.

3. The fact that the plaintiff was placing the case of dog food on the back seat of a two-door hardtop model car

for the first time, forcing him to be in a cramped position, constituted an interruption of his usual work routine, thus accidentally injuring plaintiff.

4. Plaintiff reported the incident to his boss immediately and stated he would need to go to the doctor, but was told because of being covered up with work he would have to wait until quitting time. He continued to work out the rest of the day. At about 7:30 p.m. the plaintiff was seen by a doctor who attempted to put the swelling back in place but was unsuccessful. Dr. Horner saw the plaintiff the following Monday, September 26, 1973 and hospitalized him. The plaintiff was operated on on Tuesday, September 27, 1972 at which time a hernia was repaired on the left side. Plaintiff stayed in the hospital until Friday, September 30, 1972.

5. Plaintiff had an operation for the repair of a hernia on the same side as the present hernia occurred three or four years prior to this.

6. Plaintiff's duties for the defendant employer were to stock the stockroom, load and unload and bag. He had been performing this type of work during his employment with the defendant employer.

7. Plaintiff was out of work for three months due to injury but did work parttime one month during the last month of the three month period. During the parttime employment his weekly wage averaged $20.00.

8. Plaintiff sustained an injury by accident (hernia) arising out of and in the course of his employment with the defendant employer on September 23, 1972. That the hernia or rupture appeared suddenly. That it was accompanied by pain. That the hernia or rupture immediately followed an accident. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

1. On September 23, 1972 plaintiff sustained an injury by accident (hernia) arising out of and in the course of

his employment with the defendant employer. That the hernia or rupture appeared suddenly. That it was accompanied by pain. That the hernia or rupture immediately followed an accident. That the hernia or rupture did not exist prior to the accident for which compensation is claimed. G.S. 97-2(6). DUNTON v. CONSTRUCTION COMPANY, 19 N.C. App. 51.

* * *

4. As a result of his injury by accident the plaintiff suffered a hernia. G.S. 97-2(18)."

The Commission entered an award based on the foregoing findings of fact and conclusions of law and defendant appealed.

No counsel for plaintiff appellee.

Morris, Golding, Blue & Phillips by J. N. Golding for defendant appellants.

VAUGHN, Judge.

We hold that the evidence and reasonable inferences arising from that evidence support the crucial findings of the Commission. "Under the Workmen's Compensation Act the Industrial Commission is made the fact-finding body, and the rule is, as fixed by statute and the uniform decisions of this Court, that the findings of fact made by the Commission are conclusive on appeal. . . . " *Rice v. Chair Co.*, 238 N.C. 121, 124, 76 S.E. 2d 311, 313.

" 'This and other courts of the United States have held that the various compensation acts should be liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees. . . . ' " *Hinson v. Creech*, N. C. Supreme Court (opinion filed 26 November 1974). *Barbour v. State Hospital*, 213 N.C. 515, 518, 196 S.E. 812, 813-814.

That rule of construction is supported by a host of decisions in this jurisdiction. *Hinson v. Creech, supra.*

The facts found by the Commission make this employee's hernia a compensable injury if G.S. 97-2(18) is given liberal construction with primary consideration being given to compensation for the injured employee. *See Keller v. Wiring Co.*, 259

N.C. 222, 130 S.E. 2d 342; *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175; *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592; *Moore v. Sales Co.,* 214 N.C. 424, 199 S.E. 605 and *Bigelow v. Tire Sales Co.,* 12 N.C. App. 220, 182 S.E. 2d 856. These cases would appear to support the view that an injury by accident occurred when claimant attempted to load the merchandise onto the rear seat of the automobile.

Affirmed.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. EDDISON STICKNEY

No. 7418SC821

(Filed 4 December 1974)

Robbery § 4— armed robbery — sufficiency of evidence

Evidence in an armed robbery case was sufficient to be submitted to the jury where it tended to show that defendant entered a grocery store, purchased a drink and looked at a ring before leaving the store, defendant returned fifteen minutes later and asked for the ring, as the store employee was figuring the tax on the ring, defendant pointed a pistol at her and demanded money, fingerprints on the drink bottle which defendant had handled matched those of defendant, and the employee identified defendant as the one who had robbed her from photographs about a month later, though she had been unable to identify him when he was brought to the store immediately after the robbery.

APPEAL by defendant from *Long, Judge,* 6 May 1974 Session of GUILFORD County Superior Court. Heard in the Court of Appeals 19 November 1974.

Defendant was charged in a proper bill of indictment with armed robbery under G.S. 14-87. He pleaded not guilty.

The State offered evidence showing that the defendant entered the MA-JIK Market in Greensboro on 13 February 1974. He bought a Brownie Chocolate soft drink but decided to exchange it for a Coke. It was established he handled both drinks, replacing the chocolate drink in the cooler in such a way that an employee of the market could identify which one it was. He then drank the Coke, leaving the bottle in front of the cash

register. The defendant then asked to look at some rings and tried on one. He stated that he would be back later to get the ring and left.

Approximately fifteen minutes later, he returned and asked for the ring. As the employee was figuring the tax on the ring, the defendant pointed a pistol at her and told her to give him all the money. After she put the money and the ring in a bag, he left.

The employee identified the defendant at trial as the same person who had robbed her. She also testified that immediately after the robbery the defendant was brought to the store for an identification, but she was unable to say for sure at that time that it was the defendant who had committed the robbery. A month after the robbery, she positively identified the defendant as the robber from a series of photographs.

The State also established that prints taken off the drink containers handled by the robber were the same as those taken from the defendant when he was arrested and booked. After the State rested, the defendant's motion for judgment as of nonsuit was denied.

The defendant then took the stand in his own behalf and denied having committed the robbery. After all the evidence, the defendant's motion for judgment as of nonsuit was again denied, and the case was submitted to the jury.

The jury returned a verdict of guilty as charged in the bill of indictment, and the defendant moved to set aside the verdict as it was against the greater weight of the evidence. Judgment was entered upon the verdict and from a sentence of not less than ten nor more than twelve years, the defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Alfred N. Salley for the State.

Percy L. Wall for the defendant appellant.

CAMPBELL, Judge.

The appellant's case on appeal was not docketed within the ninety-day period as required in Court of Appeals Rule 5. We will nevertheless treat the appeal as a petition for a writ of certiorari and grant the appellant a review of his case.

The appellant contends that the trial court erred in denying his motions for judgment as of nonsuit. He argues that the case should not have been submitted to the jury because the evidence was insufficient as a matter of law to prove that it was the defendant who committed the crime. Specifically, he asserts that the employee who identified the defendant as the robber was unsure of that identification immediately after the robbery. However, taking the evidence in the light most favorable to the State and giving that evidence every reasonable intendment to be drawn therefrom, we find that there was more than ample evidence that the defendant was the robber. The case was properly submitted to the jury.

The appellant's only other assignment of error was the trial court's denial of the defendant's motion for judgment n.o.v. In view of the foregoing, we find no merit in this contention.

Consequently, we find no error in the trial below.

No error.

Judges MORRIS and VAUGHN concur.

GURNEY THOMAS HOOD v. DIANNE H. HOOD

No. 745DC852

(Filed 4 December 1974)

1. **Divorce and Alimony § 16— trial without jury — evidence of settlement negotiations — admission erroneous**

In this action by the husband for a divorce from bed and board where the wife counterclaimed for alimony, custody, and child support, it was error, even though the trial was conducted before the judge without a jury, to permit the wife to testify as to settlement negotiations which had been conducted between the parties in an effort to compromise the case.

2. **Divorce and Alimony § 16— alimony and child support — insufficient findings by trial court**

Trial court's conclusion that defendant wife was the dependent spouse was unsupported by findings of fact, and findings of fact as to the husband's earning capacity and ability to pay alimony and support, the reasonable needs of the children for health, education and maintenance, reasonable counsel fees of the wife and the necessity that same be paid by the husband rather than by the wife were insufficient.

Hood v. Hood

APPEAL by plaintiff from *Barefoot, District Judge,* 23 April 1974 Session, NEW HANOVER County, General Court of Justice, District Court Division. Heard in the Court of Appeals 21 November 1974.

This action was instituted by the plaintiff (husband), for a divorce from bed and board. The defendant (wife), filed an answer, together with a counterclaim, for alimony, custody, and child support.

At the trial, upon its merits, the husband stipulated that he had abandoned the wife, and the trial was conducted before the judge without a jury.

The parties were married 2 May 1964, and there were two children born of the marriage, a daughter born 7 January 1966, and a son born 28 April 1971.

The judge found that the wife was the dependent spouse and the husband the supporting spouse. It was ordered that the wife and children have exclusive possession of the home; that the husband pay the monthly payments thereon to the savings and loan association; that the husband continue to maintain and pay the premiums on seven life insurance policies; that the husband pay alimony to the wife in the amount of $50.00 each week and for child support the sum of $50.00 each week for each child; that in the event the husband failed to keep up any of the payments, the same should constitute a lien upon any interest in real estate he might have; that the husband maintain hospital insurance and be responsible for all dental and medical bills of the children; that the wife be given possession of an automobile owned by the husband; that the husband pay attorney's fees to the wife's attorney in the amount of $500.00; that the wife have care and custody of the two minor children subject to reasonable visitation rights for the husband upon reasonable notice to the wife; that upon liquidation of a business owned by the husband and the sale of the real estate on which it was situated, that the proceeds therefrom be divided equally between the husband and the wife.

From this judgment, the plaintiff-husband appealed.

Poisson, Barnhill & Butler by Algernon L. Butler, Jr., for plaintiff appellant.

James L. Nelson and James D. Smith for defendant appellee.

CAMPBELL, Judge.

[1] The husband assigns as error evidence introduced by the wife pertaining to settlement negotiations which had been conducted between the parties without a final agreement being consummated. While the rules of evidence are not as strictly enforced where the judge hears a case without the intervention of a jury, nevertheless, evidence which is obviously incompetent should not be permitted even in such a hearing. 2 Stansbury's N. C. Evidence, § 180 (Brandis Rev. 1973). In the instant case it was error to permit the wife to testify as to settlement negotiations which had been conducted between the parties in an effort to compromise the case.

[2] The husband also assigns as error a purported finding of fact as follows:

> "2. That the defendant is a dependent spouse and the plaintiff the supporting spouse within the meaning of Chapter 50 of the North Carolina General Statutes."

This did not amount to a finding of fact and was no more than a conclusion which was unsupported by a finding of fact. *Presson v. Presson,* 13 N.C. App. 81, 185 S.E. 2d 17 (1971). The judgment in the instant case was deficient in other aspects for that there were insufficient findings of fact as to the husband's earning capacity and ability to pay alimony and support. Neither were there appropriate findings as to what were the reasonable needs of the children for their health, education and maintenance, nor were there appropriate findings of fact as to the reasonable counsel fees of the wife and of the necessity that same be paid by the husband rather than by the wife from her own sources of income. *Manning v. Manning,* 20 N.C. App. 149, 201 S.E. 2d 46 (1973); *Morgan v. Morgan,* 20 N.C. App. 641, 202 S.E. 2d 356 (1974).

The judgment and order appealed from is vacated and the cause remanded for a new hearing and determination.

Error and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

MELVIN D. CONLEY, PETITIONER v. CHRISTINE JOHNSON, RESPONDENT

No. 7425DC672

(Filed 4 December 1974)

1. **Bastards § 10.5— paternity action — right of reputed father to bring**

A reputed father of an illegitimate child can bring a civil action to establish paternity, and upon establishing paternity, the rights, duties and obligations are the same as if the child were legitimate. G.S. 49-14; G.S. 49-15.

2. **Bastards § 11— father of illegitimate child as parent — right to bring custody action**

A father of an illegitimate child is a "parent" within the meaning of G.S. 50-13.1 and is therefore entitled to bring an action for custody of the child.

3. **Bastards § 11— visitation privileges granted to reputed father**

The district court was authorized to grant the father of an illegitimate child visitation privileges and to punish the mother for refusing to allow the father to visit the child pursuant to an order previously entered.

APPEAL by respondent from *Ingle, Judge,* 1 April 1974 Session of District Court held in BURKE County.

Respondent challenges the legality of (1) an order granting petitioner certain visitation privileges with the illegitimate child of the parties, and (2) an order adjudging her in contempt of court for refusing to comply with the former order. The parties stipulated as follows:

(1) Petitioner is the father and respondent is the mother of Betty Ann Johnson who was born out of wedlock on 10 March 1971.

(2) Pursuant to an action instituted in the criminal court, petitioner is required to pay $15.00 per week toward the support of Betty Ann.

(3) Respondent has refused, and continues to refuse, to allow petitioner to see or visit with the child.

(4) On 28 January 1974, petitioner instituted this proceeding, alleging that he is the father of Betty Ann, that he has been ordered to contribute to her support, and that respondent has refused to permit him to visit the child. He asked the court to hold a hearing and grant him reasonable visitation privileges.

(5) On 22 February 1974, following a hearing, Judge Duncan entered an order finding that petitioner is the father of the child, that he is a fit, suitable and proper person to have reasonable visitation privileges with the child, and provided that the child be allowed to visit with petitioner at certain specified times.

(6) Respondent refused to permit the child to visit with petitioner as provided in the order.

(7) On 19 March 1974, petitioner filed a motion in the cause alleging that respondent would not allow him to visit the child as stated in the order and that due to this violation, the court should issue process requiring respondent to show cause why she should not be adjudged in contempt of Judge Duncan's order.

(8) Following notice to respondent and a hearing on the motion, the court entered an order finding and adjudging respondent in willful contempt of Judge Duncan's order, and requiring that she be imprisoned until she complies with the order " . . . by turning the child over to the petitioner, as provided in said Order."

Respondent appealed.

Patton, Starnes & Thompson, P.A., by Stephen T. Daniel, for petitioner appellee.

John H. McMurray, by C. Gary Triggs, for respondent appellant.

BRITT, Judge.

Respondent contends that the challenged orders are invalid for the reason that the common law prevails in this State and under the common law the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother. While we agree that ordinarily the common law prevails in this State, the same statute that makes that provision also provides " . . . and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete . . . . " G.S. 4-1. We think the principle argued by respondent has been abrogated by statutes as well as case law.

[1] In 1967 our General Assembly enacted G.S. 49-14, 15, and 16, which abrogate the common law. 3 R. Lee, North Carolina

Family Law § 251 (Supp. 1974). Under G.S. 49-14, a reputed father of an illegitimate child can bring a civil action to establish paternity. Upon establishing paternity under G.S. 49-14, " . . . the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, *as if the child were the legitimate child of such father* and mother. . . . " G.S. 49-15. (Emphasis ours.) Note, however, that under G.S. 49-14(a), " . . .(s)uch establishment of paternity shall not have the effect of legitimation," which is established under G.S. 49-10.

[2] G.S. 50-13.1 states that "(a)ny parent, . . . claiming the right to custody of a minor child may institute an action . . . for the custody of such child . . . . " We find nothing in this section which limits custody proceedings to the parent of a legitimate child. In *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592 (1955), the court applied former G.S. 50-13 and held that the father of an illegitimate child was a "parent" within the meaning of that statute so as to entitle him to bring an action for custody of the child. *Accord, Jolly v. Queen,* 264 N.C. 711, 142 S.E. 2d 592 (1965).

G.S. 50-13.2(b) authorizes the court to award to such person " . . . as will in the opinion of the judge best promote the interest and welfare of the child." G.S. 50-13.5(h) vests jurisdiction in the district court in actions or proceedings for child custody and support and G.S. 50-13.5(i) grants the district court jurisdiction to award or deny "parental" visitation privileges. Irrespective of the statutes (G.S. 50-13.1, et seq.), it appears that the definition of "parent" in *Dellinger* includes both legitimate and illegitimate parents. If either can be awarded custody, either should be allowed visitation privileges.

[3] We hold that the district court was authorized to grant petitioner visitation privileges and to punish respondent for refusing to allow petitioner to visit his child.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN ROBERTS

No. 7418SC844

(Filed 4 December 1974)

1. **Criminal Law § 91— denial of continuance to obtain witness — whereabouts of witness unknown**

The trial court in a homicide case did not err in the denial of defendant's motion for continuance to secure attendance of a witness made at trial after the State had rested its case where defense counsel learned about the desired witness two days before trial, and a subpoena was issued but not returned because the whereabouts of the witness was unknown.

2. **Criminal Law § 86— impeachment of defendant — pulling guns on another person**

In a second degree murder prosecution, the trial court did not err in permitting the State to ask defendant on cross-examination whether he "didn't pull those same guns on Allen Brennan" earlier that night, since a defendant may be asked whether he committed specific criminal acts or was guilty of specified reprehensible conduct for purposes of impeachment.

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

Trial court's instructions on self-defense met the requirements set forth in *State v. Dooley*, 285 N.C. 158.

APPEAL by defendant from *Lupton, Judge,* 13 May 1974 Criminal Session of Superior Court held in GUILFORD County.

Defendant was indicted for first-degree murder but the State elected to seek a verdict no greater than second-degree murder. The jury returned a verdict of guilty of voluntary manslaughter, and from judgment imposing prison sentence of 15 to 20 years, defendant appeals.

Attorney General James H. Carson, Jr., by Associate Attorney Robert W. Kaylor, for the State.

Assistant Public Defender Richard S. Towers for the defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motion for a continuance in order that he might secure the attendance of a witness. The motion was made at trial after the State had rested its case. The record discloses that the alleged offense occurred on 9 June 1973; that counsel was appointed on 11 June 1973;

that the indictment was returned on or about 6 August 1973; that the case had been calendared for trial on two previous occasions, but had been continued upon motions by defendant; that the case came on for trial in May 1974; that two days before the trial, defense counsel learned about the desired witness; and that a subpoena was issued but not returned, the witness' whereabouts being unknown.

It is well settled that a motion for continuance is ordinarily addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent abuse of discretion. 2 Strong, N. C. Index 2d, Criminal Law § 91, at 620 (1967); *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1968); *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880 (1971); *State v. Scott,* 8 N.C. App. 281, 174 S.E. 2d 80 (1970). We are of the opinion, and so hold, that no abuse of discretion by the trial judge has been shown, therefore, the assignment is overruled.

[2] Defendant next contends that the court erred in allowing the State to cross-examine him as to prior acts. The prosecutor asked defendant on cross-examination if " . . . [he] didn't pull those same two guns on Allen Brennan . . . " earlier that night.

In *State v. Foster,* 284 N.C. 259, 275, 200 S.E. 2d 782 (1973), the court stated the applicable rule as follows:

> When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such 'cross-examination for the purpose of impeachment *is not limited to conviction of crimes. Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination.*' (Citations omitted.) (Emphasis added.)

In *State v. Gainey,* 280 N.C. 366, 373, 185 S.E. 2d 874 (1971), the court stated that " . . . for purposes of impeachment a witness may be asked whether he has *committed* specific criminal acts or been guilty of specified reprehensible conduct. . . . " We hold that the question propounded by the State was not improper.

[3] Defendant's next assignment of error relates to the judge's instructions to the jury. Defendant contends that the court erred in its instructions on self-defense, arguing that the in-

structions did not meet the requirements set forth in *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974). We have compared the pertinent instructions given in this case with those suggested in *Dooley* and conclude that there is substantial similarity. The assignment of error is overruled.

Defendant's final contention is that the court erred in signing and entering the judgment. This contention is based on an exception to the judgment and presents for review errors appearing on the face of the record proper. *State v. Talbert,* 285 N.C. 221, 203 S.E. 2d 835 (1974); 3 Strong, N. C. Index 2d, Criminal Law § 161 (1967). We have reviewed the record proper and find that it is free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

VIRGINIA DORIS COLLIER HOWELL v. JOHN JAMES HOWELL AND JOHN J. HOWELL v. VIRGINIA DORIS COLLIER HOWELL

No. 746DC655

(Filed 4 December 1974)

Divorce and Alimony § 8— evidence of abandonment — failure to submit issue erroneous

Where the wife's action against the husband for divorce from bed and board, alimony and counsel fees was consolidated with the husband's action against the wife for absolute divorce on the ground of one year's separation, the trial court erred in failing to submit to the jury an issue with respect to constructive abandonment, since there was evidence tending to show that the husband had beaten the wife on several occasions prior to the separation, that the husband threatened to kill his wife, and that she left him out of fear after a severe beating.

APPEAL by Mrs. Virginia Doris Collier Howell from *Blythe, Judge,* 4 March 1974 Session of District Court held in NORTHAMPTON County.

On 26 January 1973, Mrs. Howell instituted an action against her husband, John J. Howell, seeking a divorce from bed and board, temporary and permanent alimony, and counsel fees. Mr. Howell answered, denying the material allegations of the complaint.

On 19 December 1973, Mr. Howell instituted an action against Mrs. Howell seeking an absolute divorce on ground of one-year separation. Mrs. Howell answered and pled as an affirmative defense that the separation was due to the constructive, willful abandonment by Mr. Howell because of his vicious assault on her. Mrs. Howell also counterclaimed, setting forth her pending action for permanent alimony and divorce from bed and board.

When the cases came on for trial, they were consolidated. Appellant requested the submission of an issue on constructive abandonment and for jury instructions on that issue, but the request was denied. The court did submit issues as to whether Mr. Howell offered such indignities to Mrs. Howell as to render her condition intolerable and life burdensome, and whether such indignities were without just cause or provocation. The jury answered the issues submitted in favor of Mr. Howell. From judgment denying her claim for alimony and granting Mr. Howell an absolute divorce, Mrs. Howell appealed.

Johnson, Johnson & Johnson, by Bruce C. Johnson, for appellant.

No counsel contra.

BRITT, Judge.

Appellant's main contention is that the trial judge should have submitted the issue of constructive abandonment and should have instructed the jury on this issue. We agree. The primary ground of appellant's original action and the counterclaim to her husband's action for an absolute divorce is constructive abandonment. Evidence presented at the trial tended to show: Prior to the separation, Mr. Howell on several occasions had beaten Mrs. Howell, and threatened to kill her; that on the night of 13 December 1972, he severely beat her with his fist and she left the next morning out of fear and remained separated from him; that as a result of said beating, her face and nose were swollen; that they have lived separate and apart since 14 December 1972.

It is well settled that a trial judge has the duty, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. G.S. 1A-1, Rule 49(b) [former G.S. 1-200];

Wheeler v. Wheeler, 239 N.C. 646, 80 S.E. 2d 755 (1954); *Nebel v. Nebel,* 241 N.C. 491, 85 S.E. 2d 876 (1955).

In *Panhorst v. Panhorst,* 277 N.C. 664, 670, 178 S.E. 2d 387 (1971), the court said:

> "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." (Citation). Rule 51(a) of the Rules of Civil Procedure, formerly G.S. 1-180, "requires the judge 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' (Citation)." (Citations omitted.)

We hold that under the pleadings and evidence in this case, the trial court erred in not submitting an issue with respect to constructive abandonment and in failing to instruct the jury on that issue.

While the error that we have determined relates primarily to only one issue, we conclude that all of the issues are so interrelated that the ends of justice require a new trial of the whole case. It is so ordered. 1 Strong, N. C. Index 2d, Appeal and Error § 62, at 239 (1967); *Paris v. Aggregates, Inc.,* 271 N.C. 471, 157 S.E. 2d 131 (1967); *Kinney v. Goley,* 6 N.C. App. 182, 169 S.E. 2d 525 (1969).

New trial.

Judges HEDRICK and MARTIN concur.

JAMES D. SLOOP, JR., SON, CAROL ANNE WHITLOCK, DAUGHTER, AND EDNA R. SLOOP, ALLEDGED WIDOW OF JAMES D. SLOOP, DECEASED, EMPLOYEE v. WILLIAMS EXXON SERVICE, EMPLOYER AND AETNA CASUALTY & SURETY CO., CARRIER

No. 7426IC842

(Filed 4 December 1974)

Master and Servant § 79— workmen's compensation death benefits — separation agreement — justifiable cause

A husband and wife were not living separate and apart for "justifiable cause" within the meaning of G.S. 97-2(14) when they

were living separate and apart as a result of a mutual agreement evidenced by a legally executed separation agreement, and the wife was thus not entitled to receive benefits payable under the Workmen's Compensation Act for death of the husband.

APPEAL by plaintiff Edna R. Sloop from the North Carolina Industrial Commission's opinion and award of 31 July 1974. Heard in the Court of Appeals on 12 November 1974.

On 19 June 1973 James D. Sloop sustained an injury by accident arising out of and in the course of his employment with defendant employer, and as a direct and proximate result thereof he died on 3 July 1973. A hearing before Deputy Commissioner A. E. Leake resulted in a conclusion of law that Edna Sloop was not the widow of the deceased as defined by G.S. 97-2(14) since she was living separate and apart from him by mutual agreement pursuant to a deed of separation. Since the deceased left no dependents, compensation was distributed to his next of kin under G.S. 29-15(2) and G.S. 29-16(1). Edna Sloop appealed to the Full Commission which in turn adopted the opinion of the Deputy Commissioner and affirmed his award. Now she appeals to this Court.

Welling and Miller, by George J. Miller, for plaintiff appellees.

Joseph B. Roberts III and Geoffrey A. Planer, for plaintiff appellant Edna R. Sloop.

MARTIN, Judge.

Appellant Edna Sloop presents a single question for our consideration which can be stated as follows: "Did the Full Commission err in concluding as a matter of law that a husband and wife are not living separate and apart for 'justifiable cause' within the meaning of G.S. 97-2(14) if they are living separate and apart as a result of a mutual agreement evidenced by a legally executed separation agreement?"

Counsel for appellant concedes that the Full Commission merely followed this Court's determination in *Bass v. Mooresville Mills*, 11 N.C. App. 631, 182 S.E. 2d 246 (1971) where an identical question was posed. However, counsel strongly urges this Court to rethink the question and depart from *Bass*.

G.S. 97-39 provides in part that a "widow" shall be conclusively presumed to be wholly dependent for support upon the

deceased employee. "The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time." G.S. 97-2(14). "[T]here is authority in other jurisdictions to the effect that 'justifiable cause,' as that term is employed in statutory provisions similar to our G.S. 97-2(14), may not be interpreted as applicable to separations by mutual consent. [Citations]." *Bass, supra,* at 633. The Court in *Bass* considered such authority to be sound and stated at 633-634, "[T]here is no reason why a separated wife who has surrendered all right to look to the husband for support while he is living, should upon his death, receive benefits that are intended to replace in part the support which the husband was providing, or should have been providing."

In reaffirming *Bass,* we also affirm the opinion and award of the Full Commission.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

FIRST-CITIZENS BANK & TRUST COMPANY v. R & G CONSTRUCTION COMPANY

No. 743DC853

(Filed 4 December 1974)

Appeal and Error § 6; Rules of Civil Procedure § 55— entry of default — interlocutory order — appeal

An order refusing to set aside an entry of default where judgment has not been entered is not a final order and is, therefore, not appealable.

APPEAL by defendant from *Phillips, District Judge,* 12 July 1974 Session of District Court held in CRAVEN County. Heard in the Court of Appeals on 21 November 1974.

The record filed in this cause shows the following: Plaintiff filed an unverified complaint on 10 May 1973 seeking a money judgment against the defendant. On 25 June 1973 plaintiff filed an affidavit alleging "that the complaint and summons

in this action were served on the defendant on May 17, 1973, as appears from the Sheriff's Return of Service of said summons; that the time within which the defendant may answer or otherwise move as to the complaint has expired; that the defendant has not answered or otherwise moved and that the time for defendant to answer or otherwise move has not been extended." On the same day, 25 June 1973, Judge Phillips entered an order, in pertinent part, as follows:

> "That whereas it has been made to appear to the undersigned Judge . . . upon affidavit or otherwise that the defendant has failed to plead and that the defaulting party is neither an infant nor incompetent.
>
> And that the defendant is otherwise subject to default judgment as provided by the North Carolina Rules of Civil Procedure.
>
> NOW, THEREFORE, default is hereby entered against . . . the defendant in this action, as provided by Rule 55(b) of the North Carolina Rules of Civil Procedure."

On 23 May 1974 the defendant filed a motion to set aside the order of 25 June 1973. Defendant appealed from an order entered 12 July 1974 denying its motion.

Ward, Tucker, Ward & Smith, P.A., by Michael P. Flanagan for plaintiff appellee.

DeLaney, Millette & DeArmon by Ernest S. DeLaney, Jr., for defendant appellant.

HEDRICK, Judge.

As a general rule an order setting aside or refusing to set aside an entry of default where judgment has not been entered is not a final order and is, therefore, not appealable. Annot., 8 A.L.R. 3d 1272, 1278 (1966); 4 Am. Jur. 2d, Appeal and Error, § 127 (1962).

Judge Phillips' order of 25 June 1973 is in no sense a final judgment. It is, at most, an entry of default, "an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter. . . ." *Whaley v. Rhodes,* 10 N.C. App. 109, 111, 177 S.E. 2d 735, 736 (1970) (citation omitted). Therefore, the appeal from the order denying defendant's motion to set aside the entry of default is

premature. An exception to such an interlocutory order, properly preserved, may be reviewed on an appeal from the final judgment.

Appeal dismissed.

Chief Judge BROCK and Judge CAMPBELL concur.

WACHOVIA BANK & TRUST COMPANY, N.A. v. CHARLIE SMITH, JR. AND WIFE, BETTY W. SMITH

No. 743SC659

(Filed 4 December 1974)

Appeal and Error § 6— claim and delivery proceeding — appeal premature

Where the superior court entered an order affirming the clerk's order of seizure of a mobile home in a claim and delivery proceeding instituted ancillary to a civil action by plaintiff against defendants seeking to recover an amount allegedly due on a promissory note executed by defendants for the balance due on the purchase price of a mobile home, defendants' appeal was premature since no substantial right of the defendants had yet been judicially determined and questions raised by defendants could be decided only when the case was heard on its merits.

APPEAL by defendants from *James, Judge,* 6 May 1974 Session of Superior Court held in CRAVEN County. Heard in the Court of Appeals on 13 November 1974.

This is an appeal from an order of the judge of the superior court affirming an order of seizure of a mobile home made by the Clerk of the Superior Court of Craven County in a claim and delivery proceeding instituted ancillary to a civil action by the plaintiff, Wachovia Bank and Trust Company, N.A., against the defendants, Charlie Smith, Jr., and Betty W. Smith, seeking to recover $21,020.02 allegedly due on a promissory note executed by the defendants for the balance due on the purchase price of a mobile home.

In its complaint, filed 1 February 1974, plaintiff alleged that a promissory note and security agreement executed by the defendants as part of the purchase price of a mobile home had been assigned to it. Plaintiff further alleged that the defendants "have refused and continue to refuse to pay the installments

called for in said note and security agreement" and that pursuant to the terms of the promissory note the plaintiff has declared the entire balance of the note due. Simultaneously with the filing of the complaint, the plaintiff filed a claim and delivery proceeding (including a substantial undertaking) in the Office of the Clerk of the Superior Court of Craven County, seeking possession of the mobile home in order to protect its security interest therein. The defendants have not filed answer to the plaintiff's complaint. However, when the claim and delivery proceeding came on for hearing before the clerk of the superior court on 28 February 1974, the defendants claimed that pursuant to G.S. 25-2-608 they revoked their acceptance of the mobile home, that pursuant to G.S. 25-2-711(3) they had a security interest in the mobile home, and that on 11 February 1974 they notified plaintiff of their intention to sell the mobile home (as allowed by G.S. 25-2-711(3)) in order to recover their down payment of $1,510.90 and the expenses incurred by them as a result of the defects in the mobile home.

After the hearing, the clerk found probable cause to issue an order of seizure. The defendants, pursuant to G.S. 1-474, appealed to the superior court. On 6 May 1974 Judge James, after reviewing the record, entered an order affirming the order of the clerk. The defendants appealed to this court.

Dunn & Dunn by Raymond E. Dunn for plaintiff appellee.

Louis F. Foy, Jr., for defendant appellants.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles R. Hassell, Jr., as amicus curiae.

HEDRICK, Judge.

Plaintiff filed a motion in this court to dismiss the defendants' appeal on the grounds that it was from an interlocutory order not affecting a substantial right. Defendants filed answer to the motion contending that the appeal was authorized by G.S. 1-277, which in pertinent part provides:

> "(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right 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."

The substantial right claimed by the defendants is that they justifiably revoked their acceptance of the mobile home in accordance with the provisions of G.S. 25-2-608 and that pursuant to G.S. 25-2-711(3) they have a security interest in the mobile home. They further contend that they are not required to file a replevy bond in order to hold the property pending a trial.

In entering the order of seizure in the claim and delivery proceeding, the clerk of superior court did not and could not determine whether the defendants justifiably revoked their acceptance of the mobile home or whether the defendants retained a security interest therein. Likewise, G.S. 1-474 only gives the judge of the superior court the authority to review the action of the clerk in issuing or refusing to issue the order of seizure. The questions raised by the defendants can be decided only when the case is heard on its merits. No substantial right of the defendants has yet been judicially determined. Furthermore, whatever interest the defendants have in the mobile home is amply protected by plaintiff's undertaking filed in the claim and delivery proceeding pursuant to G.S. 1-475.

The appeal is

Dismissed.

Judges BRITT and MARTIN concur.

DORIS LOVELACE BOONE, MARY ATKINS LOVELACE AND JOE DAVID LOVELACE v. MARY BOONE

No. 7417DC790

(Filed 4 December 1974)

Appeal and Error § 39— record on appeal — time for docketing

Appeal is dismissed where the record on appeal was docketed more than 90 days from the date of the order from which the appeal was taken.

APPEAL by defendant from *Harris, District Judge,* 22 May 1974 Session of District Court held in ROCKINGHAM County. Heard in the Court of Appeals on 14 November 1974.

Plaintiffs, Doris Lovelace Boone (mother), Mary Atkins Lovelace and Joe David Lovelace (maternal grandparents), instituted this action to obtain custody of Gregory Thomas Boone, age 7, Mark Todd Boone, age 5, and Mary Nicole Boone, age 9 months, from the defendant, Mary Boone (paternal grandmother). Pursuant to a hearing on the plaintiffs' motion for an award of custody pending the final determination of the cause on the merits, Judge Harris on 22 May 1974 entered an order awarding custody of the children to the plaintiffs. Upon the entry of this order, the defendant in open court gave notice of appeal to the Court of Appeals.

For a further statement of the facts involved in the two appeals in this case, see the opinion in *Boone v. Boone,* No. 7417DC763, filed in the Court of Appeals on 20 November 1974.

Gwyn, Gwyn & Morgan by Julius J. Gwyn for plaintiff appellees.

Benjamin R. Wrenn, P.A., by Benjamin R. Wrenn for defendant appellant.

HEDRICK, Judge.

The record on appeal was docketed in this court on 23 August 1974, which is more than ninety days from the date of the order from which the appeal was taken. No extension of time within which to docket the appeal has been granted. Therefore, pursuant to Rules 5 and 48 of the Rules of Practice in the Court of Appeals and upon motion of the plaintiffs, the appeal is

Dismissed.

Judges BROCK and CAMPBELL concur.

IN THE MATTER OF THE ESTATE OF GEORGE B. BURLESON, DECEASED

No. 7424SC841

(Filed 4 December 1974)

1. Deeds § 6; Wills § 3— difference between attestation and acknowledgment

An acknowledgment is a formal declaration or admission before an authorized public officer by a person who has executed an instru-

ment that the instrument is his voluntary act and deed, while an attestation is the act of a third person who witnessed the actual execution of an instrument and subscribed his name as a witness to that fact.

2. **Wills § 61— failure to file formally acknowledged dissent — dissent invalid**

Petitioner's dissent to her husband's will was invalid within the requirements of G.S. 30-2(b) where she had her dissent signed by a subscribing witness but she did not file a formally acknowledged dissent.

APPEAL by petitioner Pearl B. Burleson from *Thornburg, Judge,* 15 April 1974 Session of Superior Court held in MITCHELL County. Argued before the Court of Appeals 21 November 1974.

George B. Burleson died testate on 1 November 1970. He is survived by his widow, the petitioner in this action, Pearl B. Burleson. Respondents are the five surviving children of a previous marriage and the survivors of a sixth deceased child. Petitioner is the third spouse of George B. Burleson. No children were born of their marriage.

Testator's will and codicil were probated, and letters testamentary were issued to one Warren Pritchard on 10 November 1970. On 13 November 1970 petitioner Pearl B. Burleson filed a purported dissent to the will with the Clerk of Superior Court of Mitchell County. The dissent was signed by petitioner and by one Charles Thomas as a witness, but it was not acknowledged. The clerk denied petitioner's dissent to the will on the grounds that the dissent was "not filed in the manner and within the time provided for in subsections 30-2(a), (b) and (c) of North Carolina General Statutes. . . ."

Petitioner appealed to the judge of Superior Court. Petitioner filed affidavits averring that she did not have the dissent acknowledged because a lawyer had told her that it did not have to be acknowledged. The judge affirmed the clerk's order denying the dissent, and petitioner appealed to this Court.

G. Edison Hill, for the petitioner-appellant.

Pritchard & Hise, by Lloyd Hise, Jr., and Gudger & Sawyer, by Lamar Gudger, for the respondents-appellees.

BROCK, Chief Judge.

[1] G.S. 30-2(b), governing the time and manner of dissent, provides that "[t]he dissent shall be in writing signed and

acknowledged by the surviving spouse or his or her duly authorized attorney; . . ." An acknowledgement is a formal declaration or admission before an authorized public officer by a person who has executed an instrument that the instrument is his voluntary act and deed. 1 C.J.S. *Acknowledgments* § 1; *Freeman v. Morrison,* 214 N.C. 240, 199 S.E. 12 (1938). It is different "from an attestation in that an attestation is the act of a third person who witnessed the actual execution of an instrument and subscribed his name as a witness to that fact, . . ." 1 C.J.S. *Acknowledgments* § 1.

[2] Petitioner contends that by having her dissent signed by a subscribing witness, she substantially complied with G.S. 30-2(b). Petitioner urges this Court to note that her attorney advised her that attestation by a subscribing witness would be sufficient. She asserts that her failure to file a formally acknowledged dissent should not result in her being denied the right to dissent.

In 1959 the legislature, in an effort to avoid disputes concerning the genuineness of dissents, amended the statute to provide that dissents must be acknowledged. 1959 N. C. Session Laws, ch. 880. To hold that the signature by a subscribing witness satisfies the acknowledgment required by G.S. 30-2(b) would constitute judicial repeal of the 1959 amendment.

Petitioner relies on the case of *Philbrick v. Young,* 255 N.C. 737, 122 S.E. 2d 725. That case was decided under 1943 statutory law and is not supportive of petitioner's position.

Although we sympathize with petitioner, we are compelled to hold that her dissent was invalid within the requirements of G.S. 30-2(b). The statute is an expression of legislative policy which we will not vitiate.

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. RILEY C. HOOD

No. 744SC677

(Filed 4 December 1974)

Automobiles § 131— hit and run accident — sufficiency of evidence

In a prosecution of defendant for failing to stop at the scene of an accident resulting in personal injury or death and being the driver of a vehicle involved in such an accident and failing to give his name and address and failing to render assistance to the injured person, evidence was sufficient to be submitted to the jury where it consisted primarily of testimony by a passenger in defendant's vehicle that defendant was operating his truck at 70 to 75 mph when he rounded a curve and saw deceased lying in the highway, defendant swerved to avoid deceased but the right front wheel ran over his head, defendant would not stop his truck and would not report the accident, and the victim died as a result of injury sustained in the accident.

APPEAL by defendant from *Cowper, Judge,* 11 March 1974 Session of Superior Court held in JONES County.

The defendant was indicted in a single bill of indictment upon two counts: (1) failing to stop immediately his motor vehicle at the scene of an accident resulting in personal injury or death and in which he was involved, and (2) being the driver of a motor vehicle involved in an accident resulting in personal injury or death, failing to give his name, address, operator's license and registration number, and failing to render assistance to the person injured. Defendant pleaded not guilty to both counts. The jury found him guilty on the first count and not guilty on the second count. From judgment imposing prison sentence of two years, he appeals.

Attorney General James H. Carson, Jr., by Assistant Attorney General Raymond W. Dew, Jr., for the State.

Ernest C. Richardson III, and Beaman, Kellum and Mills, by Norman Kellum, for the defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error brought forward in his brief is that the court erred in failing to allow his motion for nonsuit at the close of all the evidence.

The evidence, consisting primarily of the testimony of James Taylor, a passenger in defendant's vehicle at the time

of the accident, tended to show: On the night of 3 October 1973, defendant and Taylor transported a Marine from James City to the Jacksonville bus station for $25.00. Taylor drove to Jacksonville and part of the way back to James City but defendant took over the driving when the truck started sputtering. At approximately 4:00 a.m., defendant, who was drinking beer, was driving 70 to 75 m.p.h. on Brice's Creek Road near the Craven-Jones County line. As they rounded a sharp curve, Taylor saw what appeared to be a limb in the road but as they got closer he realized it was a man and yelled, "Riley (defendant), it's a man." The victim was lying in the right-hand lane with his head about two feet from the center line; he turned his head and looked straight at the truck as it approached. Defendant swerved the truck to the left to avoid hitting the man but the right front wheel of the truck ran over his head. Taylor asked defendant if he was going to stop. Defendant slowed down but did not stop, stating that he was already on probation and that if they caught him for driving without a license or driving drunk, he would be sent up. Taylor told defendant that if he was not going to stop, to at least go back to the service station and call the highway patrol and let them know so that they could help the man. Defendant asked Taylor if he was sure that it was a man that they had run over and Taylor replied that it was. They went to a service station in James City and defendant tried to call a lawyer but did not call the police. The victim's head was crushed and he died as a result of said injury. Two days later Taylor went to the Craven County Sheriff's Department and reported the accident and what had happened.

We hold that the evidence was sufficient to survive the motion for nonsuit.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM R. REINDELL

No. 743SC548

(Filed 4 December 1974)

Narcotics § 4.5— possession with intent to distribute — instruction on simple possession — lesser included offense

The trial court in a prosecution for possession of L.S.D. with intent to distribute did not err in instructing the jury that it might return a verdict of guilty of simple possession of L.S.D. since possession is an offense included within the charge of possession with intent to distribute.

ON *certiorari* to review a trial before *Wells, Judge,* 11 September 1972 Session of Superior Court held in CARTERET County. Heard in the Court of Appeals on 17 September 1974.

The defendant was tried under a bill of indictment charging him with felonious possession of a controlled substance with intent to distribute, to wit: 299 tablets of L.S.D. The State's evidence tended to show that, pursuant to a search of defendant's home, 299 L.S.D. tablets were found on defendant's kitchen table. The officers were aided by an informant who was visiting defendant at the time of the search. Defendant testified denying that the tablets were his and claimed that the informer had brought the tablets into defendant's house seeking to sell them to defendant.

Attorney General Carson, by Associate Attorney Robert P. Gruber, for the State.

Wheatly & Mason, by L. Patten Mason and Warren J. Davis, for defendant appellant.

MARTIN, Judge.

The trial court charged that the jury could find defendant guilty of the crime of possession of L.S.D. with intent to distribute, guilty of possession of L.S.D. but without the intent to distribute, or not guilty. Defendant argues that simple possession of L.S.D. is a separate and distinct crime from possession of L.S.D. with intent to distribute, and, therefore, it was error to charge on simple possession of L.S.D. In *State v. Aikens,* 22 N.C. App. 310, 206 S.E. 2d 348 (1974), *aff'd,* 286 N.C. 202, 209 S.E. 2d 763 (1974), defendant was charged with possession of heroin with the intent to deliver, and this Court

held that it was not error for the trial court to instruct the jury that defendant could be found guilty of possession with intent to distribute, or guilty of simple possession, or not guilty. In *Aikens, supra,* at 312, Judge Morris reasons that "[i]t is impossible to possess a controlled substance with intent to distribute without having first possessed it, either actually upon the person or constructively, with the possible exception of a conspiracy or aiding and abetting." L.S.D., like heroin, is a controlled substance under Schedule I of G.S. 90-89. Defendant's assignment of error on this point is overruled.

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

No error.

Chief Judge BROCK and Judge MORRIS concur.

CAROL BARRINGER, PETITIONER v. REECE DAUGHTON BARRINGER, JR., RESPONDENT

No. 7419DC817

(Filed 4 December 1974)

Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — ability to provide support — failure to exercise earning capacity

Proceeding under the Uniform Reciprocal Enforcement of Support Act is remanded for a hearing on respondent's ability to provide support; if the award is based on respondent's capacity to earn rather than his actual earnings, there should be a finding based on competent evidence that respondent is failing to exercise his capacity to earn in disregard of his parental obligation to provide support for his children.

APPEAL by respondent from an order entered by *Warren, District Court Judge,* 11 June 1974 Session of District Court held in CABARRUS County.

Attorney General James H. Carson, Jr., by Assistant Attorney General William Woodward Webb for the State.

Davis, Koontz & Horton by Clarence E. Horton, Jr., for respondent appellant.

VAUGHN, Judge.

This is a proceeding under the Uniform Reciprocal Enforcement of Support Act. The proceeding was initiated in California when petitioner filed the complaint on behalf of three minor children of the parties. In a proceeding filed under this Act the verified complaint is admissible as prima facie evidence of the facts stated therein. G.S. 52A-19.

The complaint in this proceeding is sufficient to establish the needs of the children but is silent as to the ability of either of the parties to provide support. The only evidence offered at trial was from respondent who testified that he had been forced to resign from the job he held in California and had been unable to obtain employment since that time. He testified that he had been promised a job unloading freight in Charlotte. The record is silent as to when that employment might start or what respondent would earn. There was no other evidence relating to respondent's estate, earnings or capacity to earn.

For the reasons stated the order must be reversed. The case is remanded for a hearing on respondent's ability to provide support. If the award is based on respondent's capacity to earn rather than his actual earnings there should be a finding, based on competent evidence, that respondent is failing to exercise his capacity to earn in disregard of his parental obligation to provide support for his children. *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912.

Reversed and remanded.

Judges CAMPBELL and MORRIS concur.

WILEY EVERETTE PHILLIPS v. CURRIE MILLS, INC.

No. 7419SC803

(Filed 4 December 1974)

Venue § 8— change for convenience of parties and witnesses — discretionary matter

A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown.

State v. Ellerbe

APPEAL by plaintiff from *Crissman, Judge,* 3 June 1974 Session of Superior Court held in RANDOLPH County. Heard in the Court of Appeals on 18 November 1974.

This is an action for damages sustained by plaintiff when he fell into a well located on defendant's property. Defendant moved for a change of venue to Moore County pursuant to G.S. 1-83(2). Based upon affidavits and testimony given at a hearing, the trial court granted defendant's motion.

Plaintiff appealed.

Ottway Burton, for plaintiff appellant.

Boyette and Boyette, by M. G. Boyette, Sr., for defendant appellee.

MARTIN, Judge.

G.S. 1-83(2) provides that the court may change the place of trial "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown. *Piner v. Truck Rentals,* 10 N.C. App. 742, 179 S.E. 2d 900 (1971).

Appellant has failed to show any abuse of discretion in the trial court's action.

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. RALPH EDWARD ELLERBE

No. 7412SC827

(Filed 4 December 1974)

APPEAL by defendant from *Canaday, Judge,* 15 July 1974 Session of Superior Court held in CUMBERLAND County. Heard in the Court of Appeals on 21 November 1974.

State v. Ellerbe

Defendant, Ralph Edward Ellerbe, was charged in a bill of indictment, proper in form, with armed robbery. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

On 2 August 1971 defendant and an accomplice entered a small grocery store and defendant produced a firearm that looked like a shotgun from under his coat. Gwen Black, co-owner of the store, was working as cashier at the time. As defendant held the gun on Mrs. Black, his accomplice took $402.00 belonging to Black's Supermarket from the cash drawer.

Defendant did not testify but offered the testimony of Anthony Calloway, who was identified as the accomplice by Mrs. Black. Calloway testified that he participated in the robbery of Black's Supermarket on 2 August 1971 but that the defendant did not participate in any way in this robbery.

From a verdict of guilty as charged and the entry of judgment imposing a prison sentence of fifteen (15) to twenty (20) years, defendant appealed.

James H. Carson, Jr., Attorney General, by Assistant Attorney Claude W. Harris for the State.

Gadsden and Swindell by Mitchel E. Gadsden for defendant appellant.

HEDRICK, Judge.

The record on appeal contains four assignments of error but none are brought forward and argued in the brief. Nevertheless, we have carefully reviewed the record and all the assignments of error and conclude that the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. HAYWOOD BLAKENEY

No. 7420SC843

(Filed 4 December 1974)

APPEAL by defendant from *Copeland, Judge,* 15 April 1974 Session of Superior Court held in UNION County. Argued before the Court of Appeals 19 November 1974.

Defendant was charged in a bill of indictment with common law robbery. A plea of not guilty was entered, and a verdict of guilty as charged was returned. From an active sentence of not less than six years nor more than ten years imposed thereon, the defendant gave notice of appeal.

Attorney General Carson, by Assistant Attorney General Sloan, for the State.

James E. Griffin, for the defendant-appellant.

BROCK, Chief Judge.

Defendant, on appeal, has abandoned each assignment of error and presents the record for review for possible errors. We have reviewed the record. It is our opinion that defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE LEGGETT AND BOBBY GREEN

No. 744SC828

(Filed 4 December 1974)

ON *certiorari* to review a trial before *Cohoon, Judge,* 25 May 1973 Session of Superior Court held in ONSLOW County. Argued in the Court of Appeals 12 November 1974.

Defendants were arrested for common law robbery and waived indictment by the Onslow County Grand Jury. Pleas of not guilty were entered, and verdicts of guilty were returned.

From active sentences of ten years less credit for time served in jail pending trial, defendants petitioned for certiorari. We granted the defendants' petition on 25 June 1974.

Attorney General Carson, by Associate Attorney Gruber, for the State.

Edward G. Bailey, for the defendants.

BROCK, Chief Judge.

Defendants present the record for review for possible errors. We have reviewed the record. It is our opinion that defendants had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. BENJAMIN CHAVIS, MARVIN PATRICK, CONNIE TINDALL, JERRY JACOBS, WILLIE EARL VEREEN, JAMES McKOY, REGINALD EPPS, WAYNE MOORE, JOE WRIGHT, AND ANN SHEPHARD

No. 745SC436

(Filed 18 December 1974)

1. **Jury § 6— motion to sequester prospective jurors — pretrial publicity — statements by jurors**

In a prosecution for malicious damage to a store by use of fire bombs and for conspiracy to assault emergency personnel, the trial court did not err in the denial of defendants' motion to sequester the prospective jurors during *voir dire* examination because of pretrial publicity of the case where defendants presented no affidavits or exhibits to the court to establish a significant possibility that pretrial publicity had exposed the jurors to potentially prejudicial material; nor did the court err in the denial of defendants' renewals of such motion when a prospective juror stated that he had formed an opinion as to the character of one of the defendants from what he had read and when another prospective juror stated that he had formed an opinion and had heard opinions formed about the case, since the statements by the prospective jurors did not indicate a situation in which there had been pretrial publicity which would expose the jurors to potentially prejudicial material.

2. **Jury § 6— examination of prospective jurors — failure to object to question**

The trial court did not err in permitting the State to ask prospective jurors whether they felt any of the defendants had been unfairly indicted where defendants did not object and except to the question.

3. **Jury § 6— examination of prospective jurors — references to race**

Defendants were not prejudiced by the solicitor's reference to the race of certain persons in asking prospective jurors whether they knew such persons since the reference to race was a legitimate effort to aid in the identity of the persons named in the questions.

4. **Jury § 6— examination of prospective jurors — waiver of objection**

Defendants waived their right to object to a question asked prospective jurors by the solicitor by failing to object when the question was asked on numerous occasions after the court sustained defendants' objection the first time the question was asked.

5. **Jury § 6— examination of prospective jurors — membership in club excluding blacks**

The trial court did not err in refusing to permit defense counsel to ask a prospective juror whether he had ever belonged to any club or organization which excluded black people from its membership.

6. Jury § 6— examination of prospective jurors — belief in racial equality

The trial court did not err in refusing to permit defense counsel to ask prospective jurors whether they believed in racial equality.

7. Jury § 6— examination of prospective jurors — tendency to convict blacks — error cured

Trial court's error in excluding a question by defense counsel as to whether any prospective jurors would more readily convict a person charged with crime because he is black than they would if he were some other color was cured when the court reversed its ruling and offered counsel the opportunity to restate the question.

8. Jury § 6— jury selection — rambling question permitted — subsequent exclusion of same question

Where the court permitted defense counsel to ask prospective jurors a question concerning acceptance of testimony by a police officer, the race of defendants and the victim, and membership in organizations advocating the supremacy of one race over another, although the question was objectionable for the reason that it was rambling, objection to the same inquiry immediately thereafter was properly sustained.

9. Jury § 6— jury selection — exclusion of question — question thereafter answered

Defendants cannot complain of the exclusion of a question to a prospective juror relating to the tenets of an organization to which the juror belonged where the objection was withdrawn and the juror thereafter answered the question.

10. Jury § 6— examination of prospective jurors — necessity for evidence to return not guilty verdict

The trial court did not err in refusing to permit defense counsel to ask a prospective juror whether he would have any hesitancy about saying defendants are not guilty if he had to decide the case without hearing any evidence or to ask another prospective juror whether it would take some evidence to overcome his adverse feelings toward defendants where counsel was given an adequate opportunity to inquire whether the jurors had formed opinions about the case, whether they harbored any prejudice against defendants, and otherwise to inquire into their fitness to serve as jurors.

11. Jury § 3— competency of jurors — discretion of court

The competency of jurors to serve is left largely to the sound legal discretion of the trial judge, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law.

12. Jury § 7— challenge for cause — preservation of exception to denial

In order for a defendant to preserve his exception to the court's denial of a challenge for cause, he must (1) excuse the challenged juror with a peremptory challenge, (2) exhaust his peremptory challenges before the panel is completed, and (3) thereafter seek, and be denied, peremptory challenge to another juror.

13. Jury § 7— challenges for cause — prejudice or bias

The trial court did not err in the denial of defendants' challenges for cause to prospective jurors on grounds of prejudice and bias where in each instance the juror portrayed no prejudice or bias or, upon examination by the court, stated unequivocally that he would be guided by the evidence, would require the State to produce evidence to convince him beyond a reasonable doubt of the guilt of defendants, and could be fair and impartial to both the State and defendants.

14. Constitutional Law § 31— solicitor's notes on witness's statement — right of inspection — material evidence favorable to defense

Defendants' rights of confrontation, due process and equal protection were not violated by the court's denial of their request to inspect a typewritten copy of a statement made by a State's witness containing handwritten notes added to the margin by the solicitor during a conversation with the witness, the original signed statement having been furnished to defendants, where the handwritten notes do not disclose material evidence favorable to the defense, and it is clear from an examination of the notes that the witness could not have known what the solicitor was writing and in no way could have acknowledged and adopted the notes as his statement or as a summary thereof.

15. Criminal Law § 128; Witnesses § 1— witness advancing toward dedense counsel — motions for mental examination, mistrial

The trial court did not abuse its discretion in the denial of defendants' motions for a mental examination of a State's witness and for a mistrial when the witness, during unusually loud cross-examination by defense counsel, left the witness stand and attempted to reach the defense table.

16. Criminal Law § 89— cross-examination — where witnesses housed during trial

The trial court did not err in refusing to permit defense counsel to question two State's witnesses as to where they were being housed during the trial since the excluded answer did not disclose bias, interest, or a promise or hope of reward on the part of the witnesses.

17. Criminal Law § 161— grouping of exceptions — one question of law

All exceptions relating to the same question of law must be grouped under one assignment of error, and only those exceptions relating to the same question of law may be grouped under a single assignment of error.

18. Criminal Law § 162— broadside assignment of error to evidence

An assignment of error which states that defendants' several constitutional rights were violated "by admitting into evidence over defendants' objections testimony of witnesses for the State which was irrelevant, immaterial, incompetent, remote, prejudicial and inflammatory," and which thereafter lists by number 2,685 exceptions, is broadside and ineffective.

19. Criminal Law § 87; Witnesses § 1— list of State's witnesses — competency of witnesses not listed

In a case in which defendants filed a motion to compel the State to furnish them a list of prospective witnesses for the State and the solicitor voluntarily furnished defendants a list of the witnesses he proposed at that time to call, the trial court did not abuse its discretion in permitting the State to offer the testimony of witnesses not named on the list furnished by the solicitor.

20. Criminal Law § 97— evidence offered by one defendant — rebuttal evidence adverse to all defendants

In a prosecution of nine defendants for the felonious burning of a store and of one defendant for being an accessory before the fact to the felonious burning wherein only the defendant charged with being an accessory offered evidence, the trial court did not err in permitting a rebuttal witness for the State to give testimony adverse to the nine defendants who offered no evidence since the State's evidence against the accessory would necessarily involve the nine defendants who are charged with the actual burning, and since it was within the discretion of the court to permit the State to reopen its case against the nine defendants.

21. Criminal Law § 128— juror's acquaintance with witness — motion for mistrial

The trial court did not err in failing to order a mistrial when a juror stated that he knew a police officer who testified for the State.

22. Criminal Law § 26— double jeopardy — continuance during jury selection — subsequent trial

Where the assistant solicitor assigned to prosecute criminal charges became ill and was hospitalized during the jury selection process, and the trial court ordered that the trial of the cases be continued to a subsequent session, defendants were not placed in double jeopardy by their trial at a subsequent session since jeopardy did not attach at the first trial because the jury had not been sworn and empaneled.

23. Criminal Law § 84; Searches and Seizures § 1— warrantless search of church — standing to object — trespassers — consent of church official

In this prosecution for the felonious burning of a store and for conspiracy to assault emergency personnel, defendants had no standing to object to the warrantless search of a church and parsonage in which defendants allegedly held meetings before the crimes where they were not members of the church and were trespassers on the church premises; furthermore, the search was not unlawful since it was conducted with the permission of an official of the church.

24. Property § 4— malicious injury to property by fire bomb — accessory before the fact — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for being an accessory before the fact of the felonious burning of a store by use of fire bombs by nine other persons where it tended to

show that defendant was present in a church with the nine persons and others during the planning of the burning of the store, and that as weapons were being distributed to the group in preparation for the burning and an assault on emergency personnel who might come to the scene, defendant stated to the group, "I think it is right what you are doing. Y'all should show them you mean business."

ON writ of *certiorari* to review a trial before *Martin (Robert M.), Judge,* 11 September 1972 Session of Superior Court held in PENDER County. Argued in the Court of Appeals 29 August 1974.

Each of the ten named defendants was charged in bills of indictment with (1) the felony of burning Mike's Grocery Store building and contents in Wilmington, North Carolina, on 6 February 1971, by the use of fire bombs, which are explosives or incendiary devices (G.S. 14-49[b]), and with (2) the felony of conspiring to assault emergency personnel, law enforcement officers, and firemen with firearms (G.S. 14-288.9). The bills of indictment charging felonious burning with fire bombs were found true bills by the New Hanover County Grand Jury at the April 1972 Session. The bills of indictment charging the felonious conspiracy were found true bills by the New Hanover County Grand Jury at the May 1972 Session.

On 31 May 1972 defendants filed a motion for change of venue from New Hanover County upon the grounds of unfavorable pretrial publicity. On 1 June 1972 an order was entered transferring the cases against each of the ten defendants to Pender County for trial.

The cases were called for trial at the 5 June 1972 Session of Superior Court held in Pender County before Judge James. Without objection the cases were consolidated for trial, and the selection of a jury was commenced. After several days of jury selection, during which only three jurors were accepted and seated, the Assistant District Attorney (Solicitor) assigned to prosecute the cases became ill and was hospitalized. Upon motion of the State, the trial judge in his discretion continued the trial of the cases to a subsequent session. On 25 August 1972 the State filed a motion for jurors to be summoned from some county other than New Hanover or Pender. Defendants opposed the State's motion, and after a hearing on 31 August 1972 Judge Rouse entered an order denying the State's motion.

The cases were thereafter called for trial before Judge Martin in Pender County at the 11 September 1972 Session,

with a venire of jurors summoned from Pender County. The State announced that it elected to nol pros the cases of felonious burning and felonious conspiracy charged against the defendant Shephard and would prosecute her upon a bill of indictment, which was found a true bill by the New Hanover County Grand Jury at the August 1972 Session, charging defendant Shephard with the felony of being an accessory before the fact of the burning of Mike's Grocery Store by the use of fire bombs by the other nine defendants (G.S. 14-5 and G.S. 14-49[b]). Each defendant pleaded not guilty. The cases were again consolidated for trial without objection. Selection of a jury consumed over two weeks, and the report thereof covers 788 pages of the record on appeal.

The State offered in evidence a diagram (State's Exhibit No. 3) to illustrate the testimony of State's witnesses who described the area surrounding Mike's Grocery and Gregory Congregational Church. The diagram is reproduced on an accompanying page to portray the area. The State also offered in evidence (State's Exhibits Nos. 1 and 2) two aerial photographs taken of the same area after the events involved in these prosecutions. They were offered by the State to illustrate the testimony of State's witnesses who described the area surrounding Mike's Grocery and Gregory Congregational Church and to illustrate the testimony of the State's witnesses who described the extent of the burning of Mike's Grocery and the two adjoining residences.

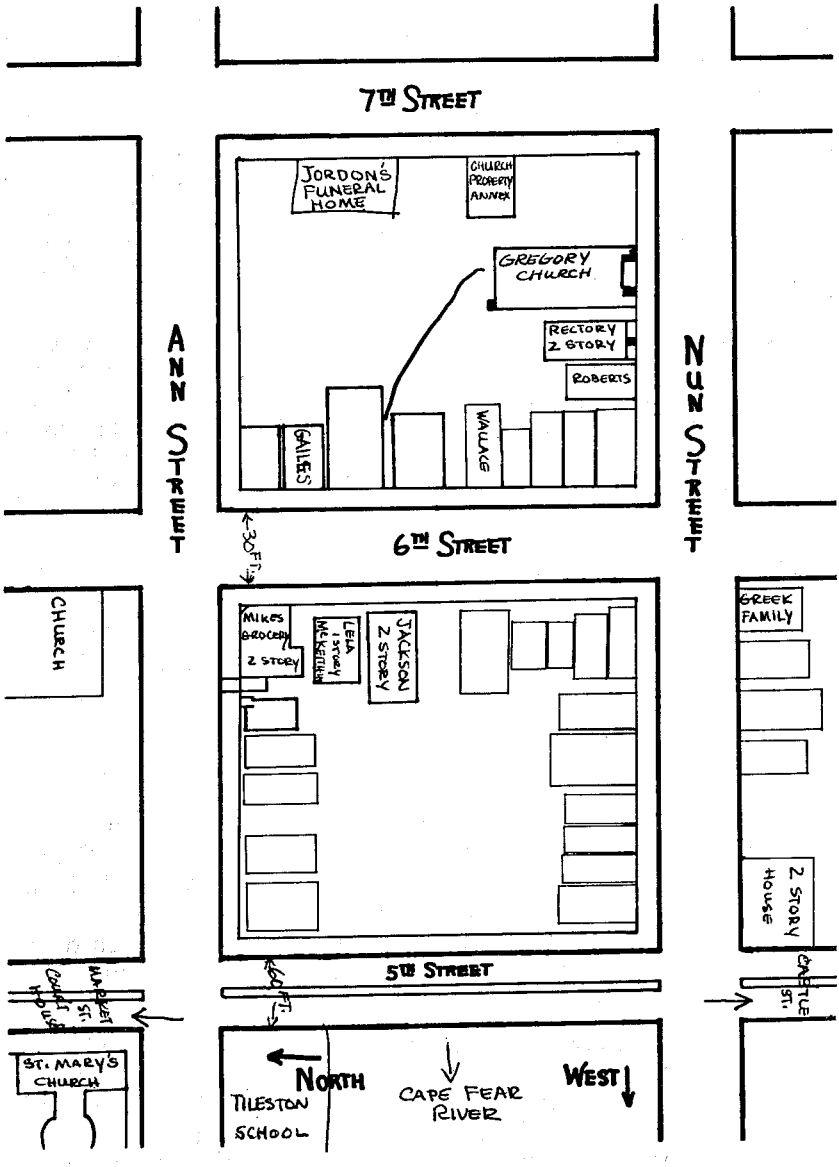
The area described by the witnesses and illustrated by the diagram (reproduced on an accompanying page), and illustrated by the two aerial photographs, is inhabited primarily by persons of the Negro race. The owner of Mike's Grocery is Caucasian. The area of the primary activity is described by the witnesses is a two city block area bounded on the north by Ann Street, on the south by Nun Street, on the east by 7th Street, and on the west by 5th Street. Sixth (6th) Street runs between Ann Street and Nun Street is in the center of the two block area. Mike's Grocery is located on a corner, in the southwest quadrant formed by the intersection of Ann and 6th Street. The two houses that were burned, in addition to Mike's Grocery, were located on the west side of 6th Street, south of the location of Mike's Grocery. Gregory Congregational Church is on the north side of Nun Street, between 6th Street and 7th Street, near the intersection of Nun Street and 7th Street. The church rec-

tory is located on the north side of Nun Street just west of the church.

The State's further evidence tended to show the following: On Friday, 5 February 1971, approximately seventy-five to one hundred persons, ranging in age from about eight years and up, were gathered in and around Gregory Congregational Church on Nun Street. The ten defendants were present; some were armed with pistols, some with rifles, and some with shotguns. Some of the defendants, along with other persons, went into the backyard of the church where they made fire bombs by filling bottles with gasoline and inserting rags into the necks of the bottles to serve as fuses.

Defendant Chavis instructed defendant Patrick to pick eight or nine "brothers" and to do a good job of fire bombing Castle Street. Defendant Chavis also stated that later he would get some "brothers" together and fire bomb the Shop-Rite store on Greenfield Street because it was owned by white people. Later, at the direction of defendant Chavis, fifteen or twenty persons, some of whom were armed with guns, went to Dock Street where they threw bricks and shot at houses. On Friday night, 5 February 1971, fire bombs were thrown at Mike's Grocery Store, but they were extinguished by city firemen before extensive damage was done.

Again on Saturday, 6 February 1971, a group of seventy-five to one hundred persons, ranging in age from eight years and up, were gathered in and around Gregory Congregational Church. The ten defendants were present. At about seven o'clock p.m., defendants Chavis, Patrick, Tindall, and Shephard gathered in the church parsonage which was next door to Gregory Congregational Church. With them were the church's pastor and four or five other persons. Defendant Chavis stated that a white man lived in a house at the corner of Nun Street and 5th Street and that they should fire bomb the house and shoot the man when he came out. Defendant Chavis also stated that there had already been two attempts to burn Mike's Grocery Store and that he was going to make sure it was burned on the third attempt. Later defendants Chavis, Patrick, Tindall, and Shephard went next door to the Gregory Congregational Church. The other six defendants were already in the crowd gathered in the church. Defendant Chavis used the pulpit and the church public address system to tell the crowd that they were going to the corner of Nun Street and 5th Street to throw a fire bomb


7TH STREET
JORDON'S FUNERAL HOME
CHURCH PROPERTY ANNEX
GREGORY CHURCH
RECTORY 2 STORY
ROBERTS
GAILES
WALLACE
ANN STREET
NUN STREET
30 FT.
6TH STREET
CHURCH
MIKES GROCERY 2 STORY
LEILA 1 STORY MCKEITHEN
JACKSON 2 STORY
GREEK FAMILY
2 STORY HOUSE
660 FT.
5TH STREET
MARKET ST.
COURT HOUSE
CASTLE ST.
ST. MARY'S CHURCH
NORTH
TILESTON SCHOOL
CAPE FEAR RIVER
WEST

in the house and shoot the white man when he came out. He told everyone who was large enough to use a gun to come with him. During this time defendant Chavis wore a .45 caliber automatic pistol in a belt holster. There were shotguns, rifles, and pistols stored near the front entrance to the church. Defendants Chavis and Patrick distributed guns to the other defendants. All of the defendants, except defendants Shephard and Epps, left the church together and went to the corner of Nun Street and 5th Street where a fire bomb was thrown at the house. At this time a police car drove to the side of the house, and the group which had come from the church started shooting at the two policemen in the car. When a second police car drove to the scene, the group retreated back to the church.

At about 9:30 p.m. on Saturday, with all of the ten defendants present in the crowd of seventy-five to one hundred people gathered in Gregory Congregational Church, defendant Chavis addressed them from the pulpit. Defendant Chavis explained to the crowd the "Chicago Strategy" as an action by which the group would set fire to a building and would hide in ambush to shoot the police and firemen when they came to the scene. He told them that Mike's Grocery "was run by a white man in a black section and that he thought that we should be getting the percentage of what Mike made in the black neighborhood. He think (sic) he should be donating so much money to us and that he wasn't and that (sic) for us to burn it down." He told the crowd to shoot and to kill the policemen who came to the fire at Mike's Grocery.

Defendant Chavis further told the crowd that he was going to have someone check the change of shifts at the police station so they could blow up the station. He stated: "[W]e were going to show these crackers that we mean business." One George Kirby, who was present in the church, went to the pulpit and told the crowd: "Get one of the pigs for me." Ann Shephard, one of the ten defendants, went to the pulpit and addressed the crowd, saying, "I think it is right what you all are doing. Y'all should show them you mean business."

Defendant Chavis and the State's witness Allen Hall then went to 6th Street to see if police were in the area. They did not see any policemen, and they went back to the church. Defendant Chavis told the group that was prepared to go burn Mike's Grocery "to come on." All of the defendants, except Ann Shephard, came out of the church with firearms. The

State's witness Allen Hall, one Steve Corbett, and fifteen or more others were with the defendants who assembled outside the church. Hall was armed with a pistol, and Corbett was armed with a shotgun. Defendant Chavis led the group to the backyard of the church where fire bombs were distributed. The group, which included all of the defendants except Ann Shephard, then walked from the back of the church along a path cutting through the block, ending between two houses across the street from Mike's Grocery. Defendant Chavis told the others in the group to "get into position and to stay there until Mike's Grocery started burning and then when the cops pull up into the area to start shooting." Some of the group were stationed back of Mike's Grocery, and some were stationed across the street. Defendant Chavis instructed each to use the password "rabbit" when they moved so they would not shoot each other.

Upon a signal by defendant Chavis, the defendants Patrick, Jacobs, McKoy, and Tindall threw fire bombs into Mike's Grocery Store building. Some were thrown through the upstairs windows, and some were thrown through the downstairs windows. They then positioned themselves in a wooded area behind Mike's Grocery. After the building began to burn, defendant Chavis and the State's witness Allen Hall went back to the church. When firemen and policemen came to the scene of the fire, the group (including all defendants except Chavis, who had returned to the church, and Shephard, who had remained in the church), which was waiting in ambush, opened fire upon the firemen and policemen with pistols, rifles, and shotguns. During this time one of the group, Steve Corbett, was fatally shot by a police officer as Corbett undertook to fire his shotgun, point-blank, at the officer. The shooting by defendants and their group was so intense that the firemen were unable to control the flames, and, as a result, Mike's Grocery Store and two separate residences were totally consumed by fire. By about midnight all of the defendants returned to Gregory Congregational Church.

On Monday morning, 8 February 1971, police officers, supported by a unit of the Army National Guard, went to Gregory Congregational Church to execute a search. In the belfry of the church were found several chairs facing the windows of the belfry, and several spent gun shell casings were on the floor. In the basement of the church were found spent shotgun shell casings, spent revolver shell casings, empty ammunition boxes,

some ammunition, several sticks of dynamite, and some blasting caps. In the backyard of the church, in front of the church, and in front of the parsonage was found spent ammunition. A search of the parsonage disclosed that on the dining room table was a large assortment of surgical and medical supplies and instruments. Ammunition boxes were also found in the dining room. The defendants were not identified as being in or around the church and parsonage when the police and Army National Guard arrived. The church's pastor and his wife had vacated the parsonage.

Nine defendants offered no evidence. The defendant Ann Shephard offered evidence which tended to show the following: She is not a member of Gregory Congregational Church. She was working with the Human Relations Council and first went to Gregory Congregational Church on Thursday afternoon, 4 February 1971, after she learned that a large group of people were meeting there. She went to the church because the group gathered there needed an adult in charge. The young people at the church were upset, and she tried to keep them calm. She spent Thursday night, all day Friday, and Friday night in the church, but she went home on Saturday morning and did not get back to the church until Sunday morning. While she was in the church, some of the defendants were also there. At one time on Friday she saw some guns. There were no speeches about the "Chicago Strategy" while she was there. There were no fire bombs while she was there. At no time did she tell the group: "I think it is right what you are doing. Y'all should show them that you mean business." She never heard anyone talk about using fire bombs on Mike's Grocery.

The jury returned verdicts of guilty as charged as to each defendant. Judgment of confinement was entered in each case. Each of the ten defendants appealed.

Attorney General Carson, by Assistant Attorney General Hensey and Associate Attorneys Archie W. Anders and C. Diederich Heidgerd, for the State.

Mathias P. Hunoval, for the defendant Shephard.

Chambers, Stein, Ferguson & Lanning, by James E. Ferguson, II, for the other nine defendants.

BROCK, Chief Judge.

[1] Defendants first argue their assignment of error number IX. This assignment of error is addressed to the denial of their motion to have the jurors sequestered and to have each prospective juror examined on *voir dire* outside the presence of the selected jurors and prospective jurors.

The record on appeal discloses that counsel filed such a motion in writing with Judge James at the 5 June 1972 Session. No affidavits or exhibits reflecting adverse pretrial publicity are attached to the motion. The record on appeal discloses that the motion was denied by Judge James at the 5 June 1972 Session sometime before a continuance was ordered because of the illness of the Assistant District Attorney. Counsel's effort to assign error to the ruling made by Judge James is ineffective because Judge Martin was free to exercise his discretion upon the question of sequestering the jurors in the trial over which he presided, irrespective of how Judge James ruled upon the question in the proceedings over which he presided.

In the trial proceedings from which this appeal is perfected, the index to the record on appeal, as prepared by defense counsel, does not indicate that a written motion to sequester the jurors was filed with Judge Martin. However, this assignment of error (number IX) also refers to exceptions number 36, 429, 462, 505, and 506.

Exception number 36 is taken to the denial of an oral motion made by defendants as follows:

> "MR. FERGUSON: We also filed a motion to sequester the jurors during voir dire examination because of the publicity that these charges have had throughout the State of North Carolina. In order to minimize influence and prejudice among jurors that if jurors were called to the box one at a time and examined out of the hearing of other jurors, we would be making a step towards assuring a fair trial for both sides. We would renew that motion and ask the Court that no jurors be present in the courtroom except the jurors examined on voir dire.
>
> THE COURT: MOTION DENIED."

Counsel's statement that the charges against these defendants had been the subject of widespread publicity throughout the

State of North Carolina is mere allegation or, at best, a conclusion by counsel. The statement does not suggest the type of publicity, nor does it suggest how any such publicity might be prejudicial to defendants. There were no affidavits or exhibits presented to the court to establish a significant possibility that pretrial publicity had exposed the jurors to potentially prejudicial material. The trial judge in these cases was not a resident of the area in which the trial was held. He resided in High Point, Guilford County, North Carolina, which is some one hundred and seventy-five miles from the scene of the alleged offenses. We do not suggest that a trial judge is required to take judicial notice of pre-trial publicity when he is a resident of the area in which an offense occurs. We merely point out that if defendants were genuinely concerned that pretrial publicity had exposed the jurors to potentially prejudicial material, they should have presented samples of such publicity to the trial judge for his consideration. The motion was addressed to the sound discretion of the trial judge. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721. No abuse of discretion has been shown in its denial.

Exception number 429 is taken to the denial of an oral motion to sequester the jurors made by defendants while the District Attorney was examining a prospective juror as follows:

"Q. Let me ask you this. Have you heard or read anything with regard to any of these defendants in connection with these particular charges?

A. No, not these particular charges, no.

Q. And as a result of anything that you have read or heard have you formed any impression since you don't know anything that has gone on and you only have what you have read or heard to rely on, have you formed any impression about any particular or any of these defendants?

A. I have formed an opinion as to the character of one of the defendants.

Q. You have?

A. Yes, sir. That is as a result of what I have read. It is not the result of any other source of information. Just what I have read.

Q. As a result of that impression you have of that particular defendant, do think it would have any bearing at all in what your verdict might be in this case on the basis of the evidence that will be presented here?

A. If I had a difficult time in reaching a verdict it just might possibly help me to in reaching a verdict, maybe, just might possibly. I am saying that the impression I have is an unfavorable one toward the defendant. I don't know the defendant personally. I have seen his picture.

Q. You have never seen him personally?

A. No.

MR. FERGUSON: OBJECTION. We renew our motion to sequester the jurors on the voir dire examination.

THE COURT: OVERRULED. DENIED."

Clearly this prospective juror had not been influenced by pretrial publicity concerning the charges for which defendants were on trial. Although the juror stated that he had formed an opinion as to the character of one of the defendants, he stated that he had not heard or read anything about these particular charges. He did not state what had influenced him to form an opinion, what the opinion was, or of which defendant he had formed an opinion. Clearly the examination of this prospective juror did not disclose a situation in which there had been pretrial publicity concerning these charges which would expose the jurors to potentially prejudicial material.

Exception number 462 is taken to the denial of an oral motion to sequester the jurors made by defendants while the District Attorney was examining a prospective juror as follows:

"Q. Do you realize that anyone who will serve on the jury in this case will be required by the law to render their verdict only on the basis of the evidence that is presented here under oath here in this courtroom. Do you understand that?

A. Yes.

Q. Only on that evidence and on no other factor. Do you understand that?

A. Yes.

Q. Would you be able to do that?

A. Well, I think maybe I could. I don't know. I have formed opinions and heard opinions formed about it. I don't know whether it would have any effect on me or not.

Q. Opinions about what, sir?

A. About this case.

Q. What about this case?

MR. FERGUSON: OBJECTION.

THE COURT: OVERRULED.

A. The case that is being tried here.

Q. You have an opinion as to the case that is being tried here?

A. Yes.

MR. FERGUSON: OBJECTION; we renew our motion to sequester the remaining panel.

THE COURT: OVERRULED."

This prospective juror had not expressed an opinion adverse to the defendants. Nor did this juror indicate a situation in which there had been pretrial publicity which would expose the jurors to potentially prejudicial material.

Exceptions number 505 and 506 are taken to the action of the court in sustaining the District Attorney's objections to examination of a prospective juror by counsel for defendant Shephard. The questions propounded and the rulings thereon are in no way related to defendants' motion to sequester.

In *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721, the defendant raised the issue of the sequestration of prospective jurors. In *Jarrette* the Supreme Court held:

"The defendant next moved, prior to trial, that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors. The ground was that this would avoid possibility that a prospective juror, in response to a question, might refer, in the presence of other prospective or previously selected jurors, to what he had read or heard through the news media concerning the

defendant's being an escaped prisoner. This motion also was directed to the sound discretion of the trial judge. [Citations omitted.] There was no abuse of discretion in its denial." 284 N.C. at 637.

Defendants have argued at great length that we should adopt the recommendation of the "American Bar Association Standards Relating to Fair Trial and Free Press," which reads as follows:

"Selecting the Jury.

It is recommended that the following standards be adopted in each jurisdiction to govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

"(a) Method of Examination.

Wherever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. . . ." A.B.A. Standards Relating To Fair Trial and Free Press, § 3.4 (1968).

Whether we agree or disagree with the foregoing recommendation has no effect upon defendants' appeal. The point is that in making their oral motion to sequester the jurors, defendants failed to present to Judge Martin evidence, if such evidence existed, from which he could form the belief that there was a significant possibility that individual talesmen would be ineligible to serve because of exposure to potentially prejudicial material. Judge Martin exercised his discretion in denying the motion, and no abuse of discretion has been shown.

We note certain other events regarding the talesmen summoned as prospective jurors. The defendants were indicted in New Hanover County and were originally scheduled for trial in that county. Upon motion by defendants the cases were removed to Pender County for trial. After the proceedings in these cases at the 5 June 1972 Session held in Pender County, the State made a motion that prospective jurors be summoned from a county other than New Hanover or Pender. Defendants resisted the motion, and the court ruled in favor of defendants. If defendants felt that jurors from Pender had been exposed to ma-

terial potentially prejudicial to defendants, they should have joined in the State's motion rather than resisting it. Assignment of error number IX is without merit and is overruled.

Defendants next argue their assignment of error number XI. By this assignment of error they contend that the trial judge permitted the State to propound improper questions to prospective jurors. Under this assignment of error they group two hundred and fifty-one exceptions.

Defendants concede that the regulation of the manner and the extent of the inquiry rests largely in the discretion of the trial judge. *See State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745. However, defendants argue that the trial judge exceeded the bounds of sound judicial discretion. We will examine the three arguments advanced by defendants under this assignment of error.

[2] First, defendants argue that it was error for the trial judge to permit the State to ask the following question: "Have any of you at any time or do you now feel that any of these defendants have been unfairly indicted? Do any of you feel that way?" Defendants did not object to the question, and the trial judge made no ruling thereon. There is no exception, and it is therefore not the subject of an assignment of error by defendants. Their argument of the question on appeal is without merit.

[3] Second, defendants argue that it was error for the trial judge to permit the State to make "constant references to race of persons during the questioning of jurors." In each of the instances to which defendants direct this argument, the District Attorney propounded the same series of questions to one or more prospective jurors. A clear example of the questions to which this argument is directed is as follows:

> "Q. . . . Now, did any of you know Steve Mitchell, also known as Steve Corbett who was a young black man who was killed on February 7 (sic), 1971, across the street from Mike's grocery store?
>
> . . . .
>
> "Q. Did any of you know him or his family? Do any of you know Mrs. Bell Fennell of Wilmington who was a black woman who owned a building two doors down from Mike's on February 6, 1971, when Mike's allegedly burned?

. . . .

"Q. Do any of you know Mr. or Mrs. James Jackson, a black couple who lived in that house owned by Mrs. Fennell?

. . . .

"Q. Do any of you know Mrs. McKeithan, a black woman of Wilmington who lived next door to Mike's grocery store?

. . . .

"Q. Any of you? Are any of you familiar with the area of 6th and Nun and 6th and Ann Street in Wilmington? Have any people or friends living in that area or have lived in that area in the past?"

Clearly the questions do not contain disparaging, derogatory, or inflamatory references to the race of anyone. They appear to be legitimate efforts on the part of the District Attorney to aid the jurors in determining whether they knew the persons named in his inquiry. The race of Steve Corbett, the young man who was killed during the night of 6 February 1971, was clearly and legitimately established by the evidence. The race of Mrs. McKeithan and Mrs. Jackson, who were called as witnesses for the State, became obvious to the jurors. It was obvious to the jurors that nine of the defendants are of the Negro race, and one, Ann Shephard, is Caucasian. We can see absolutely no prejudice to defendants by the questions to which they object. In fact the defendants did not object to the series of questions every time they were propounded. Defendants "blow hot and cold" upon the question of mentioning race in inquiries to jurors. During defendants' examination of jurors, the question of race was constantly considered. In any event, their argument upon the point is feckless.

[4] Third, defendants argue that it was error for the trial judge to permit the District Attorney to ask prospective jurors the following questions:

"Do you feel that there is any individual or group within our society that should not be required to obey the law as you and I are required to do?"

The entire venire of prospective jurors and those jurors who had been selected were in the courtroom at the times the question was asked. When the question was first asked, defendants objected, and their objection was sustained. Thereafter, the

same, or substantially the same, question was asked a second, third, fourth, and fifth time while examining a prospective juror, but defendants did not object. Apparently the defendants felt the asking of the question was not prejudicial to them. The sixth time the question was propounded, defendants objected and the objection was sustained. However, on the seventh and eighth occasions the question was asked, defendants did not object. Thereafter defendants at times did not object to the question, but, when they did object, their objection was overruled.

Without ruling upon the propriety of the challenged question, it seems clear that all of the selected jurors and prospective jurors had clearly heard the question, as it was repeatedly asked without objection from defendants. If the trial judge committed error in overruling the objections thereafter made, it seems clear that the error was not prejudicial because all the jurors had already heard the question asked and answered several times. In our view the defendants waived their right to belatedly object to the question by repeatedly failing to do so, particularly when the trial judge had ruled with them when they objected the first time the question was asked.

In our opinion there was no abuse of discretion on the part of the trial judge in his control of the manner and extent of the examination of the jurors by the District Attorney. Assignment of error number XI is overruled.

Defendants next argue their assignment of error number X. By this assignment of error they contend that the trial judge denied to them a full and effective inquiry into the fitness and impartiality of the prospective jurors. Under this assignment of error they group one hundred and five exceptions. Again we point out that the regulation of the manner and the extent of inquiry of prospective jurors rests largely in the discretion of the trial judge.

Basically this assignment of error argues that the defendants (nine of whom are of the Negro race) were entitled to inquire of prospective jurors if they harbored prejudice against members of the Negro race. Defendants argue that the trial judge would not permit such an inquiry. Defendants cite us to *Aldridge v. U.S.*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054, a case arising from the District of Columbia, decided in 1931. Some sixty years before *Aldridge*, the Supreme Court of North Carolina, in *State v. McAfee*, 64 N.C. 339 (1870), held that

proper inquiries of prospective jurors upon the subject of prejudice against a race should be allowed. The Supreme Court of the United States, in *Aldridge,* relied, *inter alia,* on the holding of the North Carolina Supreme Court in *McAfee.* In *McAfee* counsel for defendant proposed to ask a juror if "he believed he could, as a juror, do equal and impartial justice between the State and a *colored* man," the defendant being a Negro. 64 N.C. at 339. Our Supreme Court held:

> "Any fact or circumstance may be given in evidence, tending to establish bias, partiality or prejudice, on either side. Not only may his declarations to others be shown, but a juror is bound to answer on oath, any question touching his competency, unless it tend to degrade him or render him infamous. It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings towards the colored race was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character: it is at once seen that he would have been grossly unfit to sit in the jury box." 64 N.C. at 340.

Although we think the reason for the rule declared by the North Carolina Supreme Court over one hundred years ago and by the United States Supreme Court forty-four years ago has greatly dissipated and is far less compelling, the exercise of discretion by the trial judge nevertheless is subject to the essential demands of fairness. With these principles in mind we will examine the questions which defendants contend are examples of improper rulings by the trial judge.

The first question which defendants argue the jurors should have been permitted to answer was as follows:

> "Q. Now, ladies and gentlemen of the jury, it so happens in this case that nine of the defendants on trial are black persons. The store that they are charged with burning is owned by Mike Poulos, a white person in Wilmington. Let me ask first if any of you presently have any feelings of racial prejudice against black people. This is

would any of you more readily convict these persons because they are black than you would if they were white? Do any of you feel more strongly about this case because the person whose store was allegedly burned was white? All of you feel that you could put that out of your minds and not let it influence your verdicts one way or the other in the trial of this case? One of the defendants in this action, Mrs. Shephard, is white, young white lady. Does the fact that nine black men are charged along with one white woman give any of you any feelings about any of the defendants in this case which might be adverse to them or against them? Do any of you harbour any feelings of racial prejudice that you are aware of whatsoever? Have any of you ever belonged to any clubs or organizations which has as one of its tenets white supremacy?

SOL. STROUD: OBJECTION.

THE COURT: OBJECTION SUSTAINED."

Obviously the question, or series of questions, was so rambling and confusing that a juror should not have been expected to be able to give an intelligent answer. Clearly the trial judge was correct in sustaining the objection.

[5] The next question which defendants argue the jurors should have been permitted to answer was as follows:

"Q. Going back to Mr. Brown for a moment. I am sorry. What clubs or organizations in the community are you a member of, Mr. Brown?

A. I belong to the Burgaw Lions Club, Pender County Rescue Squad, American Legion, member of the Pender County Board of Education. I belong to several school groups. I belong to the Pender County Industrial Development Corporation. I have been a member of the Buckner Country Club, member of the Baptist Church. I am a Mason. That is all I can think of right off.

"Q. Have you ever belonged to any club or organization that excluded black people among its membership?

SOL. STROUD: OBJECTION.

COURT: SUSTAINED."

The juror had candidly and cooperatively answered as to every club and organization to which he belonged. The follow-up question, to which the objection was sustained, was probably impossible to answer. In any event it began to border upon harassment and bore no direct relation to the juror's prejudice, or lack thereof, against persons of the Negro race. Defendants have failed to show an abuse of discretion in this ruling, and we find none.

The next series of questions which defendants argue the jurors should have been permitted to answer was as follows:

"Q. Have any of you ever been victims of a damage to property? Has anyone ever damaged your property that you know of? Any of your property burned by anyone? It happens in this case, ladies and gentlemen, and again I am just asking for your honest answers, that the nine defendants I represent are young black men. The store that is alleged to have been burned was owned by a white man, Mike Poulos, in Wilmington. Does the race of the parties involved bother anyone? Does that give any of you any problems?

SOL. STROUD: OBJECTION.

COURT: OVERRULED.

"Q. And is anyone bothered by that fact? I am really asking you if anyone feels more sympathetic to one side in the case or the other because of that fact? Do all of you believe in racial equality?

SOL. STROUD: OBJECTION.

COURT: SUSTAINED.

"Q. Is there anyone on the jury who doesn't believe in racial equality?

MR. JOHNSON: OBJECTION.

COURT: SUSTAINED.

"Q. Would any of you more readily convict a person charged with a crime because he is black than you would if he was some other color?

SOL. STROUD: OBJECTION.

COURT: SUSTAINED."

[6, 7] It should be noted that part of the first question of the series, although somewhat rambling and confusing, related directly to possible prejudice against persons of the Negro race. The trial judge overruled the objection. The next two questions of the series injected an inquiry about belief in racial equality. We think this type of inquiry does not address itself to possible prejudice against persons of defendants' race and was properly excluded. The last question of the series was a proper inquiry, and the trial judge was in error in sustaining the objection. However, immediately thereafter the trial judge corrected the error as follows:

> "COURT: Mr. Ferguson, I am going to reverse myself on this question. Do you want me to have the Reporter read it back?
>
> MR. FERGUSON: No, Your Honor.
>
> COURT: Are you withdrawing that question?
>
> MR. FERGUSON: I don't withdraw it.
>
> COURT: Let the record show as to this last question that I have reversed my ruling. I am allowing counsel to ask that question. Counsel says he does not wish to ask that question at this time. The question was concerning conviction of blacks more so than other color."

The trial judge gave counsel the opportunity to propound the question, but for reasons known only to counsel, he declined. The trial judge promptly and unequivocably reversed his erroneous ruling and offered defendants the opportunity to restate the question. They cannot now be heard to complain. Irrespective of counsel's decision not to propound the question again at that time, the same question or questions of similar import were consistently permitted by the trial judge thereafter. We find no merit in defendants' argument upon this point.

[6] The next question which defendants argue the jurors should have been permitted to answer was as follows:

> "Q. Is there anyone on the jury now who does not believe in racial equality?
>
> SOL. STROUD: OBJECTION.
>
> COURT: SUSTAINED."

We have already stated that this type of inquiry is not properly directed to the question of possible prejudice against persons of defendants' race. We hold that the question was properly excluded.

The next question which defendants argue the jurors should have been permitted to answer was as follows:

> "Q. Have any of you belonged to any such organization? Have any of you ever had such feeling?
>
> SOL. STROUD: OBJECT.
>
> COURT: SUSTAINED."

The question standing alone is incomplete and incomprehensible. Objection was properly sustained. However, the question which immediately preceded it was as follows:

> "Q. Going now to all members of the panel you have heard it stated by the State that there will be several police officers testifying in this case. Now, I'd like for you to indicate by raising your hand those persons who would more readily accept what a police officer had to say about a matter than someone who was not a police officer simply because it is a police officer saying it? How many people have a feeling like that about police officers? Just indicate that to me by raising your hand. Now ladies and gentlemen, as you have seen, this case involves nine young men who happen to be black and one young lady who happens to be white. The store owner whose store was allegedly burned is white. Now, these facts that I have just related to you would they cause you to identify more with the State in the trial of this case than with the defendants or to feel more favorable toward the State than to the defendant? In other words, will the race of the parties involved affect your verdict in this case? Do you feel that it will? Let me just ask you this. Have any of you ever belonged to any kind of organization which had as one of its tenets the supremacy of one race or the other, the supremacy of whites over black?
>
> SOL. STROUD: OBJECTION.
>
> COURT: OVERRULED.

"Q. Have any of you belonged to any such organization? Have any of you ever had such feeling?

SOL. STROUD: OBJECT.

COURT: SUSTAINED."

[8] Although the question was rambling and for that reason was objectionable, the trial judge nevertheless permitted it. Objection to the defendants' immediately making the same inquiry again was properly sustained.

[9] The final question, or series of questions, touching upon possible prejudice against members of the Negro race, which defendants argue should have been permitted, appears as follows:

"Q. And you say the only organization that you have been affiliated with is the church?

A. I didn't say that. I was never asked that question. I am affiliated with the Masonic Lodge and the Woodmen of the World, Fraternal Life Insurance.

"Q. What are the basic tenets of that organization?

MR. FERGUSON: OBJECTION.

COURT: SUSTAINED.

Q. This is an ecological organization?

SOL. STROUD: OBJECTION.

A. Drag that by me again. I don't even know what the word means.

SOL. STROUD: We withdraw our objection.

"Q. Mr. Pate, would you please explain to us one or two of the basic tenets of this organization?

A. It is a life insurance company that has a social aspect on the local level. The office is Omaha, Nebraska. The headquarters; and mainly the purpose is to sell life insurance with a local camp having social activities. I don't know of anything else to compare it to because I don't belong to anything else. I am sure there are other things similar to this.

"Q. You don't view it as a politically conservative front or lobby for any cause?

A. No. The basic purpose of it is to sell life insurance, and I suppose anybody will use any gimmick they can to sell life insurance. There is nobody in my family by blood or marriage who is related to National Guardsmen or firemen.

"Q. You can't think of anything that would disqualify you for service?

A. I tried to think of everything I could. If I could think of anything else, I would."

Although an objection was at first sustained, the objection was withdrawn, and the answers by the juror were fully developed. It is not clear to us why counsel for defendants objected to one of the questions asked by co-counsel. The question was nevertheless pursued thereafter by defendants and answered by the juror. Defendants have absolutely no grounds to complain.

[10] Defendants next argue that the trial judge unduly restricted their inquiries to jurors by not permitting them to ask whether the jurors would require evidence before they would return a verdict of not guilty. Defendants direct our attention to twenty-one instances of the court's ruling upon the point.

At the opening of the jury selection proceedings, the trial judge instructed the prospective jurors upon their duties and upon the principle that the State had the burden to prove the guilt of defendants beyond a reasonable doubt, that defendants were presumed to be innocent, and that defendants had no burden of proof. The trial judge repeated his instruction upon these principles from time to time during the two weeks of jury selection.

In some instances a prospective juror answered that he had heard opinions expressed about the charges against defendants. The following is an example of the inquiry by defendants to which the State's objections were sustained:

"A. No. I would not be embarrassed to face the persons who expressed opinions to me if the State fails to satisfy me beyond a reasonable doubt that the defendants be guilty and I voted for not guilty. I work at Wallace Sewing Company. I do not belong to any clubs or organizations.

"Q. Having heard nothing by way of evidence in this case, if you had to decide the case without hearing any evidence now, would you have any hesitancy about saying the defendants are not guilty?

MR. JOHNSON: OBJECTION.

COURT: SUSTAINED.

I have instructed several times as to the presumption of innocence that surrounds everyone who is charged with an offense."

The question was hypothetical, confusing, and bordering upon an attempt to cross-examine the juror about the answer he had just given. The trial judge had the duty of restraining counsel from unnecessary, argumentative, and confusing examination of jurors.

In some instances a prospective juror answered that he had formed an opinion about the case. The following is an example of the inquiry by defendants to which the State's objection was sustained:

"A. I have feelings about the case. I understand what the charges are. I would consider the feelings that I have to be adverse to the defendants.

"Q. Do you feel like it would take some evidence to overcome the feelings?

SOL. JOHNSON: OBJECTION.

COURT: SUSTAINED."

The juror had answered clearly that she had feelings adverse to defendants. The question to which the objection was sustained was somewhat meaningless and most certainly confusing.

We have carefully examined each of the twenty-one instances of rulings which defendants contend denied them the opportunity to inquire whether a prospective juror would require evidence before returning a verdict of not guilty. The two instances set out above are adequate illustrations of the twenty-one instances.

In our opinion the defendants were given abundant and adequate opportunity to inquire whether the jurors had formed opinions about the case, whether the jurors harbored any preju-

dice against defendants, and otherwise to inquire into their fitness to serve as jurors. This assignment of error number X is without merit and is overruled.

Defendants next argue their assignment of error number XII. By this assignment of error they contend that the trial judge committed error in his refusal of their challenge for cause to certain jurors.

[11] By statute, G.S. 9-14, and in accord with general practice in state and federal courts, the presiding judge decides all questions as to the competency of jurors. The competency of jurors to serve is left largely to the sound legal discretion of the trial judge, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698; *State v. Cameron,* 17 N.C. App. 229, 193 S.E. 2d 485; 47 Am. Jur. 2d *Jury* § 221. A ruling in respect to the impartiality of a juror presents no question of law for review. *State v. Johnson, supra.* "The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one." *State v. English,* 164 N.C. 497, 507, 80 S.E. 72.

[12] The rule in this State is that in order for a defendant to preserve his exception to the court's denial of a challenge for cause, he must (1) excuse the challenged juror with a peremptory challenge, (2) exhaust his peremptory challenges before the panel is completed, and (3) thereafter seek, and be denied, peremptory challenge to an additional juror. *See State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833. Defendants in this case have complied fully with the above rule and are entitled to have their exceptions to the court's denial of their challenges for cause examined.

[13] In this assignment of error defendants contend that the trial judge, on thirty occasions (they have grouped thirty exceptions), violated the ninth rule laid down in *State v. Levy,* 187 N.C. 581, 122 S.E. 386, as grounds for challenging a juror for cause:

> "9. If he be prejudiced or biased to such an extent that he cannot render a fair and impartial verdict in the case he would be disqualified on objection to sit as a juror." 187 N.C. at 586.

An examination of defendants' thirty exceptions to rulings on their challenges for cause discloses that on at least three of the occasions complained of, the trial judge actually allowed the challenge for cause. On one occasion, while examining one prospective juror, defendants undertook to challenge another juror for cause. No reason was developed for such a challenge. On at least two other of the occasions complained of, the defendants merely renewed motions for challenges for cause which had already been denied. It appears that defendants have unduly burdened and confused the record by inserting and arguing assignments of error to rulings of the trial judge which were favorable to defendants.

We have carefully reviewed the remaining rulings of which defendants complain. In each instance either the juror portrayed no prejudice or bias, or, upon examination by the trial judge, stated unequivocally that they would be guided by the evidence, would require the State to produce evidence to convince them beyond a reasonable doubt of the guilt of defendants, and could be fair and impartial to both the State and defendants. The trial judge's ruling with respect to the impartiality of the jurors, who defendants sought to challenge for cause, presents no reviewable question of law. *State v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523. The trial judge hears the questions put to the juror and the answers given, observes the juror's demeanor while being interrogated, and discerns through the use of his eyes, ears, and intelligence wherein truth and credit should be given. A reviewing court does not have the benefit of this personal observation which is so important in judging the credibility of the juror. *See Leick v. People,* 136 Colo. 535, 322 P. 2d 674, *cert. denied,* 357 U.S. 922, 78 S.Ct. 1363, 2 L.Ed. 2d 1366. The trial judge's decision as to the impartiality of a juror will be reversed only where manifest abuse of discretion is shown. The trial judge in this case was considerate and patient with defendants and allowed them wide latitude in examining the propective jurors. No abuse of discretion has been shown in the rulings upon defendants' challenges for cause. This assignment of error number XII is without merit and is overruled.

[14] Defendants next argue their assignment of error number XX. By this assignment of error they contend that the trial judge denied their right of confrontation as guaranteed by the Sixth Amendment to the Constitution of the United States and Article 1, § 23 of the North Carolina Constitution; that the trial

judge denied their right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States; and that the trial judge denied their rights to due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. They assert that the denial of these constitutionally protected rights of confrontation, due process, and equal protection were violated by the denial of their request to inspect what they contend was a written pretrial out-of-court statement by the State's witness Allen Hall.

On 30 May 1971 the State's witness Allen Hall signed a statement given to investigating officers concerning the events on 5 and 6 February 1971, which events gave rise to the charges against these defendants. On 18 February 1972 the State's witness Hall, who was then serving a prison sentence upon his plea of guilty to the same charges upon which these defendants were tried, gave a statement to investigating officers. This latter statement was typed and subsequently signed by the witness Hall on 2 March 1972. This latter statement was typed single-spaced and covers eight pages. Prior to trial the defendants were furnished with copies of these two written statements of the witness Hall. Allen Hall testified for the State at the preliminary hearing of the charges against these defendants, and a transcript of his testimony at that hearing was also furnished to defendants.

Upon trial, during cross-examination of the State's witness Allen Hall, he testified that during the month of March 1972, a week or two after he had signed the second written statement, he requested a conference with Solicitor Stroud to discuss the written statement. He testified that he and the Solicitor discussed the typewritten statement and discussed the entire case. He testified that he observed the Solicitor making notes on the margin of the Solicitor's copy of the typewritten statement during their conversation; that he did not read the notations made by the Solicitor; and that he did not sign the Solicitor's copy with the notations on it. The testimony of Allen Hall which is most pertinent to this question was as follows:

> "Q. Are you saying at this time that you never did make all those statements and all those additions and corrections to Mr. Stroud in March of 1972?
>
> A. You told me—you said a statement—

Q. All right.

A. You said statement—which I did not make a statement. I just told them what I had left out, what I had told them. He put that in there, but didn't make no statement.

"Q. Did you ever see that statement that Mr. Stroud prepared?

A. He haven't prepared no statement to my knowledge. He just filled in. Whenever I talked to him he just wrote it on his statement where I had in February 18, but I haven't seen none of the statement. I saw the statement whenever we was together, whenever he was filling it in.

"Q. So you have seen the statement that Mr. Stroud—that you say Mr. Stroud has after he made all the additions and corrections to it?

A. It is the same statement. It is not narry new statement. It is the same statement, but it is the one he put the additions onto. I remember that. I remember seeing the statement where he had of mine where he put the addition on where I had gave him February 18, 1972. That statement is my final statement as to all events that took place. That is my statement just like that first statement is my statement.

"Q. And that second statement is also your statement?

A. Yes, sir.

SOL. STROUD: OBJECTION, Your Honor.

"Q. And you have adopted all the handwritten notations Mr. Stroud put in that statement you gave him on February 18, 1972?

SOL. STROUD: OBJECTION.

COURT: SUSTAINED.

"Q. Is there anything in that second statement as amended that is not a product of your mind?

SOL. JOHNSON: OBJECTION.

COURT: SUSTAINED.

"Q. Are there any notations on that second statement put on there by Mr. Stroud that you did not tell him to put on there?

A. No, sir; there isn't anything on the statement that I didn't say put on there what Mr. Stroud put on the statement was my addition to the statement was mine, and he did not add nothing to the statement.

"Q. And every single thing that is on that statement that you saw as amended and as supplemented is your statement?

A. Yes, sir.

SOL. STROUD: OBJECT.

MR. HUNOVAL: Your Honor, I move again for the State of North Carolina to produce Allen Hall's statement.

SOL. STROUD: Your Honor, may we approach the bench?

MR. FERGUSON: I join that motion, Your Honor. (Conference at the bench.)

COURT: Motion denied.

"Q. Mr. Hall, on that statement that was amended by Mr. Stroud, everything on that statement is something that you told him to put down. Isn't that correct?

SOL. JOHNSON: OBJECTION; been over it.

COURT: OVERRULED. Go ahead.

A. Whenever Mr. Stroud come—came rather, he brought his statement with him. I told him what was left out of the statement, and I told him about some of the things that was misplaced in wrong parts on the statement; and so he wrote them down on his statement on the sides of his statement. What he wrote down is what I told him to write down."

The statement of the Solicitor to the court pertinent to this question and the colloquy of counsel were as follows:

"MR. FERGUSON: If your Honor please, at this time the defendants move that we be given a copy of the amended statement made by Allen Hall by that we are referring to the statement or the additions and/or corrections made

to the statement in Lumberton after Mr. Stroud went to Lumberton at the witness's request and conferred with him about the statement that the witness had signed.

THE COURT: All right, Mr. Solicitor.

SOLICITOR STROUD: I'd like to put something in the record at this time.

MR. HUNOVAL: Your Honor, I'd like to join in that motion. I think clearly Mr. Hall incorporated by reference the written statement, and I don't believe it is the work product of the Solicitor's office. He said it was his statement. The mere fact he never signed it should not prevent us from procuring it.

MR. FERGUSON: If I recall we said he said he had already signed the statement and he incorporated these additions.

SOLICITOR STROUD: The word incorporated, particularly incorporated by reference is a word Mr. Hunoval uses a great deal. I don't recall the witness saying he incorporated. As I recall what the witness testified to he said everything he's testified to here in court he had told the detectives, Bill Walden and myself in the interview at Cherry Hospital. Then there was a typed statement made, presented to him. At that time he did not make any additions or corrections to it. He signed it. Less than a week later I was notified to come to Lumberton to talk with him about his statement. I went to Lumberton. I took a copy of the typed statement that he had signed and during the time that I talked with him concerning his activities on February 5 and 6, 1971, at Lumberton he stated things that he had previously stated at Cherry Hospital which were not in the typewritten statement. And so at that time on my copy of the statement I made certain additions in ink in my own handwriting. Mr. Hall at that time did not initial or sign those additions that had been made in the typewritten statement. This was solely for my benefit, for my use as a Solicitor prosecuting the case. I contend that I, having given the signed typewritten statement to the defense attorney which they have in their presence and which they have cross-examined Mr. Hall about, is what they requested. They requested his signed statement and that is what I gave them. That any notes that

were made after he signed that statement were work products of my office in my position and that I am not obligated under law to let them have my notes.

"THE COURT: Anything from you, Mr. Johnson?

SOLICITOR JOHNSON: No, sir.

THE COURT: Are you asking for the notes of Mr. Stroud on his copy of the statement?

MR. FERGUSON: Well, no, sir; we are not asking for Mr. Stroud's notes as any notes that are his work product. What we are asking for—

THE COURT: He says that there is not any other statement that you know of? (To Solicitor Stroud.)

SOLICITOR STROUD: Right.

"MR. FERGUSON: We are asking for the statement which includes the handwriting Mr. Stroud added to which the witness says that was a part of the statement.

THE COURT: The Solicitor said that was a part of his work product of his office.

MR. FERGUSON: Your Honor, here is my point. If what Mr. Stroud is saying is anything that the witness himself didn't write on there is work product, then the whole statement would be work product. That is not his writing. That is not his typing. He made a statement he said Mr. Stroud was the main note taker and at some point in March Mr. Walden took this statement up to him to sign. Then following that he summoned Mr. Stroud up to Lumberton because he wanted to make additions to the statement that he made. He said he was concerned because he hadn't included some things on there. I don't think what Mr. Stroud wrote on in handwriting is anymore work product than what the statement said."

The trial judge examined, *in camera,* the Solicitor's copy of the 18 February 1972 typewritten statement of the witness Allen Hall with the Solicitor's notes thereon. He denied defendants' motion with the following order:

"COURT: On the motion of the defendants for the production of a statement, amended statement, by Allen

Hall the Court has examined a copy of what purports to be a statement of Allen Hall, which copy is unsigned and which copy contains numerous handwritten notes, all of which the Court understands is in the handwriting of the Solicitor; that these handwritten notes appear on the margin of what purports to be a typewritten copy of a statement by Allen Hall. The handwritten notes are not complete in many instances. There are some notations which are stricken and crossed out. Some of the notes the Court is unable to read because the same have either been stricken or otherwise obliterated; that the notes do not make a complete statement in any respect.

"There is no signature or initial by the witness Hall; that these papers consisting of eight pages was examined by the Court while the witness was still available for cross-examination and has been examined by the Court again this date, and the Court is of the opinion that such notations are the Solicitor's own work, his own handwriting, that they do not amount to a statement by the defendant—I mean, by the witness Hall, and that they are the work product of the Solicitor and that the defendants are not entitled to these notes."

Thereafter the trial judge ordered the paper writing to be impounded and sealed in the files of the clerk of court for use on appellate review. We ordered the paper writing to be certified to this Court for *in camera* examination. This Court has examined the paper writing in detail.

The common law does not recognize a right of discovery in criminal cases. *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, *cert. denied,* 377 U.S. 978, 84 S.Ct. 1884, 12 L.Ed. 2d 747 (1964). In 1967 G.S. 15-155.4 was enacted. This statute provides that a pre-trial order may require the solicitor, upon demand, to produce for inspection and copy specifically identified exhibits to be used in the trial. Obviously defendants do not assert rights under this statute. Instead they seem to argue, in part, that the rule of *Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed. 2d 1103 (1957), should apply. It seems clear that the decision in *Jencks* does not involve a constitutional question, but established a rule of procedure to be applied in federal criminal prosecutions. Annot., 7 A.L.R. 3rd 181, § 5[b] (1966). This view is supported by the fact that the rule was later substantially

adopted by statute (18 U.S.C. § 3500). Since the adoption of that statute, the production of a government witness' statement is governed by the statute. Annot., 7 A.L.R. 3rd 181, § 17 (1966).

Defendants rely also upon the holding in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963). In *Brady* the Supreme Court used the following language:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

However, the Supreme Court has also declared: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed. 2d 706, *reh. denied,* 409 U.S. 897, 93 S.Ct. 87, 34 L.Ed. 2d 155 (1972).

The Supreme Court of North Carolina has recently applied the holding in *Brady v. Maryland, supra,* as follows: "The standards enunciated in *Brady* by which the solicitor's conduct in this case is to be measured require us to determine whether there was (a) suppression by the prosecution after a request by the defense (b) of material evidence (c) favorable to the defense." *State v. Gaines,* 283 N.C. 33, 45, 194 S.E. 2d 839 (1973). The Court noted that obviously the suppression would not be error unless the suppressed evidence was favorable to the defense.

[14] Our examination of the handwritten notes appearing along the margins of the copy of the typewritten statement of the witness Hall does not disclose material evidence favorable to the defense of these defendants. We agree with the observation of the trial judge that, on the whole, the notes do not make complete statements or sentences or thoughts. Most of them are obviously meaningless to anyone except as a signal of a thought for the maker of the notation, in this instance the Solicitor. Despite the foregoing testimony finally elicited from Allen Hall by the prolonged and probing cross-examination conducted by astute counsel for defendants, it is clear from an examination of the marginal notes that, even under the federal rule of procedure, the witness Hall could not have known what the Solicitor was writing and in no way could he have acknowledged and

adopted the marginal notes as his statement or as a summary thereof.

The trial judge exercised his sound discretion in refusing defendants' request for the copy of the typewritten statement with the Solicitor's marginal notations and in keeping the cross-examination within reasonable bounds. We find no abuse of discretion in this restriction. This assignment of error is overruled.

[15] Defendants next argue their assignment of error number XXVI. By this assignment of error they contend that the trial judge committed error by expressing an opinion and by refusing to allow defendants' motion for a mistrial. This argument is directed to the reaction of the witness Allen Hall to defense counsel's cross-examination concerning the exact times of certain events and the exact distances to certain places.

The record on appeal discloses the following cross-examination by defense counsel leading up to the conduct of the witness Allen Hall of which defendants now complain:

"A. Marva Jacobs. That is M-A-R-V-A, a girl. I went around to talk to her. I talked to Marva Jacobs just a few minutes because she was getting ready to go somewhere. When I left at the time I went around the corner, I was not looking for Marva Jacobs, I was, you know, I was going to my cousin's house.

Q. What cousin?

A. My cousin.

SOLICITOR STROUD: OBJECTION, your Honor. He doesn't have to shout.

MR. FERGUSON: Your Honor, I asked him what cousin and he won't tell me what cousin.

THE COURT: Gentlemen, keep your voices down. Go ahead and answer the question.

A. Gwen's house. I did not go to Gwen's house on Friday night. Friday afternoon. I said I had started around there. You asked me where I was headed. I said Gwen's house. I met Marva, a friend. I talked to her a few minutes, and I came back to Rev. Templeton's house. I did not continue to go around to Gwen Carrol's house.

Q. What stopped you from going to her house?

SOLICITOR STROUD: OBJECTION.

THE COURT: OBJECTION SUSTAINED.

Q. Why didn't you go to her house?

SOLICITOR STROUD: OBJECTION.

THE COURT: OVERRULED.

A. Because after I had talked to Marva then I just said to myself, 'Well, I ain't got time to go to Gwen's house. I'll catch her later.' I hadn't talked to Marva but a couple of minutes.

Q. All of a sudden after a couple of minutes you found you didn't have time to go to Gwen's house?

A. Mr. Ferguson, it doesn't take an hour or two for a mind to change. A person can realize he might not have that much time as far as what is going on at the church. I said I had to make it back to the church because I told Ben Chavis I'd be back in a few minutes, not an hour and 30 minutes.

Q. What were you going to go to Gwen's house for to start with?

SOLICITOR STROUD: OBJECTION.

THE COURT: OVERRULED.

A. Just going to talk; just to conversate. I didn't go because I thought it was more important to come back to the church. I left there and came back to Rev. Templeton's house. I am not sure what time it was when I got back to Rev. Templeton's house. Whenever I got to Rev. Templeton's house then me and Ben Chavis talked. That is whenever Ben Chavis carried me upstairs where he was staying at Rev. Templeton's house. That is where he told me he was going to show the crackers we mean business. He was going to make the crackers beg. He was going to get us what we want no matter what it takes. He was playing the Chicago Strategy. He asked me had I ever heard of the Chicago Strategy. I told him no. He asked me had I ever been to Chicago.

Q. You didn't even intend to answer my question.

SOLICITOR STROUD: OBJECT. He is answering.

MR. FERGUSON: Your Honor, he is not answering my questions.

A. You asked me whenever I came back talking to Marva where did I go then, and I told you to Rev. Templeton's house, and then you said where, then I said upstairs with Ben Chavis.

Q. That was the answer to my question. How long did you stay up there?

A. Maybe 30 minutes. Ben Chavis and Jim Grant were up there with me. Just the three of us stayed upstairs 30 minutes. I can't say for sure who was downstairs while we were upstairs.

Q. When you left upstairs and went back downstairs what time was it?

A. I don't know for sure. I don't have any idea because I didn't have a watch. When I got back downstairs I stayed in the house not too long.

Q. What do you call not too long?

A. That is whenever Chavis started talking about we needed some gasoline to make firebombs.

Q. How long did you talk about that?

A. Well, you know, he just said we needed gasoline to make firebombs in order to burn some of the big business in Wilmington.

Q. Who was present at that time?

A. Molly Hicks, Tom Houston, George Kirby. Then John Robinson came into the door and Patricia Rhodes, Connie Tyndall, Benjamin Wonce, Annie McLean, Jim Grant and some others I don't know. I don't know who the others were who came in right off-hand.

Q. How long did you talk to Allen Hall (sic)?

A. I don't know, Mr. Ferguson.

Q. Was it an hour?

A. I don't know, Mr. Ferguson.

Q. Was it a half hour?

SOLICITOR STROUD: OBJECTION.

THE COURT: SUSTAINED.

He said he didn't know.

A. No one left before I left.

Q. You were the first one to leave?

A. Myself, Chavis, John Robinson, Jim Grant and another dude left to get the gasoline and the bullets at Sears.

Q. All of you left to go get the gasoline and bullets at Sears?

A. Not all of us. Just us five and Marvin Patrick. That was me, Chavis, Grant, Robinson and another dude I don't know. That is five right there. Nobody else went with us. That is when I left and went out on Oleander Drive.

Q. What time was it when you arrived out at Fields on Oleander Drive? Is that where you say you went?

A. Yes, sir.

Q. What time was it when you arrived?

A. I can't say because I don't know what time it was. It was dust dark.

Q. How long did you stay out there?

A. I can't say right offhand, Mr. Ferguson, because I didn't time the time we got to Fields. I didn't time the time we had a conversation with the cashier. I didn't time the time whenever we left. I can't say what time it was.

Q. You don't have any idea in the world what time it was?

SOLICITOR JOHNSON: OBJECTION.

THE COURT: SUSTAINED.

When we left there then we went to the filling station to get some gasoline. We were at the filling station getting

gasoline just long enough to get the gasoline. I went in the store first. I went to the soda machine to get some soda. Then I went inside the filling station to get some candy. Then Chavis paid the service station and then the dude came back and brought the change and then we left.

Q. How far is Oleander Drive from 6th and Nun?

A. I haven't the least idea because I don't know. I had never measured it that far. I don't have any idea how far it is because I can't say how far it is, Mr. Ferguson. I have never measured how far is it from 6th and Nun to Oleander Drive. Like I don't know because I can't say how far it is.

Q. Is it 2 or 3 miles out, Allen Hall?

SOLICITOR STROUD: OBJECTION.

THE COURT: SUSTAINED.

He said he did not know how far is it.

Q. You don't know how long it took you or how long you stayed or how long it took you to get back?

A. I didn't have a watch. Even if I did have a watch at that time I probably wouldn't have been timing the time we left the church, the time we got to Oleander Drive, the time we got to Fields and then the time we stopped at the service station. Chavis had a watch to my knowledge. I don't know whether he timed the time we left or not. He could have, but I don't know. I don't know what time it was when I arrived back at Rev. Templeton's house right offhand. I went back to Rev. Templeton's when I left Oleander Drive when I left the service station.

Q. Did you go anywhere other than Fields and the service station where you got the gasoline?

A. Firemomb Mike's Grocery and to shoot at the whites on 5th and Nun. That is where I went when I got back. I don't know what time it was when I went to firebomb Mike's Grocery. I don't know what time it was when I got back. I don't know what time it was when I went to shoot the man on 5th and Nun. I don't know what time it was when I got back.

Q. What time did you go to bomb the man?

A. I told you I do not know. I don't know what time it was whenever we left. I don't know what time it was when we got back. I didn't ask anybody what time it was. Time was not on my mind. Time was not concerned. Maybe Ben Chavis would worry about time because he had a deadline. I don't know.

Q. You don't have any idea what time it was whenever you did any of these things?

SOLICITOR STROUD: OBJECT.

A. I don't know what time it was. I have told you and told you.

Q. I want you to tell me what time it was—

(The witness came off the witness stand and attempted to reach the defense table. Chairs and tables were pushed around and upset. The witness was subdued. All the jurors had left the courtroom with the exception of juror 8. The jurors returned to the jury box and were asked to retire to the jury room by the Court.)

THE COURT: We'll take about a 10 minute recess."

During the recess, and in the absence of the jury, the trial judge issued the following admonition:

"THE COURT: Gentlemen, I have asked you to keep your voice lowered and when it is apparent that this witness is becoming excited your voice got louder and you stood up and kept asking him questions until it was very apparent that he was becoming excited. I am asking you to keep your voice lowered and not excite the witness, and continue with this trial."

Near the beginning of the above quoted cross-examination, it is clear that defense counsel was using an unusually loud tone in his cross-examination. The Solicitor objected on the ground that "He doesn't have to shout." Before the occurrence of the above quoted cross-examination, it was evident that the tone in which defense counsel had examined the witness was unusually loud. The record discloses the following:

"Q. But you didn't feel it necessary to make any additions or corrections before you went on the witness stand. Is that correct?

A. (To Court) Do you mind telling Mr. Ferguson he don't have to be hollering at me like a dog. I can understand it.

THE COURT: Just a minute. Members of the jury, will you retire to your room, please?

(The jury retired to the jury room.)

THE COURT: I think if we can lower this microphone. You are talking too close to it, it may sound pretty loud, and the speaker is right above his head.

MR. FERGUSON: Your Honor, I move this witness be held in contempt for the language he used on the stand with reference to me.

THE COURT: You will not make any statements of that kind again. And we'll all take a few minutes recess now."

It is evident from the trial judge's several admonitions that defense counsel continued with unusually loud questioning right up to the time the witness left the witness stand and attempted to reach the defense table. Thereafter, in spite of the confusion created by this tone in cross-examination, defense counsel persisted in using the loud tone to the extent that it was necessary for the trial judge to admonish defense counsel on at least two later occasions as follows:

"Q. Didn't you tell Mr. Stroud what time it was?

THE COURT: Gentlemen, I'll ask you to keep your voices down now.

Q. Didn't you tell Mr. Stroud what time it was?

THE COURT: Just a minute. All right. Proceed."

* * *

"Q. Is there anything in the signed statement about going to the Community Center and breaking in?

SOL. STROUD: Your Honor, OBJECTION to his tone of voice.

MR. FERGUSON: Your Honor, how is he going to object to the tone of my voice?

THE COURT: Obviously it's loud. Just keep your voice down. Go ahead, answer the question."

Defendants made two motions, one for a mental examination of the witness Allen Hall, and another for a mistrial because of the reaction of the witness Allen Hall to defense counsel's cross-examination. On Tuesday, 3 October 1972, the trial judge ruled upon the motions, in the absence of the jury, as follows:

"COURT: On the motion of Mr. Ferguson as of late yesterday afternoon when he moved that the witness Hall be required to have a mental examination and that his evidence be stricken from the record and for mistrial, the Court finds as a fact that:

The witness Hall at the time of the incident in which he came off the witness stand was under cross examination by Mr. Ferguson and that he had been on the stand approximately five days; under cross examination since Thursday about 2 o'clock.

That the Court further finds that the witness Hall had reacted similarly in the preliminary hearing and that during the cross examination he had requested the Court to instruct Mr. Ferguson not to examine him in the manner in which he was doing and that the Court had requested Mr. Ferguson to lower his voice on several occasions and that also the Court requested Mr. Ferguson to allow the witness opportunity to answer questions before another one was interposed; that at the time of the incident while the witness was answering a question another question was interposed by Mr. Ferguson and that Mr. Ferguson stood up about the time that the witness was visibly disturbed, at which time, as the Court observed, the witness came off the stand and had to be restrained by officers.

The Court finds and concludes that the demeanor of the witness and the incident was precipitated in some degree by his long cross examination, the rapidity of the questions, the tone of voice of the examiner and that the motion for a mental examination of the witness is not required and the motion is denied.

MR. FERGUSON: May we let the record show that we except to each and every finding of fact by the Court and to the conclusions of law.

COURT: And also that the motion to strike the evidence of the witness is denied.

MR. FERGUSON: I would like if I may, to state that we would like to call to the Court's attention that shortly after the cross examination of the witness had begun and during recess of the Court we called to the Court's attention the fact that the witness was mouthing obscenities to me from the witness stand.

COURT: And also I believe that I made the remark, I asked you was it audible and you said there was no audible sound.

MR. FERGUSON: That is correct.

COURT: The motion for mistrial is denied."

Prior to the occasion which precipitated the above two motions, the trial judge requested and admonished defense counsel to lower his voice in his cross-examination of the witness Allen Hall. Counsel ignored the request and admonition. As pointed out above, after the occasion which precipitated the two motions, defense counsel persisted in the same type of unusually loud cross-examination, and it was necessary for the trial judge to further admonish defense counsel.

We have given careful consideration to defendants' argument that the denial of their motions constituted error entitling them to a new trial. In our opinion the trial judge exercised his sound judicial discretion in denying the motions. No legal error or abuse of discretion has been shown. This assignment of error is overruled.

[16] Defendants next argue their assignment of error number XVI. The focal point of this argument is that the trial judge committed prejudicial error in refusing to allow defense counsel to bring out, during trial, the place where the State's witnesses Allen Hall and Jerome Mitchell were being housed during the trial. The trial judge permitted the witnesses to make their answers to the court reporter only, and directed that the information not be divulged until after the trial. It is obvious that the trial judge was trying to protect the State's legitimate interest in keeping the housing facilities of the State's witnesses inaccessible to defendants and their supporters. The answer given the court reporter by the witness Allen Hall amplifies this thought.

"Q. Are you presently being kept in a Prison Unit?

SOL. STROUD: OBJECTION.

THE COURT: SUSTAINED.

MR. FERGUSON: I'd like to have his answer in the record.

THE COURT: Step down and whisper to the Court Reporter.

A. (Whispered) I have been kept with deputies and policemens [sic] and so Mr. Ferguson won't try to contact and make any threats whatsoever."

The only questioning of the State's witness Allen Hall concerning special treatment was as follows:

"Q. What special treatment have you received since you have agreed to be a witness in this case?

A. I haven't agreed to be a witness for the State, as you put it. All I just told like I haven't agreed on nothing. All I just said was that I will tell the truth what happened. I haven't agreed to anything.

"Q. My question is, 'What special treatment have you received?'

A. None whatsoever. I don't consider being taken to my mother's house special treatment.

Q. Would you consider staying somewhere other than a prison facility such as a hotel to be special treatment?

SOL. JOHNSON: OBJECTION.

THE COURT: SUSTAINED.

"Q. I don't care to ask this witness anything else."

The only questioning of the State's witness Jerome Mitchell concerning special treatment was as follows:

"Q. You and Allen Hall are staying together during this trial, are you now?

SOL. STROUD: OBJECTION.

THE COURT: SUSTAINED.

Q. I'll ask you if you and Allen Hall aren't sharing a room at the Blockade Runner on Wrightsville Beach?

SOL. STROUD: OBJECTION.

THE COURT: SUSTAINED.

A. (Whispered) No.

Q. Are you presently staying in any prison facility?

SOL. STROUD: OBJECTION.

THE COURT: SUSTAINED.

MR. FERGUSON: Like to have it put in the record.

THE COURT: Step down.

A. (Whispered) No.

Q. I'd like for you to tell the Court Reporter where you are staying anywhere other than the Blockade Runner Motel.

SOL. STROUD: OBJECTION.

THE COURT: SUSTAINED.

MR. FERGUSON: I'd like to have it in the record.

SOL. STROUD: May it be directed that she not divulge this record?

THE COURT: Put it in the record and I will rule on it.

SOL. STROUD: We OBJECT to this.

A. (Whispered) Carolina Beach.

THE COURT: The motion of the State is allowed that you not divulge this information as to where he is staying now to anyone until after this trial is over.

THE COURT: Proceed.

MR. FERGUSON: I have no further questions.

MR. HUNOVAL: Your Honor, I don't have any questions of this witness."

It is obvious from the foregoing cross-examination that the only information defense counsel was denied was the location of housing facilities provided for the two State's witnesses during

trial. The excluded answers clearly did not disclose bias, interest, or a promise or hope of reward on the part of the witness. In fact, counsel's questions were not appropriately directed towards a disclosure of bias, interest, or a promise or hope of reward. The areas of inquiry permitted by *Alford v. U. S.*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213, are not presented by this assignment of error. We hold that the trial judge did not commit error prejudicial to defendants in excluding the witnesses' answers. This assigment of error is overruled.

Defendants next argue their assignment of error number XV. The grouping of exceptions under this assignment of error does extraordinary violence to the rules of appellate practice in North Carolina. Under this assignment of error defendants group 2,685 exceptions covering a wide variety of questions of law and legal procedure. The fact that defendants assert that each of the 2,685 rulings of the trial judge denied their Sixth Amendment and due process and equal protection rights under the United States Constitution does not make them a single question of law or legal procedure.

[17, 18] Many decisions of the North Carolina Supreme Court and of this Court have pointed out that our rules relating to grouping of exceptions require that all exceptions relating to the same question of law be grouped under one assignment of error and that only those exceptions relating to the same question of law be grouped under a single assignment of error. *E.g., State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534; *State v. Wilson*, 263 N.C. 533, 139 S.E. 2d 736; *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. 2d 912; *State v. Atkins*, 242 N.C. 294, 87 S.E. 2d 507; *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785; *State v. Clark*, 22 N.C. App. 81, 206 S.E. 2d 252; *State v. Dickens*, 11 N.C. App. 392, 181 S.E. 2d 257; *Nye v. Development Co.*, 10 N.C. App. 676, 179 S.E. 2d 795; *State v. Patton*, 5 N.C. App. 501, 168 S.E. 2d 500; *State v. Conyers*, 2 N.C. App. 637, 163 S.E. 2d 657. An assignment of error which attempts to present several different questions of law is broadside and ineffective. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416. This assignment of error states that defendants' several constitutional rights were violated "by admitting into evidence over defendants' objections testimony of witnesses for the State which was irrelevant, immaterial, incompetent, remote, prejudicial and inflammatory." It thereafter lists by number 2,685 exceptions. It

seems clear to us at a glance that such an assignment of error is broadside and ineffective.

We have read all of the testimony presented to us by the record on appeal. In reading the testimony, we have observed and considered the 2,685 rulings of the trial judge upon the admission of the State's evidence to which defendants take exception. In our opinion some of the rulings constituted error. However, we found no error, either singly or in combination, in the admission of State's evidence which, had the evidence been excluded, presents a reasonable likelihood that the results of the trial would have been different. That portion of the State's evidence which was clearly competent was overwhelmingly sufficient to support the verdicts of guilty. In our opinion the errors in the admission of State's evidence were non-prejudicial beyond a reasonable doubt. This assignment of error is overruled.

[19] Defendants next argue their assignment of error number XXV. By this assignment of error they contend that the trial judge erred in permitting the State to offer testimony of witnesses whose names had not been furnished to defendants.

There is no statute in this State which requires the State to furnish a defendant in a criminal case with a list of the prospective State's witnesses. Defendants concede that, absent a statute, an order to furnish such a list is in the discretion of the trial court. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842. Defendants filed a motion to compel the State to furnish them a list of prospective witnesses for the State. The Solicitor voluntarily furnished defendants a list of the witnesses he proposed to call at that time, and no order from the court was thereafter requested or entered. The defendants were not legally prejudiced merely because the State later offered additional witnesses, not found on the list supplied by the Solicitor to defendants, who testified to elements of the charges against them. "Prejudicial surprise results from events 'not reasonably to be anticipated or perhaps testimony contrary to a prior understanding between the parties or something resulting from fraud or deception.' " *State v. Hoffman, supra* at 735. The record before us fails to disclose such prejudicial surprise.

Permitting these witnesses to testify over objection by defendants was a matter in the discretion of the trial judge, not reviewable on appeal in the absence of a showing of abuse

of discretion. *State v. Hoffman, supra.* No abuse of discretion appears. This assignment of error is overruled.

[20] Defendants next argue their assignment of error number XXII. By this assignment of error they contend that the trial judge committed reversible error in permitting a rebuttal witness for the State to give testimony adverse to the nine defendants who had not offered evidence. The defendant Ann Shephard was the only one of the ten defendants who testified and offered evidence in her own behalf. After defendant Shephard rested her defense, the State offered the witness Eric Junious in rebuttal, and he was permitted to testify over the objection of the other nine defendants.

In her defense to the charge of being an accessory before the fact of the felonious burning of Mike's Grocery on Saturday, 6 February 1971, by the other nine defendants, the defendant Shephard testified that she was not present at Gregory Congregational Church on the Saturday night. She also testified that she heard no plans to burn Mike's Grocery and said nothing to encourage the group to burn Mike's Grocery. Her witness testified that he was in the church on the Saturday night but that defendant Ann Shephard was not there, nor were any of the other nine defendants there, except the defendant Tindall. In rebuttal the State offered one witness who testified that he was in Gregory Congregational Church on Saturday night, 6 February 1971, and that defendant Ann Shephard was there, as were the other nine defendants. He further testified that defendant Chavis talked to the group in the church about the "Chicago Strategy" and the burning of Mike's Grocery. He also testified the defendant Shephard addressed the group and told them she thought what they were doing was right.

Obviously this testimony was in rebuttal of defendant Shephard's evidence. It is equally obvious that the State's evidence against defendant Shephard, either in chief or in rebuttal upon a charge of being an accessory before the fact to felonious burning, would necessarily involve the other nine defendants who are charged with the actual burning. The ten defendants were tried together without objection. They are in no position tion to complain now. In any event, it was within the discretion of the trial court to permit the State to reopen its case against defendants. 2 Strong, N.C. Index 2d, Criminal Law, § 97. This assignment of error is overruled.

[21] Defendants next argue their assignment of error number XXIII. By this assignment of error they contend that the trial judge committed error prejudicial to the defendants by failing to order a mistrial when a juror stated that he knew the State's witness. The sixteenth witness called by the State was Officer Chipps of the Wilmington Police Department. As he was called to the stand by the Solicitor, the following transpired:

"THE COURT: Call your next witness.

SOLICITOR STROUD: State will call Officer Chipps, your Honor.

JUROR NUMBER 1: I think I should make you aware of the fact that I know him.

THE COURT: All right, sir."

After the witness identified himself and his position with the police department, defendants entered general objections and motions to strike to almost everything the witness said. This is the same procedure followed by defendants with respect to every other witness for the State.

Defendants argue that the trial judge erred in denying their motion for mistrial at the time the juror made it known to the court that he knew the witness Chipps. The record does not disclose a motion for mistrial by defendants or any ruling on such a motion by the trial judge. The record does not disclose any effort by defendants to further examine the juror or to have the trial judge further examine the juror, touching upon the effect, if any, of the juror's acquaintance with the witness. Apparently the defendants were satisfied that the juror would be impartial in spite of the acquaintance. They cannot raise this question for the first time on appeal.

The juror had been closely examined by the trial judge, by the State, and by the defendants before he was accepted to serve. This statement by the juror was just further indication of his intention to be fair and candid with the State and the defendants. It might well be that the juror's acquaintance with Officer Chipps would tend to cause the juror to give little or no credit to the witness' testimony. This assignment of error is without merit and is overruled.

[22] Defendants next argue their assignment of error number VIII. By this assignment of error they contend that the trial resulting in their conviction subjected them to double jeopardy.

These cases were first called for trial in Pender County before Judge James presiding at the 5 June 1972 Session. After several days of jury selection, during which only three jurors were accepted and seated, the Assistant District Attorney (Solicitor) assigned to prosecute the cases became ill and was hospitalized. Upon motion of the State, Judge James, in his discretion, ordered that the trial of the cases be continued to a subsequent session. At the time the continuance was ordered, a jury had not been sworn and empaneled to try the cases. It is clearly established in this State that jeopardy cannot attach until a jury has been sworn and empaneled. "Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *State v. Cutshall,* 278 N.C. 334, 344, 180 S.E. 2d 745. Defendants concede that all the elements necessary for jeopardy to attach are not present in this case. Although it does not bear upon the disposition of this assignment of error, we view the use by Judge James of the phrase that a mistrial was ordered to be surplusage because his order continuing the trial to a subsequent session was all that was required. This assignment of error is overruled.

[23] Defendants next argue their assignment of error number XXIX. By this assignment of error defendants contend that it was error to deny their motion to suppress the evidence obtained by search of the Gregory Congregational Church and parsonage. At the conclusion of a *voir dire* hearing on the legality of the search and the standing of the defendants to object, the trial judge, from competent evidence, found facts and ordered as follows:

> "COURT: The Court finds as a fact that W. H. Butler, Chairman of the Board of Trustees of the Gregory Congregational Church, went to the church on February 6, 1971, and saw numerous persons milling around the church and several in the church; that he met the defendant Chavis in the church and told the defendant Chavis that what they were doing was wrong and asked them to leave.

"The Court further finds as a fact that none of the defendants were members of the Gregory Congregational Church on February 6, 1971, or at any subsequent time.

"The Court further finds as a fact that the church officials had—that Mr. Butler nor any of the church officials had given any authority to the defendants to hold any meeting that week.

"The Court further finds as a fact that Mr. Butler returned to the area of the church on Sunday, February 7, and that persons were still about the church.

"The Court further finds as a fact that Capt. Corbett, along with other officers and a detachment of the National Guard went to the Gregory Congregational Church on Monday, February 8, 1971, and upon arriving at the front door of the church, Mr. Bryant, H. C. Bryant, a member of the Gregory Congregational Church, approached Capt. Corbett and told him that there was no need for a search warrant and then unlocked the doors to the church and accompanied the police officers and National Guard officers as they searched the church; that Mr. Bryant had known Capt. Corbett for several years.

"The Court further finds as a fact that Mr. Butler, Chairman of the Board of Trustees, opened the parsonage and allowed the officers to search the parsonage.

"The Court further finds that no one was at the church or the parsonage when the same was entered by the officers.

"The Court further finds as a fact that Rev. Templeton, the possessor of the parsonage, was not there and that he is not a defendant in the trial of these cases.

"The Court further finds as a fact that no member of the Gregory Congregational Church is a defendant in these cases.

"The Court finds and concludes that the evidence obtained from the search of the church and the parsonage on Febuary 8th is lawful and competent evidence in these cases. The motion to suppress is denied."

It appears from the uncontradicted evidence that defendants had been trespassers on the church premises. In our view they

have absolutely no standing to object to the search. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441. In addition the search was conducted with the permission of one of the officials of Gregory Congregational Church, who had several days earlier tried, without success, to evict defendants from the church premises. This assignment of error is overruled.

[24] In addition to the assignments of error heretofore discussed, the defendant Ann Shephard argues assignments of error numbers XXXII and XXXIII. By these assignments of error she contends that her motions for nonsuit, made at the close of the State's evidence and at the close of all the evidence, should have been allowed. It is her contention that the conduct and statement attributed to her are not sufficient to support a verdict of guilty of the charge of accessory before the fact of the felonious burning of Mike's Grocery. The question is whether her voluntary presence in the Gregory Congregational Church with the other defendants for several days, particularly on Saturday, 6 February 1971, during the explanation of the "Chicago Strategy" and the planning of the burning of Mike's Grocery Store, and her statement to the group as they were distributing weapons in preparation for the burning and ambush are sufficient evidence to be submitted to the jury. According to the State's evidence, she stated: "I think it is right what you all are doing. Y'all should show them you mean business."

Defendant Shephard was charged with being an accessory before the fact in a bill of indictment which reads in part as follows:

> "That Ann Shephard late of the County of New Hanover on the 6th day of February 1971 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously become an accessory before the fact of the unlawful, wilful, malicious and felonious damaging and burning of Mike's Grocery Store building, located at 6th & Ann Street in Wilmington and owned and occupied by Mike Poulos, by the use of incendiary devices, i.e., firebombs, by Benjamin Chavis, Marvin Patrick, Connie Tindall, Jerry Jacobs, James McKoy, Willie Earl Vereen, Allen Hall, Reginald Epps, Joe Wright and Wayne Moore by counseling, inciting, inducing and encouraging said parties to commit said felony . . . . "

Our Supreme Court, in *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580, has defined the offense as follows:

> " 'There are several elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime.' (Citation omitted.)
>
> " 'The concept of accessory before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question.' (Citation omitted.)
>
> " 'To render one guilty as an accessory before the fact to a felony he must counsel, incite, induce, procure or encourage the commission of the crime, so as to, in some way, participate therein by word or act. . . . It is not necessary that he shall be the originator of the design to commit the crime; it is sufficient if, with knowledge that another intends to commit a crime, he encourages and incites him to carry out his design. . . . ' (Citation omitted.)" 255 N.C. at 51, 52.

The law in North Carolina is in accord with the generally accepted definition of this offense. *See* 22 C.J.S. *Criminal Law* § 90; 21 Am. Jur. 2d *Criminal Law* § 124.

The State's evidence tended to show that plans had been made to burn Mike's Grocery; that defendant Shephard was present in Gregory Congregational Church for several days and nights; that Gregory Congregational Church was used by defendant Chavis as a headquarters to distribute weapons and organize the commission of several offenses; that defendant Shephard was present when defendant Chavis explained the "Chicago Strategy" and explained plans to burn Mike's Grocery; that defendant Shephard, although not participating in the actual burning, encouraged the other nine defendants (and others) to commit the felony of burning Mike's Grocery; and that Mike's Grocery was feloniously burned. This evidence reflected all the elements of the offense with which defendant Shephard was charged, and it fully supports the verdict of guilty. There was no error in the denial of her motions for nonsuit.

Defendant Shephard also brings forward assignment of error number XXX in addition to those argued by the other

nine defendants. This assignment of error is as follows: "The trial court erred by permitting the State to ask improper questions upon cross examination of defense witnesses and of the defendant Shephard herself, thereby eliciting testimony which was incompetent, irrelevant, immaterial, remote, inflamatory and prejudicial to the defendants. Exception Nos. 3483-3653 (Rpp. 2041-2089)."

At a glance it is clear that defendant Shephard has attempted to group 171 exceptions, upon varying questions of law and legal procedure, scattered throughout 49 pages of the record on appeal. She did not undertake to tell us which page of the record a particular exception appears. As pointed out earlier, this type of assignment of error is broadside and ineffective. Defendant's motion to file an addendum to the record on appeal to amend her assignments of error was allowed by this Court. However, her amendment does not bring her assignment of error into compliance with the North Carolina rules.

In reading the testimony, we observed and considered the rulings of the trial judge to which defendant Shephard excepts. In our opinion such errors as the judge may have committed in those rulings were harmless beyond a reasonable doubt.

The other two assignments of error brought forward in defendant Shephard's brief (numbers XV and XX) have heretofore been discussed with respect to all defendants.

We have given written recognition to each grouping of exceptions and assignment of error brought forward and argued in the briefs. "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." Rule 28, Rules of Practice in the Court of Appeals.

In our view defendants had a fair trial before an impartial, patient, and courteous judge and by a competent, unbiased jury. They have been accorded every reasonable request. The State's evidence was clear, and overwhelmingly tended to show the guilt of each defendant of the offenses with which he was charged. In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and VAUGHN concur.

HOWARD T. WHITLEY, ADMINISTRATOR OF THE ESTATE OF KIMBERLY LYNN WHITLEY, DECEASED v. DR. C. L. CUBBERLY, JR., AND PARKE, DAVIS & COMPANY, A MICHIGAN CORPORATION

No. 737SC710

(Filed 18 December 1974)

1. **Rules of Civil Procedure § 56— summary judgment — burden of proof**

Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is upon the moving party therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law; furthermore, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion.

2. **Negligence § 29— death from taking drug — negligence of manufacturer — summary judgment improper**

In an action for personal injury and wrongful death resulting when plaintiff's intestate contracted aplastic anemia after taking a drug prescribed by defendant doctor and manufactured by defendant company, the trial court erred in granting defendant company's motion for summary judgment where material presented in support of the motion was inadequate to establish that there was no genuine issue of fact in connection with plaintiff's allegations that defendant was negligent in improperly marketing and over-promoting the drug, in failing to heed warnings given to it about the dangerous properties of the drug, and in failing to make adequate warnings about the dangerous properties of the drug to the medical profession.

Chief Judge BROCK dissenting.

APPEAL by plaintiff from *James, Judge,* 9 April 1973 Session of Superior Court held in WILSON County.

This is a civil action in which plaintiff seeks to recover damages for (1) personal injuries suffered by his intestate and (2) wrongful death of his intestate, which plaintiff alleged were proximately caused by the joint and concurring negligence of the two defendants.

Plaintiff alleged: On 15 February 1969 his intestate, a six-year-old child suffering from a minor respiratory ailment, was examined and treated by the defendant, Dr. C. L. Cubberly, Jr. As treatment, the doctor prescribed the use of Chloromycetin Palmitate, a drug manufactured by the defendant, Parke, Davis & Company. This drug was administered pursuant to the doc-

tor's prescription, and as a result plaintiff's intestate suffered various ill effects, including aplastic anemia, which caused her pain and suffering and ultimately caused her death on 17 May 1969. The doctor was negligent in: (a) prescribing an unreasonably dangerous drug not warranted by the nature of the illness; (b) not keeping abreast of medical advances; (c) not warning the parents of the known hazards that could result from use of Chloromycetin Palmitate; and (d) not obtaining the parents' informed consent to the use of the drug. Parke, Davis & Company was negligent in that it: (a) failed to test Chloromycetin adequately; (b) failed to label it adequately; (c) improperly marketed and over-promoted Chloromycetin; (d) improperly obtained and retained governmental permission to market Chloromycetin; (e) failed to heed warnings given about the dangerous properties of Chloromycetin; (f) failed to make adequate warnings about the dangerous properties of Chloromycetin to the medical profession and to the consumers of the drug, and (g) failed to comply with the provisions of the Federal Food, Drug and Cosmetic Act. The negligence of the doctor and Parke, Davis & Company joined and concurred to proximately cause the injuries and death of plaintiff's intestate.

Defendant, Dr. C. L. Cubberly, Jr., answered and admitted he had examined and treated the child and had prescribed the use of Chloromycetin Palmitate. The doctor denied that the child was suffering from a minor respiratory ailment or other minor ailment, and denied all of plaintiff's allegations as to negligence on his part. Defendant, Parke, Davis & Company, answered and admitted it was the manufacturer of Chloromycetin Palmitate, denied any knowledge as to the condition or treatment of the child, and denied all of plaintiff's allegations as to negligence on its part. Both defendants denied plaintiff's allegations that negligence on their part joined and concurred to proximately cause the injuries and death of plaintiff's intestate.

After depositions were taken on adverse examination of the parents of the child and of Dr. Cubberly, and after written interrogatories were filed by plaintiff and answered by Parke, Davis & Company, the defendant Parke, Davis & Company, filed a motion for summary judgment against the plaintiff on the ground that there was no genuine issue as to any material fact and that Parke, Davis & Company was entitled to judgment as a matter of law against the plaintiff. This motion was based upon the depositions and the interrogatories and the answers

thereto above mentioned and was also supported by an affidavit of the Vice-President of Parke, Davis & Company in charge of quality control and government regulations of that Company.

After hearing, the motion of Parke, Davis & Company for summary judgment was allowed and judgment was entered that "the action as to the Defendant, Parke, Davis & Company, be dismissed." From this judgment, plaintiff appealed.

Moore, Moore & Weaver by Thomas M. Moore and George A. Weaver for plaintiff appellant.

Battle, Winslow, Scott & Wiley by J. B. Scott for defendant appellee Parke, Davis & Company.

PARKER, Judge.

[1] The sole assignment of error challenges entry of the order granting Parke, Davis's motion for summary judgment. "Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law." *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E. 2d 683, 688 (1972). Thus, in the present case defendant Parke, Davis, as the party moving for summary judgment, had the burden of showing the absence of a genuine issue as to any material fact and that it was entitled to judgment as a matter of law. Plaintiff, as the party opposing the motion, did not have the burden of coming forward with evidentiary material in support of his claim until defendant Parke, Davis, as movant, produced evidence of the necessary certitude which negatives plaintiff's claim against it in its entirety. *Tolbert v. Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). "This is true because the burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned; and rests on him whether he is by it required to show the existence or non-existence of facts." 6 Moore's Federal Practice ¶ 56.15[3], pp. 2342-43.

Furthermore, in passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must

be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in his favor which may be reasonably drawn from such material. *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

[2] Applying the foregoing principles to the record before us, we find that Parke, Davis did come forward with uncontradicted evidentiary material to show that it was not negligent in certain of the respects alleged in the complaint. Specifically, the uncontradicted affidavit of Parke, Davis's Vice-President in charge of quality control and government regulations sets forth facts which negative the allegations in plaintiff's complaint that Parke, Davis was negligent in failing to test Chloromycetin (chloramphenicol) adequately, failing to label it adequately, improperly obtaining and retaining governmental permission to market it, or failing otherwise to comply with the provisions of the Federal Food, Drug and Cosmetic Act. However, we find the material presented in support of the motion inadequate to negative plaintiff's allegations that Parke, Davis was negligent in other respects. For example, viewing this material in the light most favorable to plaintiff and giving plaintiff the benefit of all reasonable inferences in his favor, and keeping in mind that the burden of carrying the motion rests upon Parke, Davis, we find the material insufficient to establish that there is no genuine issue of fact in connection with plaintiff's allegations that Parke, Davis was negligent in improperly marketing and over-promoting Chloromycetin, in failing to heed warnings given to it about the dangerous properties of Chloromycetin, and in failing to make adequate warnings about the dangerous properties of the drug to the medical profession. That Parke, Davis may have fully complied with all applicable Federal laws in its marketing and labeling of Chloromycetin would not in itself free it of liability for harm caused by use of the drug if it were shown that such use and resulting harm was caused by the Company's negligent acts in over-promoting the drug, the dangerous properties of which it was aware or in the exercise of due care should have been aware. For example, even though all warnings required by Federal authorities may have been given, such warnings would be insufficient to exonerate Parke, Davis from all liability if over-promotion through a vigorous sales campaign should induce the medical profession in general, and in this case Dr. Cubberly in particular, to fail

adequately to heed the warnings given. In the present case, Dr. Cubberly's deposition discloses that, despite his statement that he was familiar with the manufacturer's warnings, he was not "completely aware" that there should be periodic blood studies during treatment with the drug nor was he aware of the manufacturer's warning that "to facilitate appropriate studies and observation during therapy, it is desirable that patients be hospitalized." Whether the doctor's lack of awareness was due to negligent over-promotion of the drug by Parke, Davis is not answered by the present record. All that is significant for present purposes is that the record does not so clearly establish that no genuine issue of fact exists in this regard that Parke, Davis is entitled to summary judgment as a matter of law. Only in exceptional negligence cases is summary judgment appropriate. "This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court." *Page v. Sloan, supra,* at 706, 190 S.E. 2d at 194. We find that the movant here has failed to carry its burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Although, of course, each case must be decided on its own facts, we find support for our decision in the opinions in *Stevens v. Parke, Davis & Co.,* 9 Cal. 3d 51, 507 P. 2d 653, 107 Cal. Rptr. 45 (1973) ; *Love v. Wolf,* 226 C.A. 2d 378, 38 Cal. Rptr. 183 (1964) ; *Lake v. Konstantinu,* 189 So. 2d 171 (Fla. Dist. Ct. App. 1966) ; and *Incollingo v. Ewing,* 444 Pa. 263, 282 A. 2d 206 (1971).

It may well be that upon a trial of the issues before a jury, when the burden will be upon the plaintiff to establish his case, plaintiff may be unable to come forward with evidence sufficient to establish that any negligence on the part of Parke, Davis was the proximate cause of the illness and death of his intestate. We hold only that on the present record it was error to enter summary judgment against him. The judgment of the trial court granting Parke, Davis's motion is

Reversed.

Judge CAMPBELL concurs.

Chief Judge BROCK dissents.

Chief Judge BROCK dissenting.

I agree that movant has failed to establish that there is no genuine issue as to a material fact in connection with plaintiff's allegations that Parke, Davis was negligent in failing to heed warnings given to it about the dangerous properties of Chloromycetin, and in failing to give adequate warnings to the medical profession of the dangerous properties of the drug. Therefore, I would ordinarily concur in the result reached by the majority in reversing the summary judgment in favor of Parke, Davis.

However, the majority opinion gives sanction to pleading a cause of action for "improperly marketing and overpromoting" Chloromycetin and requires movant to establish that no genuine issue as to a material fact exists with respect to such nebulous allegations. In so doing, the majority opinion seems to hold that allegations that Parke, Davis "improperly marketed and overpromoted" constitutes allegations of fact upon which relief can be granted. It seems to me that an allegation that defendant "improperly marketed and overpromoted" does not rise even to the dignity of notice pleading. Unless such "improper marketing and overpromoting" are alleged to be accomplished by some conduct amounting to fraud or deceit, or the result of some recognizable negligence, it does not allege a 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 as required by G.S. 1A-1, Rule 8.

C. G. CLINE v. BERTRAM ERVIN BROWN II

No. 7421SC808

(Filed 18 December 1974)

1. Libel and Slander § 10— deputy sheriff as public officer — criticism of official conduct — showing of actual malice required

Plaintiff who was a deputy sheriff of Forsyth County was a public official within the meaning of *New York Times Co. v. Sullivan*, 376 U.S. 254, which held that the First and Fourteenth Amendments to the U. S. Constitution delimit a State's power to award damages to a public official in a suit for libel based upon defamatory criticism of his official conduct without proof that the defendant acted with actual malice.

2. Libel and Slander § 10— conduct of deputy sheriff — letter requesting investigation not libelous

In this libel action where plaintiff alleged that defendant had written to the FBI asking for an investigation into the fatal shooting by plaintiff of one Mabe during the commission of a burglary by Mabe and another and that defendant had provided a newspaper a copy of the letter, the trial court properly concluded that the defendant's statements were made with no knowledge of the falsity thereof and without reckless disregard for their truth or falsity, since the words used in the letter were that plaintiff "*may* have a personal grudge" and "*may* have conspired" and, additionally, the letter was written to the proper law enforcement agency suggesting the possibility of an investigation, not accusing plaintiff of misconduct.

APPEAL by plaintiff from *Armstrong, Judge,* 28 May 1974 Session Superior Court held in FORSYTH County. Argued in the Court of Appeals 18 November 1974.

On 14 December 1973, plaintiff, a deputy sheriff with the Forsyth County Sheriff's Department in Winston-Salem, brought this action seeking compensatory and punitive damages to which he alleged he was entitled by reason of certain "slanderous, libelous and defamatory statements" made by defendant, which statements were made without just cause or provocation. He further alleged that defendant knew or should have known by the exercise of reasonable care that the statements were untrue, that plaintiff has been greatly embarrassed by the statements, and that in making or causing the statements to be published, defendant acted with malice toward plaintiff. Attached to the complaint as Exhibit A, incorporated in the complaint by reference, was a copy of an article published by the Winston-Salem *Journal,* Friday morning, 14 December 1973. The article reported that defendant had written to the Federal Bureau of Investigation asking for an investigation into the fatal shooting by plaintiff of one, Marshall McCree Mabe, during the commission of a burglary by Mabe and another. The article stated that the letter said "that the shooting may have been in violation of federal laws and that one of the deputies who fired at Mabe may have had a personal grudge against him" and that "there may have been a 'conspiracy to take Mabe's life.'" The article stated that defendant's letter contained the statement "[w]e have reason to believe that the agents responsible for Mabe's death may have conspired to 'injure, threaten or intimidate' Mabe 'under color of state law.'" The letter advised that the deputies, acting on tips from an informant, had staked out the store in which the killing took

place, and that no one other than Mabe's accomplice (naming him) could have known about the robbery in advance and that the accomplice, who was not arrested, must have been the informant.

Defendant answered the complaint first alleging plaintiff's failure to comply with G.S. 99-1 entitling defendant to dismissal or in the alternative to dismissal of at least the claim for punitive damages and then admitting writing a letter to the United States Department of Justice and the Federal Bureau of Investigation and furnishing a copy of that letter to a staff reporter for the Winston-Salem *Journal,* but denying knowledge that the statements therein were untrue or that plaintiff had suffered embarrassment or damage or that defendant had acted with malice.

As defenses to the action defendant pleaded absolute privilege in that the statements were made by an attorney acting in the interests of a client and to correct injustices believed to have been done to the client; qualified privilege in that plaintiff, as a deputy sheriff, is a public official and the statements were made concerning his official conduct and concerning an event of public interest; that the information was privileged by reason of the fact that plaintiff and other members of the Sheriff's Department had, for several days, furnished information to the newspaper, and defendant was entitled to make statements in defense of his client; that the statements made by defendant are true.

Defendant subsequently filed written motion for summary judgment, stating therein the rule and his grounds for the motion. With the motion he filed the affidavits of Mrs. Mabe, defendant, and Charles O. Reed, and a copy of letter to the Federal Bureau of Investigation. Plaintiff filed written response to the motion and plaintiff's affidavit.

The grounds for defendant's motion for summary judgment were "that the allegedly libelous and slanderous remarks were qualifiedly privileged under the First Amendment to the United States Constitution as interpreted by the United States Supreme Court in *New York Times v. Sullivan* in that, the plaintiff as a Deputy Sheriff, is a public official and the statements were made of and concerning his official conduct and concerning an event of public interest; that the complaint fails to properly allege malice within the rule of *New York Times v. Sullivan;*

that the allegedly libelous and slanderous statements were in fact made without actual malice as defined in *New York Times v. Sullivan* as more fully appears in the affidavits presented by defendant in support of this motion; and, that no genuine issue of fact exists with respect to the absence of malice as defined in *New York Times v. Sullivan . . .*"

Upon hearing the court found the following facts to be undisputed:

"1. The plaintiff, C. G. Cline, is and was during the times in question, a Deputy Sheriff of Forsyth County;

2. The statements made by the defendant were made of and concerning the plaintiff in the performance of his duties as a Deputy Sheriff of Forsyth County;

3. The defendant had been supplied with the information set forth in the affidavits offered on his behalf by various persons and by the Winston-Salem newspaper, as set forth in the affidavits;

4. Although the information supplied to defendant may or may not have been true, the defendant believed it to be true at the time he made and published the statements in question."

Based on those facts "and the law applicable thereto" the court made the following conclusions of law:

"1. The plaintiff is a public official within the meaning of *New York Times v. Sullivan;*

2. The statements made by the defendant were made of and concerning a public official in the performance of his duties as a public official;

3. The defendant's statements were made without 'actual malice' as defined in *New York Times v. Sullivan,* in that the defendant did not know his statements to be false nor did he act with reckless disregard for the truth or falsity of his statements;

4. No genuine issue of fact exists with regard to the presence of actual malice as defined in *New York Times v. Sullivan.*"

To the finding and conclusion that there was no genuine issue as to any material fact the plaintiff excepted and also

excepted to the entering and signing of the judgment and appealed therefrom.

Wilson and Morrow, by John F. Morrow, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by William D. Caffrey and Janet L. Covey, for defendant appellee.

MORRIS, Judge.

Defendant Brown contends that plaintiff's action is barred by the decision in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), which held that the First and Fourteenth Amendments to the United States Constitution delimit a State's power to award damages to a public official in a suit for libel based upon defamatory criticism of his official conduct without proof that the defendant acted with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false. The Court there held that the Chief of Police of Montgomery, Alabama, was a public official.

There is no doubt but that plaintiff was, at the time of the occurrence, a deputy sheriff of Forsyth County. Nor is there any dispute about the fact that Mabe was engaged in criminal activity at the time of his death and that the alleged defamatory statements made of and concerning plaintiff were related to his official conduct.

For determination here are the questions: Is a deputy sheriff a public official within the meaning of *New York Times Co. v. Sullivan,* and if so, does the record disclose the existence of a genuine issue of fact as to whether the defendant published the alleged libel with actual malice as that term was defined in the New York Times case.

[1] We turn first to the question of whether plaintiff is entitled to the benefit of the rule enunciated in *New York Times Co. v. Sullivan, supra.* The Court in *Sullivan* said that it was considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan, supra,* 11 L.Ed. 2d 686, at 701. The advantages

to the public generally from free and open discussion are so great, and the importance to the State so vast, that they more than counterbalance the occasional injury to the reputations of individuals.

The Court in *Sullivan* did not specify how far down the governmental hierarchy the privilege of comment on governmental conduct would go. Subsequently, however, it has been applied to a variety of law enforcement officers: Deputy Chief of Detectives of the Chicago police force [*Time, Inc. v. Pape,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 2d 45 (1971)]; deputy sheriff in East Baton Rouge Parish, Louisiana [*St. Armant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262 (1968)]; chief of police, Clarksdale, Miss. [*Henry v. Collins,* 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed. 2d 892 (1965)]; sergeant, Wilmington, Del. police force [*Jackson v. Filliben,* Del. Supr., 281 A. 2d 604 (1971)]; patrolman, Norwalk, Conn. police force [*Moriarty v. Lippe, et al.,* 162 Conn. 371, 294 A. 2d 326 (1972)]; police sergeant, Countryside, Ill. [*Suchomel v. Suburban Life Newspapers, Inc.,* 84 Ill. App. 2d 239, 228 N.E. 2d 172 (1967)]; patrolman in Skokie, Ill., [*Coursey v. Greater Niles Twp. Pub. Corp.,* 40 Ill. 2d 257, 239 N.E. 2d 837 (1968)]; police lieutenant [*Gilligan v. King,* 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (1965)]. However, later in *Rosenblatt v. Baer,* 383 U.S. 75, at 85, 86 S.Ct. 669, 15 L.Ed. 2d 597, at p. 605, (1966), the Court said:

> "Criticism of those responsibe for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the publice to have, substantial responsibility for or control over the conduct of governmental affairs."

While we readily concede that there may be cases in which the determination of this question might raise issues for the trier of fact, we do not perceive that to be the case here. In *Gowens v. Alamance County,* 216 N.C. 107, 109, 3 S.E. 2d 339 (1939), the Court said:

> "The right of the sheriff to appoint deputies is a common law right. 'The deputy is an officer coeval in point of antiquity with the sheriff.' *Lanier v. Greenville,* 174 N.C. 311, 93 S.E. 850; *Borders v. Cline,* 212 N.C. 472, 193 S.E. 826. He is the deputy of the sheriff, one appointed to act

> ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer. 57 C.J. 731, Sec. 4. . . ."

And in *Borders v. Cline,* 212 N.C. 472, 476, 193 S.E. 826 (1937), it was said:

> "The duties and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff. How those duties are to be performed and the ends to be accomplished are as prescribed and directed by law, and not in accordance with the direction and discretion of the sheriff. By appointing a deputy the sheriff merely delegates to him the authority to execute ministerial functions of the office of sheriff. Those functions are of a public character."

The appointment of deputies sheriff is provided for by the General Assembly. G.S. 153A-103. The relationship between a sheriff and his deputy is, then, an official and not a private relationship. The deputy is a representative of the sheriff in his official capacity. He is a public officer whose authority and duties are regulated and prescribed by law. The public generally regards the acts of a deputy sheriff as the acts of the sheriff himself. The sheriff's position in government vests in him and his deputies "substantial responsibility for or control over the conduct of governmental affairs." This is certainly true where law enforcement and police functions are concerned. Additionally, though the office of deputy sheriff may be a comparatively low ranking one in the hierarchy of government, nevertheless, if the deputy's office be abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position. So that, in addition to the fact that technically under our court decisions a deputy sheriff is a public official, the test of *Rosenblatt v. Baer, supra,* has been met, and defendant is entitled to the benefit of the rule of *New York Times Co. v. Sullivan.*

Having determined that defendant, as an individual citizen critical of official conduct, is entitled to the constitutional guaranties which require a public official to prove that the alleged libelous statements were made with actual malice, and assuming, without deciding, that the complaint sufficiently alleges actual malice, we turn now to the question of whether

the record before us discloses the existence of a genuine issue of fact as to whether defendant published the alleged libelous statement with actual malice.

[2] The complaint alleges that the libelous statements were "one of the deputies who fired at Mabe may have had a personal grudge against him" and "[w]e have reason to believe that the agents responsible for Mabe's death may have conspired to 'injure, threaten or intimidate' Mabe 'under color of state law' " and ". . . that Deputy C. G. Cline, who along with Deputy E. P. Oldham fired at Mabe, once made comments to another Legal Aid Society lawyer indicating that he may have had a grudge against Mabe." Defendant does not deny the contents of the letter nor that a copy was given to the newspaper for publication.

Actual malice is defined in *New York Times Co. v. Sullivan* as knowledge of falsity or with a reckless disregard of whether it was false. The affidavit filed by defendant gave the source of his information and leads inescapably to the conclusion that, if the statements were in any way false, defendant had no knowledge of their falsity. The contents of his affidavit with respect thereto are undisputed, nor does any affidavit submitted by plaintiff in opposition to the affidavits of defendant raise any issue of fact with respect thereto. The phrases themselves and the context of events and circumstances under which the letter was written belie any "reckless disregard" of whether the statements were false. The words used are *"may* have a personal grudge," *"may* have conspired." The caution inherent in the words does not bespeak "reckless disregard." Additionally, the letter was written to the proper law enforcement agency suggesting the possibility of an investigation—not accusing the officer of misconduct.

We agree with the trial court's conclusion that the defendant's statements were made with no knowledge of the falsity thereof and without "reckless disregard" for the truth or falsity of his statements.

In the court's conclusion that "no genuine issue of fact exists with regard to the presence of actual malice as defined in *New York Times v. Sullivan"* we concur.

Affirmed.

Judges CAMPBELL and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT MARVIN POPE, JR.

No. 745SC802

(Filed 18 December 1974)

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

Trial court did not err in refusing to allow the witness who was decedent's brother and who was present at the scene of the homicide to answer the question, "Of course, you realize if you had anything to do with starting the argument with him [defendant] that your family might hold you responsible for your sister's death, don't you?"

2. **Witnesses § 1— minor children of defendant — competency to testify**

The trial court did not abuse its discretion in determining that three children of defendant and decedent who were eight, ten, and thirteen years old were competent to testify in this murder prosecution.

3. **Criminal Law § 62— polygraph evidence — admissibility**

Polygraph evidence is not admissible in evidence in the trial of criminal cases.

4. **Criminal Law § 112— reasonable doubt — instructions proper**

Trial court did not err in failing to instruct that a reasonable doubt must be "one growing out of the evidence or the insufficiency of the evidence."

5. **Criminal Law § 117— prosecuting witness — instructions to scrutinize testimony**

To require an instruction to scrutinize interested prosecution witnesses as well as interested defense witnesses would improperly and prejudicially discredit the testimony of the prosecuting witnesses and would be an unwarranted extension of the interested witness rule.

6. **Homicide § 27— involuntary manslaughter — instructions on proximate cause and unlawful pointing of gun proper**

Trial court in this first degree murder case properly defined proximate cause and unlawful pointing of a gun in charging on the elements of involuntary manslaughter.

7. **Homicide § 25— instruction on .38 caliber pistol as deadly weapon — no expression of opinion**

Trial court's instruction that "in determining whether the thirty-eight caliber pistol is a deadly weapon," did not amount to an expression of opinion since defendant stipulated that his wife died as the result of a gunshot wound and testified that he had his .38 caliber gun in his hand when his wife entered the room and the gun fired.

8. **Homicide § 27— first degree murder case — instruction on heat of passion**

Trial court's instruction as to heat of passion that "it means that the defendant's state of mind was at the time so violent as to over-

come his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions," did not require defendant to prove that he was legally insane in order to negate the element of malice and to reduce the offense from murder to manslaughter.

ON *certiorari* to review trial before *Rouse, Judge,* 1 January 1973 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals 10 December 1974.

Defendant was charged in an indictment with the first degree murder of his wife on 23 October 1972. He pleaded not guilty and was tried before a jury.

The State's evidence tended to show that on 21 October 1972, after an altercation with her husband, Hilda Harrelson Pope left their home near Wilmington, taking with her the four children of the marriage. On the morning of 23 October 1972, accompanied by two of her children and her brother, she returned to get some belongings. Defendant, Marvin Pope, who had been standing in a telephone booth by the roadside, saw his wife pass by and followed her home. He entered the house first, followed by his wife, his brother-in-law, Carroll Lennon (Lenny) Harrelson, and the children. Lenny Harrelson testified that he saw defendant standing in the living room some eight or ten feet from him and his sister near the kitchen. Defendant was holding a pistol. He fired, the children ran from the house, and Hilda Pope stepped backward to the door and fell to the carport. She was found dead with a bullet wound in her chest. Defendant got in his car and drove away. With the jury absent, the trial judge determined that the children, ages eight and ten, were competent witnesses and then allowed them to testify in corroboration of Lenny Harrelson's testimony. A third child, age thirteen, testified concerning previous assaults by defendant upon decedent.

Defendant called several witnesses and also testified in his own defense. His evidence tended to show that when Hilda Pope returned home, defendant and his brother-in-law had an argument. Lenny Harrelson was standing near the kitchen, where defendant knew knives were kept. Defendant reached into the stereo speaker in the living room, pulled out a .38 caliber pistol, and pointed at Harrelson to make him leave. Hilda Pope then stepped between the two men and the gun went off. Defendant testified that he did not intend to shoot decedent or her

brother. He drove to nearby Wrightsville Beach where his brother Johnny was working. Johnny Pope testified that defendant "was crying and told me he thought something terrible had happened." He then telephoned a nephew, Hovie W. Pope, Jr., a Wilmington policeman, and subsequently learned that Hilda Pope was dead.

Johnny Pope and his son, Robert Cecil Pope, testified that when they went to defendant's house to investigate, Lenny Harrelson told Johnny Pope that he and defendant had argued before defendant reached for the gun. Both witnesses were questioned concerning results of polygraph examinations, but their answers were excluded, as was the testimony of the polygraph examiner.

The judge gave full instructions on first degree murder, and lesser included offenses, and the defenses of provocation and self-defense. The jury found defendant guilty of second degree murder, and the judge imposed sentence of 25 to 30 years imprisonment. Defendant did not appeal. This Court granted certiorari.

Attorney General James H. Carson, Jr., by Assistant Attorney General Sidney S. Eagles, Jr., and Assistant District Attorney, Fourteenth Judicial District, Robert L. Farb, for the State.

Loflin, Anderson & Loflin, by Thomas B. Anderson, Jr., for defendant appellant.

ARNOLD, Judge.

[1] In his first assignment of error defendant contends that in the following instance he was denied the right to confront the witness, Lenny Harrelson:

> "Q. Of course, you realize if you had anything to do with starting the argument with him that your family might hold you responsible for your sister's death, don't you?
>
> MR. MOORE: Objection.
>
> COURT: Sustained."

Latitude of cross-examination is a matter well within the discretion of the trial court. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50; *State v. Dickens,* 11 N.C. App. 392, 181 S.E. 2d 257. Although defendant is entitled to elicit facts which tend

to show bias in order to impeach a witness, *see* 1 Stansbury, N.C. Evidence (Brandis rev.), § 45, he has failed to show how he may have been prejudiced by the trial court's refusal to allow this witness to respond to a clearly argumentative question. The jury knew the witness was decedent's brother and that he was present at the time of the shooting.

[2] Defendant next assigns as error the trial court's determination that the three minor witnesses were competent to testify. Competency of witnesses is clearly within the trial court's discretion and is reviewable only in case of abuse, which does not here appear. 7 Strong, N. C. Index 2d, Witnesses, § 3, p. 693; *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E. 2d 321. The test of competency is the capacity to understand and relate under oath facts which will assist the jury in finding the ultimate facts. *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365. Each of the children stated on voir dire that he knew what it meant to swear to tell the truth. From his observation of their intelligence and demeanor, the trial court had ample grounds from which to conclude that each child was a competent witness.

[3] Defendant's third assignment of error concerns the admissibility of polygraph evidence. In *State v. Foye,* 254 N.C. 704, 708, 120 S.E. 2d 169, 172, our North Carolina Supreme Court rejected such evidence, saying:

> "[W]e are of opinion that the foregoing enumerated difficulties alone [lack of general scientific recognition, tendency to distract the jury, inability to cross-examine machine, no corresponding necessity for submission to tests by the prosecution] in conjunction with the lie detector use presents obstacles to its acceptability as an instrument of evidence in the trial of criminal cases, notwithstanding its recognized utility in the field of discovery and investigation, for uncovering clues and obtaining confessions. This conclusion is in line with the weight of authority repudiating the lie detector as an instrument of evidence in the trial of criminal cases."

Defendant nevertheless urges us to accept the polygraph in light of technological and judicial advances since *Foye* was decided in 1961. The weight of authority still supports the *Foye* view, however, *see* Annot., 23 A.L.R. 2d 1306 (Later Case Service 1970), and we decline to hold adherence to *Foye* to be prejudicial error.

Assignments of error four and five deal with evidence which was properly excluded as irrelevant or hearsay and merit no further discussion.

[4] Defendant's last assignments of error involve the court's charge to the jury. Citing *State v. Bright,* 237 N.C. 475, 478, 75 S.E. 2d 407, 409, he contends that the court erred in failing to charge that a reasonable doubt must be "one growing out of the evidence or the insufficiency of the evidence." We do not agree with this contention. When the evidence is direct and not circumstantial and there is ample evidence to support the verdict, an unqualified instruction on reasonable doubt is not prejudicial. *State v. Gaiten,* 277 N.C. 236, 176 S.E. 2d 778; *State v. Britt,* 270 N.C. 416, 154 S.E. 2d 519.

[5] Defendant next urges this Court to overrule its decision in *State v. Williams,* 6 N.C. App. 611, 170 S.E. 2d 640, holding that it was not error to fail to give an instruction to scrutinize interested prosecution witnesses as well as interested defense witnesses. In *Williams,* we concluded that to require such instruction would " 'improperly and prejudicially' discredit the testimony of the prosecuting witnesses and would be an unwarranted extension of the interested witness rule. . . . " *Id.* at 613, 170 S.E. 2d at 641. We continue to follow this rationale and find no error in the instruction given.

[6] Defendant also contends that the court erroneously instructed on the elements of involuntary manslaughter by failing properly to define proximate cause and unlawful pointing of a gun. After reviewing the charge we feel that the court correctly defined the crime of involuntary manslaughter and properly outlined the elements necessary for the State to prove in order to find defendant guilty of involuntary manslaughter. Defendant argues that under *State v. Mizelle,* 13 N.C. App. 206, 185 S.E. 2d 317, the trial court is required to instruct that foreseeability is an element of proximate cause. In that opinion this Court cited *State v. Dewitt,* 252 N.C. 457, 114 S.E. 2d 100, wherein the North Carolina Supreme Court held that the trial court must instruct fully on proximate cause as it relates to the facts of the particular case. In *Mizelle,* defendant was indicted and convicted on a charge of involuntary manslaughter. In the case at bar, defendant was indicted on a charge of first degree murder and was convicted of second degree murder. Under the facts of the case, foreseeability was not seriously in issue. Defendant admitted that he held a loaded gun and pointed it at

Lenny Harrelson, who was standing close to decedent. We find the instruction sufficient on both causation and the unlawful act. *State v. DeWitt, supra. Accord, State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132; *State v. Sawyer,* 11 N.C. App. 81, 180 S.E. 2d 387. For the reasons stated above, we also find no error in the proximate cause portion of the instruction on second degree murder.

[7] Defendant contends that in instructing the jury "[i]n determining whether the thirty-eight caliber pistol is a deadly weapon," the court expressed an opinion that defendant's .38 caliber gun caused his wife's death. This contention is without merit. Defendant stipulated that his wife died as the result of a gunshot wound and testified that he had his .38 caliber gun in his hand when his wife entered the room and the gun fired. The court was not expressing an opinion but merely reciting evidence not in dispute.

[8] In defining heat of passion, the trial court said:

> "It means that the defendant's state of mind was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions."

Defendant argues that such instruction requires him to be legally insane in order to negate the element of malice and to reduce the offense from murder to manslaughter. *See State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135; *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305. We disagree. In *State v. Jennings,* 276 N.C. 157, 161, 171 S.E. 2d 447, 450, the North Carolina Supreme Court quoted with approval Black's Law Dictionary's definition of heat of passion as "rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection." Legal insanity, in contrast, requires that the accused be laboring under such defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act, or if he does know this, not to know right from wrong. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328. The trial court's definition of heat of passion fell far short of the insanity test approved by our courts and placed no improper burden on defendant.

We have examined defendant's other assignments of error relating to the charge and find all to be without merit. While isolated portions of the charge may be somewhat incomplete, they will be read in context. *State v. Bailey,* 280 N.C. 264, 185

S.E. 2d 683, *cert. denied,* 409 U.S. 948 (1972). In this light they appear to charge adequately on the material aspects of the case arising on the evidence. *See State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25.

Defendant has been accorded a vigorous defense, but the evidence against him was strong and convincing. While he may not have received a perfect trial, he has received a trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE, APPELLEE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, MIDWEST MUTUAL INSURANCE COMPANY, UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND BALBOA INSURANCE COMPANY, APPELLANTS

No. 7410INS727

(Filed 18 December 1974)

1. **Insurance § 1— Commissioner of Insurance — authority to regulate premium rates**

The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute.

2. **Insurance § 79.1— automobile liability insurance — applicability to motorcycles**

As used in Article 25 of G.S. Chap. 58, the term "automobile" liability insurance includes "motorcycle" liability insurance.

3. **Insurance § 79.1— motorcycle liability insurance — order eliminating classifications**

The Commissioner of Insurance exceeded his authority in eliminating classifications for motorcycle liability insurance rates and fixing a flat premium rate for all motorcycle liability insurance where he made no finding that all drivers of motorcycles constitute a reasonably homogeneous group sharing essentially the same hazard for liability insurance regardless of their age, sex or any other criteria, and regardless of the size, weight or power of such vehicle. G.S. 58-248.9.

4. **Insurance § 1— findings by Commissioner — supporting evidence — no reason to believe fact not true**

A finding by the Commissioner of Insurance that a fact is true because there is no reason to believe it is not true is not supported by "material and substantial evidence" as required by G.S. 58-9.6(b)(5).

APPEAL by the North Carolina Automobile Rate Administrative Office and certain member companies of that Office from order and supplementary order of the Commissioner of Insurance dated 1 May 1974.

This proceeding involves the fixing of premium rates and classifications for bodily injury and property damage liability insurance covering motorcycles, motor scooters, motorbikes, and other similar motor vehicles not used for commercial purposes, all of which vehicles are hereinafter referred to simply as "motorcycles." For many years in this State the premium rates for liability insurance on motorcycles have been determined by relating them directly to the rates from time to time fixed for liability insurance covering private passenger automobiles. Since 1964 motorcycles with an unladen weight not in excess of 300 pounds have been rated at 50% of the applicable private passenger automobile rate and motorcycles with an unladen weight in excess of 300 pounds have been rated at the same rate applicable to private passenger automobiles. All other rating classifications applicable to private passenger automobiles, such as vehicle use, whether or not driven to and from school or work, and age and marital status of operator, have been equally applicable to motorcycles.

On 7 May 1970 the North Carolina Automobile Rate Administrative Office filed with the Commissioner of Insurance a proposed revised classification and rating procedure for motorcycle liability insurance. Under this proposal motorcycle liability insurance rates would remain keyed to Class 1A private passenger automobile liability insurance rates, but motorcycles would

be classified by reference to engine size rather than by reference to weight and there would be a further differential in rates depending upon whether the operator was under age thirty. A public hearing on the Rate Office's proposal was held before Commissioner of Insurance Lanier on 23 July 1970, but no further action on the matter was taken by Commissioner Lanier prior to the expiration of his term of office.

On 25 January 1974 Commissioner of Insurance Ingram issued a notice that, among other matters, a public hearing would be held on the 7 May 1970 proposal filed by the Rate Office. After hearings held pursuant to this notice, the Commissioner on 1 May 1974 issued an order making findings of fact and conclusions of law on the basis of which the Commissioner (1) terminated the existing classification system for motorcycle liability insurance (except for the provisions of the Safe Driver Reward Plan), (2) rejected the Rate Office's 7 May 1970 proposal, and (3) fixed a flat premium rate of $27.00 for all motorcycle liability insurance providing specified limits of coverage, with rates for limits in excess thereof to be adjusted in accordance with the approved Increased Limits Table. By supplementary order, also dated 1 May 1974, the Commissioner made the foregoing order applicable (1) to every policy or renewal policy of motorcycle liability insurance issued on and after 9 May 1974 if requested by the insured and (2) to every such policy bearing an initial or renewal effective date of 15 June 1974 or thereafter. These orders are the subject of this appeal.

Attorney General Carson by Assistant Attorney General Charles A. Lloyd and Staff Attorney of the N. C. Department of Insurance Isham B. Hudson, Jr. for the Commissioner of Insurance, appellee.

Allen, Steed & Pullen by Arch T. Allen and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr.; Sanford, Cannon, Adams & McCullough by J. Allen Adams; Young, Moore & Henderson by R. Michael Strickland; Bailey, Dixon, Wooten, McDonald & Fountain by Wright T. Dixon, Jr. for appellants.

PARKER, Judge.

[1, 2] The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute. *In re Filing by Automo-*

bile Rate Office, 278 N.C. 302, 180 S.E. 2d 155 (1971); *In re Filing by Fire Ins. Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969). Such authority as the Commissioner has with respect to motorcycle liability insurance rates is contained in Article 25 of G.S. Chap. 58, which also provides for the creation and prescribes the functions of the North Carolina Automobile Rate Administrative Office. The word "motorcycle" does not appear in Article 25 of G.S. Chap. 58, but the statutes in that Article use the words "automobile" and "motor vehicles which are private passenger vehicles" and "private passenger vehicles" interchangeably, and although none of these terms are further defined in G.S. Chap. 58, we hold that "automobile" liability insurance includes "motorcycle" liability insurance and that the same laws apply to both.

[3] In *Comr. of Insurance v. Automobile Rate Office,* 23 N.C. App. 475, 209 S.E. 2d 411 (1974), this Court held that the Commissioner of Insurance exceeded the authority delegated to him by the Legislature by ordering the establishment of a premium rate classification plan for private passenger automobile liability insurance not based in whole or in part on the age and sex of the drivers. In the order appealed from in the present case the Commissioner has not only undertaken to eliminate age and sex of the drivers as a basis for classification, but he has gone further and has undertaken to eliminate all classifications insofar as motorcycle liability insurance rates are concerned. If the liability insurance applies to a "motorcycle," "motor scooter," "motorbike," or "other similar motor vehicle," descriptive words not otherwise defined, then under the order appealed from all other classification criteria are abolished and the same premium rate is made applicable to each policy regardless of the size, weight, or horsepower of the vehicle, its use, or the age, sex, or marital status of the driver. G.S. 58-246(1) makes it the duty of the North Carolina Automobile Rate Administrative Office in the first instance to "fix rates for automobile bodily injury and property damage insurance *and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.*" (Emphasis added.) This is an express legislative mandate to establish classifications for premium rate purposes "as far as practicable in accordance with the hazard of the different classes of risks." The legislative mandate to make equitable rate classifications was further strengthened and made directly applicable to the Commissioner of Insurance by enactment of

Chap. 908 of the 1971 Session Laws, now codified as G.S. 58-248.9. The order appealed from contains no finding that all drivers, regardless of their age, sex, or any other criteria, of "motorcycles, motor scooters, motorbikes and other similar motor vehicles not used for commercial purposes," regardless of the size, weight, or power of such vehicles, constitute a reasonably homogenous group sharing essentially the same hazard for liability insurance purposes. Had there been such a finding based upon substantial evidence, it is possible that the order here appealed from, insofar as it creates such a single classification, might be sustained as sufficiently complying with the legislative mandate to establish classifications for premium rate purposes "as far as practicable in accordance with the hazard of the different classes of risks." That question we need not presently decide, since in the absence of such a finding it is clear that the Commissioner of Insurance exceeded the authority delegated to him by the Legislature.

[4] In other respects also the orders appealed from cannot be sustained. Certain of the findings upon which the orders purport to be based are "[u]nsupported by material and substantial evidence in view of the entire record . . . " as required by G.S. 58-9.6(b)(5). In some instances factual findings were made on the basis that the Commissioner found "no reason to believe" otherwise. For example, Findings of Fact 10, 12 and 13 contain the following:

> 10. " . . . There is no reason to believe that assigned risk loss experience is better or worse than voluntary experience for motorcycle liability insurance."
>
> 12. " . . . There is no reason to believe that average claim costs for motorcycle bodily injury liability claims and property damage liability claims would have trended differently [from automobile liability claims] during the period and for the purposes of this Decision and Order I find this trend to be correct to project losses during and after the aforesaid period."
>
> 13. "[T]here is no reason to believe that the pure premium developed would be substantially different if only 10/20 BI and 5 PD limits premium and experience were reported [rather than total limits of earned premium and total limit incurred losses] and I find the pure premium to be correct in regard to 10/20 bodily injury and 5 PD limits premiums and losses."

A finding that a fact is true because the fact-finder finds no reason to believe it is not true is certainly not supported by "material and substantial evidence."

Considering the entire record, we find no material and substantial evidence to support the decision of the Commissioner to eliminate completely the existing motorcycle liability insurance plan, which has been in effect in this State for many years. Furthermore, as above pointed out the Commissioner exceeded his delegated statutory authority in attempting to adopt in its place a one-class plan for all motorcycle operators.

For the reasons stated, the orders of the Commissioner of Insurance which are the subject of this appeal are

Reversed and vacated.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY, UNITED STATES FIDELITY AND GUARANTY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, UNIGUARD MUTUAL INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

No. 7410INS582

(Filed 18 December 1974)

Insurance § 79.1—decrease in automobile liability rates — effect of energy crisis

Order of the Commissioner of Insurance decreasing automobile liability insurance rates for bodily injury and property damage, entered after hearings were conducted for "consideration of what effect, if any, the energy crisis should have upon private automobile insurance rates," was in excess of the authority of the Commissioner, was unsup-

ported by material and substantial evidence, and was affected by other errors of law. G.S. 58-9.6.

Chief Judge BROCK dissents.

APPEAL by North Carolina Automobile Rate Administrative Office and certain member companies from orders of the Commissioner of Insurance filed 6 March 1974 and 8 March 1974. Heard in Court of Appeals 29 August 1974.

Attorney General Robert Morgan by Assistant Attorney General Charles A. Lloyd for Intervenor appellee.

Commissioner of Insurance John Randolph Ingram by Staff Attorney Isham B. Hudson, Jr., for Commissioner of Insurance, appellee.

Allen, Steed & Pullen by Arch T. Allen, Thomas W. Steed, Jr., and Lucius W. Pullen; Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr., for defendant appellants.

CAMPBELL, Judge.

The North Carolina Automobile Rate Administrative Office is required:

"(1) To maintain rules and regulations and fix rates for automobile bodily injury and property damage insurance and equitably adjust the same as far as practicable in accordance with the hazard of the different classes of risks as established by said bureau.

* * * *

(4) The bureau shall have the duty and responsibility of promulgating and proposing rates for liability insurance for motor vehicles which are private passenger vehicles, taxicabs, commercial cars, and for garage liability insurance as determined by classification plans promulgated by the bureau and approved by the Commissioner. The bureau also shall have authority to maintain rules and regulations and promulgate and propose rates for automobile medical payments insurance, uninsured motorists coverage and other insurance coverages written in connection with the sale of automobile liability insurance on private passenger cars, taxicabs and commercial cars and garage liability insurance, . . . " G.S. 58-246.

On or before 1 July of each year the Rate Office must submit to the Insurance Commissioner data necessary to compile statistics for the purpose of determining the underwriting experiences of automobile liability injury and property damage insurance and must submit a rate review based on that data. "Such rate proposals shall be approved or disapproved by the Commissioner in writing within 90 days after submission to him: Provided, the Commissioner shall have at least 30 days after the completion of hearings and the receipt of any additional data requested from the North Carolina Automobile Rate Administrative Office in which to consider the rate proposals." G.S. 58-248.

The rates now in effect were established, effective 10 October 1973, upon a filing of the Rate Office made 1 July 1971. As required by statute, the Rate Office made its next annual filing on 30 June 1972. This filing is still pending before the Commissioner of Insurance. On 29 June 1973, the Rate Office again made the annual filing required by G.S. 58-248. After the new rates were established effective 10 October 1973, the Rate Office, on 26 January 1974, made an amended filing which reduced the overall requested rate level increase.

The Commissioner has not held hearings on the 29 June 1973 Rate Office filing as amended on 26 January 1974, which contained the relevant rate-making data required by statute. Instead, the Commissioner proceeded to conduct hearings for "consideration of what effect, if any, the energy crisis should have upon private automobile insurance rates." Hearings were held on 19, 26 and 27 February 1974 and on 5 and 6 March 1974.

The Commissioner made no inquiry as to the accuracy, reasonableness or fairness of the 1973 filing. Instead the filing was accepted as true and accurate. The record on appeal consists 322 pages in addition to voluminous exhibits. During the course of the hearing on 5 March 1974, the Commissioner announced his decision and ordered that the automobile liability insurance rates, which had just been placed in effect on 10 October 1973, be decreased by 14.50 percent for bodily injury and 11.24 for property damage, effective 26 March 1974. The following day, the proceeding was reopened for reception of evidence purporting to show anticipated earned premiums, operating expenses and loss expenses. A ten-page order was signed and filed. A supplementary order was also entered relating to the effective date

of the order, which, among other things, required a refund on all policies with an initial or renewal effective date of 26 March 1974, or thereafter, even though the policies may have been written, delivered or issued for delivery prior to 26 March 1974.

The dissent from the opinion in this case insures the absolute right and reasonable probability of an appeal to the Supreme Court. For that reason, we do not elect to summarize the evidence or discuss all of the assignments of error.

We hold that the order must be reversed for the reasons that (1) it is in excess of statutory authority of the Commissioner; (2) it is unsupported by material and substantial evidence in view of the entire record; and (3) it is affected by other errors of law. G.S. 58-9.6.

Reversed.

Judge VAUGHN concurs.

Chief Judge BROCK dissents.

BARBARA H. HINSON v. WILLIAM W. JEFFERSON AND WIFE, ANNE C. JEFFERSON, AND MAE W. JEFFERSON

No. 743DC754

(Filed 18 December 1974)

1. **Cancellation and Rescission of Instruments § 1— failure of consideration**

Mere absence of consideration is not sufficient to warrant relief by way of equitable cancellation or rescission of an executed contract or deed in the absence of some additional circumstance creating an independent ground for granting cancellation or rescission, such as fraud or undue influence, but where a person has been induced to part with something of value for little or no consideration, equity will seize upon the slightest circumstance of fraud, duress, or mistake for the purpose of administering justice in a particular case; the same rule applies where there is a failure of consideration.

2. **Cancellation and Rescission of Instruments § 4— lot sold for residential purposes — sewage disposal system unavailable — rescission proper**

Where defendants gave plaintiff a deed for a lot, the deed contained restrictive covenants making it clear that both parties contemplated that the lot would be used solely for residential purposes,

after the contract was consummated it was determined that due to the proximity of the water level to the surface of the lot and certain drainage difficulties the lot would not support a septic tank or other on-site sewage disposal system, there was no municipal sewage disposal system available, and neither party knew at the time of the conveyance that the lot was incapable of supporting an on-site system, plaintiff was entitled to rescind the contract.

Judge CAMPBELL dissents.

APPEAL by plaintiff from *Phillips, Judge,* 11 July 1974 Session of District Court held in PITT County.

The controversy presented by this action was submitted on an agreed statement of facts as follows:

(a) This is an action by the plaintiff against the defendants for the recovery of the purchase price of $3,500 paid by the plaintiff to the defendants for a parcel or lot of land described in the complaint and for the cancellation of that certain deed whereby the defendants conveyed said lot or parcel of land to the plaintiff. The unverified answer of the defendants was duly filed.

(b) That by deed dated October 19, 1971, the defendants conveyed to the plaintiff a certain lot or parcel of land lying in Farmville Township, Pitt County, North Carolina, as particularly described in Deed Book J-40, page 365, of the Pitt County Public Registry and as described in the complaint of the plaintiff, said parcel of land fronting 200 feet on State Road #1200 by 300 feet deep.

(c) That the conveyance by the defendants to the plaintiff contained the following restrictive covenants which run with the lot or parcel of land conveyed as follows:

1. The above described lot or parcel of land shall be used for residential purposes only and no residence constructed thereon shall cost less than $25,000.00 based on cost prevailing in the County of Pitt, State of North Carolina, as of October 1, 1971; further, no residence shall be built upon the above described lot or parcel of land unless and until the plans and specifications therefor are approved in writing by William W. Jefferson and wife, Anne C. Jefferson, or the survivor, provided, however, that said plans and specifications need be approved only for the first residence built upon the above described lot or parcel of land.

2. No trailer, mobile home, basement, tent, shack, garage, barn or other outbuilding erected on the above described lot or parcel of land shall at any time be used as a residence, either temporarily or permanently.

3. No building shall be located on the above described lot or parcel of land nearer than 50 feet to the front lot line nor nearer than 20 feet from any side lot line.

4. No noxious or offensive trade or activity shall be carried on upon the above described lot or parcel of land nor shall anything be done thereon which may be or become an annoyance or nuisance. No signs or billboard shall be erected or maintained on the premises. No trade materials or inventories may be stored upon the premises and no trucks or tractors may be stored thereon. Further, said lot or parcel of land shall at all times be neat and clean in appearance and not allowed to be and become unsightly.

5. The lot or parcel of land hereinabove described shall not be subdivided into smaller building lots or parcels of land.

(d) That prior to and at the time of the conveyance by the defendants to the plaintiff of the subject parcel or lot of land, the defendants and the plaintiff contemplated that the plaintiff would construct a home or residence on said lot or parcel of land and that the plaintiff actually prepared to build a home or residence on said lot or parcel of land of the type the plaintiff discussed with the defendants prior to the conveyance of the subject lot and according to the plans approved by the defendants subsequent to the purchase of the subject lot.

(e) That the lot or parcel of land conveyed by the defendants to the plaintiff is located about one mile west of Joyner's Crossroads on State Road #1200, a rural community, to which a municipal sewage disposal system is not now available. That any sewage disposal system for a residence constructed on the subject lot would require the use of a septic tank or an on-site sewage disposal system.

(f) That when plaintiff was ready to commence construction of a proposed residence on the subject lot and before construction commenced, the Environmental Health Division of the Pitt County Health Department on Decem-

ber 27, 1972, pursuant to an examination of said lot performed by Mr. W. C. Haislip under the supervision of its Chief of Sanitation, Mr. W. M. Pate, in March 1972, certified that said lot would not support a septic tank or on-site sewage disposal system for that it was noted that the area has a drainage problem and is subject to flooding and would not support a septic tank or on-site sewage disposal system which would comply with the regulations governing sewage disposal systems in Pitt County, adopted by the Pitt County Board of Health on March 1, 1972, with the regulations adopted by the Pitt County Board of Health on the 1st day of February, 1953, as amended, the latter being in effect on October 19, 1971, and the ordinances of the County of Pitt. That on the 16th day of February, 1972, Charles R. Vandiford, an employee of the United States Department of Agriculture, Soil Conservation Service, Greenville, Pitt County, North Carolina, under the supervision of District Conservationist, Roy R. Beck, conducted an evaluation of the subject lot, the result of which disclosed that the subject lot is only 2.6 feet above the water level of Black Swamp, and subject to overflow, and has a very severe drainage problem which said condition can be corrected by extensive drainage procedures including as a necessary part thereof channel improvements to Black Swamp and Little Contentnea Creek at a prospective cost of several hundred thousand dollars. That these facts so determined and the conditions of the subject lot were true and the same on October 19, 1971, the date of the sale and transfer of the subject lot to the plaintiff by the defendants.

(g) That due to the determination of the Environmental Health Division of the Pitt County Health Department the subject lot would not support a septic tank or on-site sewage disposal system in its present condition, a permit to install a septic tank or on-site sewage disposal system was denied pursuant to the regulations governing sewage disposal in Pitt County adopted by the Pitt County Board of Health, March 1, 1972, the ordinances of Pitt County, and to the regulations of the Pitt County Board of Health, adopted February 1, 1953, as amended, if applied.

(h) That by reason of the denial by the Environmental Division of Pitt County Health Department to the plaintiff of a permit to construct a septic tank or on-site sewage

disposal system on said lot, the plaintiff did not construct a residence on said lot and since the correction of the condition inhibiting the construction of a septic tank and on-site sewage disposal system on the subject lot could not be achieved except through an expenditure of funds of several hundred thousand dollars, the plaintiff demanded the refund of the purchase price paid by the plaintiff to the defendants for said lot in exchange for a reconveyance by the plaintiff to the defendants of said lot.

(i) Defendants declined the plaintiff's offer and refused plaintiff's demand.

(j) That the purchase price of said lot paid by the plaintiff to the defendants was $3,500.00.

(k) That prior to and at the time of the conveyance of said lot by the defendants to the plaintiff, neither the defendants nor the plaintiff knew that said lot would not support a septic tank or on-site sewage disposal system and did not know such fact until the evaluation of said lot was made by the United States Soil Conservation Service of the Department of Agriculture and the Environmental Health Division of the Pitt County Health Department determined such to be true.

(l) That there was no allegation by the plaintiff in her complaint of fraud or misrepresentation on the part of the defendants and the plaintiff does not contend that the defendants were guilty of any fraud or misrepresentation with respect to the condition of the aforesaid lot prior to or at the time of the conveyance of said lot by the defendants to the plaintiff, but on the contrary the defendants in conveying said lot to the plaintiff were totally unaware of any drainage or other soil condition respecting said lot which would or might prohibit the use of a septic tank or other on-site sewage system thereon.

(m) That the Environmental Health Division of the Pitt County Health Department determined, "That this lot is not suitable for residential building purposes and does not meet County Health requirements."

(n) That the deed of conveyance contained no covenant of warranty that the lot or parcel of land conveyed was suitable for the on-site construction of a residence.

The deed referred to in the statement of facts is set out in the record and contains the usual covenants of seizen and warranty against encumbrances "except for restrictive covenants hereinabove referred to and set out."

The trial court concluded that plaintiff is entitled to no relief, and plaintiff appeals from judgment dismissing the action.

Everett & Cheatham, by C. W. Everett, for plaintiff appellant.

Gaylord and Singleton, by Mickey A. Herrin, for defendant appellees.

BRITT, Judge.

Did the trial court err in entering judgment for defendants? We hold that it did.

Plaintiff argues that judgment should have been rendered in her favor for the reason that the deeds from defendants to her constituted a contract, that a mutual mistake of a material fact existed at the time the contract was entered into and consummated, and that the mutual mistake was accompanied with a failure of consideration.

While our research has failed to disclose a case in this jurisdiction directly in point with the instant case, we think a rational extension of the principle established in *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800 (1967), would be proper. In *MacKay,* plaintiff owner and defendant purchaser entered into a contract for the sale and purchase of a lot upon which was a brick building; defendant's sole interest in the property was to use the building as a retail store and she so advised plaintiff's agent; defendant was induced to sign the contract by the agent's representation that the property was in a zone where retail business was permitted; and both the agent and defendant acted pursuant to their mistaken belief that the representation with regard to zoning was true when in fact it was false. The owner brought suit for specific performance. In affirming a judgment for defendant, the Supreme Court said (page 73):

> Defendant does not seek to contradict the writing or to enforce a parol agreement. She contends that, since both Mrs. Cooper (plaintiff's agent) and defendant negotiated

and acted in the honest but mistaken belief the subject property was in fact zoned for business, no contract, either written or oral, resulted; and that, there being no agreement, she is not obligated to purchase property which cannot be used for a retail store.

"The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." 17 Am. Jur. 2d, Contracts § 143.

A deed, duly signed, sealed and delivered, is an executed contract. *Edwards v. Batts*, 245 N.C. 693, 97 S.E. 2d 101 (1957). While the holding in *MacKay* dealt with an executory contract, we think the principle is also applicable to an executed contract. "A mutual mistake of such a character as to affect the validity of an executory agreement ordinarily affects the validity of an executed agreement." 17 Am. Jur. 2d, Contracts, § 143.

[1] It appears to be a generally recognized rule that mere absence of consideration is not sufficient to warrant relief by way of equitable cancellation or rescission of an executed contract or deed in the absence of some additional circumstance creating an independent ground for granting cancellation or rescission, such as fraud or undue influence; but where a person has been induced to part with something of value for little or no consideration, equity will seize upon the slightest circumstance of fraud, duress, or mistake for the purpose of administering justice in a particular case. 13 Am. Jur. 2d, Cancellation of Instruments, § 21, page 515.

With respect to consideration, we find in 13 Am. Jur. 2d, Cancellation of Instruments, § 22, pp. 515-6, the following:

> Failure of consideration differs from lack of consideration in that it refers to something subsequent to the agreement, and not to something inherent in the agreement itself. Failure of consideration, like lack of consideration, is not generally considered a sufficient ground for equitable cancellation of an instrument in the absence of some additional circumstance independently justifying this relief, such as fraud, duress, or mistake. But, as in the case of lack of consideration, where there is a failure of consideration equity will seize upon the slightest circumstance of an inequitable nature for the purpose of administering justice in the particular case.

And in § 31, pp. 523-4, we find:

> Equity may decree cancellation of an instrument on the ground of mistake of fact whether the instrument relates to an executory agreement or to one that has been executed. A mistake warranting cancellation must affect the substance of the contract and be more than a mere incident of the agreement. It must be made to appear that the fact concerning which the mistake was made was one that animated and controlled the conduct of the party on whose behalf the cancellation is sought, and that but for that mistake he would not have executed the instrument involved . . . .

[2] We now apply the stated principles to the facts presented in the case at bar. The inclusion of the restrictive covenants in the deed from defendants to plaintiff leaves no doubt that the parties contemplated that the lot in question would be used solely for residential purposes, and that only a substantial residence would be erected on the lot. After the contract was consummated, it was determined that due to the proximity of the water level to the surface of the lot, and certain drainage difficulties, the lot would not support a septic tank or other on-site sewage disposal system. This being true, and no municipal sewage disposal system being available, there is no feasible way the lot can be utilized for the purpose contemplated by the parties. Neither the plaintiff nor the defendants knew, at the time of the conveyance, that the lot was incapable of supporting a septic tank or other on-site sewage disposal system.

The mistake shared by the parties related to a *material* fact, one which entered into and formed a basis of the contract, one which was of the essence of the agreement, and one which "animated and controlled" the conduct of the parties. Inasmuch as plaintiff's use of the property is restricted to residential purposes, it is virtually worthless to plaintiff.

In *MacKay,* the mistake was an unintentional false representation; in this case, the mistake was a false assumption. There is more reason for equity to intervene in this case than there was in *MacKay;* in that case, the property could have been put to some profitable use but that is not true here. Defendants argue in this case that plaintiff could have determined before consummating the sale that the lot would not support a septic tank or on-site sewage system by having a qualified person perform a soil test. In *MacKay,* a telephone call to the city hall no doubt would have revealed that zoning regulations would not permit retail business on the subject property.

In 5 Strong, N. C. Index 2d, Money Received, § 1, page 524, it is said: "Where a party pays in good faith, in ignorance of the facts, a sum of money for certain property, rights or interests, which in fact are worthless so that there is a total failure of consideration, the money paid may be recovered under the principles of justice. . . ."

We hold that plaintiff is entitled to rescind the contract. Upon tender of a deed to defendants, reconveying to them the lot free of any encumbrances placed thereon since the conveyance by defendants, plaintiff is entitled to recover from defendants the $3,500 purchase price.

The judgment appealed from is vacated and this cause is remanded to the district court for entry judgment consistent with this opinion.

Remanded.

Judge VAUGHN concurs.

Judge CAMPBELL dissents.

JUDY BRADLEY PENLAND AND HUSBAND, BRUCE ELBERT PENLAND v. RONNIE GREENE

No. 7428SC607

(Filed 18 December 1974)

1. **Trial § 32— instructions to follow earlier instructions — no error**

Trial court's instructions reminding the jurors of his earlier instructions to disregard stricken testimony and to follow those instructions were proper.

2. **Automobiles § 90— entering highway from private road — instructions proper**

In an action to recover damages incurred by plaintiff in an automobile accident, the trial court's instructions occasionally using the term "servient highway or street" instead of "private road or drive" did not intermingle the law of G.S. 20-158 involving dominant-servient highways and G.S. 20-156 involving the entry of an automobile from a private drive or road into a public highway and thereby confuse the jury.

Judge CAMPBELL dissenting.

APPEAL by defendant from *Friday, Judge,* 11 February 1974 Session of Superior Court held in BUNCOMBE County.

This is an action to recover damages incurred by plaintiff in an automobile accident. Plaintiff, Judy Bradley Penland, driver of an automobile owned by plaintiff, Bruce Elbert Penland, was injured when she attempted to enter a public highway from a private industrial entrance and her automobile collided with an automobile driven by defendant. Plaintiff's automobile was extensively damaged.

Defendant denied negligence and alleged that the negligence of Mrs. Penland is a bar to any recovery.

The accident occurred near an intersection of a prominent industrial road and North Carolina Highway 1112, also known as Sand Hill Road. The industrial road is the entrance to and exit from the American Enka Plant. The industrial entrance runs north-south; Sand Hill Road runs east-west. Viewed from the industrial entrance facing south, the area would be described as follows.

Directly across Sand Hill Road from the industrial entrance, there is an Esso station. There is a traffic island in front of the station, separating the station from the highway. Some

100 feet to 118 feet to the right of the entrance to the plant, in the westerly direction, there is a dyke. Further west on the other side of the dyke is a bridge. Also on the western side of the entrance, within a span of 100 feet to 150 feet there are six different highway signs. There are two speed limit signs, a caution sign to beware of an industrial entrance, a double caution light which runs 24 hours a day, and a sign which warns that a traffic officer will be ahead when the caution light on the sign is flashing. The highway is marked with a double yellow line to indicate a "no passing" zone and the speed limit in front of the entrance is 35 miles per hour. Sand Hill Road is 24 feet wide, each lane being 12 feet in width. Sand Hill Road runs through the dyke which is located on either side of the road. The highway curves between the industrial entrance and the dyke. Because of the way the highway curves between the industrial entrance and the dyke, as one pulls out on the highway, distance of visibility increases.

At about 7:05 to 7:15 on the morning of 27 July 1972, Mrs. Penland was leaving the American Enka Plant where she was employed. She drove up to the stop sign placed on the right side of the industrial entrance. She was facing a southerly direction and was preparing to exit from the plant and to proceed in an easterly direction on Sand Hill Road. She was driving a gold 1972 Datsun automobile. There is a considerable amount of exiting traffic at this hour, it being the end of the "graveyard" shift at the plant. Estimates range from several hundred to six hundred cars.

Mrs. Penland testified that she pulled up to the point of exit and observed five or six cars pass. She sat there three or four minutes. She looked in both directions before pulling out, saw no cars in sight, and then began to proceed to the eastbound lane on Sand Hill Road. As she moved towards the center of the road she continued to look to the west and still saw no car. As she began to straighten up her automobile in the eastbound lane she was hit by defendant's automobile, a blue 1967 Chevrolet. She testified that she was proceeding at about 15 miles per hour when hit, that she never saw defendant's automobile, and that she heard no warning before the impact. The left front of defendant's automobile crashed into the passenger side of plaintiff's automobile, caving in the right front door, tearing up the dash, and crashing the windows.

According to Mrs. Penland, when she pulled up to the entrance she was beside Clarence Grogan, who was in the neighboring lane preparing to turn into the westbound lane of the highway. She said Mr. Grogan pulled out into the westerly lane just before she pulled out. According to Grogan, he too waited for five or six cars to pass, and then seeing no oncoming traffic, pulled out. He indicated that he and Mrs. Penland entered the highway at about the same time.

Mr. Grogan further testified that he observed a blue Chevrolet as he passed through the dykes. He saw the car come across a bridge over Hominy Creek west of the dykes and observed the car some five or six seconds. It was the only blue Chevrolet he saw on the road. Mrs. Ivarine Trull, riding with Mr. Grogan, confirmed that they passed a blue Chevrolet and testified that upon approaching the Chevrolet, "Mr. Grogan pulled off the highway at the right side" and commented "wonder how far he is going to get at that rate of speed."

Ronald Revis, owner of the Esso station across from the industrial entrance, testified that he saw Mrs. Penland come up to the road and stop. She then pulled out in a normal fashion and was travelling at an average speed, about fifteen to twenty miles per hour. Revis then heard tires squalling and looked up. He saw defendant's blue Chevrolet coming through the dyke. Defendant was applying his brakes and sliding off the road towards the station. Defendant then released his brakes, jerked his automobile back on the road, and tried to get around plaintiff's automobile on the right side. In the process defendant hit plaintiff's automobile in the side of the right passenger's door just as plaintiff was straightening up in her lane. Defendant went up against the traffic island in front of the station. Plaintiff was pushed over some 20 to 30 feet, jumped the curb, and landed between a tree and a fence bordering the Enka plant.

According to Revis, plaintiff was more in the eastbound lane than in the westbound lane at the time of impact. Her back wheel and perhaps the back eighteen inches of her car were in the westbound lane. Revis estimated defendant's speed to be between 65 to 70 miles per hour. He observed that skid marks started at the dyke, stopped, then started again and continued to the point of impact.

Randy Vicks, who worked at the Esso station, witnessed the accident. Vicks testified that he saw plaintiff pull out of

the industrial entrance in a normal fashion, heard tires squalling, saw defendant's automobile sliding on the road, and saw defendant collide with plaintiff. The impact occurred near the easterly end of the traffic island located in front of the station. Plaintiff was in the right-hand lane and defendant was in the right-hand lane up against the curb of the traffic island. Vicks confirmed Revis' testimony that there were two sets of skid marks, one about 80-100 feet in length by the dyke and one 15-20 feet long at the point of impact. Vicks testified that plaintiff was going between ten and twenty miles per hour and defendant was going between 45 and 60 miles per hour. Vicks testified that the left front headlight of defendant's Chevrolet collided with the middle of the front right door of plaintiff's vehicle.

Defendant then presented the following evidence. Defendant was driving down Sand Hill Road to his work at the American Enka Plant at about 7:10 a.m. to 7:15 a.m. He travels the road frequently and is familiar with the area. On this particular day defendant was late for work, as he was scheduled to be at work at 7:00, but he was not in a hurry. He was driving about thirty to thirty-five miles per hour. He came through the dykes and was about sixty feet from plaintiff's automobile when he first saw it. When plaintiff pulled out, defendant first thought of turning off the road through the station but a man was standing in the way. Defendant "popped" his brakes in an attempt to stop. He was unsuccessful and hit plaintiff's passenger door. At the time of impact, the front of plaintiff's car was in the eastbound lane, with her side toward defendant's car. The rear portion of plaintiff's car was in the westbound lane. Defendant's left front fender hit plaintiff's right front door in front of the industrial entrance. Defendant estimated plaintiff's speed to be about ten miles per hour. He did not remember leaving skid marks or applying brakes near the dykes. He agreed that there are signals near the industrial entrance and specifically recalled the double flashing caution light and the "guard on duty" sign with a caution light near the dyke.

Issues of negligence, contributory negligence and damages were all answered in favor of plaintiffs. Defendant appeals from the judgment awarding damages for personal injuries and property damages.

Cecil C. Jackson, Jr., for plaintiff appellees.

Morris, Golding, Blue & Phillips by James N. Golding for defendant appellant.

VAUGHN, Judge.

Defendant brings forward numerous exceptions to the court's instructions to the jury.

[1] We quote from defendant's brief:

> "During the Court's charge to the jury the Trial Court instructed the jury as follows (R p 107):
>
> '(Now members of the jury, the Court will again instruct you that when it has instructed you to disregard testimony, disabuse it from your mind not to consider it. Please follow those instructions in your deliberations.)'
>
> In effect the Court advised the jury to disregard its former instructions not to consider certain evidence which it had stricken and instructed the jury not to consider."

On several occasions during the course of the trial, the judge had granted motions to strike certain testimony. On each occasion the jurors were instructed to disregard that testimony and not consider it in their deliberations. It is obvious to us, as it must have been to the jury, that in the quoted part of the instructions the judge was reminding the jurors of his earlier instructions to disregard the stricken testimony and to follow "those [earlier] instructions." The exception is without merit.

In assignments of error 17 and 18 defendant argues that the judge instructed the jury in such a fashion that it was possible for the jury to conclude that if defendant failed to keep a proper lookout or failed to keep his automobile under control he would be in violation of a statute, the violation of which would constitute negligence within itself. It is sufficient to say that we have carefully considered the charge in that respect and hold that it is not susceptible to the interpretation placed upon it by defendant.

[2] Defendant argues that although the facts involve plaintiff's entry from a private driveway into a public highway "It is obvious that the Court instructed the jury of the law arising under G.S. 20-158 (dominant-servient highways) and intermingled and

thereby confused its instructions pertaining to the law set forth in G.S. 20-156, which involves the entry of an automobile from a private drive or road into a public highway."

A reading of the charge discloses that the judge, as he instructed the jury on the respective duties of the parties, on occasions used the term "servient highway or street" instead of "private road or drive" when he explained the law arising on the evidence as it related to the intersection of the road or drive leading from the Enka premises and North Carolina Highway 1112. Defendant contends that the judge thereby confused provisions of G.S. 20-158 and G.S. 20-156, thereby instructing the jury on law which did not arise from the evidence and giving conflicting instructions.

Defendant's argument is without merit. We note that the judge did not read from or refer to either G.S. 20-156 or G.S. 20-158, as such. Defendant does not point out any alleged errors the judge made in explaining the respective right and duties of the two drivers as they approached and entered the intersection. Other than the judge's occasional use of the term "servient highway or street" instead of "private road or drive," defendant does not indicate how he feels that the instructions given were erroneous or different from those which he thinks should have been given. That there was no error prejudicial to defendant in the occasional interchange of the term may be illustrated by the following quotation from the charge:

> "Now the defendant further says and contends to you that at the time and place in question the plaintiff was negligent in that she violated the statute controlling a person entering a highway from a dominant highway—from a subservient highway. Members of the jury, and the Court instructs you in that regard that the Motor Vehicle Law of North Carolina provides that the driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on the public highway, the dominant highway.
>
> In order to comply with this law the driver is required to look at vehicles approaching on the highway at the time when her lookout might be affected to see what she should see, to yield her right-of-way to vehicles on the highway and to delay her entry into the highway until it can be made in safety, and a violation of this law is negligence per se

or negligence within itself. A proximate cause would result in liability, members of the jury.

* * *

. . . the Court instructs you that if you find by the greater weight of the evidence that the plaintiff, Judy Penland . . . violated the rule of starting from a stopped position on a subservient highway, or violated the rule upon entering a dominant highway from a private drive, as the Court instructed you, members of the jury, as you will recall the Court's instructions."

Even the Supreme Court has, on occasion, said that G.S. 20-158, which deals with the driving of one entering a main travelled highway from intersecting highways on which a stop sign has been erected, regulates the conduct of one entering the main highway from a private road. *Warren v. Lewis,* 273 N.C. 457, 461; 160 S.E. 2d 305, 307.

We have considered defendant's remaining assignments of error and hold that neither those, nor those discussed, disclose error prejudicial to defendant.

No error.

Judge BRITT concurs.

Judge CAMPBELL dissents.

Judge CAMPBELL dissenting:

I dissent and think a new trial should be given.

FRED W. DRURY, PLAINTIFF v. E. B. DRURY AND WIFE, MARY DRURY, AND ROBERT L. HOLLAND, DEFENDANTS

— AND —

ROBERT L. HOLLAND, CROSS-CLAIMING DEFENDANT v. E. B. DRURY AND WIFE, MARY DRURY, DEFENDANTS

No. 7420SC810

(Filed 18 December 1974)

1. Rules of Civil Procedure § 50— directed verdict for party with burden of proof

Ordinarily, it is not permissible to direct a verdict in favor of a party who has the burden of proof; however, the court may direct a

verdict when the issue submitted presents a question of law based on admitted facts.

2. Estoppel § 3— ownership alleged in complaint — no estoppel subsequently to deny interest in proceeds from property

Where defendants brought an action to set aside a deed, the case was removed to federal court and defendants filed an "amended complaint" alleging that plaintiff was the record owner of two-sevenths of the land in question and, as such, should be joined as a necessary party "in order that his interest, if any, in the subject controversy may be determined," the amended complaint did not amount to a sufficient admission of plaintiff's interest in the property to estop defendants from denying plaintiff's interest in the proceeds therefrom.

APPEAL by defendants E. B. Drury and wife, Mary Drury, and Robert L. Holland from *Seay, Judge,* 3 June 1974 Civil Session of Superior Court held in UNION County. Heard in the Court of Appeals on 18 November 1974.

This is a civil action in which plaintiff Fred W. Drury seeks to recover two-thirds out of a total of $90,850.80 on deposit in the Office of the Clerk of Superior Court of Union County. Defendant Holland cross-claims against co-defendants E. B. Drury and wife, Mary Drury, to recover for legal services arising out of a transaction that is the subject matter of the original action by Fred W. Drury.

The record discloses that E. B. Drury and his wife conveyed by gift a large tract of land to Bob Jones University. Thereafter, they brought an action in the Superior Court of Union County to set aside the deed. The case was removed to federal district court where E. B. Drury and his wife, through their attorney, Robert L. Holland, filed an "amended complaint" alleging that Fred W. Drury was the record owner of two-sevenths of the tract conveyed and, as such, should be joined as a necessary party to the action under N.C.G.S. 1A-1, Rule 19 (sic). The time for amending the complaint as a matter of right had expired, but the federal court treated the pleading as a motion and joined Fred W. Drury as a third-party defendant so that his interest in the property could be determined. This action in federal court was terminated by a settlement agreement under which Bob Jones University agreed to pay $90,643.50 by check to E. B. Drury, Mary Drury, Fred W. Drury, and Robert L. Holland as joint payees. Fred W. Drury then brought the present action in superior court alleging that he is entitled to two-thirds of this money. Defendant Robert L. Holland cross-claimed against co-defendants E. B. Drury and

Mary Drury to recover his fee for the earlier action in federal court, which he alleged was equal to one-third of any amount found to be due the co-defendants, less a retainer fee of $1,500. It was stipulated that the total amount involved was actually $90,850.80. At trial, the court excluded defendants' evidence tending to show that Fred W. Drury had no interest in the property conveyed to Bob Jones University. At the close of all the evidence, the trial court granted Fred W. Drury's motion for a directed verdict in the amount of $60,567.20 (two-thirds of $90,850.80). On defendant Holland's cross-claim the jury returned a verdict in his favor for $8,471.03. Defendants E. B. Drury, Mary Drury, and Robert L. Holland appealed.

Williams, Willeford, Boger & Grady, by John Hugh Williams, H. W. Calloway, Jr., and Kenneth B. Cruse, for plaintiff appellee.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, by H. F. Seawell, Jr., and Bruce T. Cunningham, Jr., for defendant appellants E. B. Drury and Mary Drury.

Griffin & Humphries, by Charles D. Humphries, for defendant appellant Robert L. Holland.

MARTIN, Judge.

Defendants E. B. Drury and Mary Drury contend the trial court erred in directing a verdict against them at the close of all the evidence. Plaintiff Fred W. Drury argues that the directed verdict was proper, because defendants admitted in their "amended complaint" in federal court that plaintiff Drury owned a two-sevenths interest in the tract of land, and they are now estopped to deny that fact in the present action. Furthermore, plaintiff seeks to buttress his argument of estoppel by referring to the terms of the settlement agreement in the federal action. He argues: (1) the settlement agreement by express terms was based on three-sevenths of the sale proceeds received by Bob Jones University from the tract; (2) the figure "three-sevenths" derived from a recognition of plaintiff's two-sevenths interest in the tract; (3) the remaining one-seventh was designated to go to defendants E. B. Drury and Mary Drury for their expenses in the federal action; (4) therefore, it was intended that plaintiff would have two-thirds of the total settlement of $90,850.80. Plaintiff fashions a reasonable explanation of the settlement agreement. Even so, the settlement agreement does

not expressly give plaintiff two-thirds of the $90,850.80. Nor do we think this is the only reasonable inference to be drawn therefrom. Therefore, we turn to the matter of the "amended complaint" to determine if it estops defendants from denying plaintiff's two-sevenths interest in the tract of land and hence his interest in the proceeds as well. If it does not, then clearly the settlement agreement, by itself, does not either.

[1] In the present case the trial court directed a verdict for the plaintiff. Ordinarily, it is not permissible to direct a verdict in favor of a party who has the burden of proof. However, the court may direct a verdict when the issue submitted presents a question of law based on admitted facts. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726 (1961). The question before us is whether defendants' amended complaint in the federal court amounts to a sufficient admission of plaintiff's interest in the property to estop them from denying plaintiff's interest in the proceeds therefrom. We hold that it does not.

A full discussion of the role of a pleading containing an admission and offered against the pleader in a subsequent action is found in *Hotel Corporation v. Dixon,* 196 N.C. 265, 145 S.E. 244 (1928). "[W]hile it is competent to introduce pleadings or solemn admissions as defined by law as evidence, nevertheless the admissions so admitted are not conclusive. The party making such admissions has the legal right to show, if he can, that they were made under misapprehension or by inadvertence or mistake, or for the purpose of dispensing with formal proof, or that they were made for the purpose of presenting a particular point in the particular case under consideration. [Citations.]" *Hotel Corporation v. Dixon, supra.* Also, in such a case, the pleading "is competent against the party if he signed it or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence, open to rebuttal, that he admitted such facts." *Bloxham v. Timber Corporation,* 172 N.C. 37, 89 S.E. 1013 (1916), quoting 1 Enc. of Evidence, p. 425.

[2] In the present case, the "amended complaint" filed in the federal court alleged that Fred Drury was the owner of two-sevenths of the disputed tract of land. It requested that Fred W. Drury be joined as a party "in order that his interest, if any, in the subject controversy may be determined." A party should not be required to make such an allegation for the purpose of

joining a necessary party at the risk of being estopped to deny its truthfulness in a subsequent action. Furthermore, it is not apparent, as a matter of law, that the allegation in question did admit to Fred W. Drury's ownership in the property.

The pleading from the prior federal action was used to estop defendants from rebutting plaintiff's assertion of an interest in the property and the proceeds therefrom. Consequently, defendants suffered a directed verdict. Under such circumstances, defendants E. B. Drury and Mary Drury are entitled to a new trial. As to Holland, however, it appears that the jury, in effect, found that he was entitled to one-third of the recovery had by E. B. Drury and wife. On appeal, the percentage or fractional portion is not in dispute. Holland concedes that the one-third fraction is in accord with his agreement. E. B. Drury does not make any argument at all with respect to this question. It, therefore, appears that Holland is entitled to one-third of that portion of the $90,000 settlement which is finally adjudged to be due E. B. Drury and wife. It follows that there is no need for this portion of the litigation to be retried. Upon retrial of the Fred Drury action, any judgment entered shall provide for the payment to Holland of one-third of that portion of the proceeds of settlement payable to E. B. Drury and wife.

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLIAM PRESTON GRIFFITH

No. 7420SC576

(Filed 18 December 1974)

1. **Criminal Law § 64— evidence of defendant's intoxication — admissibility**

The jury was properly allowed to consider opinion evidence of an officer that, when he observed defendant thirty minutes after the automobile accident in question, defendant was under the influence of intoxicating liquor, even though the State offered defendant's statement which tended to show that defendant consumed two drinks of liquor after the accident.

2. **Automobiles § 113— driving under influence and reckless driving — manslaughter — sufficiency of evidence**

Evidence was sufficient to justify the jury's finding that defendant violated either the drunk driving statute, G.S. 20-138, or the

reckless driving statute, G.S. 20-140(b), or both, and that such violation was a proximate cause of the death of a child who was being pushed in a stroller along a highway by his mother.

APPEAL by defendant from *Seay, Judge,* 28 January 1974 Session of Superior Court held in MOORE County. Argued in the Court of Appeals 4 September 1974.

Defendant was charged in a bill of indictment, proper in form, with the felony of manslaughter. The charge arose out of the death of a child who was struck, allegedly by defendant's automobile, on 7 August 1972, on highway 211 approximately one mile outside the corporate limits of Aberdeen, Moore County, North Carolina. The jury returned a verdict of guilty of involuntary manslaughter. Judgment of imprisonment was entered. Defendant appealed.

Attorney General Carson, by Associate Attorney Reilly, for the State.

William D. Sabiston, Jr., for the defendant.

BROCK, Chief Judge.

The evidence considered in the light most favorable to the State tends to show the following:

At about 8:30 p.m. on 7 August 1972, the weather was clear, and, although darkness was approaching, visibility was good without the use of lights. The road was straight and the surface dry. Mrs. Joyce Hogg, along with her daughter, Glenda Carter, age 12, and her 16-month-old son, William Hogg, Jr., were walking in an easterly direction along the dirt shoulder on the southern edge of highway 211 near Aberdeen. Mrs. Hogg was walking about a foot from the pavement, pushing William Hogg, Jr., in a stroller. Glenda was walking to their right. Glenda did not see or hear an automobile at any time.

At about this same time and place, defendant drove his automobile east along highway 211. He did not see the three pedestrians, but he did feel an impact with his automobile. Defendant stopped, backed up, and got out of his vehicle. He looked around the area but did not see anything. Defendant continued to drive east on highway 211 but shortly thereafter turned around to return to Aberdeen. As defendant reached the spot where he had originally felt the impact, he did not see anything.

Defendant went to his place of business in Aberdeen, and then went to his home. He arrived at home approximately 20 minutes from the time he felt the impact with his automobile on highway 211. Defendant consumed two drinks of whiskey prior to feeling the impact and had two drinks of whiskey when he drove back to his place of business before going home. An investigating officer saw defendant at his home at about 9:10 p.m. on 7 August 1974. Defendant's face was flushed and his eyes were bloodshot. He had the odor of alcohol on his breath and was unsteady on his feet. In the opinion of the investigating officer, defendant was under the influence of intoxicating liquor.

The rear view mirror which had been mounted on the right (passenger) side of defendant's automobile was broken off. Impressions of the fabric on the baby stroller in which William Hogg, Jr., was being pushed were found on the gravel pan of defendant's car. Hair matching the hair of William Hogg, Jr., was found on the lower right A-frame of defendant's car. Hair matching the hair of Mrs. Joyce Hogg was found on the radio antenna base which was mounted on the right (passenger) side of defendant's car, about one foot from the broken rear view mirror bracket. Paint matching the paint on defendant's car was found on the handle of the stroller in which William Hogg, Jr., was riding. A rear view mirror matching the broken bracket on the right (passenger) side of defendant's car was found lying between the bodies of Mrs. Joyce Hogg and William Hogg, Jr., on the south side of highway 211.

The body of Mrs. Joyce Hogg was found approximately ten feet south of the paved portion of highway 211. The body of William Hogg, Jr., was found in the remains of the stroller approximately ten feet east of the body of Mrs. Joyce Hogg. Parts of the stroller in which William Hogg, Jr., was riding were found scattered over an area of approximately 41 feet. William Hogg, Jr., died as a result of a multiple trauma to his head and chest.

The evidence does not disclose the results of injuries to Mrs. Joyce Hogg. The only evidence of her injuries was the observation of a witness at the scene of the accident. Officer Jerry Wilson testified in part: "She was lying face down. . . . Mrs. Joyce Hogg was bleeding a little bit from the mouth. . . . I saw signs of life about the body of Mrs. Joyce Faircloth Hogg. She was moaning, but she never did say anything." Mrs. Hogg did not testify at the trial.

Mrs. Joyce Hogg's daughter, Glenda, testified at the trial. She described the manner in which they were walking along the shoulder of the road prior to the accident. She testified that she regained consciousness in the hospital. She testified in part as follows:

> "After I was walking along the highway there—as I last remember—I never saw my mother or my brother, William Hogg, Jr., again. I did not hear the sound of any motor or any noise at all just after I looked back. I did not see any cars on that paved road at or about that time.
>
> . . . .
>
> "I had been walking on this particular road about thirty minutes. We had walked about a mile on the road. No cars passed us. I did not see any cars the whole time I was walking. I did not hear the motor or engine of any automobile."

The State's evidence does not disclose skid marks or tiremarks on the pavement or on the dirt shoulder of the road at the scene. Marks described as "some scuff marks" were observed on the dirt shoulder at the scene.

Despite Glenda's apparent failure of memory of the moments of impact, the physical facts presented by the evidence seem compelling. The location of the bodies ten feet south of the pavement, the imprint of the stroller fabric on the gravel pan of defendant's car, the hair on the lower right A-frame of defendant's car, the rear view mirror broken from defendant's car lying approximately ten feet south of the pavement, the hair on the radio antenna on the right front of defendant's car, and the "scuff marks" in the dirt of the shoulder of the road would justify, though not compel, the jury's finding that defendant drove his vehicle off the right side of the paved portion of the road and struck the three pedestrians. Such physical facts would support a finding that defendant operated his vehicle without maintaining a proper lookout and without keeping his vehicle under proper control. It would strain credulity to suggest that the defendant, while maintaining a proper lookout, would drive his car along a straight road during daylight hours and fail to see an adult walking along the shoulder of the road or on the paved portion, pushing a baby in a stroller and accompanied by a 12-year-old daughter. It likewise would strain credulity to suggest that the defendant, while maintaining proper

control of his vehicle, would drive onto the shoulder of the road, strike the three pedestrians, and continue down the road without knowledge of what had happened.

It remains, however, to be determined whether such conduct constitutes culpable negligence.

[1] The State offered defendant's statement tending to show that defendant had consumed two drinks of intoxicating liquor before he drove out highway 211 where he felt an impact with his automobile. The State's evidence also tends to show that defendant was under the influence of intoxicating liquor within about 30 minutes after the accident. Defendant concedes that the interval of time of 30 minutes is reasonable for the use by the State of this evidence of intoxication to show defendant's condition at the time of the accident. Defendant argues, however, that the testimony of the officer concerning defendant's intoxication 30 minutes after the accident has no probative value in this case and should have been excluded. Defendant argues that the State offered defendant's statement which tended to show that defendant consumed two drinks of intoxicating liquor *after* the accident. He argues that this evidence robs the officer's opinion of defendant's intoxication of its probative value and that the officer's opinion should have been excluded. In our view the weight to be given the officer's opinion testimony was for the jury to determine under appropriate instructions. *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165.

[2] "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *State v. Cope,* 204 N.C. 28, 167 S.E. 456. In the case under consideration the evidence tends to show a violation of two statutes designed for the protection of human life or limb. "It shall be unlawful for . . . any person who is under the influence of intoxicating liquor . . . to drive any vehicle upon the highways within this State." G.S. 20-138. "Any person who drives any vehicle upon a highway without due caution and circumspection and . . . in a manner so as to endanger or be likely to endanger any person . . . shall be guilty of reckless driving." G.S. 20-140(b). Death caused by a violation of either of these statutes may constitute manslaughter. *State v. Dills,* 204 N.C. 33, 167 S.E. 459.

A precedent to a conviction of manslaughter for the violation of either one or both of the foregoing safety statutes is

that the violation of either one or both must have caused the accident and the death of William Hogg, Jr. In our opinion the evidence is sufficient to justify, but not compel, the jury's finding that defendant violated either one or both of the foregoing statutes and that such violation was a proximate cause of the death of William Hogg, Jr. The trial judge did not err in the denial of defendant's motions for nonsuit. *Cf. State v. Weston*, 273 N.C. 275, 159 S.E. 2d 883.

Defendant assigns as error certain portions of the trial judge's instructions to the jury. We have reviewed each of these. In our opinion when the instructions are read in context, as they must be, they adequately apprise the jury of its duties and the applicable principles of law.

No error.

Judges MORRIS and MARTIN concur.

ROY ARNOLD, PLAINTIFF v. RONALD W. HOWARD AND LINDA H. HOWARD, ORIGINAL DEFENDANTS, AND JAMES F. CLARDY, THIRD-PARTY DEFENDANT

No. 7426SC627

(Filed 18 December 1974)

Appeal and Error § 6; Rules of Civil Procedure § 54— judgment not adjudicating rights of all parties — interlocutory order — no right to appeal

Summary judgment entered in favor of the third-party defendant is interlocutory and not presently appealable by the original defendants where the judgment adjudicates "the rights and liabilities of fewer than all the parties" and contains no determination by the trial judge that "there is no just reason for delay." G.S. 1A-1, Rule 54(b).

ATTEMPTED appeal by original defendants from *Falls, Judge*, 8 April 1974 Schedule "A" Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff Arnold brought this civil action against the Howards, original defendants, to recover balance allegedly due on a purchase money promissory note dated 31 March 1972 executed by the Howards to the order of Arnold. The Howards answered, setting up certain defenses, including that Arnold had made

fraudulent misrepresentations during the transaction in connection with which the note was given. In their answer the Howards also set out a third-party claim against Clardy, whom they made a third-party defendant, alleging that if they should be found liable to Arnold for any sum, then they are entitled to reimbursement from Clardy.

The pleadings disclose the following events. On 31 March 1972 Arnold sold and conveyed to the Howards a tract of land in Mecklenburg County on which there was situated a 96-unit apartment complex. The property was subject to the lien of a deed of trust dated 22 February 1971 securing a note to Cameron Brown Company in the original principal sum of $800,000.00. As part of the purchase price the Howards executed to the order of Arnold the note here in suit payable in the sum of $225,000.00, and secured the same by a purchase money deed of trust which was subordinate to the prior lien of the Cameron Brown deed of trust. By written contract dated 28 December 1972 the Howards agreed to sell the property to Clardy and Clardy agreed to purchase it from the Howards, the contract reciting that the "contract price" for the property was $1,039,470.05, "which shall consist of" the existing principal balance on the Cameron Brown first mortgage in the amount of $786,170.61, the existing principal balance on the Arnold second mortgage in the amount of $220,299.44, a "binder" of $5,000.00, and cash on delivery of the deed in the amount of $28,000.00. The contract recited that the "[p]roperty shall be taken subject to" the Cameron Brown and the Arnold mortgages. By deed dated 1 January 1973 the Howards conveyed the property to Clardy and wife "subject to" the two deeds of trust. Thereafter default occurred in payment on the notes secured by the two deeds of trust, the first deed of trust was foreclosed, the plaintiff Arnold brought this suit against the Howards.

After pleadings were filed, Clardy, the third-party defendant, moved pursuant to Rule 56 of the Rules of Civil Procedure for summary judgment on the Howards' claim against him on the ground that "as between these parties there is no genuine triable issue as to any material fact, and that third party defendant is entitled to judgment as a matter of law." This motion was based on the pleadings and on an affidavit of one Waters, the real estate agent who acted for Clardy in the purchase of the property. In this affidavit Waters stated that Clardy had instructed him that he would take the property subject to the

two mortgages but would not assume any personal obligation for the payment of either; that Waters had prepared the contract, which Clardy had signed and which was then sent to Mr. Howard for his signature and approval; that prior to signing the contract, Mr. Howard telephoned Waters and asked if Clardy would assume Howard's personal obligation on the second mortgage note; that Waters again told Howard that Clardy would not assume any of the mortgage debts or accept any language of assumption in the contract; and that following this telephone conversation the contract was consummated and the sale was closed.

The court, finding no genuine issue as to any material fact and that the third-party defendant was entitled to summary judgment, granted the motion and ordered the original defendants' claim for contribution against the third-party defendant dismissed. The original defendants objected and excepted to this order and gave notice of appeal.

Lloyd F. Baucom for original defendants, Ronald W. Howard and Linda H. Howard.

Thomas Ash Lockhart and Joe C. Young for third-party defendant, James F. Clardy.

PARKER, Judge.

Rule 54(b) of the Rules of Civil Procedure, G.S. 1A-1, Rule 54(b), is as follows:

> "(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties *and shall not then be subject to review either by*

appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

Although the parties have raised no question concerning the matter, we note that the judgment from which the original defendants now purport to appeal adjudicates "the rights and liabilities of fewer than all the parties" and that it contains no determination that "there is no just reason for delay." Our Rule 54(b) is substantially similar to the Federal Rule 54(b) as that Rule was amended in 1961, and it is therefore appropriate to look to Federal decisions and authorities for guidance in applying our Rule. As those authorities point out, the need for Rule 54(b) arose from the increased opportunity for liberal joinder of claims and parties which the new Rules of Civil Procedure provided. For analysis and discussion of the history and purposes served by Federal Rule 54(b), see 6 Moore's Federal Practice, ¶ 54.01 et seq.; 10 Wright and Miller, Federal Practice and Procedure, § 2660. As described by the United States Supreme Court, under Rule 54(b) the trial court "is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 435, 100 L.Ed. 1297, 1306, 76 S.Ct. 895, 899 (1956). Under the Federal Rule 54(b) as amended in 1961 and under the North Carolina Rule 54(b), the trial court performs that function also in multiple-party actions as well as in multiple-claim actions. Under the North Carolina Rule, the trial court is granted the discretionary power to enter a final judgment as to one or more but fewer than all of the claims or parties, "only if there is no just reason for delay *and it is so determined in the judgment.*" (Emphasis added.) By making the express determination in the judgment that there is "no just reason for delay," the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal. In the absence of such an express determination in the judgment, Rule 54(b) makes "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," interlocutory and not final. By express provision of the Rule, such an order remains "subject

to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties," and such an order is not then "subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes." G.S. 1-277 is not such an express authorization. *See* Comment to G.S. 1A-1, Rule 54(b).

Since, the judgment from which the original defendants now attempt to appeal in the present case adjudicates "the rights and liabilitites of fewer than all the parties" and since it contains no determination by the trial judge that "there is no just reason for delay," the judgment is interlocutory and not presently appealable. Accordingly, the attempted appeal of the original defendants is

Dismissed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JIMMY McKINNEY

No. 7429SC846

(Filed 18 December 1974)

1. **Narcotics § 4— sale of "THC" — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution upon two charges of distribution of the controlled substance tetrahydrocannabinol where it tended to show that defendant sold a white substance which he represented to be "THC" to two different buyers, the first buyer swallowed a pinch of the substance, became dizzy, was hospitalized and had hallucinations for a day, a doctor testified that the first buyer was under the influence of a hallucination drug, that tetrahydrocannabinol could have caused the symptoms he observed, and that "THC" is "a substance similar to marijuana like drugs," and the second buyer became dizzy and sick after he tasted the substance he purchased from defendant.

2. **Narcotics § 3— medical testimony — person under influence of drug — cause of symptoms**

In a prosecution for distribution of tetrahydrocannabinol, a medical witness was properly allowed to give his opinion that a State's witness was under the influence of a hallucination drug on the day after the witness tasted a substance purchased from defendant and to testify that a sufficient quantity of tetrahydrocannabinol could have caused the symptoms he observed.

3. Narcotics § 4.5— instructions equating tetrahydrocannabinol and "THC"

The trial court did not err in charging the jury that tetrahydrocannabinol and "THC" are the same thing since a medical expert testified that the abbreviation "THC" represents "a substance similar to marijuana like drugs," and the dictionary defines tetrahydrocannabinol as a highly active constitutent of cannabis indica and defines cannabis indica as marijuana.

APPEAL by defendant from *Martin (Harry C.), Judge,* April 1974 Session of McDOWELL County Superior Court. Heard in the Court of Appeals 21 November 1974.

Defendant, a 16-year-old school boy, was charged in two separate bills of indictment with unlawfully, wilfully and feloniously selling and distributing a controlled substance, *i.e.,* tetrahydrocannabinol, which is included in Schedule VI of the North Carolina Controlled Substances Act. The defendant pleaded not guilty to both charges.

The evidence for the State disclosed that the defendant, on two separate nights, December 9 and 10, 1973, sold what was represented to be "THC." In each instance, the buyer, a 15-year-old school boy, working after school, testified that he had asked for "THC" and the defendant had represented and told them that that was what he was selling. Neither purchaser had ever seen "THC" before.

In the first instance, the buyer, Franklin, bought a small plastic bag of the substance for $10.00 and placed a pinch, about one-fourth of a thimbleful, of the substance in his mouth and swallowed it. He testified it was white and looked like sugar but tasted bitter. He threw the remainder in the trash can as he was scared to have it with him. Before doing so, he showed it to fellow schoolmate and worker, Peppers. Fifteen to twenty minutes later, he became so dizzy that he did not know what he was doing. He had hallucinations and was taken to a doctor who put him in the hospital where he remained for two weeks. He had hallucinations for about one day after taking the "THC."

The buyer in the second instance, Peppers, testified that he had tasted the same substance sold to Franklin. He testified the substance was white, like sugar crystals, and had a bitter taste. In about 30 or 45 minutes after tasting it, he started getting dizzy and sick but continued at his work until 10:00 p.m. when he went home and to bed. The next night, he also purchased some "THC" from the defendant for $10.00. He did this at the

request of some of his friends and took it to school the next day and gave it to other boys.

A Dr. Ellis (an admitted medical expert) testified that he had examined and treated Franklin the day following the night he had allegedly ingested the substance. At that time Franklin was completely incoherent regarding time, place and person and in the doctor's opinion was acutely psychotic. It was Dr. Ellis's opinion that he was under the influence of medication or drugs of some type, "most likely a hallucination drug." His testimony was that during the examination, Franklin "talked about horns growing out of his head and he was hearing bells and said he couldn't hear anything else." The doctor further testified that tetrahydrocannabinol can be an hallucinogenic drug and if Franklin had had a sufficient quantity of it it could have caused the symptoms he observed. He did not see Franklin after he went to the hospital. He further testified that he was familiar with the abbreviation "THC" and that it was "a substance similar to marijuana like drugs."

At the end of the State's case, defendant's motion for judgment as of nonsuit was denied whereupon the defendant took the stand in his own behalf. He denied all the charges against him asserting that he had never sold nor possessed any drugs.

From a verdict of guilty on both charges and a judgment sentencing the defendant to not less than one nor more than three years, the defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney Raymond L. Yasser for the State.

Story & Hunter by C. Frank Goldsmith, Jr., for the defendant appellant.

CAMPBELL, Judge.

The defendant was being tried for the unlawful sale and distribution of a drug, tetrahydrocannabinol. This raises the question as to what this drug is. Stedman's Medical Dictionary Unabridged Lawyers' Editon (1961) defines tetrahydrocannabinol as, "A highly active constitutent of *Cannabis indica.*" Cannabis indica in turn is defined as, "Indian hemp; hashish; marijuana; marihuana; the dried flowering tops of the pistillate plants of *Cannabis sativa,* gathered before the fruits are developed. Narcotic, sedative, analgesic, and aphrodisiac."

The defendant contends that the trial court was in error in failing to dismiss the action and enter a judgment as of nonsuit.

In a criminal case the proper motion to test the sufficiency of the State's evidence to carry the case to the jury is a motion to dismiss the action or a motion for judgment as in the case of nonsuit pursuant to G.S. 15-173. The sufficiency of the evidence for the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court. G.S. 15-173.1. From the record in this case, it appears that the defendant did not make any motion at the conclusion of all the evidence. However, we review the sufficiency of the State's evidence under the provisions of G.S. 15-173.1 as if the proper motion had been made under G.S. 15-173. On such motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. All of the evidence favorable to the State is considered, and defendant's evidence relating to matters of defense or defendant's evidence in conflict with that of the State is not considered. To withstand a judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged. Whether the State has offered such substantial evidence presents a question of law for the trial court. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973).

[1] Applying this test, we think the evidence sufficient to carry the case to the jury.

[2] Dr. Ellis was competent to testify concerning facts within his knowledge based upon his actual treatment of Franklin and to render his opinion as to what Franklin was suffering from and for which he was treated. His testimony in this regard was entirely competent.

[3] Defendant also assigns as error that portion of the charge of the judge to the jury wherein the judge equated tetrahydrocannabinol and "THC" as being the same thing. The defendant asserts that no witness testified to the fact that the two were the same. We disagree. Dr. Ellis testified that he was familiar with the abbreviation "THC" and that that abbreviation represents "a substance similar to marijuana like drugs." We have heretofore pointed out that the dictionary definition of tetra-

hydrocannabinol defines it as a highly active constitutent of cannabis indica and that cannabis indica in turn is marijuana. When we apply the mathematical axiom that things equal to the same thing are equal to each other, we come up with the answer that "THC" and tetrahydrocannabinol are one and the same.

We have considered the other assignments of error brought forward by the defendant, and we conclude that the defendant had a fair trial free of prejudicial error.

Under the defense presented, this case presented a question for the twelve, and they found against the defendant.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

NANCY DONAVEE ROSS STEGALL v. CHARLES SPURGEON STEGALL

No. 7426DC829

(Filed 18 December 1974)

Appeal and Error § 36— failure properly to serve case on appeal — review of record proper

Where the case on appeal was not properly served in accordance with G.S. 1-282, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof.

APPEAL by plaintiff from *Griffin, District Judge,* 27 May 1974 Session of MECKLENBURG County, General Court of Justice, District Court Division. Heard in the Court of Appeals 19 November 1974.

On 13 January 1971, plaintiff filed a complaint seeking custody of their four children, child support, alimony pendente lite, permanent alimony, and the sequestration of their residence for her use with the right to sell and invest in a different home. The complaint set out various contentions relating to grounds justifying the relief plaintiff sought. Among these were claims of abandonment, adultery, and indignities rendering her condition intolerable and life burdensome.

In an answer filed 7 January 1972, the defendant denied all pertinent claims and sought custody of the four children.

On 4 August 1972, plaintiff amended her complaint to allege adultery with a particular individual and other indignities. There were numerous show cause orders but the record discloses no action thereon. Over objection, this amendment was allowed by a *nunc pro tunc* order of 16 January 1974.

On 27 September 1972, both parties, represented by counsel, appeared in district court pursuant to a motion filed by the defendant seeking custody of the four children. After hearing and based upon numerous findings of fact, the court entered an order dated 15 November 1972, awarding custody to the defendant. The plaintiff was allowed certain visitation privileges provided they were exercised at a place other than defendant's residence. On 22 November 1972, plaintiff filed notice of appeal, but all exceptions were reserved pending a hearing on the merits, a statement of the exceptions to be presented later.

Pursuant to the same hearing, a consent order was entered on 19 December 1972 awarding plaintiff $500 a month alimony pendente lite, an automobile, and counsel fees of $750.

On 6 March 1973, plaintiff moved to obtain custody of the two younger children and for an increase in her alimony payments. On 9 March 1973, defendant in turn moved to find the plaintiff in contempt of court for failure to comply with previous orders of the court. Show cause orders were entered and the matter was heard by Judge Robinson on 15 March 1973. Pursuant to this hearing, an order was entered 24 May 1973, denying plaintiff custody of the two younger children and continuing the custody of all of the children with the defendant-father. The order further found that the plaintiff-mother was a disruptive influence, and she was ordered to limit telephone conversations to three a week and not in any way to harass, molest, bother, hinder or interfere with the father's custody of the children; and further that plaintiff's motion was frivolous and malicious, but she was not found to be in wilful contempt of the court.

On 18 October 1973, plaintiff moved that the case be placed on the trial docket and that she have a trial by jury. The plaintiff also sought to file a second amendment to her complaint.

On 25 April 1974, Judge Black allowed the plaintiff's motion for a trial by jury and denied her motion to amend the complaint a second time. This order further directed the calendar committee to place the case on the trial calendar for trial without further delay.

On 3 May 1974, the defendant-father filed a motion to the effect that the home he had been renting was to be sold and it would be necessary for him to find another residence for himself and the four children for whom he was providing. He alleged that the plaintiff would not consent to allow him to lease, purchase, convey or mortgage any residence that he might find and that the welfare of the children required him to procure a residence for them. After a show cause order was entered, the matter was heard on 10 May 1974, by Judge Griffin. At the time of the hearing, the plaintiff moved that Judge Griffin disqualify himself from further proceedings in the cause. Judge Griffin refused to disqualify himself and entered an order finding that the defendant had made a diligent effort to find another suitable place to rent but without success; that the defendant had found a residence on Sandy Porter Road which would be a suitable place for the children but that this property could not be acquired and financed since plaintiff would not release her marital rights therein; that it would not be detrimental to the plaintiff and that the best interests and welfare of the minor children required the entry of an order releasing and barring any marital rights of the plaintiff in the particular property on Sandy Porter Road. The order provided that the defendant-father could acquire, hold, own, encumber and dispose of this particular piece of property to the same extent as if he were unmarried.

The case came on for trial at 27 May 1974, Civil Term of the District Court. During the course of the trial, the plaintiff was permitted to amend her complaint on two additional occasions—on 30 May and 31 May.

The jury answered the issues submitted to them to the effect that the defendant had not wilfully abandoned the plaintiff without just cause or excuse; that the defendant had not offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome. On the defendant's cross-action, the jury answered the issues to the effect that the plaintiff had not constructively abandoned the defendant wilfully and without just cause and excuse and that

the plaintiff had not offered such indignities to the person of the defendant as to render his condition intolerable and life burdensome. Based upon the jury verdict, a judgment was entered to the effect that the plaintiff recover nothing from the defendant, and he was discharged of any and all further liability to the plaintiff. On the cross-action of the defendant, it was adjudicated that the defendant recover nothing from the plaintiff.

To the entry of the judgment, the plaintiff objected and excepted and appealed to this Court.

Gene H. Kendall for plaintiff appellant.

Peter H. Gerns for defendant appellee.

CAMPBELL, Judge.

The defendant appellee has filed a motion to dismiss the appeal and affirm the judgment of the trial court for that the case on appeal was not properly served in accordance with G.S. 1-282. This position is well taken. See *Thurston v. Salisbury Zoning Board of Adjustment* (North Carolina Court of Appeals, filed December 18, 1974).

As was stated in that case:

> "In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof. . . . "

This matter has been in litigation for over three years, and during that time Judges Gatling, Robinson, Black and Griffin have been called upon to consider various phases of the matter. It was finally submitted to a jury as requested by the plaintiff, with instructions to which no exception was taken. The jury found against the plaintiff. We have reviewed the record proper, and no prejudicial error is disclosed on the face thereof.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEAH JANE STUNTZ

No. 7429SC850

(Filed 18 December 1974)

Criminal Law § 143— violation of conditions of probation

The evidence was sufficient to support findings by the trial court that defendant violated the conditions of her probation by failing to report to her probation officer as directed, changing her place of residence without the consent of her probation officer, and failing to remain in her dormitory room each night after 10:00 p.m. while in school.

APPEAL by defendant from *Martin, Judge (Harry C.),* 16 May 1974 Session of Superior Court held in RUTHERFORD County. Heard in the Court of Appeals on 21 November 1974.

On 17 August 1973 the defendant was convicted in Rutherford County for possession of 500 grams of marijuana with intent to distribute. She was sentenced to be imprisoned from three (3) to five (5) years, but the sentence was suspended and defendant placed on probation upon certain conditions, including the following:

"(c) Report to the Probation Officer as directed:

* * *

(f) Remain within a specified area and shall not change place of residence without written consent of the probation officer:

* * *

SPECIAL CONDITIONS:

* * *

6. That she is to remain in her room each night after 10 o'clock P.M. while in school."

On 29 April 1974 defendant's probation officer, Mrs. Kathryn Crisp, filed a verified report alleging that the defendant had violated the terms and conditions of her probation in the following respects:

(a) The defendant moved from her dormitory room at Western Carolina University on 30 November 1973 without the written consent of her probation officer, a violation of condition (f);

(b) The defendant failed to report to her probation officer as directed on 29 November 1973 and on 6 December 1973, a violation of condition (c) ;

(c) The defendant was out of her dormitory room after 10:00 p.m. on or about 11 November 1973 and on 4 December 1973, a violation of special condition (6) ; and

(d) The defendant failed to report as directed to a revocation hearing at Haywood County Superior Court on 4 February 1974, a violation of condition (c).

When the matter came on for hearing at the 16 May 1974 Session of Superior Court held in Rutherford County upon the report of the probation officer, the State offered evidence tending to show the following: Upon conviction, the defendant was placed under the supervision of Mrs. Kay Taylor, probation officer in Rutherford County. However, in September of 1973, when the defendant entered Western Carolina University at Cullowhee, N. C., her case was transferred to Mrs. Kathryn Crisp. About 16 November 1973 Mrs. Crisp wrote a letter asking the defendant to meet her at the Student Union on 29 November 1973. The defendant did not keep this appointment; and although Mrs. Crisp went to the defendant's dormitory room, she was unable to locate the defendant on that day. Mrs. Crisp made at least six trips to the Western Carolina campus to find the defendant and made numerous attempts to telephone her. Furthermore, she wrote letters to the defendant and left notes for her when she visited the defendant's dormitory. The defendant did not respond to any of the notes or letters and did not contact the probation office at Bryson City after arriving on campus as she was instructed by Mrs. Taylor. On 23 October 1973 defendant asked Mrs. Taylor if she could move to Florida. Mrs. Taylor told defendant that she had a new probation officer and refused to give her permission to change her residence. About 30 November 1973 defendant moved from her dormitory room without notifying Mrs. Crisp or getting her written permission. The defendant finally met with Mrs. Crisp on 14 January 1974. At this time she was advised that her probationary sentence would likely be revoked and was notified to appear at the 4 February 1974 Session of Superior Court in Haywood County. The defendant failed to appear.

The defendant testified that she received a letter from Mrs. Crisp in November 1973. Pursuant to this letter she telephoned

Mrs. Crisp but was unable to reach her. The defendant received another letter requesting her to meet with her probation officer at the Student Union on 29 November 1973. However, the defendant was in Rutherfordton on that day and was unable to get transportation back to Western Carolina. The defendant further testified that while she lived at school she was occasionally out of her room after 10:00 p.m. Sometimes she went to another girl's room to study and sometimes she went to the lobby of her dormitory to practice playing the piano. At her 14 January 1974 meeting with Mrs. Crisp she told her probation officer that she had moved home. On 17 January 1974 the defendant, accompanied by her boyfriend, moved to Florida. She was arrested in Florida and remained in jail from 4 April 1974 to 1 May 1974 before being returned to North Carolina.

After the hearing Judge Martin found and concluded that the defendant had willfully and without lawful excuse violated the terms and conditions of her probation in the following respects:

(a) On or about 30 November 1973 the defendant moved from her dormitory room at Western Carolina University and changed her residence to an unknown address without the written consent of her probation officer;

(b) The defendant failed to report to her probation officer as directed on 29 November 1973 and on 6 December 1973;

(c) The defendant was not in her dormitory room after 10:00 p.m. on or about 11 November 1973 and on 4 December 1973;

(d) The defendant failed to appear at the 4 February 1974 Session of Superior Court in Haywood County as directed by her probation officer; and

(e) On or about 17 January 1974 the defendant moved to the State of Florida without the consent of her probation officer.

From an order entered on 20 June 1974 revoking her probation and activating her prison sentence of three (3) to five (5) years, the defendant appealed.

Attorney General James H. Carson, Jr., by Associate Attorney Jesse C. Brake for the State.

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

HEDRICK, Judge.

Defendant contends that insufficient evidence was introduced at the hearing to support the finding by the trial judge that she willfully and without lawful excuse violated the terms and conditions of her probation. We do not agree.

With respect to probation revocation hearings, our Supreme Court, in *State v. Hewett,* 270 N.C. 348, 353, 154 S.E. 2d 476, 480 (1967), has stated:

> "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.]
>
> All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended."

Absent a gross abuse of discretion, the findings of fact by the trial judge and the judgment entered thereon will not be reversed on appeal. *State v. Robinson,* 248 N.C. 282, 286, 103 S.E. 2d 376, 379 (1958). In the case at bar, there was plenary competent evidence from which the trial judge, in the exercise of his sound discretion, could find that the defendant willfully and without lawful excuse violated the terms and conditions of her probation as set forth in the order revoking her suspended sentence.

The order appealed from is

Affirmed.

Chief Judge BROCK and Judge CAMPBELL concur.

WILMAR, INCORPORATED v. JOSEPH A. CORSILLO

No. 7426SC833

(Filed 18 December 1974)

1. **Contracts § 7— covenant not to compete — requirement for validity**

Covenants not to compete contained in employment contracts will be held valid if the covenants are in writing, entered into at the time and as part of the contract of employment, based on valuable consideration, reasonable both as to time and territory embraced in the restrictions, fair to the parties, and not against public policy.

2. **Contracts § 7— covenant not to compete — illusory benefits — valuable consideration**

Benefits contained in defendant's initial contract of employment were not illusory where they included the right to sell plaintiff's products and earn commissions on those sales, a drawing allowance of $800 per month, and possession of valuable sales material and equipment; therefore, the covenant not to compete set out in the contract was founded upon valuable consideration.

3. **Contracts § 7— covenant not to compete — reasonableness**

A covenant not to compete in defendant's initial contract of employment with plaintiff sought to protect a legitimate business interest of plaintiff and was reasonable to the parties and the public.

4. **Contracts § 7— injunction prohibiting competition — territory included**

An injunction prohibiting defendant from competing with plaintiff properly included all territory in which defendant sold and not just his original territory assigned in his initial contract of employment where the parties' agreement provided that defendant could not compete "within the territory in which Salesman actually sold" plaintiff's products during his employment.

APPEAL by defendant from *Godwin, Judge,* 24 June 1974 Session of Superior Court held in MECKLENBURG County.

This is an action by a manufacturer and distributor of janitorial products to enjoin one of its former salesmen from competing with it in violation of a covenant not to compete contained in an employment contract.

The contract provided that defendant would sell plaintiff's chemical products in the nonexclusive territory of Gastonia. Paragraph 6 of the contract contained a covenant not to compete with the employer for one year after termination of the employment in the territory in which defendant worked while employed by plaintiff. The covenant provided that defendant would not compete with plaintiff as to "anyone engaged in or

interested in such line of business *within the territory in which Salesman actually sold* janitorial, automotive and specialty cleaning chemicals and supplies. . . . " [Emphasis added.]

On 14 and 15 June 1971, plaintiff and defendant executed an amendment to the contract expanding the territory in which defendant was authorized to sell plaintiff's products.

From 22 April 1970 through 16 April 1974, defendant was employed by plaintiff as a salesman in Gastonia and other cities in North and South Carolina. Defendant received a regularly monthly draw and sales commissions. In a letter dated 16 April 1974, defendant voluntarily terminated his employment with plaintiff, stating that he was resigning "as of this date." The contract provided that it could be terminated by either party upon 15 days' written notice to the other party.

Defendant is now employed as a salesman with Zak Chemical Corporation of Charlotte (Zak), a company in direct competition with plaintiff, selling and marketing janitorial supplies. Since being employed by Zak, defendant has solicited and sold Zak's products to some of plaintiff's customers which were previously serviced by defendant while employed by plaintiff.

The court entered an order enjoining defendant from competing with plaintiff in Gastonia and from soliciting specific customers in other territories to whom defendant had previously sold plaintiff's goods while employed by plaintiff.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston by Mark R. Bernstein and W. Samuel Woodard for plaintiff appellee.

Welling & Miller by George J. Miller for defendant appellant.

VAUGHN, Judge.

[1] Covenants not to compete contained in employment contracts will be held valid if certain essential criteria are satisfied. The covenant must be: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy. [citations]." *Exterminating Co. v. Griffin* and *Exterminating Co. v. Jones,* 258 N.C. 179,

181, 128 S.E. 2d 139, 140-141. Defendant concedes that the covenant in question was in writing and was entered into at the time and as a part of the employment contract. Defendant contends, however, that the covenant fails with respect to the other standards.

Defendant contends that the contract is unenforceable because of the absence of a valuable consideration moving to him. He argues generally that the recited consideration is illusory because (1) the territory assigned is nonexclusive and defendant could not be assured that plaintiff would not send in other salesmen and deprive him of a minimum salary, (2) fixed sales commissions were not set out, the contract providing that plaintiff would pay "such commissions as are agreed upon from time to time," (3) that the employment could be terminated at the will of plaintiff (the contract provided that the employment could be terminated by either party "upon fifteen days' written notice to the other"), and (4) the contract is not, in reality, a contract of employment but is a naked contract not to compete.

[2] It is generally held that the promise of new employment is valuable consideration and will support an otherwise valid covenant not to compete contained in the initial employment contract. *Greene Co. v. Kelley,* 261 N.C. 166, 134 S.E. 2d 166; *Industries, Inc. v. Blair,* 10 N.C. App. 323, 178 S.E. 2d 781. That the employment contract could be terminated by either party upon fifteen days' notice does not mean that the promise of employment was not valuable consideration. *See Moskin Bros. v. Swartzberg,* 199 N.C. 539, 155 S.E. 154, (where the employment was from week to week and could be terminated by either party for any reason whatsoever). That the amount of commissions defendant would be paid was not stated and that defendant's territory was nonexclusive does not make the promise of employment illusory.

The promises moving to defendant were, among others, (1) the right to sell plaintiff's products and earn commissions on those sales, (2) a drawing allowance of $800.00 per month, (3) possession of valuable sales materials and equipment. We hold that the covenant not to compete, set out in the initial contract of employment is founded upon valuable consideration. After receiving the benefits of the contract for years, defendant can hardly be heard to say that those benefits were illusory.

Defendant, with appropriate candor, does not advance any argument that the covenant is unreasonable as to the time and territory embraced in the restriction. The restriction applies only to competition for one year within the territory in which defendant actually sold plaintiff's goods during the term of his employment. The restrictions are reasonable as to the time and territory.

[3] The employment contract contains the following:

> "During the course of his employment, Salesman will receive from Wilmar valuable training and assistance as well as the monthly draw hereinabove referred to which will materially aid Salesman in establishing and holding customers as a Salesman in the janitorial, automotive and specialty cleaning chemicals and supply business; Salesman will, through personal contact with these customers, made possible by the financial and technical support furnished by Wilmar, establish business good will which is a valuable asset of Wilmar; and Salesman will become familiar with the price lists, catalogs, methods of pricing, needs and requirements of customers and methods of operation of Wilmar; all of these things will place Salesman in an unfair competitive position as to Wilmar in the event that Salesman's employment should for any reason be terminated and he should go into competition with Wilmar."

Defendant now seeks to do that which, when he entered into the contract, he agreed should not be done because of its unfairness to plaintiff. The covenant seeks to protect a legitimate business interest of plaintiff and is reasonable to the parties and the public. *Enterprises, Inc. v. Heim,* 276 N.C. 475, 173 S.E. 2d 316; *Sales and Service v. Williams,* 22 N.C. App. 410, 206 S.E. 2d 745.

The following from former Chief Justice Stacy may be appropriate here.

> "There is no ambiguity in the restrictive covenant. It was inserted for the protection of the plaintiff, and to inhibit the defendant, for a limited time, from doing exactly what he now proposes to do. . . The parties regarded it as reasonable and desirable when incorporated in the contract. Subsequent events, as disclosed by the record, tend to confirm, rather than refute, this belief. Freedom to contract imports risks as well as rights. Such a covenant

is lawful if the restriction is no more than necessary to afford a fair protection to the covenantee and is not unduly oppressive on the covenantor and not injurious to the interests of the public.

* * *

While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones.

* * *

In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligation to the steed which brought him safely to midstream and readied him for the shift. The purpose here is to call his attention to the matter." *Sonotone Corp. v. Baldwin,* 227 N.C. 387, 390-391, 42 S.E. 2d 352, 354-355.

[4] Finally defendant contends that, in any event, the injunction should not include territory other than the City of Gastonia, his original territory. He urges that the new territory was assigned after his initial employment and the employment contract would not, therefore, provide consideration for the covenant not to compete in the new territory. This argument lacks merit. The covenant not to compete was not changed by the addition of new territory to defendant. The original agreement provided that he could not compete "within the territory in which Salesman actually sold" plaintiff's products during his employment.

The judgment is affirmed.

Affirmed.

Judges CAMPBELL and MORRIS concur.

CARLYLE BOOE v. LOCKSLEY S. HALL, M.D., SAM J. CRAWLEY, M.D., AND BOBBIE P. BOOE

No. 7421SC749

(Filed 18 December 1974)

Insane Persons § 1; Process § 19— wrongful commitment — action against wife, doctors — summary judgment

In an action for malicious prosecution, abuse of process and false imprisonment arising out of the alleged unwarranted judicial commitment of plaintiff to a state mental hospital, the trial court properly entered summary judgment in favor of the two doctors who examined plaintiff prior to his commitment, but the court erred in entering summary judgment in favor of plaintiff's wife who initiated the commitment proceedings.

APPEAL by plaintiff from *McConnell, Judge,* 13 May 1974 Session of Superior Court held in FORSYTH County.

This is a civil action alleging, among other things, malicious prosecution, abuse of process and false imprisonment arising out of alleged unwarranted judicial commitment of plaintiff to a state hospital for mentally disordered persons. The action originally named as defendants Locksley S. Hall, M.D. and Sam J. Crawley, M.D., two practicing physicians in Yadkin County; Bobbie P. Booe, wife of plaintiff; Charles T. Speer, Sheriff of Yadkin County; Harold J. Long, Clerk of Superior Court of Yadkin County; and Ferne W. Spillman, Notary Public of Yadkin County. On 24 July 1973, plaintiff voluntarily entered a notice of dismissal as to defendant Spillman. On 31 July 1973, Judge William Z. Wood entered an order dismissing the action against defendants Speer and Long.

In his complaint plaintiff alleges that he suffered from thrombophlebitis, which resulted in periodic hospitalization and loss of work. The suffering and idleness from this illness led to marital disharmony. Following an argument between plaintiff and his wife, his wife went to the office of the Clerk of Superior Court for the purpose of exercising some form of judicial process which would punish plaintiff. Accordingly, plaintiff's wife instituted process for judicial commitment against plaintiff. Plaintiff contends that his wife did not actually believe plaintiff to be suffering from mental illness or inebriety nor did she consider him in need of treatment in a mental hospital, but that she executed the affidavits alleging such disorders and requesting commitment of plaintiff to a hospital for the sole

purpose of punishing plaintiff. Plaintiff further contends that such action on part of his wife was done with malice for an unjust and ulterior purpose, thereby using the judicial process for a purpose for which it was not intended under the law.

Plaintiff also alleges that defendant, Dr. Crawley, failed to make a proper examination of plaintiff for mental illness and failed to make any independent determination from his own observation that plaintiff was in need of treatment for mental illness. Plaintiff further alleges that Dr. Crawley saw plaintiff for only five minutes. Plaintiff contends that Dr. Crawley was an accessory to plaintiff's wife's abuse of legal process, and that he is guilty of the malicious prosecution and false imprisonment of plaintiff.

Plaintiff alleges that defendant, Dr. Hall, made no examination of plaintiff for mental illness and made no independent determination that plaintiff was mentally ill. Plaintiff further alleges that Dr. Hall saw plaintiff for a period of five minutes or less and any examination conducted by Dr. Hall was so inadequate as to be void. Accordingly, plaintiff contends that Dr. Hall is guilty of abuse of process, malicious prosecution, and false imprisonment of plaintiff.

Plaintiff seeks judgment against defendants, jointly and severally, in the amount of $107,500.00 for compensatory damages and $500,000.00 for punitive damages.

Defendants, Booe, Hall and Crawley filed Motions for Summary Judgment. The affidavits, answers to interrogatories and other exhibits disclose the following.

On 13 March 1972, defendant, Bobbie P. Booe, wife of plaintiff, executed an affidavit before the Clerk of Superior Court of Yadkin County wherein she testified that she believed plaintiff to be a mentally ill or inebriate person and a fit subject for admission into a psychiatric hospital, and that plaintiff was likely to endanger himself or others and should be confined immediately. According to the Clerk's affidavit, Mrs. Booe told the court that plaintiff had threatened her life and that she was in fear of her life and the lives of her daughters. The Clerk issued an order directing the Sheriff of Yadkin County to take plaintiff into custody.

On 14 March 1972, plaintiff was examined by defendants Hall and Crawley, practicing physicians in Yadkin County, for

the purpose of determining whether plaintiff was a mentally ill or inebriate person as Mrs. Booe alleged in her affidavits. Both doctors concluded that plaintiff was a proper subject for observation and treatment, and executed affidavits to that effect.

On 14 March 1972, notice of hearing was served on plaintiff. The hearing was conducted on 15 March 1972 and plaintiff was represented by counsel. After the hearing the Clerk of Superior Court signed an order committing plaintiff to John Umstead Hospital at Butner, North Carolina. No appeal was taken nor objection entered to the order, and plaintiff was taken to John Umstead Hospital.

On 19 April 1972, plaintiff was transferred to Medical Park Hospital in Winston-Salem, North Carolina, where he was treated for approximately two weeks for a physical ailment unrelated to his hospitalization at John Umstead Hospital. On 5 May 1972, plaintiff was discharged from John Umstead Hospital.

Hearings on these motions for summary judgment were conducted at the 13 May 1974 Session of Superior Court of Forsyth County. At the conclusion of the hearing, the court determined that the motions should be allowed as to each defendant and entered judgment dismissing the action. Plaintiff appealed.

Drum and Liner by David V. Liner for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster and Robert J. Lawing for defendant appellees Hall and Crawley.

R. Lewis Alexander for defendant appellee Booe.

VAUGHN, Judge.

In determining whether a motion for summary judgment should be granted, "the court may consider pleadings, affidavits meeting the requirements of Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, and documentary materials; and the court may also consider facts which are subject to judicial notice and such presumptions as would be available upon trial." *Singleton v. Stewart,* 280 N.C. 460, 464, 186 S.E. 2d 400, 403.

Dr. Hall and Dr. Crawley filed affidavits in support of their respective motions for summary judgment. Dr. Hall's affidavit reads:

> "On or about March 14, 1972, Sheriff Charles T. Speer, known to me to be Sheriff of Yadkin County, brought Mr. Carlyle Booe to my office for the purpose of an examination to determine whether or not he was mentally ill or inebriate person and thus a proper subject for observation and treatment. I examined Mr. Carlyle Booe and talked to him at great length concerning his mental state for the past year.
>
> I exercised my best medical judgment in signing an affidavit on a form supplied by the office of Superior Court of Yadkin County that Mr. Booe was a proper subject for observation and treatment."

Dr. Crawley's affidavit reads similarly:

> "On or about March 14, 1972, I examined Mr. Carlyle Booe for the purpose of determining whether or not he was mentally ill or an inebriate person as alleged in the affidavit of Mrs. Booe.
>
> In the exercise of my best judgment I signed and acknowledged before a Notary Public an affidavit to the effect that Mr. Booe was a proper subject for observation and treatment. This affidavit was signed on a form supplied by the office of the Clerk of Superior Court of Yadkin County, North Carolina."

Other affidavits were filed in support of the doctors' motions for summary judgment. One by the Sheriff reads:

> "Pursuant to the order of the Clerk of Superior Court of Yadkin County, I took Carlyle Booe to Lula Conrad Hoots Memorial Hospital for the purpose of having him examined by two medical doctors to determine whether he was a proper subject for examination and treatment for mental illness or inebriecy. I presented Carlyle Booe to Doctors Locksley S. Hall and Sam J. Crawley for examination by them. I was physically present when each doctor examined Carlyle Booe. Both doctors examined Carlyle Booe. I presented the doctors a standard North Carolina form, which was provided by the Clerk of Superior Court, which was an affidavit to procure admission for mental illness or inebriecy."

After defendants Hall and Crawley's motions for summary judgment and supporting affidavits were filed, plaintiff failed to come forward by affidavit or otherwise with any competent evidence tending to show the existence of a triable issue of material fact as to those defendants. The affidavits and other uncontradicted supporting documents disclose that, as a matter of law, plaintiff is not entitled to recover from Dr. Hall or Dr. Crawley under any theory he attempts to assert in his complaint. The judgment dismissing plaintiff's action against defendants Hall and Crawley is affirmed.

Defendant Booe did not file a personal affidavit in support of her motion for summary judgment. We have carefully considered the pleadings and all other documents in the case. We hold that defendant Booe has failed to carry her burden of showing plaintiff's action against her to be baseless in fact and law. It was error to dismiss the action against defendant Booe.

As to defendants Hall and Crawley, affirmed.

As to defendant Booe, reversed and remanded.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. SHERMAN LEWIS JONES

No. 7414SC578

(Filed 18 December 1974)

1. **Criminal Law § 40— memorandum of preliminary hearing — admission at trial not required**

The trial court did not err in denying defendant's motion made pursuant to G.S. 15-88 for a copy of the judge's memorandum of the preliminary hearing held in district court since defendant offered no showing that the evidence was reduced to writing by the district court judge, the provision of G.S. 15-88 that the examining magistrate reduce the evidence to writing is directory only and not mandatory, and defendant did not make his motion timely.

2. **Criminal Law § 40— testimony before grand jury — admission at trial not required**

Defendant's assignment of error to the denial of his motion for a transcript of the testimony before the grand jury is without merit since a grand jury in N. C. is not required to record the testimony of witnesses who appear before it.

3. **Constitutional Law § 31— confidential informer — disclosure of identity not required**

Defendant was not entitled to disclosure of the identity of a confidential informant where such disclosure would in no way aid defendant in his defense.

4. **Criminal Law § 66— identification of defendant — observation at crime scene as basis**

In-court identification of defendant was of independent origin, based solely on what the prosecuting witness saw at the time of the crime, and did not result from any out-of-court confrontation, from any photographs, or from any pre-trial identification procedures suggestive or conducive to mistaken identification.

APPEAL by defendant from *Brewer, Judge,* 7 January 1974 Session of Superior Court held in DURHAM County. Argued in the Court of Appeals 23 September 1974.

Defendant was charged in a bill of indictment with the felony of armed robbery.

The State's evidence tends to show that at approximately 10:55 p.m. on 15 October 1973, defendant entered the Little General Store in Holloway Street in the City of Durham. It was then five minutes before the normal closing time for the store. Mrs. Pattie Ray and Mrs. Evelyn Mitchell were the employees in the store. Defendant was the only other person in the store. The two employees were waiting to close the store for the day. Mrs. Ray was attending the cash register. Mrs. Mitchell was standing beside the front door preparing to lock it after defendant departed.

Defendant purchased a bottle of orange juice. Mrs. Ray placed it in a bag and handed it to defendant. Defendant then walked around in the store. He brought another bottle of orange juice to the check-out counter. Defendant reached in his pocket and pulled out a pistol. He told Mrs. Ray not to touch anything, and he ordered Mrs. Mitchell to "get over here." Defendant then ordered Mrs. Ray to hand him the money which had been placed under the counter in a bank bag. He also took the currency from the cash drawer. He then walked out the door.

Defendant offered the testimony of two witnesses which tended to show that defendant was elsewhere at the time of the alleged robbery.

The jury returned a verdict of guilty as charged. Judgment of confinement was entered.

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

Dailey J. Derr, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error the denial by the trial judge of defendant's motion for a copy of the judge's memorandum of the preliminary hearing held in District Court on 30 October 1973. He stated that his motion was pursuant to G.S. 15-88, which reads as follows:

> "§ 15-88. *Testimony reduced to writing; right to counsel.*—The evidence given by the several witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution." (Citations omitted.)

Counsel admits that he was present with defendant at the preliminary hearing and took notes. There is no suggestion or argument that counsel was not allowed full opportunity to hear the testimony and cross-examine the witnesses.

There are at least three reasons why this assignment of error is without merit. First, defendant offers no showing that the evidence was reduced to writing by the District Court Judge. Second, the provision of G.S. 15-88 that the examining magistrate reduce the evidence to writing is directory only and not mandatory. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384. Third, defendant did not make his motion timely. He waited until after his case was called for trial in Superior Court. We note that G.S. 15-88 has been repealed effective 1 July 1975. This assignment of error is overruled.

[2] Defendant assigns as error the denial of his motion for a transcript of the testimony before the grand jury which returned the bill of indictment. This assignment of error is feckless. A grand jury in North Carolina is not required to record the testimony of witnesses who appear before it. It is not the custom in this State to record evidentiary proceedings before

the grand jury. The witnesses examined by the grand jury are marked on the bill of indictment, but their testimony is not recorded.

[3] Defendant assigns as error the denial of his motion for disclosure of the identity of a confidential informant. This informant advised the investigating officer that defendant had been away from town but had returned before the robbery in question in this case. It seems clear that the identity of this informant would in no way aid defendant in his defense. This Court has held that disclosure of the identity of a confidential informant will not be allowed unless it clearly appears that such disclosure would be relevant or helpful to the defense. *State v. Watson,* 19 N.C. App. 160, 198 S.E. 2d 185. In this case the identification of defendant, independent of information from the informant, as the perpetrator of the crime far outweighed the tip from the informant.

[4] Defendant assigns as error the denial of his motion to suppress the in-court identification of defendant by the two employees of the Little General Store. Upon defendant's objection to in-court identification, the trial judge excused the jurors, and a lengthy *voir dire* was conducted. The trial judge found, from competent evidence, *inter alia,* as follows:

> "That the defendant did not wear any mask of any kind; that the prosecuting witness Pattie Ray and the prosecuting witness Evelyn Mitchell had an opportunity to observe and did observe the defendant Sherman Lewis Jones within the interior of the store and the facial features of the defendant for some four or five or six minutes while within the interior of the store and while the store was well lighted; . . .
>
> . . . .
>
> "That the prosecuting witnesses Pattie Ray and Evelyn Mitchell observed the defendant almost continuously during the said period of time that the defendant was at the scene, and when the defendant was within three to six feet from the prosecuting witness; that the prosecuting witnesses Pattie Ray and Evelyn Mitchell determined that the defendant was of the black race, approximately six feet tall, dark hair, with a medium Afro, eyes were brown, and described the clothes being worn by defendant to the investigating officers, and subsequent descriptions have been reasonably consistent."

The trial judge thereafter found and concluded that the in-court identification was of independent origin and was based on the prosecuting witnesses' observation of the defendant at the scene rather than on the photographic identification. He further found and concluded that the in-court identification was untainted by the illegality, if any, underlying the photographic identification; that the in-court identification of the defendant was of independent origin, based solely on what the prosecuting witnesses saw at the time of the crime, and did not result from any out-of-court confrontation, from any photographs, or from any pre-trial identification procedures suggestive or conducive to mistaken identification.

We do not approve the method by which the investigating officers employed the use of photographs in this case. *See State v. Faire*, 22 N.C. App. 573, 577, 207 S.E. 2d 284. The officer went to Mrs. Ray's home with six photographs. He told her the police had a suspect and asked if she recognized anyone in the six photographs. Such an approach to photographic identification lends itself immediately to criticism for possible suggestiveness. However Mrs. Ray did not positively identify anyone in the six photographs. She indicated that one resembled the defendant but that the photograph was of a much younger person. In the light of the unequivocal recognition of defendant based upon observation at the scene of the crime, we are of the opinion that there was no error in the findings by the trial judge or in the admission of the in-court identification.

Defendant's argument that the trial judge should have allowed in evidence a computerized statement of defendant's income is feckless. No effort was made to identify such a statement nor to show that it was a record of a business where defendant was employed.

The remaining assignments of error are to the court's charge to the jury. These raise no novel or new question for consideration. We have examined the charge as a whole. In our opinion the case was fairly submitted to the jury upon applicable principles of law.

No error.

Judges PARKER and MARTIN concur.

NEW RIVER CRUSHED STONE, INC. v. AUSTIN POWDER COMPANY

No. 7424SC830

(Filed 18 December 1974)

Indemnity § 2— indemnity for negligent acts — validity and construction of agreement

Contract in which the operator of a stone quarry agreed to indemnify and hold harmless the manufacturer of blasting powder for any injury or loss resulting from the manufacturer's assistance of the quarry operator in blasting work was not against public policy where only the rights of the parties to the contract were involved, and the contract was intended to cover a claim by the quarry operator for damages resulting from blasting operations on the operator's premises whether the damages resulted from the negligence of the manufacturer's employees or otherwise.

APPEAL by plaintiff from *Fountain, Judge,* 10 June 1974 Session of Superior Court held in WATAUGA County. Heard in the Court of Appeals on 21 November 1974.

This is a civil action wherein plaintiff, New River Crushed Stone, Inc., seeks to recover $35,382.49 in damages to its property and business allegedly resulting from the negligence of the defendant, Austin Powder Company, in detonating "blasting powder" on plaintiff's premises.

In its complaint, plaintiff alleged that it was engaged in the business of quarrying stone and that it purchased certain explosive material from the defendant. As an inducement to the plaintiff to purchase the blasting material, the defendant "contracted and agreed to be responsible for the detonation of said blasting powder after it had been properly placed in correctly drilled holes by the plaintiff." Defendant took over the duties of detonating the blasting powder and on 28 March 1973 was negligent in detonating it all at one time rather than through a system of delays. The resulting explosion damaged the fixtures and equipment of plaintiff.

Defendant filed answer to the complaint and, among other things, alleged that all work performed by defendant's employees on plaintiff's premises on 28 March 1973 was pursuant to the terms of a "Service Agreement" entered into by the parties on 10 November 1972. Defendant pleaded the "Service Agreement," the terms of which are set forth below, in bar of plaintiff's claim.

"Dated 11-10 1972

WHEREAS, the undersigned customer may hereafter, from time to time, request certain assistance of AUSTIN POWDER COMPANY in connection with the performance of certain blasting work; and

WHEREAS, AUSTIN POWDER COMPANY is not engaged in blasting work, its business in explosives being confined solely to the manufacture and sale thereof, but to assist the said customer, the said AUSTIN POWDER COMPANY has agreed, at certain times, to permit said customer the temporary use, free of charge, of the services of said company's employees, together with or without certain needed equipment.

NOW, THEREFORE, the undersigned hereby expressly agrees that, while engaged in said work, said employees and equipment are and shall be, on each occasion, to all intents and purposes, the employees and equipment of the undersigned and subject to his sole supervision and control, and that all work and services so performed shall be at the sole risk and responsibility of the undersigned, and for any damage or loss resulting from such services, except liability for injury or death of said AUSTIN POWDER COMPANY employees, the undersigned expressly agrees to indemnify and hold harmless the AUSTIN POWDER COMPANY and further to assume sole responsibility for the result of the services of such employees or equipment gratuitously furnished by said AUSTIN POWDER COMPANY.

This agreement shall continue in force until either party notifies the other, in writing, of its desire to terminate the same, but such termination shall not relieve either party of any liability arising thereunder prior to such termination.

AUSTIN POWDER COMPANY	NEW RIVER CRUSHED
By: EDD MCNEW	STONE, INC. Customer
Dist. No. 41	BY: HANS MEIXNER"
410	

On 16 October 1973, based upon its plea in bar, defendant moved for summary judgment. The pleadings, affidavits, answers to interrogatories, and exhibits filed in support of and in opposition to the motion for summary judgment show that Hans G. Meixner, Secretary-Treasurer of plaintiff, executed the

"Service Agreement" on 10 November 1972 on behalf of the plaintiff and that he was acting within the scope and authority of his employment. The court entered summary judgment for defendant. Plaintiff appealed.

Finger & Greene by C. Banks Finger for plaintiff appellant.

Larry S. Moore and John S. Willardson for defendant appellee.

HEDRICK, Judge.

A careful review of the record in the instant case reveals that plaintiff and defendant are in agreement as to the execution of the "Service Agreement" by them on 10 November 1972. Therefore, the one question for resolution on this appeal is whether the "Service Agreement" bars plaintiff's claim as a matter of law. G.S. 1A-1, Rule 56(c), Rules of Civil Procedure.

Initially, plaintiff contends that the "Service Agreement" violates public policy. While an indemnity contract which purports to relieve the indemnitee from liability for its own negligence or the negligence of its employees is not favored by the law and will be strictly construed, such an indemnity provision is not against public policy where, as in the case at bar, the contract is private and the interest of the public is not involved and where there is no gross inequality in bargaining power. *Railway Co. v. Werner, Ind.*, 286 N.C. 89, 209 S.E. 2d 734 (1974); *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393 (1965); *Hall v. Refining Co.*, 242 N.C. 707, 89 S.E. 2d 396 (1955). No rights of third parties are involved in the instant case, and the plaintiff was under no obligation or compulsion to take advantage of the service which the defendant offered to its customers free of charge. By entering into the "Service Agreement," the plaintiff clearly accepted the conditions defendant annexed to its offer. We, therefore, find this argument to be without merit.

Plaintiff further contends that even if the contract is not against public policy it must be strictly construed, and in the absence of explicit language the court will not relieve the indemnitee from liability for its own negligence or the negligent conduct of its employees. This argument is not convincing. When the express provisions of the "Service Agreement" are read in light of the circumstances surrounding its execution, *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133 (1952), we

are of the opinion that the contract was clearly intended to cover a claim by the plaintiff for damages resulting from the use by plaintiff of defendant's employees on plaintiff's premises pursuant to the "Service Agreement," whether the damage resulted from the negligence of defendant's employees or otherwise. Due to the limited nature of the "Service Agreement," we cannot conceive how the parties could have intended otherwise. The language in the "Service Agreement" is clear and unambiguous and will be taken and understood in its plain, ordinary and popular sense. *Railway Co. v. Werner Ind., supra; Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

Furthermore, the "Service Agreement" specifically provides that for all intents and purposes the defendant's employees will be considered the employees of the plaintiff while they are assisting the plaintiff and that they will be subject to the plaintiff's control and supervision. There being no rights of third parties involved, the employees of the defendant were therefore the employees of the plaintiff on 28 March 1973 and their acts were the acts of the plaintiff and not the defendant. See *Fralin v. American Cyanamid Company*, 239 F. Supp. 178 (W.D. Va. 1965); *Oregon Portland C. Co. v. E. I. DuPont De Nemours & Co.*, 118 F. Supp. 603 (D. Ore. 1953); *Powder Company v. Campbell*, 156 Md. 346, 144 A. 510 (1929).

For the foregoing reasons, the judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

THOMAS G. THURSTON, PETITIONER v. SALISBURY ZONING BOARD OF ADJUSTMENT: CARROLL EARNHARDT, FANNIE BUTLER, JOHN RINK, ALEXANDER MONROE, RODNEY CALLAWAY, E. G. SAFRIT, KEN WAGONER, JOHN HIPP, EDWARD POE, JAMES KLUTTZ, MRS. ELMER LAGG AND DUKE POWER COMPANY, RESPONDENTS

No. 7419SC831

(Filed 18 December 1974)

1. Appeal and Error § 36— necessity for proper service of case on appeal

Service of the case on appeal by a proper officer, or acceptance of service by appellee or his counsel, is a requirement of a valid appeal. G.S. 1-282.

2. Appeal and Error § 36; Rules of Civil Procedure § 5— service of case on appeal

G.S. 1A-1, Rule 5, is inapplicable to service of case on appeal as required by G.S. 1-282.

APPEAL by petitioner from *Exum, Judge,* 10 June 1974 regularly schedule Civil Session of Superior Court held in CABARRUS County. Heard in the Court of Appeals 19 November 1974.

In early 1973 Duke Power Company applied to the Salisbury Zoning Board of Adjustment for a special exception to allow the construction of a power line through a restricted residential neighborhood. On 14 May 1973, a hearing was held. Petitioner was present and spoke in opposition thereto. Present counsel for petitioner was also present and spoke in opposition. Eight members of the Board were present and of those, seven voted for the issuance of the exception. Because the vote was not unanimous, as required by the ordinance, the application was denied. Duke applied to the superior court for review and furnished present petitioner with a copy of the record and petition. Present petitioner appeared in superior court but did not apply to the court for permission to intervene or to be made a party and did not present evidence or participate in any way in the hearing. The court directed the Board to grant the special exception applied for upon the imposition of such reasonable restrictions as the Board might require. No objection was made or exception taken to the court's ruling. Nine days after the entry of the order, Thurston attempted to appeal to this Court. We dismissed the apppeal for that Thurston, having failed timely to intervene or request that he be made a party, had no right to appeal. 20 N.C. App. 730, 202 S.E. 2d 607 (1974), cert. denied 285 N.C. 235 (1974).

On 11 April 1974, acting pursuant to the court's order the Board held a special session and allowed Duke's petition "on the condition that the transmission poles' foundation be placed at the lowest coast and geodetic survey established elevation allowable within good line construction practices." Subsequently, and on 10 May 1974, this action was instituted in the superior court asking, for alleged errors on the part of the Board, that the act of the Board in allowing the petition be reversed or that the matter be remanded for further consideration.

Duke petitioned the court that it be allowed to become a party to the present action, and its petition was allowed. Duke,

on 28 May 1974, moved, in writing that the petition be dismissed and for summary judgment. Notice was served on Thurston notifying him, among other things, that the hearing on the motions would be held in Cabarrus County on Monday, 10 June 1974. On Friday, 7 June 1974, Thurston, in writing, objected to the matter's being heard in Cabarrus. In open court on 10 June 1974, Thurston orally renewed his objection. It was overruled because there had been adequate notice. The court treated the motion for dismissal and summary judgment as a petition for a writ of certiorari to review the 11 April 1974 action of the Board, granted the petition, made the writ returnable immediately, reviewed the record, and held that the action of the Board was in all respects proper. Thurston gave notice of appeal to this Court.

Carlton, Rhodes and Thurston, by Richard F. Thurston, for petitioner appellant.

Kluttz and Hamlin, by Clarence Kluttz, and William I. Ward, Chief Trial Counsel, for appellee Duke Power Company.

James A. Hudson, City Attorney, for Salisbury Zoning Board of Adjustment, respondent appellee.

MORRIS, Judge.

By motion filed prior to argument, respondents move to dismiss petitioner's appeal, among other reasons, for failure of petitioner to comply with G.S. 1-282, which provides, in pertinent part:

> "The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. *A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; . . .* " (Emphasis supplied.)

The statute provides for procedure "after such service" and for extension of time "[i]f it appears that the case on appeal cannot be served within the time prescribed above."

The provisions of G.S. 1-282 are mandatory, not directory. *Twiford v. Harrison,* 260 N.C. 217, 132 S.E. 2d 321 (1963);

Wiggins v. Tripp, 253 N.C. 171, 116 S.E. 2d 355 (1960); *State v. Lewis,* 9 N.C. App. 323, 176 S.E. 2d 1 (1970).

[1] Service of the case on appeal by a proper officer, or acceptance of service by appellee or his counsel, has long been a requirement of a valid appeal in this State. *State v. Moore,* 240 N.C. 792, 84 S.E. 2d 174 (1954); *State v. Daniels,* 231 N.C. 17, 56 S.E. 2d 646 (1949); *Bell v. Nivens,* 225 N.C. 35, 33 S.E. 2d 66 (1945); *State v. Moore,* 210 N.C. 686, 188 S.E. 421 (1936) and cases there cited; *Willis v. R. R.,* 119 N.C. 718, 25 S.E. 790 (1896); *Woodworking Co. v. Southwick,* 119 N.C. 611, 26 S.E. 253 (1896); *Smith v. Smith,* 119 N.C. 311, 25 S.E. 877 (1896); *McNeill v. R. R.,* 117 N.C. 642, 23 S.E. 268 (1895) and cases there cited; *Forte v. Boone,* 114 N.C. 176, 19 S.E. 632 (1894) and cases there cited; *Cummings v. Hoffman,* 113 N.C. 267, 18 S.E. 170 (1893) and cases there cited; *Peebles v. Braswell,* 107 N.C. 68, 12 S.E. 44 (1890).

[2] Petitioner concedes that service by a proper officer was not had, nor did respondent or counsel accept service. He argues that cases cited by respondents were decided "before the enactment of the North Carolina Rules of Civil Procedure by the General Assembly." He does not enlighten us as to which of the new rules brought about a change in the service requirement, nor have we been able to find a rule which substantiates petitioner's position. We are of the opinion that G.S. 1A-1, Rule 5, has no applicability to service of case on appeal as required by G.S. 1-282 and the case law of this State. He further argues that it is a general practice of attoneys in his county "to serve case on appeal either by mail or by delivering it themselves to the attorneys." Even if we were so inclined, we can give no weight to this alleged very liberal practice of noncompliance with the statute prevailing in the county. See *Willis v. R. R., supra.*

In the case of *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), cert. denied 275 N.C. 137 (1969), this Court said:

> "In the absence of a case on appeal served within the time fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof . . . ."

We have reviewed the record proper. No prejudicial error is disclosed on the face thereof.

Affirmed.

Judges CAMPBELL and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE CARTER

No. 7426SC807

(Filed 18 December 1974)

1. **Criminal Law § 111— unanimity of jury — instruction proper**

Trial court's instruction that all twelve jurors must agree before there could be a verdict and that " . . . [w]hen all twelve are in agreement as to what your verdict is, you will indicate it by knocking on the door . . . , " could not have been interpreted by the jury to mean that there could be no disagreement.

2. **Criminal Law § 113— alibi instruction — specific request required**

Defendant was not entitled to an alibi instruction where he failed to make a specific request therefor.

APPEAL by defendant from *Falls, Judge,* 27 May 1974 Session of Superior Court held in MECKLENBURG County. Argued before the Court of Appeals 14 November 1974.

Defendant was indicted for first degree murder, but at trial the State announced that it would proceed on the charge of second degree murder. Defendant entered a plea of not guilty, and a verdict of guilty of second degree murder was returned.

The State's evidence consisted of short statements by nine witnesses, none of whom was an eyewitness to the shooting. Ernestine Alexander testified that she, defendant, and others were at the home of Mary Belk Johnson, the deceased, on 28 May 1973. Defendant and deceased went into one of the bedrooms. She stated:

> "[A]fter they went in to (sic) the bedroom we heard shots and we thought the shots had come from outside and later on Mr. Carter came in the kitchen and told us that Mrs. Johnson was in the bedroom asleep and not to wake her."

Defendant got a beer and some bologna and went back into the bedroom. After ten minutes defendant left the bedroom, leaving

the door partially open, and walked out the front door. Mrs. Alexander stated that she looked in the bedroom and saw deceased lying in an awkward position on the bed. On cross-examination Mrs. Alexander admitted that she had consumed alcoholic beverages that night. She also stated that defendant, when he came into the kitchen, was not excited but "just acted like he always did." Two other witnesses substantiated Mrs. Alexander's testimony.

Harold Pharr, Jr., a thirteen year old boy, testified that on 28 May 1973 he saw defendant remove a pistol from his pocket and empty shell casings into a garbage can behind his (Pharr's) house.

The two policemen who were called to the scene of the crime stated that they could find neither evidence of a struggle nor bullet holes in the bedroom.

Dr. Hobart Woods, Mecklenburg County Medical Examiner, performed an autopsy on deceased on 29 May 1973. Dr. Woods stated that he found five gunshot wounds on the deceased's body. Powder burns found on the body indicated that the shots were fired at close range. One of the shots passed through the heart and was fatal.

Bob Sloan, Firearms Examiner for the Charlotte Police Department, testified that the slugs recovered from the body could not be positively identified as having come from the shell casings recovered from the garbage can.

The defendant testified that he and deceased were partners in the operation of a liquor house. On the night of 28 May 1973 he and deceased were discussing plans for selling beer and wine. Defendant stated that he and deceased went into the bedroom and talked for a while. Defendant testified that he went to the kitchen, got a beer and a bologna sandwich, and walked out the front door. Defendant denied seeing Harold Pharr, Jr., that night.

From a verdict of guilty and a sentence of eighteen to twenty years imposed thereon, defendant appeals, setting forth sixteen assignments of error.

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

Hamel, Cannon & Hamel, by William F. Hamel, for the defendant-appellant.

BROCK, Chief Judge.

[1] In his thirteenth assignment of error, defendant contends that the trial judge erred when he charged the jury:

> "Your verdict must be unanimous. All twelve must agree before it is a jury verdict.
>
> ". . . When all twelve are in agreement as to what your verdict is, you will indicate it by knocking on the door. . . ."

Defendant argues that this portion of the charge "left no room open for the jury to disagree."

We believe that the jury could not have interpreted that portion of the charge to mean that there could be no disagreement. The State argues that knowledge of disagreement among jurors is so pervasive in our society that no juror could misunderstand such statements. We agree. This assignment of error is overruled.

[2] In his fourteenth assignment of error, defendant asserts that the trial court erred when it failed to give defendant an alibi instruction notwithstanding his failure to request it. The evidence offered by defendant tended to show that he was elsewhere when Mrs. Johnson was slain. Although this evidence was reviewed fully by the court, no specific instruction was given the jury as to the specific principles applicable to the defense of alibi.

It was formerly the rule in North Carolina that failure to give an alibi instruction was prejudicial error, even if defendant had not specifically requested the instruction. *State v. Vance,* 277 N.C. 345, 177 S.E. 2d 389; *State v. Leach,* 263 N.C. 242, 139 S.E. 2d 257; *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860; *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175; *State v. Melton,* 187 N.C. 481, 122 S.E. 17. However, in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513, the Supreme Court overruled those decisions in respect of that rule and "reached the conclusion that reason and authority support a different rule, namely, that the court *is not required* to give such an instruction unless it is requested by the defendant." 283 N.C. at 618.

Because defendant made no request for an alibi instruction, he may not now complain. This assignment of error is overruled.

We have carefully reviewed defendant's remaining fourteen assignments of error and find them to be without merit.

It is our opinion that defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

JAMES D. SLOOP, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JAMES DAVID SLOOP, SR., AND CAROL ANN WHITLOCK v. EDNA LUCILLE SLOOP

No. 7426SC637

(Filed 18 December 1974)

Husband and Wife § 11; Descent and Distribution § 13; Wills § 61— separation agreement — waiver of right to dissent from will

Although the parties to a separation agreement did not by express language release their rights to administer or to share in the estate of the survivor, such intention was implicit in the express provisions of the separation agreement, the situation of the parties and their purpose in executing the agreement, and the surviving wife thus waived her right to dissent from the husband's will.

APPEAL by defendant from *Ervin, Judge,* 3 June 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 12 November 1974.

This is an action instituted by James D. Sloop, Jr., executor, and James D. Sloop, Jr., and Carol Ann Whitlock, sole devisees under the will of James D. Sloop, Sr., plaintiffs, against Edna Lucille Sloop, testator's undivorced widow, defendant, seeking a declaration of the rights of the parties under the will to which the defendant dissented.

The parties waived trial by jury. Judge Ervin made findings of fact which are summarized as follows: James and Edna Sloop were married on 9 September 1972, and on 13 March 1973 they entered into a valid deed of separation. On 3 July 1973 James D. Sloop, Sr., died leaving a will which has been duly probated in the Office of the Clerk of Superior Court of Mecklenburg County wherein the plaintiffs, children by a prior

marriage, were named the sole beneficiaries. At the time of his death, James and Edna Sloop were living separate and apart in accordance with the separation agreement. On 2 August 1973 the defendant filed a dissent to the will.

Judge Ervin made the following conclusions of law:

"1. Edna Lucille Sloop released her right of intestate succession as provided by North Carolina General Statutes 29-13 and 29-14 by executing the separation agreement attached to the plaintiff's Complaint.

2. By releasing her right of intestate succession as provided by North Carolina General Statutes, Sections 29-13 and 29-14, Edna Lucille Sloop waived and released her right to dissent from the will of James David Sloop, Sr., as provided by North Carolina General Statutes 30-1.

3. The purported dissent from the will of James David Sloop, Sr., previously filed by Edna Lucille Sloop in the office of the Clerk of Superior Court of Mecklenburg County on August 2, 1973, is a nullity and of no force and effect.

4. By not being named as a devisee or beneficiary in the will of James David Sloop, Sr., Edna Lucille Sloop is not entitled to share in any of the assets or proceeds of the Estate of James David Sloop, Sr."

From a judgment "that James David Sloop, Jr., Executor of the Estate of James David Sloop, Sr., distribute the net assets of the Estate of James David Sloop, Sr., to James David Sloop, Jr., and Carol Ann Whitlock, the sold [sic] devisees and beneficiaries under the will of James David Sloop, Sr.", defendant appealed.

Welling & Miller by George J. Miller for plaintiff appellees.

Joseph B. Roberts III and Geoffrey A. Planer for defendant appellant.

HEDRICK, Judge.

Since the defendant's right to dissent from her husband's will depends on whether she is entitled to take a widow's share of his estate under G.S. 29-13 and G.S. 29-14, *Tilley v. Tilley*, 268 N.C. 630, 633, 151 S.E. 2d 592, 593 (1966), the sole ques-

tion for resolution on this appeal is whether Judge Ervin erred in concluding that the defendant by the terms of the deed of separation contracted away her right to share as a surviving spouse in her husband's estate and that her dissent to his will was a nullity. Paragraphs of the deed of separation pertinent to this inquiry are as follows:

> "THIRD: The party of the first part [defendant] does hereby fully release and forever discharges the party of the second part [James D. Sloop, Sr.] of any and all liabilities of whatsoever the kind and nature arising out of the marriage between the parties, and the party of the first part releases the party of the second part and waives any and all right to alimony and support for herself; the party of the second part does hereby make the party of the first part a free trader within the meaning of the laws of the State of North Carolina, and does hereby give and grant unto the party of the first part the absolute right and privilege to mortgage, sell and convey any and all classes and kinds of property, real, personal, or mixed, and wheresoever situated, free and clear from the joinder of the party of the second part, and that the party of the second part hereby quitclaims all right, title and interest which he may now have or hereafter acquire in and to the personal property of the party of the first part.
>
> FOURTH: And likewise, the party of the first part does hereby quitclaim unto the party of the second part all right, title and interest which she may now have or hereafter acquire in and to the personal property of the party of the second part, by reason of the marriage relation which formerly existed between the parties, and does hereby give and grant unto this party of the second part the absolute right and privilege to mortgage, sell, and convey any and all classes and kinds of property, real, personal or mixed, and wheresoever situated, free from the joinder of the party of the first part."

While we recognize that the parties did not, as contended by the defendant, by *express* language release his or her right to administer on the estate of the other or to share as a surviving spouse in the estate of the other, we are of the opinion that such intention is implicit in the express provisions of the deed of separation, their situation, and their purpose at the time

the contract was executed. *Lane v. Scarborough,* 284 N.C. 407, 200 S.E. 2d 622 (1973). It seems inconceivable that either surviving party to this deed of separation could claim upon the death of the other that which manifestly he or she could not claim while both parties were living. Therefore, we hold that by the terms of the deed of separation the defendant released her right to take a widow's share of her husband's estate and thereby waived her right to dissent from his will.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT D. KEZIAH

No. 7420SC854

(Filed 18 December 1974)

Assault and Battery § 15— assault upon public officer discharging duty — driver's license check — instructions

In a prosecution for assault upon a public officer while he was attempting to discharge a duty of his office by checking defendant's driver's license, the trial court properly declared and explained the law relating to the officer's authority and duty to check the defendant's license and clearly instructed the jury that before they could return a verdict of guilty of the offense charged in the warrant, they must find that the officer was performing a duty of his office when the alleged assault occurred.

APPEAL by defendant from *Smith, Judge,* 17 June 1974 Session of Superior Court held in UNION County. Heard in the Court of Appeals on 20 November 1974.

The defendant was charged in a warrant, proper in form, with assaulting Highway Patrolman J. L. Barbee, a public officer, while he was attempting to discharge a duty of his office, to wit, "check the defendant's driver's license," a violation of G.S. 14-33(b)(4). The defendant was also charged with failing to exhibit his driver's license to Highway Patrolman Barbee upon request in violation of G.S. 20-29.

The two cases were consolidated for trial and judgment in the district court. Upon his conviction in the district court, defendant appealed to the superior court. When only the case

charging the defendant with assault upon a public officer was called for trial in the superior court, defendant made a motion to consolidate the two cases for trial. This motion was denied.

Upon defendant's plea of not guilty, the State offered evidence tending to show the following: At 3:00 a.m. on 27 April 1974, J. L. Barbee, a North Carolina Highway Patrolman, observed a motor vehicle proceed out of a private driveway onto State Route 75, move approximately 150 feet along this highway, and turn into another private driveway. The patrolman followed the vehicle into the second driveway "with the intention of stopping the vehicle and checking the operator's license of the driver." When Officer Barbee entered the driveway, he saw the backup lights of the other car come on; and the vehicle moved backwards toward the officer's automobile and stopped a few feet in front of the patrol car. The officer got out of his automobile and proceeded on foot toward the vehicle driven by the defendant. The defendant walked to meet the officer. The officer asked the defendant to show him his driver's license, and an argument ensued as to whether the defendant was obligated to show his license under the circumstances. When the defendant resolutely refused to exhibit his driver's license, the officer took hold of his arm and told him he was under arrest, and the defendant assaulted the officer by striking him in his ribs. After a considerable struggle between the two men, the officer called for help on his radio, and the defendant fled in his motor vehicle.

The defendant offered no evidence. From a verdict of guilty and the entry of judgment imposing a prison sentence of two years, defendant appealed.

James H. Carson, Jr., Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Clark and Griffin by Richard S. Clark for defendant appellant.

HEDRICK, Judge.

Assignments of error 10, 12 and 13 relate to the court's instructions to the jury and present the question of whether the court erred in not instructing the jury that before the jury could find the defendant guilty of the offense charged it must find that the officer saw the defendant operating a motor vehicle on the public highway and that the officer must have had

reasonable grounds to believe the defendant had committed a misdemeanor in his presence. The defendant relies on *State v. Jefferies,* 17 N.C. App. 195, 193 S.E. 2d 388 (1972), in which this court held that where the defendant was charged with resisting an officer who was attempting to arrest him without a warrant for driving a motor vehicle while under the influence of an intoxicating beverage it was error for the court not to instruct the jury as an element of the offense charged that the jury must find that the officer had reasonable grounds to believe that the defendant had committed a misdemeanor in his presence. In *Jefferies,* this court reasoned that absent such an instruction the jury could have found the defendant guilty of resisting an unlawful arrest.

We think the present case is distinguishable in that here the duty the officer was allegedly performing was that of checking the defendant's driver's license pursuant to G.S. 20-29 and G.S. 20-183(a). While there may be little or no distinction between resisting an officer by assaulting him and assaulting an officer while he is performing a duty of his office under G.S. 14-33(b)(4), there is considerable difference between being arrested unlawfully by an officer and having an officer lawfully check a driver's license pursuant to G.S. 20-29 and G.S. 20-183(a).

The record here is replete with evidence that Patrolman Barbee was performing a duty of his office by attempting to check the defendant's driver's license. The trial court declared and explained the law relating to the officer's authority and duty to check the defendant's driver's license and clearly instructed the jury that before they could return a verdict of guilty of the offense charged in the warrant, they must find that the officer was performing a duty of his office when the alleged assault occurred. These assignments of error are not sustained.

The only other assignments of error brought forward and argued in defendant's brief are: (1) That the court erred in denying his motion to consolidate the two misdemeanor charges for trial; (2) That the judgment is ambiguous and erroneous; and (3) That "a two-year active sentence in this case manifests inherent unfairness and injustice and offends the public sense of fair play." Suffice it to say, we have carefully examined each of these assignments of error and find them to be without merit.

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

No error.

Chief Judge BROCK and Judge MARTIN concur.

D. MURRAY BAREFOOT v. ALEX TRASK, JR.

No. 745SC812

(Filed 18 December 1974)

Boating— operation of boat — insufficient evidence of negligence

Plaintiff's evidence was insufficient to make out a case of actionable negligence by defendant in the operation of an outboard motorboat where it tended to show only that plaintiff and defendant decided to return to shore when the ocean became rough, that defendant was operating the boat at a speed of 20 mph across six-foot waves while the boat was passing through the breakers, that plaintiff shouted to defendant to "slow down" but defendant did not respond, and that the boat bounced on the waves and plaintiff was thrown against his seat injuring his back.

APPEAL by plaintiff from *Wells, Judge,* 16 April 1974 Session of Superior Court held in NEW HANOVER County. Heard in Court of Appeals 10 December 1974.

This action was filed to recover for personal injuries alleged to have been suffered on 1 May 1969 as the result of defendant's negligent operation of a 22-foot motorboat in which plaintiff was a passenger. The incident occurred as the parties were returning from a fishing trip in the Atlantic Ocean, just east of Masonboro Inlet.

At the conclusion of the plaintiff's evidence, which on the issue of negligence consisted solely of his own testimony, a directed verdict was entered for the defendant on grounds that the plaintiff failed to show actionable negligence and that the plaintiff was contributorily negligent as a matter of law.

Murchison, Fox & Newton, by James C. Fox, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee.

ARNOLD, Judge.

Upon motion by the defendant for a directed verdict the evidence of the plaintiff must be taken in the light most favorable to him and he is entitled to the benefit of all reasonable inferences which may be drawn therefrom. *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121.

Plaintiff's evidence, if believed, would tend to show that at the time the accident occurred the boat was passing through breaking waters en route to shore. Defendant was operating the boat at a speed of twenty miles an hour across six-foot waves in a 20 to 25 mile an hour wind. The boat bounced over the waves. Plaintiff, because he was getting wet, moved from a seat near the stern to the baitcasting platform near the bow. He shouted to defendant "slow down," but defendant did not respond. Moments later, plaintiff was lifted by the movement of the boat, lost his grip on the edge of the platform, came down, and met the boat with such force that he injured his back.

Plaintiff offered no evidence to show that defendant acted unreasonably in crossing the breakers or operated the boat at a speed greater than necessary in order to cross them. In fact, plaintiff testified that an outboard motorboat, such as the one in question, has the ability to come in continually through the waves. The case of *Gilreath v. Silverman,* 245 N.C. 51, 95 S.E. 2d 107, is distinguishable. There the operator of the motorboat from which plaintiff's decedent fell testified that his speed was "rough and reckless" under existing conditions. Here we have only plaintiff's contention that speed was excessive. There was no evidence that the speed of the boat caused it to bounce with violence not attributable primarily to the rough sea. Plaintiff testified that the effect of speed "depends on the plane of the boat. . . . The more waves that you have to contend with, the more activity there is going to be with the boat going up and down." Finally, nothing in plaintiff's testimony indicates that, given the condition of the sea, he would not have been lifted by the wave and lost his seat if defendant had operated the boat differently.

Viewed in his favor, all plaintiff's evidence tends to show is that he and defendant decided to return to shore when the sea became rough. The boat entered the inlet and started crossing the breakers. It bounced on the waves and plaintiff was thrown against his seat injuring his back.

We hold that this evidence is insufficient to make out a *prima facie* case of actionable negligence. In so holding we do not reach the additional issues of whether plaintiff was contributorily negligent and whether maritime law applies to the facts in this case. The order of the trial court, granting defendant's motion for directed verdict, is affirmed.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ERNEST LINWOOD EDWARDS

No. 745SC887

(Filed 18 December 1974)

1. **Homicide § 27— manslaughter — instructions proper**

Trial court's definition of manslaughter as "the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation" followed by the statement that defendant would be guilty of manslaughter if "he intentionally and unlawfully stabbed and killed" deceased properly instructed the jury in a second degree murder case.

2. **Criminal Law §§ 51, 99— expert witness — statement of finding in presence of jury — no error**

Trial court's statement in the presence of the jury that a medical doctor was an expert witness could only have been understood by the jury to mean that the witness was qualified to testify as to his opinion, and such statement was not prejudicial error.

ON *certiorari* to review trial before *Cohoon, Judge,* 20 September 1973 Session of Superior Court held in NEW HANOVER County. Heard in Court of Appeals 10 December 1974.

Defendant, Ernest Linwood Edwards, was charged in an indictment with the first degree murder of Harold Arthur on 31 May 1973. The State elected to try him on charges of second degree murder and any lesser included offenses. Defendant pleaded not guilty and was tried before a jury.

The State's evidence tended to show that early in the afternoon on 31 May 1973, Edwards and Arthur went to the house of William Irick where they drank vodka and watched television. When they left, they drove to Arthur's trailer. Ed-

wards had been living at the trailer and taking care of Arthur for the past few weeks. Shortly after they left Irick's house, Edwards returned, hysterical, and told Irick he had stabbed Arthur. The police were summoned. They found Arthur sitting in a chair outside the trailer bleeding from a wound in his right side. A physician, who performed the post mortem, testified that Arthur died as the result of a laceration in the abdominal wall and liver, caused by a long sharp object. Inside the trailer, police found a trail of blood from the front door to a couch and a large bloody knife in the kitchen sink.

A neighbor testified that he saw Edwards and Arthur go into the trailer, and shortly thereafter heard a voice say, "Help me, help me." Arthur came out of the trailer and said, "I have been stabbed." Edwards then drove away. The police found Edwards at Irick's house. He had some red spots on his shirt. Both men appeared to be intoxicated.

Defendant testified that he first went to Irick's house alone. Later he went back to the trailer, picked up Arthur and took him to Irick's. The three of them then went to Arthur's trailer. Defendant took some medicine for a heart condition and went to lie down in the bedroom. Arthur and Irick discussed some money that Irick owed Arthur for a car. Defendant dozed off and awakened to find Irick and Arthur gone. He went to Irick's house to look for them, had a drink, and fell asleep again. This was the last thing he remembered before the police arrived. He stated that the spots on his shirt were from a shaving cut.

The jury returned a verdict of guilty of murder in the second degree. From judgment imposing sentence of 20 to 25 years imprisonment, defendant appealed. The appeal was not perfected in apt time and this Court granted certiorari.

Attorney General James H. Carson, Jr., by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

Harold P. Laing for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court in effect equated manslaughter with second degree murder by instructing that defendant would be guilty of manslaughter if "he intentionally and unlawfully stabbed and killed Harold Arthur . . . . " It is well settled, however, that the charge of the court will be con-

strued contextually, and when it is correct as a whole, isolated portions will not be held to be prejudicial. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548. Prior to giving the above instruction, the court properly defined manslaughter as "the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation." *See State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393. When the jury later requested repeated instructions on the offenses charged, the court again gave a proper definition of manslaughter. Read in the context of the charge as a whole, any possibility of prejudice in the defective charge was removed.

[2] Defendant also contends that the court erred in stating in the presence of the jury its finding that a medical doctor was an expert witness. In *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, *vacated on other grounds,* 409 U.S. 1004 (1972), the North Carolina Supreme Court held that such a ruling could only have been understood by the jury to mean that the witness was qualified to testify as to his opinion. This assignment of error therefore is without merit.

The evidence against the defendant, including his own declaration of guilt, was overwhelming. He received a fair trial free of prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

MINNIE WILLIAMS, ADMINISTRATRIX FOR THE ESTATE OF AARON HUBERT WILLIAMS v. MARIO WILLIS GRAY

No. 748DC801

(Filed 18 December 1974)

1. **Appeal and Error § 50— instructions pertaining to plaintiff's negligence — contributory negligence issue not reached**

Any defect in the charge in respect to plaintiff's intoxication was immaterial since the jury did not reach the issue of contributory negligence.

2. **Automobiles § 90— right of way of pedestrian — failure to charge in initial instructions — subsequent instruction**

Any error in the court's failure to instruct in the initial charge that a pedestrian has the right of way when crossing a highway at

an unmarked crosswalk was cured when the instruction was thereafter given upon request of plaintiff's counsel.

APPEAL by plaintiff from *Lanier, Judge,* 3 June 1974 Session of Superior Court held in WAYNE County. Heard in Court of Appeals 10 December 1974.

This is an action brought by decedent's wife as administratrix to recover for his alleged wrongful death. Plaintiff's evidence tended to show that on the night of 18 February 1974, decedent was attempting to cross Highway 70-117 Bypass near its intersection with George Street in Goldsboro when he was struck and killed by an automobile driven by defendant. Decedent was walking from north to south within the bounds of an unmarked crosswalk formed by extending the lines of the George Street sidewalk across the highway. It was about 8:55 p.m. and raining. Two cars approached decedent at speeds of 45 to 50 miles per hour. The first car safely passed decedent. Defendant, driver of the second car, testified that he did not see decedent until he was only 10 to 20 feet away. He swerved sharply to the left but was unable to avoid hitting decedent. He introduced evidence that decedent's blood contained "ethanol 280 milligrams percent" at the time of his death.

The jury found that the defendant was not negligent. From judgment entered for defendant, plaintiff appealed to this Court.

Barnes and Braswell, P.A., by W. Timothy Haithcock, for plaintiff appellant.

Roland C. Braswell, by Roger W. Hall, for defendant appellee.

ARNOLD, Judge.

Although plaintiff has violated the rules of this Court by failing to note in the record his exceptions to the charge, we decline to dismiss the appeal on this ground and turn to the assignments of error. *See Houston v. Rivens,* 22 N.C. App. 423, 206 S.E. 2d 739.

[1] Plaintiff first contends that the trial court erred by instructing the jury on the intoxication when the issue had not been properly raised. Any defect in the charge in this respect is immaterial, however, for the jury did not reach the issue of

contributory negligence. This assignment of error is therefore without merit.

[2] Plaintiff also contends that the court erred by failing to instruct that a pedestrian has the right-of-way when crossing a highway at an unmarked crosswalk. Such an instruction was omitted from the initial charge, but upon request of plaintiff's counsel the instruction was later given. Any error in omission was thereby corrected.

We have examined the remaining portions of the record and find

No error.

Chief Judge BROCK and Judge MORRIS concur.

DEBRA JOHNSON MORGAN (NOW SINCLAIR) v. EVELENE O. JOHNSON

No. 7421SC860

(Filed 18 December 1974)

Parent and Child § 2— stepmother in loco parentis— immunity in negligence action

In plaintiff's action against her stepmother to recover for personal injuries allegedly resulting from defendant's negligent operation of an automobile in which plaintiff was a passenger, defendant stood *in loco parentis* to plaintiff, and defendant was entitled to summary judgment in her favor on the ground of parental immunity; furthermore, plaintiff failed to present a triable issue as to her emancipation where her affidavit indicated that plaintiff received all of her support from her father, that plaintiff disliked defendant, and that defendant always referred to plaintiff as "her husband's child."

APPEAL by plaintiff from *Exum, Judge,* 8 July 1974 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals on 20 November 1974.

Plaintiff instituted this action to recover for personal injuries resulting from an automobile accident in July 1967. In her complaint she alleges that her injuries were proximately caused by defendant's negligent operation of an automobile in which plaintiff was a passenger. Defendant moved for summary judgment on the ground that defendant was immune from

suit because she stood *in loco parentis* to the plaintiff at the time of the accident. The trial court, having considered affidavits of plaintiff and defendant, granted defendant's motion, and plaintiff appealed.

Harrell Powell, Jr., for plaintiff appellant.

Deal, Hutchins and Minor, by Richard Tyndall and James C. Eubanks III, for defendant appellee.

MARTIN, Judge.

"It has long been the rule in North Carolina that an unemancipated minor child cannot maintain an action against his parent for personal injuries negligently inflicted." *Mabry v. Bowen,* 14 N.C. App. 646, 188 S.E. 2d 651 (1972). The present case involves an action by plaintiff against her stepmother. Plaintiff concedes that the doctrine of parental immunity extends to a stepparent standing *in loco parentis,* but she contends that (1) defendant never stood *in loco parentis* to plaintiff and (2) even if such a relationship did exist, there remains a triable issue of fact regarding plaintiff's emancipation from defendant.

The term *'in loco parentis'* means in the place of a parent, and a 'person *in loco parentis'* may be defined as one who has assumed the status and obligations of a parent without a formal adoption. *Shook v. Peavy,* 23 N.C. App. 230, 208 S.E. 2d 433 (1974). In her affidavit defendant states:

> "From the date of my marriage to the plaintiff's father in 1963, until on or about March of 1970, I assumed a parental character and discharged parental duties with respect to the plaintiff, DEBRA JOHNSON MORGAN. I never formally adopted any of my stepchildren. I prepared meals, kept the home, provided counsel and directed the daily activities of my stepchildren, including DEBRA JOHNSON MORGAN, in such a manner and in all respects as would a mother to these stepchildren. I stood in the place of a parent to my stepchildren in all respects."

Nothing else appearing, the foregoing affidavit of defendant would clearly entitle defendant to summary judgment in her favor on the ground of parental immunity. We now turn to plaintiff's affidavit to determine if it shows a triable issue of material fact.

"'[I]f the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact . . . .' Moore's Federal Practice, 2d Ed., Vol. 6, § 56.11(3), p. 2171." *Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

In her affidavit plaintiff does not deny that defendant assumed the role as a mother toward her. Instead, she states:

"I never regarded the defendant as a mother or a stepmother, but as my father's wife, because I had a real mother. Neither did the defendant regard me as 'her child', but as 'her husband's child'. Anytime she introduced me to anyone she always introduced me as 'my husband's child'. I called my father's wife 'Evelene' at her direction. My relationship with the defendant was not good, and at my request, from June, 1966 until May, 1967 my father placed me in a boarding school. . . ."

She also states that she received all of her support from her father, and after graduation from school in 1970 she became self-supporting. We find no triable issue of a material fact presented in plaintiff's affidavit. Plaintiff's dislike for defendant and the fact that plaintiff's father provided for her support does not indicate emancipation in the slightest. "The power to emancipate resides in that parent having the duty to support, ordinarily the father." *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965). Nor do we think that defendant's regard for plaintiff as "her husband's child" is significant. After all, defendant married plaintiff's father when plaintiff was eleven years old, and it would be only natural to regard plaintiff as "her husband's child."

Plaintiff failed to show a triable issue of material fact for the jury, and, therefore, it was appropriate for the trial court to grant defendant's motion for summary judgment.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

DAN L. GREGG v. J. B. STEELE AND EVELYN GORE STEELE

No. 745DC660

(Filed 18 December 1974)

1. **Rules of Civil Procedure § 60— setting aside default judgment — no showing of excusable neglect**

Trial court erred in setting aside default judgment against the male defendant based on excusable neglect where the evidence tended to show that the female defendant received a summons and complaint which she turned over to her husband, the male defendant went to plaintiff's attorney on the same day and stated that he did not owe plaintiff any money, and the male defendant, being inexperienced in legal matters, did not employ an attorney or file an answer, but simply assumed he would be notified when to appear for trial.

2. **Rules of Civil Procedure § 60— no excusable neglect by wife — setting aside default judgment improper**

The trial court erred in setting aside default judgment against the female defendant based on excusable neglect where there was no evidence that she neglected to file an answer upon assurances by her husband that he would be responsible for the defense of the action.

APPEAL by plaintiff from *Barefoot, Judge,* 25 March 1974 Session of District Court held in NEW HANOVER County. Heard in the Court of Appeals on 13 November 1974.

Plaintiff brought an action to recover a sum certain allegedly due on a note executed by defendants. Defendants failed to plead and the clerk of court entered a default against them. After entry of default the clerk entered judgment by default for the sum certain. Several months later defendants obtained an order by Judge Barefoot setting aside the default judgment. Plaintiff appealed.

Harold P. Laing for plaintiff appellant.

No counsel contra.

MARTIN, Judge.

[1] G.S. 1A-1, Rule 55(d) provides that "[f]or good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." Plaintiff contends the trial court erred in setting aside the default judgment because there was insufficient evidence from which the court could find excusable neglect on the defendants' part.

Defendants' testimony and J. B. Steele's affidavit indicate that Evelyn Steele received a summons and complaint which she turned over to her husband, J. B. Steele. That same day, J. B. Steele went to the office of plaintiff's attorney and stated that he did not owe plaintiff any money. Being inexperienced in legal matters, J. B. Steele did not employ an attorney and did not file an answer. He thought he would be notified when to appear for trial.

A party may be relieved from a final judgment for mistake, inadvertence, surprise, or excusable neglect. G.S. 1A-1, Rule 60(b)(1). "Rule 60(b)(1) replaces former G.S. 1-220, and the cases interpreting it are still applicable." *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407 (1971). Since defendant J. B. Steele knew he had been sued on a note, this case is distinguishable from *Shackleford v. Taylor*, 261 N.C. 640, 135 S.E. 2d 667 (1964) where the legal inexperience of a defaulting party was an important factor. "Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable." 5 Strong, N. C. Index 2d, Judgments, § 25, p. 46-47. If a party's neglect of a lawsuit is excusable simply because that party has no attorney, has never been involved in a lawsuit before, and lacks knowledge of when the case will come up for trial then the term "excusable neglect" has little meaning. Therefore, we hold that J. B. Steele has not shown "excusable neglect" on his part.

[2] "[A] wife's failure or neglect to file answer in a suit against her and her husband, upon assurances by her husband that he will be responsible for and assume the defense of the action, is excusable neglect." *Abernathy v. Nichols*, 249 N.C. 70, 105 S.E. 2d 211 (1958). In the present case, there is nothing to indicate that Evelyn Steele neglected to file an answer upon assurances by her husband that he would be responsible for the defense of the action. Thus, her neglect has not been shown to be excusable.

For the reasons stated, the order appealed from is

Reversed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RUDOLPH BERRY, JR.

No. 745SC836

(Filed 18 December 1974)

1. **Criminal Law § 76— admissibility of confession — examination of witness by court on voir dire**

The trial court did not show partiality or bias during a voir dire examination to determine admissibility of defendant's confession where the court asked questions of the officer who obtained the confession but asked defendant no question.

2. **Criminal Law § 80— testimony from card — proper method of refreshing memory**

The trial court did not err in permitting a witness to use a card as a memorandum to refresh his memory.

3. **Criminal Law § 112— reasonable doubt — request for definition required**

Where defendant did not request that the term "reasonable doubt" be defined, failure of the trial court to include a definition of the term in the charge was not error.

APPEAL by defendant from *Winner, Judge,* 24 June 1974 Criminal Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a single bill of indictment with (1) felonious breaking and entering with intent to commit larceny, and (2) larceny of $18. He pled not guilty, was convicted on both counts, and judgment was entered imposing prison sentence of 10 years. From the entry of said judgment, defendant appeals.

Attorney General James H. Carson, Jr., by Associate Attorney Thomas M. Ringer, Jr., for the State.

Charles E. Sweeny, Jr., for the defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the trial court violated G.S. 1-180 by certain statements made to defendant's counsel during the trial. We have carefully reviewed the record with respect to the statements complained of and conclude that they were not improper. The assignment of error is overruled.

[1] By his second assignment of error, defendant contends the court erred in failing to suppress evidence relating to a confession made by defendant, and allowing said evidence to be admitted, for the reason that the court showed bias and partiality during the voir dire examination. We find no merit in this assignment.

The record discloses: A voir dire was conducted in the absence of the jury. Officer McLaurin testified that he interrogated defendant in jail after fully informing defendant of his Miranda rights and after defendant had executed a written waiver of his rights. The officer was examined by the prosecuting attorney and cross-examined by defendant's attorney, after which the court asked the officer several questions. Defendant also testified on voir dire but the court asked him no questions. The court then made findings of fact to the effect that defendant was fully advised of his rights; that he affirmatively waived those rights in writing; and that at the time his rights were explained to him and at the time he made a statement with respect to this case, defendant was rational, understood what he was doing, and made the statement freely, understandingly and voluntarily; the court then concluded as a matter of law that the statement made to the officer was admissible in evidence.

We perceive nothing improper about the court's questions to the officer. The trial judge is under a duty to make findings of fact as to the admissibility of a confession. 1 Stansbury's North Carolina Evidence § 187 (Brandis rev. 1973). If he is not given reasonable latitude in questioning witnesses, the voir dire would serve no useful purpose. The assignment of error is overruled.

[2] By his third assignment of error, defendant contends that the trial judge erred in permitting witness McLaurin to testify from an unidentifed card without any foundation having been laid. The record discloses that the witness was using the card as a memorandum to refresh his memory. The rule is stated as follows:

> . . . In the ordinary case the device used for stimulating the memory is a memorandum or other writing made by the witness himself, . . . or by another in his presence . . . . In any event the evidence consists of the testimony of the witness, and not of the device by which his memory is

revived, and cross-examination is always available to bring to light any improper practice or suspicious circumstance. 1 Stanbury's North Carolina Evidence § 32, at 86-7 (Brandis rev. 1973).

We hold that the court did not err in allowing the witness to use the memorandum to refresh his memory.

By his fourth assignment of error, defendant contends that the trial court erred in failing to grant his motion for nonsuit. This assignment is based on the assumption that the court erred in holding that defendant's confession was voluntary and admissible. Since we have held that the court did not err in its finding with respect to the confession, we hold that it did not err in denying the motion for nonsuit.

[3] Defendant contends in his sixth assignment of error that the court erred in not defining "reasonable doubt" in the jury charge. There was no request that the term "reasonable doubt" be defined and, absent such request, the failure to include a definition of the term in the charge was not error. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Hicks,* 16 N.C. App. 635, 192 S.E. 2d 597 (1972).

We have carefully considered the other contentions argued in defendant's brief but find them also to be without merit.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. EARL EUGENE PARKS

No. 748SC589

(Filed 18 December 1974)

Automobiles § 3; Criminal Law § 171— driving while license permanently revoked — error in charge — consolidation with another case for judgment

In a prosecution for driving while license was permanently revoked, the trial court erred in failing to charge the jury on what would constitute permanent revocation; however, such error was not prejudicial since the court consolidated the case for judgment with a conviction of driving under the influence, fifth offense, and the

sentence of 12 months is supported by the conviction of driving under the influence, fifth offense.

APPEAL by defendant from *Lanier, Judge,* 28 January 1974 Session of Superior Court held in WAYNE County. Heard in the Court of Appeals on 12 November 1974.

The defendant was charged in a warrant, proper in form, with operating a motor vehicle upon the public highway (1) while under the influence of an intoxicating beverage, fifth offense, and (2) while his operator's license was permanently revoked. The defendant was found "[g]uilty as charged to both offenses." The court consolidated the two cases for judgment and sentenced the defendant to be imprisoned in the county jail for twelve (12) months. Defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney William Woodward Webb and Associate Attorney James Wallace, Jr., for the State.

Strickland & Rouse by David M. Rouse for defendant appellant.

HEDRICK, Judge.

By his first three assignments of error, based on exceptions duly noted in the record, the defendant contends the court in its instructions to the jury expressed an opinion on the evidence relating to the charge of driving under the influence, fifth offense. Each of these exceptions challenges a portion of the charge where the trial judge was stating the contentions of the State and when considered contextually with remainder of the instructions is clearly without error.

The defendant's fourth asisgnment of error relates to the court's instructions to the jury on the charge of operating a motor vehicle on the public highway while the defendant's operator's license was permanently revoked. The defendant contends: "The trial judge in defining the offense for the jury failed to give the jury any instructions on what would constitute permanent revocation, but merely instructed the jury on what they would need to find for driving while license revoked." The defendant was charged with a violation of G.S. 20-28(b), which in pertinent part provides:

"Any person whose license has been permanently revoked or permanently suspended, as provided in this Article,

who shall drive any motor vehicle upon the highways of this State while such license is permanently revoked or permanently suspended shall be guilty of a misdemeanor and shall be imprisoned for not less than one year."

While there is evidence in the record tending to show that defendant's operator's license was permanently revoked, nowhere in his instructions did the judge relate this aspect of the evidence to the charge in the warrant. This was error. In effect, the case was submitted to the jury as if the defendant had been charged with the lesser offense of driving while his license was suspended or revoked other than permanently under G.S. 20-28(a). If the jury had found the defendant guilty of the lesser offense, rather than "guilty as charged," the defendant, having been the beneficiary of the error, would have had no cause to complain. In any event, since the two cases were consolidated for judgment and the jail sentence of twelve months therein imposed is supported by the conviction of driving under the influence, fifth offense, under the authority of *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972); *State v. Avery,* 18 N.C. App. 321, 196 S.E. 2d 555 (1973); and *State v. Jefferies,* 17 N.C. App. 195, 193 S.E. 2d 388 (1972), the error in the charge in the case of driving while license was permanently revoked is not prejudicial.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JIMMY WAYNE SMITH

No. 745SC687

(Filed 18 December 1974)

Robbery § 5— armed robbery — failure to submit lesser offenses

The trial court in an armed robbery case did not err in failing to charge the jury on lesser included offenses where the State's evidence tended to show that defendant committed the crime of armed robbery and defendant's evidence tended to show that he committed no crime at all.

APPEAL by defendant from *Wells, Judge,* 25 February 1974 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals on 13 November 1974.

This is a criminal prosecution wherein the defendant, Jimmy Wayne Smith, was charged in a bill of indictment, proper in form, with armed robbery. The State offered evidence tending to show the following:

On 15 January 1974 Ira Lee Davis met the defendant and Patricia Wilkens (co-defendant) in a bar on Front Street in Wilmington, N. C. Later that night while Davis, the defendant, and Wilkens were riding around Wilmington, the defendant "put a knife" to Davis' throat and told him, "Don't try nothing, and you won't get hurt." Defendant then directed Davis to drive to a deserted spot in Brunswick County where, after tying Davis' hands and feet and removing his shoes, he and Wilkens took Davis' wallet containing $6.00 in cash. After taking Davis' wallet and money, the defendant cut Davis across the chest and on the chin with a "sharp object" and said, "You S.O.B. I ought to kill you." The defendant and Wilkens then drove away in Davis' automobile.

Defendant Smith offered no evidence, however, defendant Wilkens testified that Davis voluntarily drove to the deserted spot in Brunswick County. She further testified that Davis indicated he had a gun and began acting as if he were going to rape her. At this point, defendant Smith protected her by pulling a knife on Davis and threatening him with it. She denied taking Davis' money and stated that the defendant did not cut Davis with the knife.

From a verdict of guilty as charged and a judgment imposing a prison sentence of six (6) to ten (10) years, defendant appealed.

James H. Carson, Jr., Attorney General, by Assistant Attorney General Walter E. Ricks and Associate Attorney Wilton Ragland, for the State.

James K. Larrick for the defendant appellant.

HEDRICK, Judge.

The one question argued on this appeal is whether the trial judge erred in failing to charge the jury on the lesser included offenses of armed robbery. Our Supreme Court in *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954), has set forth the rule for determining when an instruction on a lesser included offense must be given: "The necessity for instructing the jury

as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor."

All of the State's evidence in this record tends to show that the defendant committed the crime charged in the bill of indictment. The evidence of Wilkens tends to show that the defendant committed no crime at all. Since the State's evidence shows that an armed robbery was committed and there is no conflicting evidence relating to the elements of the crime charged, there was no necessity for the trial judge to instruct the jury on the lesser included offenses of armed robbery. *State v. Hicks, supra.*

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIE WHITE

No. 7426SC566

(Filed 18 December 1974)

Criminal Law § 146— question not raised in trial court — no showing of error on appeal

Defendant failed to show that the trial judge committed error in "precluding defendant's counsel from gaining access to statements made by witnesses" where the record does not show that such a question was raised in the trial or was passed on by the judge.

APPEAL by defendant from *Falls, Judge,* 18 February 1974 Session of Superior Court held in MECKLENBURG County. Argued in the Court of Appeals 14 October 1974.

Defendant was charged with assault with a deadly weapon with intent to kill and inflicting serious bodily injury. G.S. 14-32(a). The jury verdict was guilty of assault with a deadly weapon and inflicting serious injury. G.S. 14-32(b). An active prison sentence was imposed.

Attorney General Carson, by Assistant Attorney General Murray, for the State.

Levine & Goodman, by Arthur Goodman, Jr., for the defendant.

BROCK, Chief Judge.

Defendant argues one assignment of error. He argues on appeal that the trial judge committed error in "precluding defendant's counsel from gaining access to statements made by witnesses." Defendant argues the principles of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215. The principles of *Brady* have been recognized recently by our Supreme Court in *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973), and by this Court in *State v. Chavis, et al.* (filed 18 December 1974). However, counsel's argument of those principles in this case seems wide of the mark.

After reviewing the record on appeal in this case, we cannot find that such a question was raised in the trial or was passed on by the judge. The only question about a statement of a witness was raised during cross-examination of one of the investigating officers. It appears that the officer wanted to look at something to refresh his recollection. Counsel insisted that, if the witness were going to use notes to refresh his recollection, counsel was entitled to see the notes also. No ruling by the judge appears in the record on appeal. In any event the witness did not use notes to refresh his recollection.

No error.

Judges PARKER and MARTIN concur.

ILA MILLER v. BILLY RAY MILLER AND FRANCES MILLER

No. 7410DC512

(Filed 18 December 1974)

Rules of Civil Procedure § 55— setting aside entry of default — discretion of court

A determination of the existence of good cause for setting aside an entry of default under Rule 55(d) rests in the sound discretion of

the trial judge, and his ruling will not be disturbed unless a clear abuse of discretion is shown.

APPEAL by plaintiff from *Barnette, Judge,* 11 February 1974 Session of District Court held in WAKE County. Argued before the Court of Appeals 24 September 1974.

On 7 November 1973 plaintiff filed a complaint seeking recovery of actual and punitive damages for the malicious destruction by defendants of a hedge situated on plaintiff's land. Defendants are neighbors and adjoining property owners. Plaintiff complains that she began growing a hedge along her property line in 1967; that the hedge reached a height of five to nine feet; and that defendants cut down the hedge while plaintiff was absent from her house.

Defendants failed to file an answer to the complaint, and on 4 January 1974, on the motion of plaintiff, default was entered. On 9 January 1974 defendants filed a motion to set aside the entry of default. Defendants alleged that after being served with the summons and complaint, they met with town officials of Garner who advised them that the Town of Garner would handle the suit against defendants. Defendants filed an affidavit in support of their motion to set aside the entry of default, averring that officials of the Town of Garner told them that plaintiff's hedge grew on an easement of the Town of Garner and that town officials gave them permission to cut down the hedge. Plaintiff responded with an affidavit controverting defendants' allegations. The cause subsequently was heard by Judge Barnette, who vacated the entry of default. The plaintiff appeals.

L. Phillip Covington, for the plaintiff-appellant.

Clyde A. Douglass II for the defendants-appellee.

BROCK, Chief Judge.

Rule 55(d) of the North Carolina Rules of Civil Procedure provides that

> "[f]or *good cause* shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with rule 60(b)." (Emphasis added.)

It is well settled that an entry of default is to be distinguished from a judgment by default. *Whaley v. Rhodes,* 10 N.C.

App. 109, 177 S.E. 2d 735. An entry of default is made by the clerk of court and has been characterized as a "ministerial duty." *See* 2 McIntosh, N. C. Practice 2d, § 1668 (Supp. 1970). Courts generally favor giving every litigant a fair opportunity to present his side of a disputed controversy.

We have repeatedly held that a determination of the existence of good cause under Rule 55(d) rests in the sound discretion of the trial judge. His ruling will not be disturbed unless a clear abuse of discretion is shown. *Whaley v. Rhodes, supra; Hubbard v. Lumley,* 17 N.C. App. 649, 195 S.E. 2d 330; *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 181 S.E. 2d 794. We find no abuse of discretion in the ruling questioned by plaintiff.

Affirmed.

Judges PARKER and MARTIN concur.

IN THE MATTER OF ROOSEVELT SMITH

No. 7412DC554

(Filed 18 December 1974)

1. **Courts § 15; Infants § 10— trial of 14 year old for felony — procedural statute — constitutionality**

The statute requiring the district court to determine whether the case of a fourteen year old juvenile charged with a felony should be transferred to the superior court is constitutional. G.S. 7A-280.

2. **Courts § 15; Infants § 10— transfer of juvenile felony charge to superior court — separate evidentiary hearing not required**

G.S. 7A-280 does not require the district court to conduct a separate evidentiary hearing upon the cause for transfer of a juvenile charged with a felony to the superior court.

3. **Courts § 15; Infants § 10— transfer of juvenile case to superior court — sufficiency of findings**

Juvenile disposition order stating that a juvenile charged with rape was being transferred to superior court for trial because the Board of Youth Development (now the Department of Correction) would not be in a position to render appropriate custodial rehabilitative services if the juvenile should be found guilty of the charge of rape contained the minimal specification of reason under G.S. 7A-280 and disclosed that, in exercising his discretion to transfer the case, the district judge found that the needs of the child would be best served by the transfer.

In re Smith

APPEAL by the juvenile from *Carter, District Court Judge,* 2 May 1974 Session of District Court held in CUMBERLAND County. Argued in the Court of Appeals 17 September 1974.

Juvenile petition was filed in District Court alleging, *inter alia,* the following:

> "3. That the child is a delinquent child as defined by G.S. 7A-378(2) in that at and in the county named above and on or about the 29th day of April, 1974, the child did unlawfully, wilfully, and feloniously ravish and carnally know one Linda Watts, age 14."

After hearing the evidence, the District Court Judge made the following two findings of fact in the juvenile adjudication order:

> "1. That said child is over 14 years of age and less than 16 years of age.
>
> "2. That the Court finds probable cause as to the offense of rape."

Thereafter, in the juvenile disposition order, the District Court Judge, *inter alia,* found the following facts:

> "4. That if said child is guilty of the offense as charged and for which the Court has found probable cause, the Board of Youth Development is not in a position to render appropriate custodial rehabilitative services for said child.
>
> "5. That said case should be bound over to Superior Court for trial on its merits if a true bill is found by the grand jury."

The juvenile was represented at the hearing and on this appeal by the Assistant Public Defender.

Attorney General Carson, by Assistant Attorney General Reed, for the State.

Assistant Public Defender Beaver, for the juvenile.

BROCK, Chief Judge.

[1] The juvenile argues that G.S. 7A-280 is unconsitutional. This same argument with the same reasoning was recently considered by this Court. The statute was held to be constitutional.

In re Bullard, 22 N.C. App. 245, 206 S.E. 2d 305, *appeal dismissed,* 285 N.C. 758, 209 S.E. 2d 279.

[2] The juvenile further argues that the district judge did not follow the statute in his order transferring the case to the Superior Court. The juvenile argues that the statute implicitly requires a separate evidentiary hearing on the cause for transfer.

While we recognize that circumstances may sometimes make it more appropriate for the court to conduct a separate evidentiary hearing upon the cause for transfer of a juvenile charged with a felony to the Superior Court, we reject the argument that G.S. 7A-280 mandates a separate hearing.

[3] The juvenile disposition order in this case specifies the reason for the transfer to be that if the juvenile is found guilty of the charge of rape, the Board of Youth Development (now Department of Correction) is not in position to render appropriate custodial rehabilitative services. This is a minimal specification of reason under G.S. 7A-280. However, it discloses that, in exercising his discretion to transfer the case, the trial judge found that the needs of the child would best be served by the transfer. There is no claim or contention that counsel for the juvenile was denied the right to examine any court or probation records considered by the trial judge.

Affirmed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. FREDERICK STANLEY

No. 745SC875

(Filed 18 December 1974)

Narcotics § 4.5— possession with intent to distribute — submission of simple possession proper

Where the bill of indictment charged defendant with possession of a controlled substance with intent to distribute, the trial court could properly submit an issue to the jury as to defendant's guilt of simple possession of a controlled substance, since simple possession is a lesser included offense of possession with intent to distribute.

State v. Stanley

ON *certiorari* to review a trial before *Tillery, Judge,* 11 February 1974 Session of Superior Court held in NEW HANOVER County.

Defendant was tried under a bill of indictment charging him with one count of felonious possession of a controlled substance with the intent to distribute, and one count of felonious distribution of a controlled substance.

The evidence tended to show that on 4 April 1973, a narcotics undercover agent picked up defendant and a companion and proceeded to drive them to a concert. Upon arrival at the concert, defendant and his companion left the agent's vehicle. A few minutes later they returned and informed the agent that they could purchase two tablets of LSD (Lysergic Acid Diethylamide) for six dollars. The agent gave defendant six dollars, and defendant made the purchase and returned to the vehicle where he gave two LSD tablets to the agent.

The jury returned a verdict of guilty of possession of a controlled substance. Defendant was acquitted on the count charging him with distribution of the substance and was sentenced to be imprisoned for a term of not less than three years nor more than five years, with recommendation that the sentence be served in a youthful offenders' camp.

Attorney General James H. Carson, Jr., by Assistant Attorney General, William F. O'Connell, for the State.

Harold P. Laing for defendant appellant.

VAUGHN, Judge.

The trial court instructed the jury that they could find defendant guilty or not guilty of possession of a controlled substance, and guilty or not guilty of distribution of a controlled substance. Defendant contends that the court erred in instructing the jury on the offense of possession of a controlled substance when the bill of indictment charged him with possession of a controlled substance with the intent to distribute, arguing that possession of LSD is a separate and distinct crime from possession of LSD with intent to distribute. In *State v. Aiken,* 286 N.C. 202, ____ S.E. 2d ____ (1974), defendant was charged with possession of heroin, a controlled substance, with the intent to deliver, and the Supreme Court, affirming this Court, held that it was not error to instruct the jury that defendant could

be found guilty of possession with intent to distribute, or guilty of simple possession, or not guilty. In Aiken, *supra,* the Court said:

> ". . . [o]ne may not possess a substance with intent to deliver it (the offense charged in the present indictment) without having possession thereof. Thus, possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver. Consequently, there was no error in instructing the jury that, under the indictment in the present case, it might find the defendant guilty of the unauthorized possession of a controlled substance."

In *State v. Reindell* (N. C. Court of Appeals, opinion filed 4 December 1974), defendant was charged with possession of a controlled substance with intent to distribute, to wit: 299 tablets of LSD, and this Court, citing *Aiken* as authority, held that it was not error to instruct the jury that defendant could be found guilty "of possession of LSD with intent to distribute, guilty of possession of LSD but without the intent to distribute, or not guilty."

The crime of possession of a controlled substance is a lesser included offense of the crime of possession of a controlled substance with intent to distribute.

We have carefully considered defendant's other assignment of error, find it to be without merit and hold that defendant's trial was free from prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. FREDERICK MADISON PATTERSON

No. 7425SC665

(Filed 18 December 1974)

APPEAL by defendant from *Chess, Judge,* 14 May 1974 Session of Superior Court held in CATAWBA County. Argued before the Court of Appeals 21 October 1974.

Defendant was charged in a bill of indictment with the felony of robbery with a firearm. A plea of not guilty was entered, and a verdict of guilty as charged was returned. From an active sentence of not less than 15 years nor more than 25 years imposed thereon, the defendant gave notice of appeal.

Attorney General Carson, by Assistant Attorney General Briley, for the State.

Samuel D. Smith, for the defendant.

BROCK, Chief Judge.

Defendant presents the record for review for possible errors. We have reviewed the record. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION, ROBERT MORGAN, ATTORNEY GENERAL, NORTH CAROLINA CONSUMERS COUNCIL, INC., NORTH CAROLINA ASSOCIATION OF BROADCASTERS, CONTACT, INC., AND THE SECRETARY OF DEFENSE OF THE UNITED STATES, APPELLEE, v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLANT

No. 7410UC775

(Filed 2 January 1975)

1. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — rate of return — failure to find cost of capital and equity**

The Utilities Commission sufficiently set forth its reasons for adopting a rate of return on fair value of 7.55% for a telephone company, and the Commission did not err in failing to make findings of fact as to the cost of capital to the telephone company and the cost of, or reasonable return on, either book or fair value equity.

2. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — adjusted amount for materials and supplies**

The Utilities Commission did not err in adopting an adjusted figure for materials and supplies used and useful in providing telephone service that was less than the telephone company's actual investment in materials and supplies during the test period.

3. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — error in cash component of working capital**

Error by the Utilities Commission in determining the cash component of a telephone company's working capital was not prejudicial where the error deprived the company of only $31,265 and the Commission allowed an increase in rates that would produce in excess of $8 million in additional income.

4. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — allocation of interest expense incurred by parent corporation**

The Utilities Commission did not err in allocating to a telephone company a portion of interest expense incurred by its parent company, with whom it files a consolidated income tax return, in obtaining funds by debt issues to purchase common stock of the parent's wholly-owned subsidiaries, and treating the allocated interest expense as a tax deduction for the telephone company, thus reducing the tax expense of the telephone company.

5. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — annualization adjustment factor**

The Utilities Commission did not err in adopting an annualization adjustment factor of 3.61% for a telephone company based on total telephones in service, including extensions.

6. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — disallowance of charitable contributions**

The Utilities Commission did not err in disallowing charitable contributions as an expense in determining a telephone company's reasonable operating expenses.

7. **Telephone and Telegraph Companies § 1; Utilities Commission § 6— telephone rates — order more than 270 days after proposed rates suspended**

Utilities Commission order in a telephone rate case was not invalid for the reason that it was entered, or that the rates provided therein became effective, more than 270 days after the proposed rates were suspended. G.S. 62-134.

Judge MORRIS dissenting.

APPEAL by applicant, Southern Bell Telephone and Telegraph Company, from order of North Carolina Utilities Commission entered 30 April 1974.

This proceeding was instituted on 20 June 1973 when Southern Bell Telephone and Telegraph Company (Southern Bell) filed an application with the North Carolina Utilities Commission (Commission) asking for authority to increase existing rates and charges for intrastate service to produce an annual increase in revenue of approximately $33,812,129. By order dated 20 July 1973, the Commission declared the application to be a general rate case, suspended the proposed increase in rates, and set the matter for hearing to begin 27 November 1973 after due notice to the public.

Pursuant to petitions duly filed, the Commission allowed the following to intervene: The Department of Defense and all other Executive Agencies of the United States; the North Carolina Consumers Council; the North Carolina Association of Broadcasters, Inc.; Contact, Inc.; and the Attorney General of North Carolina, on behalf of the using and consuming public.

Following a much used procedure to test a utility's level of earnings and thus the reasonableness of its existing rate structure, the Commission selected a test period for the 12 months ending 30 June 1973. The Commission required Southern Bell to revise the exhibits filed with its application to show its financial experience for that 12 months' period.

Hearings were held for some seven or eight days in late November and early December of 1973. Witnesses were presented by Southern Bell, the Commission, and various protest-

ants, including the Attorney General. On 30 April 1974, the Commission filed its order which included the following findings of fact:

(1) The total increases in rates and charges as filed by Southern Bell would produce $34,412,771 in additional gross annual revenues, and the total reductions filed would amount to $600,642 in annual reductions, leaving the combined additional increase in annual revenues applied for of $33,812,129, or resulting in total annual intrastate operating revenues of $236,660,582.

(2) The reasonable original cost of Southern Bell's North Carolina intrastate utility property is $606,237,216, the depreciation reserve is $126,706,712, thereby making the depreciated original cost $479,530,504.

(3) The reasonable replacement cost of Southern Bell's intrastate plant in service is $623,640,532, plus a working capital, material and supplies allowance in the amount of $2,205,994, producing a total reasonable replacement cost of $625,846,526.

(4) The allowance for working capital under approved rates after accounting and pro forma adjustments at June 30, 1973, of $2,205,994 is proper.

(5) The fair value of Southern Bell's property used and useful in providing service to the public within North Carolina at the end of the test period considering the depreciated original cost, and the working capital allowance of $481,736,498 and the reasonable replacement cost of $625,846,526, is $549,691,301.

(6) The approximate gross revenues for Southern Bell for the test period were $203,001,960 under present rates, and under proposed rates would have been $236,841,089, before annualization to year end revenues.

(7) The level of operating expenses after accounting and pro forma adjustments, including taxes and interest on customer deposits, is $166,581,787, which includes an amount of $29,284,759 for actual investment currently consumed through reasonable actual depreciation, before annualization to year end level.

(8) The proper annualization factor necessary to restate income after accounting and pro forma adjustments to end-of-period level as required by G.S. 62-133 is 3.61%.

(9) The proper rate of return which Southern Bell should have the opportunity to earn on the fair value of its North Carolina intrastate investment is 7.55%.

Although the test period ended on 30 June 1973, in making its final determinations the Commission took into consideration an increase in ways for Southern Bell employees which went into effect on 1 July 1973.

In its order, the Commission allowed an increase in rates that would produce approximately $8,271,000 in additional annual income, approximately 25 percent of that requested, the increase to become effective on 15 May 1974. Southern Bell appealed.

Attorney General James H. Carson, Jr., by Deputy Attorney General I. Beverly Lake, Jr., and Associate Attorney Robert P. Gruber, for plaintiff appellee.

North Carolina Utilities Commission by Commission Attorney Edward B. Hipp, Assistant Commission Attorney Maurice W. Horne, and, Associate Commission Attorney Lee W. Movius, for plaintiff appellee.

Joyner & Howison, by R. C. Howison, Jr., John F. Beasley, R. Frost Branon, Jr., Drury B. Thompson, and Harvey L. Cosper, for defendant appellant.

BRITT, Judge.

This being a general rate case, it is controlled for the most part by G.S. 62-133 which provides how rates are fixed, and by G.S. 62-79 which provides what the final order of the Commission shall contain. Due to the large number of general rate cases that have found their way to our appellate division in recent years, much has been written on the subject of rate making and the respective functions of the Commission and the courts in that important process.

An extensive discussion of legal principles applicable to establishing rates for telephone companies is set forth in an opinion by Justice Lake in *Utilities Commission v. General Telephone Company,* 281 N.C. 318, 189 S.E. 2d 705 (1972) which, with minor modification, affirmed a well considered opinion by Judge Parker reported in 12 N.C. App. 598, 184 S.E. 2d 526 (1971). While no useful purpose would be served by stating again all of the principles set forth in the General Telephone

Company opinions, we think a restatement of the following principles, gleaned from those opinions and pertinent to this case, would be appropriate:

(1) The Utilities Commission, not the Supreme Court or the Court of Appeals, has been given the authority to determine the adequacy of a public utility's service and the rates to be charged therefor. G.S. 62-31; G.S. 62-32; G.S. 62-130; G.S. 62-131.

(2) The authority of an appellate court to reverse or modify an order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. 62-94, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision.

(3) Upon appeal, the rates fixed by the Utilities Commission, pursuant to G.S. Chapter 62, are deemed *prima facie* just and reasonable, and all findings of fact supported by competent, material and substantial evidence are conclusive.

(4) A finding of fact or determination of what rates are reasonable by the Utilities Commission may not be reversed or modified by the reviewing court merely because the court would have reached a different finding or determination upon the evidence.

(5) The burden of proof is upon the utility seeking a rate increase to show the proposed rates are just and reasonable. G.S. 62-75; G.S. 62-134(c).

By its assignments of error, Southern Bell contends the Commission erred in the following respects: (1) in setting the rate of return at 7.55%; (2) in determining Southern Bell's rate base; and (3) in delaying too long the issuance of its order. We will discuss the assignments in the categories indicated.

SETTING THE RATE OF RETURN

[1] Southern Bell argues that the Commission did not sufficiently set out the reasons for adopting a rate of 7.55%; that the Commission should have made factual findings as to the cost of capital to Southern Bell, and the cost of, or a reasonable return on, either book or fair value equity to Southern Bell. We reject this argument.

G.S. 62-133(b)(1) requires the Commission to ascertain the fair value of a public utility's property " . . . used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method." The Commission ascertained fair value to be $549,691,301 and that determination is fully supported by the record. The statute, G.S. 62-133(b)(4), then provides that the Commission shall "[f]ix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reaesonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors."

Two of the key witnesses at the hearing before the Commission were Mr. Dean, an expert witness presented by Southern Bell, and Mr. Kosh, an expert witness presented by the Attorney General. In arriving at their opinions as to a fair rate of return, Mr. Dean used the "comparable earnings" test and Mr. Kosh used what he referred to as the "discounted cash flow" approach. Mr. Dean compared Southern Bell's financial structure, earnings, etc., with certain other utilities, regulated and unregulated, and certain high grade industrials. Mr. Kosh used a different approach, providing an analysis of the entire Bell System of which Southern Bell is a part, and stressed the favored position of a regulated utility as contrasted with industrials in a highly competitive market. Based on his studies, Mr. Kosh concluded that 7.8% was the maximum return that would be reasonable for Southern Bell to have an opportunity to earn on its fair value rate base.

In its order the Commission devoted some 18 pages in reviewing and analyzing testimony and pertinent statutes and court decisions relating to its finding of fair value. We find no authority that requires the Commission to make the factual

findings that Southern Bell contends it should have made. The statutes list what the Commission shall "ascertain" or "determine," but the items in question are not so listed. The Commission relied heavily on Mr. Kosh's testimony and he appears to have followed the principle that to attract capital, a public utility need not charge, and is not entitled to charge, for its services rates which will make its stock or bonds attractive to investors who are willing to risk substantial loss of principal in return for the possibility of abnormally high earnings, since the utility, having a legal monopoly in an essential service, offers its investors a minimal risk of loss of principal. This principle was restated with approval in the General Telephone case, *supra.*

Southern Bell further argues that the effect of Mr. Kosh's testimony was to recommend a 7.8% return, therefore, there was no evidence to support the Commission's finding of 7.55%. We construe Mr. Kosh's testimony to say that 7.8% was the *maximum* return that would be reasonable for Southern Bell. Furthermore, it is the prerogative of the Commission to determine the credibility of evidence before it, even though such evidence be uncontradicted by another witness. *Utility Commission v. Power Company,* 285 N.C. 377, 206 S.E. 2d 269 (1974).

We hold that the assignments of error with respect to fixing the rate of return are without merit.

DETERMINING THE RATE BASE

Southern Bell contends the Commission erred in understating Southern Bell's rate base by certain exclusions for materials and supplies and cash working capital; by overstating revenues and understating expenses by improperly allocating AT&T interest expense, by erroneously utilizing an improper annualization adjustment factor, and by disallowing charitable contributions as an expense.

Under this contention, Southern Bell argues that the Commission wrongfully calculated the fair value of its properties by adopting an incorrect figure for materials and supplies, and erroneously calculating the proper amount for the cash component of working capital.

[2] With respect to materials and supplies, Southern Bell's witness Turner testified that the intrastate portion of Southern Bell's investment in materials and supplies as of 30 June 1973 was $4,563,388. Witness Carter, of the Commission's staff, testified that this figure should be adjusted downward by $1,091,058

and the Commission adopted the adjustment. The effect of this adjustment was to reduce by the latter amount the fair value of Southern Bell's property "used and useful" in providing service to the people of North Carolina. The methodology used by Mr. Turner was the same as that approved by this court, speaking through Judge Parker, in *Utilities Commission v. Telephone Company,* 15 N.C. App. 41, 189 S.E. 2d 777 (1972), and no useful purpose would be served in restating the methodology here. Suffice it to say, we adhere to our former opinion.

[3] With respect to the amount adopted by the Commission as a cash component of working capital, the Commission admits that it made an error but denies that the error was sufficiently prejudicial to require reversal of the order appealed from. We agree with the Commission.

The error resulted in a $414,111 understatement of working capital, which in turn caused an identical understatement of the fair value of Southern Bell's property used and useful. Multiplying the $414,111 by the 7.55% rate of return on fair value allowed by the Commission, Southern Bell was deprived of approximately $31,265, which amount should have been added to return on common equity. This represented only .00126% of the $24,746,737 allotted to Southern Bell's common equity under the approved rates.

In the Supreme Court opinion in the General Telephone case, *supra,* Justice Lake said (page 370): " . . . At best, the result of the complex rate making procedure is an approximation of this objective (fixing a fair rate of return on fair value)." We hold that the admitted error was not sufficiently prejudicial to disturb the order.

[4] We think the Commission properly allocated to Southern Bell certain interest expense incurred by its parent, American Telephone and Telegraph Company. The statute requires that the Commission ascertain the utility's annual "reasonable operating expenses," G.S. 62-133(b)(3), and, clearly, taxes constitute an operating expense item. Since interest is a deduction from taxable income, the Commission must determine a utility's annual interest payments. This determination was made difficult in the instant case for the reason that Southern Bell files no tax return of its own, but files a consolidated return with AT&T. Therefore, the Commission allocated to Southern Bell a portion of certain interest expense incurred by AT&T, which expense was generated by debt issues by AT&T to obtain funds

with which to purchase common stock issues of its wholly owned subsidiaries, including Southern Bell. The tax savings accrues when the interest paid by AT&T on its debt securities is deducted from gross income on the consolidated tax return filed by AT&T and its subsidiaries. For purposes of rate making, the Commission treated the allocated interest expense as a tax deduction and, accordingly, lowered Southern Bell's tax expense. The result of this procedure was a $3,617,998 adjustment to Southern Bell's North Carolina intrastate interest expense, and a concomitant $1,785,080 adjustment to Southern Bell's state and federal income taxes. We hold that the procedure was proper.

[5] Southern Bell argues that the Commission erred in adopting an annualization adjustment factor of 3.61%. As a part of the rate fixing process, the statute requires that the Commission estimate the utility's revenue under present and proposed rates, and that probable future revenues and expenses shall be based on the plant and equipment in operation as of the end of the test period. G.S. 62-133(b)(2) and (c). The adjustment factor is referred to also as a growth factor. At the hearing, Southern Bell's witness Turner testified that this factor should be 2.6% and based his conclusion on the number of main and equivalent stations in service. Commission staff witness Carter opined that this factor should be 3.61% and based his conclusion on total telephones in service, including extensions. Southern Bell argues that revenue derived from extensions is much less than that derived from main stations. We hold that the factor adopted by the Commission is supported by the evidence.

[6] Southern Bell argues that the Commission erred in disallowing as expense certain charitable contributions. The record reveals that in ascertaining Southern Bell's operating expenses, the Commission disallowed $180,000 in contributions. The Commission reasoned that to include this item as an expense would have the effect of requiring ratepayers to make involuntary contributions through the payment of rates to an organization or organizations of Southern Bell's choice. We hold that the disallowance of the contributions item was a proper exercise of the Commission's discretion in determining Southern Bell's *reasonable* operating expenses.

DELAYING ISSUANCE OF ORDER

[7] Southern Bell contends that the order appealed from is invalid for the reason that under G.S. 62-134 the Commission

may suspend proposed rates for a maximum of 270 days; that if the rates proposed by Southern Bell in this proceeding had not been suspended by the Commission, they would have gone into effect on 31 July 1973; that the Commission's order granting part of the requested increase in rates was entered on 30 April 1974, 273 days after 31 July 1973, and it made the new rates effective 15 May 1974. Admitting that the order was not entered within the 270 days, appellees argue that Southern Bell could have put its requested rates into effect for the period from 27 April 1974 to 15 May 1974 but voluntarily chose not to do so.

G.S. 62-134(b) clearly gave the Commission authority to suspend the proposed rates for a maximum of 270 days. The statute further provided that if the proceeding with respect to the proposed increases had not been concluded, and an order made within the period of suspension, the proposed change of rates would go into effect at the end of such period. But the statute further provided that after hearing, whether completed before or after the proposed rates went into effect, the Commission could make such order with respect thereto as would be proper in a proceeding instituted after the rates had become effective.

We hold that the order appealed from is not invalid for the reason that it was entered, or that the rates provided therein became effective, more than 270 days after the proposed rates were suspended.

* * *

For the reasons stated, the order appealed from is

Affirmed.

Judge HEDRICK concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

By G.S. 62-133(b)(4) the Commission is directed to "[f]ix such rate of return on the fair value of the property as will enable the public utility by sound management to produce a fair profit for its stockholders, *considering changing economic conditions* and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its fran-

chise, *and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.*" (Emphasis supplied.)

In *Utilities Commission v. Power Co.*, 285 N.C. 377, 393, 206 S.E. 2d 269 (1974), Justice Lake, speaking for the Court, said:

> "Since the decision of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. Public Service Commission,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176, it has been accepted that a 'fair rate of return' is one sufficient to enable the utility to attract, on reasonable terms, capital necessary to enable it to render adequate service. This is the test laid down by G.S. 62-133(b)(4)."

The Commission in its order, speaking of "fair rate of return" said:

> "Evidence as to what is a fair and reasonable rate of return is often conflicting and by its very nature lacks complete objectivity. We have carefully considered the criteria laid down in the Bluefield and Hope cases and have applied our informed judgment based upon all of the evidence to reach the necessary conclusions. We have weighed all the factors considered by the witnesses testifying in this proceeding and we have discussed certain points we felt appropriate heretofore in this Order.
>
> The Commission has given serious consideration to all of the relevant evidence presented in this case, concerning the cost of capital, in view of the company's need for a competitive position in the capital market in order to pursue the programs of expansion which will provide both additional and improved service to the ratepayers. Based on the foregoing and the entire record in this matter, and applying its informed judgment, the Commission finds that fair rate of return of 7.55% is fair and reasonable for this company to earn on its fair value rate base. . . . "

If cost of capital must be considered in arriving at a fair rate of return, there must be evidence offered thereon. It is obvious that consideration of these factors generate conflicting opinions. This is particularly true with respect to costs of and return on equity capital. For example, the Company witness Dean testified that in determining the overall cost of capital

to Southern Bell, he used cost of equity of 12½%. Mr. Kosh, witness for the Attorney General, however, testified that he found the cost of equity for Southern Bell to be no more than 9.5%.

I am of the opinion that as to cost of capital, it is not sufficient for the Commission to state that it has considered "all of the relevant evidence presented in the case, concerning cost of capital" and has applied to it its "informed judgment." There should be findings of fact with respect thereto so that the reviewing court can know what elements were considered and what effect the testimony was given.

STATE OF NORTH CAROLINA v. HOWARD BROOKS

No. 7416SC96

(Filed 2 January 1975)

1. **Riot and Inciting to Riot § 1— constitutionality of statutes**

The statutes under which defendant was prosecuted for inciting and engaging in a riot, G.S. 14-288.2, and failing to comply with a lawful command to disperse, G.S. 14-288.5, are constitutionally valid.

2. **Constitutional Law § 20; Courts § 7— appeal to superior court from district court — trial de novo — no transcript of district court proceedings required**

Defendant was not entitled to have a court reporter take down the proceedings at his trial in district court nor was he entitled to a free transcript of the proceedings, since a defendant convicted in a criminal case in the district court has an absolute right to appeal to the superior court for trial de novo, and in such instance it is as if the case had been brought there originally and there had been no previous trial.

3. **Riot and Inciting to Riot § 2— items found at crime scene — no possession by defendant — admissibility**

In a prosecution of defendant for inciting a riot, engaging in a riot, and failing to comply with a lawful command to disperse, the trial court did not err in admitting into evidence an iron pipe, a revolver, two shotguns, a machete, and two jugs containing an amber liquid not further identified, which were found at the crime scene, though there was no evidence that defendant owned or had ever personally possessed any of the articles, since the fact that such articles were present and possessed by some persons at the scene was clearly relevant to show the existence of a clear and present danger of injury or damage to persons or property.

4. Riot and Inciting to Riot § 2— Indian gathering — defendant as leader — sufficiency of evidence of riot

In a prosecution for inciting a riot, engaging in a riot, and failing to comply with a lawful command to disperse, evidence was sufficient to be submitted to the jury where it tended to show that defendant claimed to be and was recognized by some members of a crowd of Indians as their leader, that defendant urged his followers to assemble at a school, the use of which had been denied the Indians by authorities, that after the crowd assembled at his urging, defendant addressed them and asked them to remain, that defendant kept the crowd across the road from the school knowing that threats voiced by some toward officers posted at the school were growing increasingly violent in nature, that defendant persisted in his endeavors until physical violence finally erupted, and that defendant continued on the scene after the riot began and pursued the same activities which brought the riot into being.

5. Disorderly Conduct § 2— failure to obey dispersal order — jury instructions prejudicial

Defendant is entitled to a new trial in a prosecution for failure to comply with a lawful order to disperse where the trial court's charge failed to take into account the 1971 amendment to G.S. 14-288.4 and thereby failed to limit the definition of disorderly conduct to embrace only actions and words likely to bring on an immediate breach of the peace.

APPEAL by defendant from *Bailey, Judge,* 9 July 1973 Session of Superior Court held in ROBESON County.

Defendant was charged by warrants with (1) inciting a riot, (2) engaging in a riot, and (3) failing to comply with a lawful command to disperse, violations respectively of G.S. 14-288.2(d), G.S. 14-288.2(b), and G.S. 14-288.5(b). He was convicted in the District Court and appealed to the Superior Court, where he again pled not guilty to all charges.

The State's evidence tended to show the following events. On the afternoon of 23 March 1973 defendant, who was sometimes referred to by the witnesses as "Chief" Brooks, addressed a gathering in Pembroke of fifty to sixty people, most of whom were Indians. He announced the scheduling of an "organization meeting" for 6:45 p.m. at the Prospect School and reported that the County School Superintendent had indicated that the school would not be available for the meeting because of construction taking place on the premises. Defendant told the gathering he did not think this was a "reasonable or prudent" excuse for not allowing them to use the facility as a meeting place and that he wanted the people of Robeson County to know "that he was willing to die at the steps of the school and that if

there were any riot clad armed law enforcement officers on the school grounds that they were trespassing on Indian property" and he hoped "they know what that means."

The Prospect School is on the south side of a State paved road across from the Prospect Methodist Church, which is on the north side of the road. The paved portion of the road is 20 feet wide and the highway right-of-way extends 30 feet on either side of its center line. Shortly before dark on 23 March 1973 a crowd, composed mostly of Indians, began to assemble on the church grounds. Approximately 40 to 45 law enforcement officers, including Highway Patrolmen, Sheriff's Deputies, and SBI Agents, were stationed on the school grounds under the command of Deputy Sheriff Hubert Stone. By 6:30 p.m. some 75 to 100 people had assembled on the north side of the road across from the school, and this crowd continued to grow during the night, reaching its maximum of from 175 to 200 people sometime between 11:00 p.m. and midnight. Throughout the evening defendant was present, clad in a blanket draped around his shoulders, and from time to time he was seen addressing the crowd from the church steps. The officers could not hear what defendant said, but when he spoke members of the crowd would yell, "Red Power," and "stick their arms up in the air and holler real loud and then he spoke some more."

As the evening progressed the crowd became increasingly noisy and boisterous. A bonfire was built on the church grounds and there was considerable shouting, dancing, and singing of "We Shall Overcome." Traffic on the road was heavy, with much coming and going. Cases of beer were brought, and some members of the crowd were drinking. The crowd began to shout insults and threats towards the officers stationed across the road at times threatening to come across the road and "beat the officers to death." Passing motorists were stopped, and some were dragged from their cars while members of the crowd beat on the hoods, sides, and trunks of the cars. Persons in the crowd began to throw beer and other drink bottles at the officers, and the officers observed that some in the crowd were armed with knives and sticks. From time to time a knot of people would form and start across the road toward the officers. When this happened, defendant would call them back, telling them not to cross the road until he made his decision and that when he made his decision, they were going across to the school grounds. Defendant also announced to the officers across

the road that if any of "his people" were injured, he would "declare war on Robeson County." A pistol shot and a shotgun blast were heard, and the verbal insults and threats toward the officers became increasingly belligerent and violent in tone. One patrolman described the situation of the officers as one in which they "could very easily get killed and never know who did it."

Shortly after midnight a bottle was thrown out of the crowd, striking the pavement and splintering glass on the officers. Just then three blasts were fired in quick succession from a shotgun, and the officers heard the pellets falling on their parked vehicles. When this occurred, Deputy Sheriff Stone, after having been advised to do so by other officers present, gave the command to the crowd to disperse. Using a bullhorn, he told the crowd it had five minutes in which to leave. This directive was greeted by an increased flurry of bottle throwing from the crowd. However, approximately twenty-five people did obey the command to disperse and left the area. Others, including defendant Brooks, remained. After waiting six minutes, Deputy Sheriff Stone ordered his officers to cross the road and to arrest those who had refused to comply with his command to disperse. The officers then crossed the road and began arresting persons in the crowd who had refused to leave. In all, forty-eight men, including defendant Brooks, six women, and one boy were arrested. Others in the crowd evaded arrest by fleeing into the darkness.

Defendant did not offer any evidence. He was found guilty on all charges, and from judgments imposing concurrent jail sentences, he appealed.

Attorney General Morgan by Associate Attorney General Thomas M. Ringer, Jr. for the State.

Paul, Keenan & Rowan by James V. Rowan for defendant appellant.

PARKER, Judge.

Prior to pleading upon trial de novo in Superior Court, defendant moved to quash the warrants as to all three charges on the grounds that the underlying statutes are unconstitutionally vague and overbroad and infringe upon fundamental First Amendment rights. By his first assignment of error defendant now seeks review of the denial of these motions. We find the statutes valid.

The statute involved in the cases in which defendant was charged with inciting and engaging in a riot, G.S. 14-288.2, was enacted as a part of Section 1 of Chap. 869 of the 1969 Session Laws, entitled "An Act to Revise and Clarify the Law Relating to Riots and Civil Disorders." Long before enactment of that statute, participation in a riot had been recognized as a common-law crime in this State, *State v. Moseley,* 251 N.C. 285, 111 S.E. 2d 308 (1959); *State v. Hoffman,* 199 N.C. 328, 154 S.E. 314 (1930); State Stalcup, 23 N.C. 30 (1840), and the companion common-law crime of inciting a riot has been recognized as a distinct offense. *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732 (1959), cert. denied, 361 U.S. 867, 4 L.Ed. 2d 107, 80 S.Ct. 128 (1959). As stated in *State v. Moseley, supra,* at 288, 111 S.E. 2d at 311, the common-law offense of riot was "composed of three necessary and constituent elements: (1) unlawful assembly; (2) intent to mutually assist against lawful authority; and (3) acts of violence." The common-law offense of inciting a riot was described in *State v. Cole, supra,* at 741, 107 S.E. 2d at 738, quoting from a Pennsylvania case, as follows:

> "Inciting to riot from the very sense of the language used, means such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged on to action, as would naturally lead, or urge other men to engage in or enter upon conduct which, if completed, would make a riot."

In enacting the 1969 Act, the Legislature expressly declared that the provisions of the statute "are intended to supersede and extend the coverage of the common-law crimes of riot and inciting to riot." G.S. 14-288.3. Comparison of the provisions of G.S. 14-288.2 with the recognized elements of the common-law crimes which it supersedes discloses only a limited extension of the common-law offenses. Under G.S. 14-288.2(d) "[a]ny person who wilfully incites or urges another to engage in a riot, so that as a result of such inciting or urgings a riot occurs or a clear and present danger of a riot is created, is guilty of a misdemeanor. . . ." Under G.S. 14-288.2(b) "[a]ny person who wilfully engages in a riot is guilty of a misdemeanor. . . ." The statute, G.S. 14-288.2(a), defines a riot as follows:

> "A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property

or creates a clear and present danger of injury or damage to persons or property."

[1] There is nothing constitutionally offensive in this definition. The words employed are not "so slippery and imprecise to the man of common understanding that he would have to guess at their meaning," *Fuller v. Scott,* 328 F. Supp. 842, 850 (1971), and clearly the State transgreses upon no constitutionally protected activity when it makes it an offense to engage in a "riot" defined in terms of "violent" behavior and the "clear and present danger" of resultant harm. Nor does G.S. 14-288.2(d) fail to pass constitutional scrutiny. The advocacy of imminent lawless action is not protected by the First Amendment, *Brandenburg v. Ohio,* 395 U.S. 444, 23 L.Ed. 2d 430, 89 S.Ct. 1827 (1969), and this is the only type of speech any reasonable construction of the statute would seem to cover. We find the statute under which defendant was prosecuted for inciting and engaging in a riot, G.S. 14-288.2, to be constitutionally valid. As to the charge of failing to comply with a lawful command to disperse, this Court has already ruled adversely to defendants present contentions. In *State v. Orange,* 22 N.C. App. 220, 206 S.E. 2d 377 (1974) and *State v. Clark,* 22 N.C. App. 81, 206 S.E. 2d 252 (1974), we upheld judgments imposed for violations of G.S. 14-288.5. In so doing, we considered and rejected the contention that the underlying statutes were unconstitutional. Defendant's first assignment of error is overruled.

[2] When the cases were called for trial in the District Court, defendant's counsel filed a motion that the Court provide, at the expense of the State, a stenographic reporter to take down the proceedings at the trial in that Court and that he be furnished a transcript. In support of this motion, counsel offered to have defendant sign an affidavit to show his indigency. The District Court denied the motion, in so doing making findings that it is not customary to have a stenographic record in the District Court, that the District Court has no statutory authority to provide at the State's expense a stenographic reporter in that Court, that while counsel offered to have the defendant make affidavit of indigency, no such affidavit had been theretofore filed, and the defendant appeared represented by privately employed counsel, that the motion was made after the case was called by the Solicitor for trial, that there is a scarcity of court reporters, and that to provide a reporter would delay the trial

which was already scheduled for its third trial date. The Court did permit defendant to submit his affidavit of indigency for the record, but no finding as to indigency was made by the Court. At the call of the cases for trial de novo in the Superior Court and prior to pleading in that Court, the defendant, still represented by the same privately employed counsel, moved in the alternative for remand of the cases for a new trial in the District Court with a transcript to be provided to defendant, arrest of the District Court judgments, or for dismissal of the charges because of denial of his motion in the District Court to have a transcript of the trial in that Court made at the State's expense. The denial of this motion in the Superior Court is the subject of defendant's second assignment of error on this appeal.

Customarily, no court reporter is available and no transcript is made of criminal trial proceedings in our District Courts nor is such a transcript necessary to protect adequately the rights of a criminal defendant. This is so because when a defendant in a criminal case is convicted in the District Court, he has an absolute right to appeal to the Superior Court for trial de novo. G.S. 7A-290. In such event the trial in the Superior Court is in all respects de novo, and, "in contemplation of law it is as if the case had been brought there originally and there had been no previous trial." *State v. Sparrow,* 276 N.C. 499, 507, 173 S.E. 2d 897, 902 (1970). Thus, a transcript of the criminal trial proceedings in the District Court, where the case is heard by the Judge without a jury, is of no substantial value to an effective appeal to the Superior Court, where the trial is completely de novo before Judge and a jury. It should be noted, also, that in this respect our practice treats the poor man in exactly the same manner as it treats the rich. Customarily no transcript of District Court criminal proceedings is available to either. Finally, we note that defendant in this case has alleged no special circumstances suggesting the need for a District Court transcript for a just determination of his cases, defendant, at all stages of the proceedings, simply asserting his abstract right thereto. We hold, therefore, that even if defendant had been adjudicated an indigent prior to his trial in the District Court, and even had his motion for a free transcript been timely made in that Court, there was no error in denying his motion. Defendant's second assignment of error is overruled.

[3] Defendant contends that certain weapons and containers found by the officers at the scene were improperly admitted into evidence over his objections. These articles, an iron pipe, a revolver, two shotguns, a machete, and two jugs containing an amber liquid not further identified, were found by the officers in a search of the area after the arrests were made. Although there was no evidence that defendant owned or had ever personally possessed any of these articles, the fact that such articles were present and possessed by some persons at the scene under the circumstances disclosed by the evidence was clearly relevant to show the existence of a "clear and present danger of injury or damage to persons or property." There was no error in admitting these articles into evidence.

[4] Defendant's motions for nonsuit in all three cases were properly overruled. There was ample evidence that a riot as defined in G.S. 14-288.2(a) occurred. When viewed in the light most favorable to the State, the evidence would support a jury finding that defendant both incited the riot before it occurred and thereafter participated in it. There was evidence that defendant claimed to be and was recognized by some in the crowd as their leader. There was also evidence from which the jury could reasonably find that defendant, knowing that use of the school premises had been denied by the school authorities, anticipating the presence on the school grounds of "riot clad armed law enforcement officers," and apparently willing to press his demands for use of the school property to the point of a violent confrontation with the authorities, urged his followers to assemble for that unlawful purpose; that after the crowd assembled at his urging, he continued to address them and to urge that they remain; that he did this knowing that threats voiced by members of the crowd toward the officers were growing increasingly violent in nature; and that defendant persisted in these endeavors until physical violence finally erupted. Upon such findings the jury could find that defendant willfully incited or urged others to engage in a riot and as a result of such inciting or urging a riot finally occurred.

There was also evidence that after the riot erupted, defendant remained at the scene and continued in the same activities which brought the riot into being. It is true, of course, that evidence of mere presence at the scene of a riot may not alone be sufficient to show participation in it. The evidence here shows much more than defendant's mere presence after the riot

occurred. As above noted, it shows that he claimed to be and was apparently recognized as the leader of those assembled at the scene. They cheered when he spoke and on occasion appeared to obey his commands. That at times he appeared to restrain them from advancing all the way upon the officers, was for the jury to evaluate. Certain it is that defendant can justly claim no credit for the fact that the affair ended without bloodshed. Credit for that must be given to the law enforcement officers, who acted with admirable coolness and restraint thoughout.

It is also manifest that there was ample evidence to support the jury's finding that defendant was guilty of the charge of failing to comply with a lawful command to disperse. Defendant's assignment of error directed to denial of his motions for nonsuit is overruled.

Defendant assigns error to denial of his motions for mistrial made on the grounds of what he asserts were various acts of prosecutorial misconduct on the part of the State's attorney. We have carefully reviewed the record and, without expressing approval of the actions complained of, find that they were not such, either singly or cumulatively, as to result in denying defendant a fair trial. The trial court did not abuse its discretion in denying the motions for mistrial.

[5] Finally, defendant assigns error to portions of the court's instructions to the jury. We find it necessary to discuss only one of these. In connection with the case in which defendant was accused of failing to comply with a lawful order to disperse, the able trial judge inadvertently failed to note the 1971 amendment to G.S. 14-288.4 and in so doing charged concerning disorderly conduct in the language of G.S. 14-288.4(1) and (2) as those sections were originally enacted in 1969. As a result, the court's charge failed to limit the definition of disorderly conduct to embrace only actions and words likely to bring on an immediate breach of the peace, as would be required by the 1971 amendment. *See State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972). For this error in the charge, defendant is entitled to a new trial in the case charging him with failing to comply with a lawful order to disperse. We have carefully considered defendant's remaining assignments of error, and find no prejudicial error such as to warrant granting a new trial in the other two cases.

The result is:

In defendant's trial and in the judgments imposed on the charges of inciting a riot (Warrant No. 3893, second count) and engaging in a riot (Warrant No. 4822, first count) we find

No error.

In the case in which defendant is charged with failing to comply with a lawful order to disperse (Warrant No. 4822, second count) defendant is entitled to a

New trial.

Judges BRITT and VAUGHN concur.

FIRST-CITIZENS BANK & TRUST COMPANY AS EXECUTOR AND TRUSTEE UNDER THE WILL OF HARVEY. L. BARNES v. WILLIAM R. BARNES, WILLIAM M. BARNES, SCOTT T. BARNES, BARBARA BARNES SHERMAN, HARVEY LEE BARNES III, PATRICIA A. BARNES, HELEN BARNES ALLGEIER; ANGELA MARIE BARNES, INFANT CHILD OF HARVEY LEE BARNES III; THE UNBORN ISSUE OF WILLIAM M. BARNES, SCOTT T. BARNES AND HARVEY LEE BARNES III; AND THE UNBORN ISSUE OF BARBARA BARNES SHERMAN, PATRICIA A. BARNES AND HELEN BARNES ALLGEIER

No. 743SC815

(Filed 2 January 1975)

1. **Trusts § 10— death of beneficiary — distribution of corpus — unequal shares to grandsons and granddaughters**

In an action to determine distribution of trust corpus and accumulated income upon the death of one of testator's grandchildren without lineal descendants, the trial court erred in determining that the deceased grandchild's portion of the trust should be distributed to the trusts for each remaining grandchild in equal shares where testator's will clearly manifested his intent that trusts established for his grandsons and his granddaughters not be equal, neither with respect to total corpus for each trust nor with respect to the corpus set aside for each grandson as compared with that set aside for each granddaughter.

2. **Trusts § 8— death of beneficiary — income distribution — equal shares to remaining beneficiaries**

The trial court properly determined that accumulated undistributed trust income applicable to a grandchild of testator who died without lineal descendants should be divided equally among the six surviving grandchildren, though the corpus of the trust should not

be divided equally among grandsons and granddaughters and though testator used the term "jointly" in directing income distribution to the granddaughters, since in all other references to income distribution in the will testator demonstrated an intent that the income from the trust for the granddaughters, like the one for the grandsons, be distributed to the beneficiaries equally.

APPEAL by the Guardian Ad Litem for the unborn issue of Barbara Barnes Sherman, Patricia A. Barnes, and Helen Barnes Allgeier, from judgment entered by *Rouse, Judge,* in Chambers, Superior Court, CRAVEN County, 17 July 1974. Heard in the Court of Appeals 11 December 1974.

Harvey L. Barnes, a resident of Craven County, North Carolina, died on 26 April 1961, leaving a last will and testament which was duly probated and recorded in the office of the Clerk of the Superior Court of Craven County.

Item V of his will is as follows:

"The remainder of the capital stock of the Maola Milk and Ice Cream Company standing in my name at the time of my death after the sale of any stock as provided in Item III of this Will, I give and bequeath to the First-Citizens Bank and Trust Company as Trustee, upon the trusts and conditions hereinafter set out, to wit:

1. To apply the net income from thirty-eight and 52/100 (38.52%) percent of said stock in trust for the use and benefit of my wife, Kathleen R. Barnes, said net income to be paid to her in convenient installments but not less frequently than semiannually, during her lifetime, provided the income payable to my wife hereunder shall not in any event be less than the net income as shown by the Federal income tax return for said trust before the deduction of the income distributed to my said wife.

In addition to income, the Trustee shall distribute to or for the benefit of my said wife from time to time, such sums from the principal of the trust as it may consider necessary or desirable for her medical care, comfortable maintenance and welfare, taking into consideration the station of life to which she is accustomed at the time of my death, and all other income and cash resources available to her for such purposes from all sources known to the trustee.

In this connection, in order to carry out this direction, my trustee shall have the power to dispose of said stock with

the written consent of my wife, as hereinafter more fully set forth, to produce cash for her needs, maintenance and support, and said trustee shall upon the written request of my said wife sell said stock, or any portion thereof, as directed by her and apply the proceeds of such sale for her benefit or as she may direct to any other person.

2. To apply the net income from eight and 01/100 (8.01%) percent of said stock after any sale under Item III hereof, in trust for the use and benefit of my son Harvey L. Barnes, Jr.; to apply the net income from eight and 01/100 (8.01%) percent of said stock after any sale under Item III hereof in trust for the use and benefit of my son, William R. Barnes; to apply the net income from eight and 97/100 (8.97%) percent of said stock after any sale under Item III hereof, in trust for the use and benefit of my three grandsons, share and share alike; and to apply the net income from ten and 65/100 (10.65%) percent of said stock after any sale under Item III hereof, in trust for the use and benefit of my four granddaughters, jointly.

The said income is to be paid to the persons named in the proportions set out, or for their benefit, in equal shares as frequently as earnings or dividends on said stock shall be available for such purpose, this to continue so long as each beneficiary named in this paragraph shall live, subject to the power of the trustee herein set out as to disposal.

3. Upon the death of each of my said sons, the stock held for the benefit of the one so dying shall be held in trust for the benefit of my grandchildren designated in the next preceding paragraph, and shall become a part of the trust set out in the next preceding paragraph for said grandchildren, and held by my said trustee for the same purposes and benefits for my said grandchildren so long as they shall live, the distribution to my said grandchildren to be on a per capita basis as set forth in the proportions set forth in the next preceding paragraph.

4. I hereby grant to my said wife the power to appoint by her Last Will and Testament or by an earlier instrument in writing the entire remaining principal of the trust, or any part thereof, herein set up for her benefit, to her estate or to such persons as she shall designate, free of this trust, such power to be exercisable by her alone and only by specific reference thereto in her Last Will and Testament or

other written instrument referred to above. The amount in value of stock in said trust set up for the benefit of my said wife, together with so much of the property bequeathed and devised, to her under Item II of this Will as shall equal the amount of fifty (50%) percent of the adjusted gross estate as determined for Federal Estate tax purposes, shall constitute the marital deduction under the provisions of the Federal Estate Law.

5. If my wife should predecease me, my entire residuary estate shall be administered and disposed of in accordance with paragraphs 2 and 3 of Item V of this Will, hereby giving to my said trustee full power and authority to deal with any property which would pass by reason of this paragraph of my Will, including the real estate and personal property described in Item II, and my sons and my grandchildren shall participate in such other property in the same proportions and to the same extent as is set out for their participation in the capital stock of the Maola Milk and Ice Cream Company. Said trustee shall have the power and authority to sell, mortgage, pledge, invest and reinvest as in its discretion shall be to the best interest of the beneficiaries named in this Will, said trust to continue in like manner and to the same extent and for the benefit of the same persons as set out above.

6. If any grandchild mentioned in Item V of this Will should die without lineal descendants, his or her share shall go to the surviving grandchildren for their lives in the same proportions as set out in paragraph 2 of Item V.

7. Upon the death of each of my grandchildren leaving lineal descendants, the stock herein given and its accumulations shall go to such lineal descendants of each grandchild so dying in the proportions hereinbefore set out, free and discharged of the trust herein set out or any other restriction."

Harvey L. Barnes, Jr., a son of testator, predeceased him. William R. Barnes, another son, survived. The record is silent as to which of the grandchildren were in being at testator's death. Those in being at the time of the bringing of this action were William M. Barnes, Scott T. Barnes, and Harvey Lee Barnes, III, grandsons, and Barbara Barnes Sherman, Patricia A. Barnes, and Helen Barnes Allgeier, granddaughters. Eleanor R. Barnes, unmarried, was the only other grandchild of Harvey

L. Barnes, and she died intestate on 6 January 1972. Angela Marie Barnes is the daughter of Harvey Lee Barnes, III, a grandson of testator. The unborn lineal descendants of testator's grandsons are represented in this action by a guardian ad litem as are the unborn lineal descendants of testator's granddaughters.

Upon the death of Eleanor R. Barnes, granddaughter of testator, the trustee instituted this action asking for instructions with respect to distribution of shares upon the event of the death of a beneficiary within a specified group and asking for instructions with respect to vesting of interests and defining of interests of lineal descendants of grandchildren. The court concerned itself with only one of the questions, to wit: "How should Eleanor R. Barnes's share, who died without lineal descendant, be distributed in view of the language of Item V, paragraph 2, which states that the granddaughters' trust is held jointly, and the grandsons' trust is held 'share and share alike' and Item V, paragraph 6 which states that the interests of any grandchild who dies without lineal descendants shall go to the surviving grandchildren for their lives in the proportions set forth in paragraph 2?" After reviewing the matter the court found facts and concluded that a real controversy exists with respect to the proper distribution of the share of the deceased granddaughter, Eleanor R. Barnes. It further concluded:

> "4. The original proportions set forth in the testator's Will reveals an intention of the testator that his grandsons receive a proportionate larger share of the available income than his granddaughters and further that the lineal descendants of the grandsons receive a higher proportionate share of the principal than the lineal descendants of the granddaughters.
>
> 5. When viewed in the context of this Will the language contained in Item V, paragraph 6 is interpreted to mean that each grandchild shall receive an equal amount as any other grandchild upon the death of a grandchild, without lineal descendants; and that the deceased grandchild's portion of that grandchild's trust shall be distributed to the trust for each remaining grandchild in equal shares.
>
> 6. To preserve the intention of the testator, the share of the principal within the granddaughters' trust applicable to the deceased granddaughter, Eleanor R. Barnes, shall be divided in equal amounts between the remaining grandchil-

dren of Harvey L. Barnes and placed in the trust for the applicable grandchildren, to wit: one-sixth of the applicable net corpus shall be placed in the trust for each grandchild of the said Harvey L. Barnes and added to the amount now held for each grandchild with prospective income on this additional proportion of the corpus being distributed to each grandchild in the same manner as the original; and, the accumulated undistributed income of the said Eleanor R. Barnes, deceased, shall likewise be divided in equal amounts between the remaining grandchildren of Harvey L. Barnes, to wit: one-sixth of the said income shall go to each grandchild and shall be of the same nature as that already being received by said grandchild."

Based upon those conclusions the court ordered that:

"1. The portion of the corpus of the granddaughter's trust applicable to Eleanor R. Barnes, shall be divided in equal amounts among the surviving grandchildren who number six and a one-sixth share of said corpus shall be allotted to the interest of each grandchild in the respective trust.

2. The accumulated undistributed trust income applicable to Eleanor R. Barnes, shall be divided in equal amounts among the surviving grandchildren who number six and each surviving grandchild shall take as its share, one-sixth of the amount previously allotted to said Eleanor R. Barnes."

The guardian ad litem for the unborn lineal descendants of the granddaughters of testator excepted to the entry of and appealed from the judgment.

Ward & Ward, by Jerry F. Waddell, for Jerry F. Waddell, Guardian Ad Litem for the unborn lineal descendants of Barbara Barnes Sherman, Patricia A. Barnes, and Helen Barnes Allgeier, respondent appellant.

Ward, Tucker, Ward & Smith, P.A., for First-Citizens Bank & Trust Company as Executor and Trustee under the Will of Harvey L. Barnes, petitioner appellee.

Lee and Hancock, by Moses D. Lassiter, for Moses D. Lassiter, Guardian ad Litem for Angela Marie Barnes, respondent appellee.

Barden, Stith, McCotter & Stith, by F. Blackwell Stith, for F. Blackwell Stith, Guardian ad Litem for the unborn lineal descendants of each grandson, respondent appellee.

MORRIS, Judge.

No question is raised by anyone involved in this litigation with respect to the procedure adopted. We assume that the action is brought under the provisions of G.S. 1-253.

Before we get into the merits of the appeal, we think it appropriate to note that we agree with the trial court that the only justiciable issue of the issues set out in the complaint is the one answered by the trial court.

The correct interpretation of the provisions of testator's will presently before us is far more difficult of determination.

General principles applicable in construing a will are set out by Justice Branch in *Kale v. Forrest,* 278 N.C. 1, 5, 6, 178 S.E. 2d 622 (1970):

> "The intent of the testator is his will, and such intent as gathered from its four corners must be given effect unless it is contrary to some rule of law or is in conflict with public policy. (Citations omitted.)
>
> The intent is ascertained, if possible, from the testator's language and in light of conditions and circumstances existing at the time the will was made. (Citation omitted.) In considering the language used, technical words will be presumed to have been used in their technical sense unless the other language of the will evidences a contrary intent; however, when testator obviously does not intend to use words in their technical sense, they will be given their ordinary and popular meaning. (Citation omitted.) In any event, the use of particular words, clauses or sentences must yield to the purpose and intent of the testator as found in the whole will. (Citations omitted.)"

[1] There is one intention in the will before us which is not laden with ambiguity, and that is that the testator did not intend that the corpus of trusts bequeathed to the trustee for the benefit of his grandchildren be equal. He very clearly provided that the net income from *8.97%* of his stock in Maola should be held in trust for the use and benefit of his *three grandsons* and that the net income from *10.65%* of the stock should be held in trust for the use and benefit of his *four granddaughters.*

He goes on to provide that in the event of the death of "each of" his sons, the "stock held for the benefit of the one so

dying shall be held in trust for the benefit of my grandchildren designated in the next preceding paragraph, and shall become a part of the trust set out in the next preceding paragraph for said grandchildren . . . " With respect to the disposition of the stock in his wife's trust, if not appointed by her, testator provides that it is to be "disposed of in accordance with paragraphs 2 and 3 of Item V of this Will . . . " It appears obvious that testator intended that the whole of that part of his testamentary estate which formed the corpus of various trusts should eventually be channelled into the trust established for his grandchildren. As already pointed out, it is completely clear that the testator did not wish these trusts to be equal in value—neither with respect to total corpus for each trust nor the corpus set aside for each grandson as compared with that set aside for each granddaughter.

To us that intent is further evidenced by his provision in the event of the death of a grandchild without lineal descendants. He specifically and without equivocation provided that in that event, the *"share"* of the one dying should "go to the surviving grandchildren for their lives *in the same proportions as set out in paragraph 2 of Item V."* We think the testator clearly intended that the share of Eleanor Barnes in the trust must now be divided in the same proportions as the corpus was divided between the two trusts for the grandchildren in paragraph 2 of Item V—i.e., 54.28% to the trust for granddaughters and 45.72% to the trust for the grandsons. There is no technical language used which must be considered.

[2] We reach a different result with respect to the accumulated income. The testator used the word "jointly" in directing income distribution to the granddaughters. That the word was not intended to apply to eventual corpus distribution is evidenced by specific provisions for that in section 6 of the same Item. However, nowhere else in the will does there appear the word jointly. Actually, in other portions of the will where the testator refers to income distribution, he uses the words "share and share alike" and "per capita." Of primary importance in determining testator's intent with respect to income distribution within the trusts set up is his language in the second paragraph of paragraph 2 of Item V, the portion of the will by which he established the trusts. After he had directed the trustee "to apply the net income from ten and 65/100 (10.65%) percent of said stock after any sale under Item III hereof, in trust for the use and

benefit of my four granddaughters jointly," he said: "The said income is to be paid to the persons named in the proportions set out, or for their benefit, in equal *shares* as frequently as earnings or dividends on said stock shall be available for such purposes, this to continue so long as each beneficiary named in this paragraph shall live . . . " Again, in paragraph 3 of Item V in providing that upon the death of each son, the stock held by the trustee for the one dying should become a part of the "trust for the benefit of my grandchildren designated in the next preceding paragraph" and referring to income distribution the testator said: "the distribution to my said grandchildren to be on *a per capita basis* as set forth in the proportions set forth in the next preceding paragraph" (referring to paragraph 2, Item V). Here, it seems to us that testator has clearly demonstrated a contrary intent—that is, he did not intend to use the word "jointly" in its technical sense. *Kale v. Forrest, supra.* We think testator demonstrated an intent that the income from the trust for the granddaughters, like the one for the grandsons, be distributed to the beneficiaries equally. It follows, therefore, that under paragraph 6 of Item V, the testator would intend that accumulated but undistributed income would, at the death of a beneficiary—grandchild, be distributed in equal shares to the surviving grandchildren.

The cause is, therefore, remanded for the entry of a judgment in accordance with this opinion.

Modified and remanded for judgment.

Judges MARTIN and ARNOLD concur.

Trotter v. Debnam

REV. C. R. TROTTER, PASTOR OF GOOD HOPE BAPTIST CHURCH, ARTHUR BARBOUR, OTIS WILLIAMS, AND JOSEPH J. BLAKE, ACTING AS TRUSTEES HOLDING TITLE TO THE PROPERTY OF GOOD HOPE BAPTIST CHURCH AND INDIVIDUALLY FOR THEMSELVES AS MEMBERS OF SAID CHURCH AND FOR SUCH OTHER MEMBERS OF SAID CHURCH AS ARE SIMILARLY SITUATED; WILLIE E. JONES, DALON FREEMAN AND WALTER WILLIAMS, ACTING AS DEACONS OF GOOD HOPE BAPTIST CHURCH AND INDIVIDUALLY AS MEMBERS OF SAID CHURCH AND FOR SUCH OTHER MEMBERS OF SAID CHURCH AS ARE SIMILARLY SITUATED, PLAINTIFFS v. FRED DEBNAM, MARION GOODSON, THEODORE GOODSON, NATHAN WATSON, AND ALL OTHERS ACTING IN CONCERT WITH THE NAMED DEFENDANTS, DEFENDANTS

No. 7410SC806

(Filed 2 January 1975)

1. **Constitutional Law § 22; Religious Societies and Corporations § 2— church dispute — use of property — constitutionality of order**

In an action involving a dispute between factions in a church, the trial court's order providing for use of the church at different times by each faction and prohibiting each faction from interfering with the other in such use was not based on ecclesiastical considerations but involved questions justiciable in a civil court; therefore, the order was not unconstitutional, and appellants could properly be found in contempt of the order.

2. **Rules of Civil Procedure § 65— injunction — notice given**

Appellants who were found in contempt of the trial court's order prohibiting their interference with the worship of one faction in a church of which appellants were members had actual as well as constructive notice of the order. G.S. 1A-1, Rule 65(d).

3. **Appeal and Error § 26— appeal as exception to judgment**

An appeal itself constitutes an exception to the judgment or order appealed from and presents the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment.

4. **Rules of Civil Procedure § 65— injunction — parties not named found in contempt — finding of active concert or participation required**

Where appellants, who were adjudged in contempt of the trial court's order, were not named parties to the action, nor were they the officers, agents, servants, employees or attorneys of any named party, it was necessary for the trial court, in order to find them in contempt, to find that they were in active concert or participation with one or more of the named parties to the action or their officers, agents, servants, employees, or attorneys.

APPEAL by Edward Debnam, Romuel Jones and Foster McCullough [hereinafter referred to as appellants] from order

of *McLelland, Judge,* entered at the 27 May 1974 Session of Superior Court held in WAKE County.

This action involves a dispute between factions in a church. The appeal is from an order adjudging appellants in contempt of an order of the court.

In their complaint, filed 22 December 1972, plaintiffs allege in pertinent part: Plaintiff Trotter is the pastor and the other plaintiffs are members, trustees and deacons of Good Hope Baptist Church [hereinafter referred to as the Church]. Defendants are also members of the Church. Plaintiff Trotter was called as pastor in 1943 and has served the Church in that capacity continuously since that time. The Church holds regular business conferences on Fridays preceding the second Sunday of each month. At the regular business conference in June 1972, plaintiff Trotter, by a substantial majority vote, was reaffirmed as pastor of the Church and " . . . his contract as pastor was renewed for an indefinite term of service, terminable only by a vote of the majority of the members of the Church at an authorized business conference." On 8 December 1972 defendants and several others held an unauthorized meeting and purported to remove plaintiff Trotter as pastor. On 10 December 1972 defendants, by force and threats of violence, prohibited plaintiff Trotter from conducting services at the Church and have stated that they will continue to prevent Trotter from serving as pastor of the Church. Plaintiffs asked that Trotter be adjudged the duly elected pastor of the Church, that they and those affiliated with them be declared the majority of the Church membership, and that defendants and those acting in concert with them be temporarily and permanently restrained and enjoined from interfering with plaintiffs in conducting services and discharging other duties relative to the operation of the Church.

Defendants filed answer and counterclaim in which they denied that plaintiff Trotter was still the pastor of the Church and asked that he be restrained and enjoined from entering upon the premises of the Church or otherwise " . . . interfering with the use and control . . . " of the Church property.

On 23 May 1973, following motion by plaintiffs, notice to defendants, and a hearing, Judge Godwin entered an order providing in pertinent part as follows: (1) that during the pendency of this action, plaintiffs and other members of the Church "similarly situated" would be allowed to use the Church building

and premises on certain specified dates and at certain specified hours; (2) that defendants and other members of the Church "similarly situated" would be allowed to use the Church building and premises on other specified dates and at certain specified hours; (3) that defendants and all others acting in concert with them or similarly situated are restrained from in anywise interfering with plaintiffs in the exercise of the privileges granted them by the order; (4) that plaintiffs and those acting in concert with them or similarly situated are restrained from in anywise interfering with defendants in the exercise of the privileges granted them by the order; (5) that during the pendency of this action plaintiffs and defendants shall each pay to the treasurer of the Church the sum of $185 between the first and tenth day of each calendar month to defray the costs of janitor services, building and ground maintenance, electric current, fuel, insurance, etc.; (6) that failure of either plaintiffs or defendants to comply with (5) will be construed by the court as a voluntary and intentional forfeiture of the privilege to use the Church property as provided in the order. The court further provided that copies of the order would be posted forthwith upon each of the outside doors of the Church building in such manner as to be protected from weather damage and said notices shall not be removed during the pendency of this action.

On 15 March 1974 plaintiffs filed a motion asking that certain persons allegedly aligned with defendants, including appellants, be ordered to show cause why they should not be found in contempt of Judge Godwin's order. On 29 March 1974, following a hearing, Judge McLelland entered an order adjudging 17 persons, including appellants Jones and McCullough, in contempt of the Godwin order, and imposing fines: the fines were suspended for a period of six months on condition that at the end of said period those found in contempt would appear and satisfy the court that they had not, during the six months' period, in any way interfered with any use of the Church premises as provided in the Godwin order. There was no exception to or appeal from this order.

On 25 April 1974 plaintiffs filed a motion for issuance of an order to appellants and one other to show cause why they should not be adjudged in violation of the Godwin order because of their conduct on Sunday, 14 April 1974. On 10 May 1974 plaintiffs filed another motion for issuance of an order to 10 persons, including appellants, to show cause why they should not be

adjudged in violation of the Godwin order because of their conduct on Sunday, 28 April 1974.

On 30 May 1974, following a hearing, Judge McLelland entered an order finding facts and concluding that by virtue of their conduct on 14 April 1974 appellants were in contempt of the Godwin order; appellants were ordered imprisoned for 10 days.

Young, Moore & Henderson, by R. Michael Strickland, for plaintiff appellees.

Kirk & Ewell, by John E. Tantum, for defendant appellants.

BRITT, Judge.

[1] Appellants contend first that the trial court erred in denying their motion to quash the contempt citations for the reason that Judge Godwin's order, on which the citations were predicated, was unconstitutional. We find no merit in this contention.

In *Reid v. Johnston,* 241 N.C. 201, 204, 85 S.E. 2d 114 (1954), our Supreme Court, speaking through Parker, Justice (later Chief Justice), said:

> The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state, but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy. (Citations). This principle may be tersely expressed by saying religious societies have double aspects, the one spiritual, with which legal courts have no concern, and the other temporal, which is subject to judicial control.

In *Reid,* the court further held that a Missionary Baptist Church, being congregational in its church polity, a majority of its membership, nothing else appearing, is entitled to control its church property; however, a majority of its membership is supreme and is entitled to control its church property only so long as it remains true to the fundamental faith, usages, customs, and practices of that particular church, as accepted by both factions before dissension arose.

The principles declared in *Reid* were followed in several decisions of our appellate division until the decision of this court in *Atkins v. Walker,* 19 N.C. App. 119, 198 S.E. 2d 101, *aff'd* 284 N.C. 306, 200 S.E. 2d 641 (1973). The decision in *Atkins* was brought about because of the decision of the U. S. Supreme Court handed down in 1969 in the case of *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, et al.,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658.

In the cited U. S. Supreme Court opinion, the question presented was stated thusly: "The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine. * * * " The court answered the question in the negative. However, the court went further and held: "It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution. * * * "

In *Atkins,* our State Supreme Court held that in view of the cited U. S. Supreme Court opinion, certain principles stated in *Reid* are no longer authoritative; however, in *Atkins,* page 318, we find:

> It nevertheless remains the duty of civil courts to determine controversies concerning property rights over which such courts have jurisdiction and which are properly brought before them, nothwithstanding the fact that the property is church property. Neither the First Amendment to the Constitution of the United States nor the comparable provision in Article I, Section 13, of the Constitution of North Carolina deprives those entitled to the use and control of church property of protections afforded by government to all property owners alike, such as the services of the Fire Department, police protection from vandals and trespassers or access to the courts for the determination of contract and property rights. * * *

Appellants argue that the case at bar involves ecclesiastical differences between the opposing factions; that the Godwin order was based on ecclesiastical considerations, therefore, it was and is void. We reject this argument. In our opinion, the

pleadings present questions that are justiciable in the civil courts and Judge Godwin's order did not violate the area forbidden in *Atkins*.

Appellants further argue that the Godwin order is unconstitutional for the reason that it requires the parties, and those aligned with them, to make monetary payments as a condition to their right to worship. Since the order appealed from was in no way predicated on the portions of Judge Godwin's order providing for monetary payments, we do not reach the question as to the validity of those provisions.

[2] Appellants contend that the court erred in denying their motion to quash the contempt citations for the reason that Judge Godwin's order was never served on appellants and they are not parties to the action.

G.S. 1A-1, Rule 65(d) provides:

> *Form and scope of injunction or restraining order.*— Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

We find no merit in the contention that appellants had no notice of Judge Godwin's order prior to the conduct complained of on 14 April 1974. The record and stipulations of counsel disclose that appellants had actual notice of the order in addition to constructive notice that was provided.

Appellants further contend that they are not parties to the action, nor "officers, agents, servants, employees" or attorneys of any party; and that Judge McLelland made no finding that they were "in active concert or participation" with any of the parties, their officers, etc. Responding to this contention, appellees argue that since appellants entered no exception to the order appealed from, the question as to sufficiency of findings is not presented.

[3] It appears to be settled in this jurisdiction that an appeal itself constitutes an exception to the judgment or order appealed

from and presents the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 26, pp. 152-3. We think the question as to "active concert or participation" by appellants is presented.

[4] Contempt proceedings being criminal in nature must be strictly construed. *In re Hege,* 205 N.C. 625, 172 S.E. 345 (1934). Admittedly, appellants are not "named" parties to this action, nor the officers, agents, servants, employees, or attorneys of any named party. Therefore, under Rule 65(d), to find them in contempt, we think it was necessary for the trial court to find that they were "in active concert or participation" with one or more of the named parties to the action or their officers, agents, servants, employees, or attorneys. This the trial court failed to do. For failure to make this finding, the order appealed from must be vacated and the cause remanded for another hearing. It is so ordered.

Remanded.

Judges VAUGHN and ARNOLD concur.

KENNETH D. HEPLER AND JUDY D. HEPLER v. BROOKIE I. BURNHAM AND WALTER VAN BURNHAM III

No. 7415SC644

(Filed 2 January 1975)

1. **Husband and Wife § 11; Partition § 2— separation agreement — waiver of right to partition**

Right to partition as a tenant in common could be waived by separation agreement even though the parties were tenants by the entirety at the time the separation agreement was entered since the right to partition was a right which the parties should have reasonably foreseen would vest upon entry of a decree of absolute divorce.

2. **Husband and Wife § 11; Partition § 2— separation agreement — implied waiver of right to partition**

Separation agreement in which the husband agreed that prior to the emancipation of a minor child of the parties he would continue mortgage payments on a house, permit the wife to reside there and lease the premises to her free of any rent impliedly limited the husband's right to seek partition during the agreement, was reasonable in its duration and was not void as an unreasonable restraint on alienation.

3. Husband and Wife § 10— separation agreement — allowing respondent's new husband to live on property rent free — equitability

Separation agreement allowing respondent to live rent free for the duration of the agreement on premises owned by the parties and impliedly prohibiting petitioner from obtaining a partition of the property is not inequitable to petitioner in allowing respondent's new husband to live on the property free of rent.

APPEAL by petitioners from *Tillery, Judge,* 27 May 1974 Session of Superior Court held in ALAMANCE County. Argued before the Court of Appeals 17 September 1974.

Petitioner Kenneth D. Hepler (hereinafter referred to as petitioner) and Respondent Brookie I. Burnham (hereinafter referred to as respondent) were married in 1964 and divorced in 1971. During their marriage petitioner and respondent purchased a house and lot located at 739 Fairfield Street in Burlington, North Carolina. This property was conveyed to petitioner and respondent as tenants by the entirety. Since their divorce in 1971, by operation of law the property has been owned by petitioner and respondent as tenants in common. Both petitioner and respondent have remarried, and respondent and her husband now reside in the residence held by the parties as tenants in common.

This appeal derives from a petition filed by Kenenth D. Hepler to partition and sell that land. The petition also contains a prayer for the refund of advance taxes paid by petitioner and for the fixation of a fair rent to be paid by respondent's husband, Walter Van Burnham, III. Respondent answered the petition, contending that a deed of separation, entered into on 12 November 1970, barred the petitioner's claim. Respondent's answer asserts that the deed of separation is to remain in effect until the only child born of the marriage, Robert Brian Hepler, born 24 March 1965, becomes emancipated. Furthermore, the answer asserts that the parties intended that respondent would have sole use and possession of the real property and that the mortgage payments made on the property by petitioner would be in the nature of child support and would remain in effect until the child's emancipation.

The crux of this controversy is the interpretation of the deed of separation. It provides, in part, that

> "3. It is understood and agreed that party of the second part, husband, shall pay to party of the first part, wife,

the sum of Eighty five and No/100 ($85.00) Dollars per month for the support and maintenance of said child, Robert Brian Hepler, beginning November 25, 1970, and continuing with a like payment on the 25th day of each month thereafter until said child shall become emancipated.

"4. It is further agreed that the husband shall be responsible for and shall pay the following obligations now owed by the parties:

. . . .

"(c) The monthly payment on the indebtedness on the real property which was occupied by the parties hereto as their home, which is presently being paid to Cameron-Brown, and which said payment shall include principal, interest, and escrow deposits for insurance and taxes and any other purposes, and it is understood and agreed that the title to said real property shall remain as it is presently in party of the first part and party of the second part hereto.

. . . .

"5. It is understood and agreed that the parties hereto, prior to the separation, resided at 739 Fairfield Street, Burlington, North Carolina, and the party of the first party (sic), wife now resides in and shall be permitted to continue to reside in and at said location unmolested, and party of the second part does hereby lease said premises to party of the first part, free of any rent, for her continued use of said premises as her home, during the existence of this agreement; it is further understood and agreed that the party of the first part, wife, shall have the household and kitchen furnishings located in the said former residence of the parties as her sole and separate property; and party of the second party (sic), husband, hereby releases and quitclaims all of his right, title and interest in said household and kitchen furnishings to her.

"6. It is further agreed . . . that each of the parties may hereafter freely sell and otherwise dispose of any and all of his or her own separate property . . . . It is further understood and expressly agreed that said parties hereto shall have the right hereafter at all times to buy, sell, transfer, assign, convey, mortgage and otherwise dispose of any and all personal or real property which either of them shall now have or hereafter acquire without the other being required to join therein or consent thereto in any manner."

No witnesses appeared before the court, but both parties submitted briefs. After considering their arguments, the trial judge made findings of fact from admissions in the pleadings and concluded that petitioner had waived his right to partition during the existence of the separation agreement. His order dismissed the petition and enjoined petitioner from selling the property described in the deed of separation. From this order the petitioner appeals to this Court.

R. Chase Raiford, for petitioner-appellant.

Ross, Wood & Dodge, by B. F. Wood, for respondents-appellee.

BROCK, Chief Judge.

The sole assignment of error challenges the dismissal of the petition and the enjoining of petitioner from selling the property in question. In support of this assignment of error, petitioner advances two arguments. First, petitioner argues that it was impossible for him to waive his right to partition as a tenant in common in the separation agreement because he was a tenant by the entirety at the time and did not have a right to partition. Second, petitioner argues that the deed of separation, in any event, cannot be interpreted to contain such a waiver.

Chapter 46 of the North Carolina General Statutes grants certain partition rights to cotenants of property. These rights, however, are not unqualified. In *Chadwick v. Blades,* 210 N.C. 609, 188 S.E. 198 (1936), the North Carolina Supreme Court stated:

> "Statutes declaring that joint tenants or tenants in common shall have a right to partition were never intended to interfere with contract between such tenants modifying or limiting this otherwise incidental right, or to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards." 210 N.C. at 612.

Thus, there is no question that in the case at bar petitioner could validly contract away his right to partition in a deed of separation. "The ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them." *Church v. Hancock,* 261 N.C. 764, 765, 136 S.E. 2d 81.

[1] Petitioner asserts that his first argument, that it was impossible for him to waive a right not in existence at the time of the separation agreement, should control the disposition of this appeal. While we acknowledge that one of the essentials of waiver is the existence at the time of a known right, *Fetner v. Granite Works,* 251 N.C. 296, 111 S.E. 2d 324, we believe that the separation agreement served as an agreement to waive a right to partition, a right which should have reasonably been foreseen would vest upon entry of a decree of absolute divorce. *See* 92 C.J.S. *Waiver* (1955). For this reason we find no merit in petitioner's first argument.

Petitioner contends that the case of *Kayann Properties, Inc. v. Cox,* 268 N.C. 14, 149 S.E. 2d 553, is supportive of both his position and his second argument. In that case, a husband, Truitt Cox, had conveyed property to his wife, Merle Cox, before their marriage. After their marriage he sued his wife to have title vested in them as tenants by the entirety. During the pendency of this action, the parties entered into a deed of separation wherein Merle Cox agreed to convey to Truitt Cox a one-half undivided interest in the property so that title would be vested in them as tenants in common. Truitt Cox also agreed to make mortgage payments on the property and to give Merle Cox sole possession and occupancy of the premises during her lifetime. At the time of the execution of the deed of separation, and as part of the same transaction, the property was conveyed to a third party who subsequently reconveyed it to Truitt and Merle Cox as tenants in common. Truitt Cox then obtained a divorce judgment which provided that he was to make all payments set forth in the separation agreement. Truitt Cox later conveyed one-quarter undivided interest to one Stanley, who instituted an action to quiet title against Merle Cox. The court found that Merle Cox had sole possession and occupancy during her lifetime. The "consent part" of the divorce judgment created an enforceable lien upon the property purchased by Stanley. *Stanley v. Cox,* 253 N.C. 620, 117 S.E. 2d 826. Truitt Cox later conveyed his remaining one-quarter undivided interest to petitioner Kayann Properties, Inc., subject to the separation agreement. Kayann filed a petition for partition by sale. The North Carolina Supreme Court found that the separation agreement did not expressly contain a stipulation that Truitt Cox would not partition. But the Court did find that neither party to the agreement had considered the possibility of partition during Merle Cox's life.

Her husband's goal was an absolute divorce. After considering the arguments and the circumstances of the case, the Court held:

> "It is apparent that the partition which petitioner seeks would be in contravention of the separation agreement and would defeat its purposes. An agreement against partition will therefore be implied. (Citations omitted.) '[I]f the intention is sufficiently manifest from the language used, the court will hold that the parties may effectively bind themselves not to partition even without express use of the word.' *Michalski v. Michalski,* 50 N.J. Super. 454, 462, 142 A. 2d 645, 650." 268 N.C. at 22.

We do not find *Kayann* to be at all supportive of petitioner's position in the case at bar. *Kayann* is a well-reasoned case which supports the respondent. *See also* Annot., 37 A.L.R. 3d 962 (1971).

[2] The deed of separation executed between respondent and petitioner, in our opinion, effectively modifies and limits petitioner's right to partition the property. Paragraphs 3, 4(c), and 5 of the agreement, set forth above, if not expressly, at least impliedly modify and limit this right. By its provisions petitioner has agreed to support Robert Brian Hepler, to continue mortgage payments, to permit respondent to reside in the house, and, most importantly, to lease the premises to her "free of any rent, for her continued use of (the) premises as her home, during the existence of the agreement." Because the agreement terminates upon Robert Brian Hepler's emancipation, we believe that the contract is reasonable in its duration and not void as an unreasonable restraint on alienation. "A contract among cotenants that neither they nor their heirs or assigns will ever institute proceedings for partition has been held void as an unreasonable restraint on the use and enjoyment of the land." *Chadwick v. Blades,* 210 N.C. 609, 612, 188 S.E. 198 (1936).

[3] Petitioner urges us to find the agreement "inequitable and against the reasoning of prudent men to interpret that a husband would enter a contract with his separated wife and upon her remarriage intend to allow her new husband to live on the premises free of rent until the minor child reached his majority without clearly setting out such a provision in the contract."

In our opinion the separation agreement does not impose an inequitable burden on petitioner. The agreement provides that respondent is to live rent free on the premises for the duration

of the agreement. Clearly the petitioner should have contemplated the respondent's remarriage. The fact that respondent has now remarried and is living with her husband on the premises does not affect the petitioner's duty to provide her the premises rent free. Had petitioner been concerned with respondent's remarriage, he could have provided for it in the agreement. The burden on petitioner since respondent's remarriage is no greater than it was originally.

"In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property." *Kayann Properties, Inc. v. Cox, supra* at 20. Petitioner cites 31 C.J.S. *Estoppel* § 63 (1964) for the proposition that "[t]he remedy of estoppel has for its purpose the promotion of the ends of justice, and the doctrine is grounded on equity and good conscience." While we agree with that statement, we note that partition is also subject to the principle that he who seeks equity must do equity. "Equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed on the estate by one through whom he claims." *Chadwick v. Blades,* 210 N.C. 609, 612, 188 S.E. 198 (1936).

Affirmed.

Judges MORRIS and MARTIN concur.

JOHN T. CAMPBELL, JR. T/A JOHN T. CAMPBELL, JR. GENERAL CONTRACTOR v. JOHN GRAY BLOUNT AND WIFE MARY BOWEN BLOUNT

No. 742SC555

(Filed 2 January 1975)

1. Quasi Contracts § 1— abandonment of contract provision — recovery on quantum meruit

Where the evidence warranted a finding by the court that the conduct of the parties indicated that they had abandoned a provision of their contract for construction of a home requiring an agreement as to the price for extra work or changes in the work before the work was done, the trial court properly allowed recovery for the changes on the basis of quantum meruit or implied contract.

2. Contracts § 27; Rules of Civil Procedure § 52— action on contract — court's failure to make sufficient findings of fact

In an action to recover the balance allegedly due for the construction of a house which was heard by the court without a jury, the trial court erred in failing to make findings of fact with respect to whether certain items represented changes requested by defendants or were required by the contract, and whether defendants were entitled to credit for certain items which they paid for and for expenditures they made to complete the house. G.S. 1A-1, Rule 52.

APPEAL by defendants from *Perry Martin, Judge,* 18 February 1974 Civil Session of Superior Court held in BEAUFORT County.

In this action plaintiff, a building contractor, attempts to recover the balance allegedly due him by defendants for the construction of a home for defendants. In his complaint, plaintiff alleges that the parties entered into a written contract with respect to construction of the home; that pursuant to the contract, together with change orders brought about by defendants, defendants were obligated to pay plaintiff $54,039.41; that defendants have paid $45,000, leaving a balance of $9,039.41 due plaintiff; that plaintiff within the time provided by law, has filed a notice of lien against the real estate. Plaintiff asked for judgment for the balance due, plus interest, and that the amount awarded be declared a lien on the real estate.

The feme defendant filed answer denying all material allegations of the complaint. The male defendant filed answer admitting that he entered into a written contract with plaintiff and that he paid plaintiff $45,000, but denied that plaintiff is entitled to collect any additional amount. In a further defense and counterclaim, the male defendant contended that plaintiff failed to complete the home, that he (the male defendant) had to complete the home and had to pay certain bills for materials that plaintiff should have paid; he asked for judgment against plaintiff in amount of $3,510.

Jury trial being waived, the cause was heard without a jury. Following a trial, at which all parties presented evidence, the court entered judgment setting forth certain findings of fact and conclusions of law and providing that plaintiff recover of defendants the sum of $6,600.72 without interest. Defendants appealed.

Wilkinson and Vosburgh, by James R. Vosburgh, for plaintiff appellee.

McMullian, Knott & Carter, by Lee E. Knott, Jr., for defendant appellant.

BRITT, Judge.

In their first and sixth assignments of error, defendants contend the court erred in allowing a recovery based on quantum meruit. We reject this contention.

The evidence tended to show: On 29 March 1972, following negotiations, plaintiff and the male defendant executed a document entitled "DESCRIPTION OF MATERIALS" setting forth detailed specifications for labor and materials for the home. Defendants also provided plaintiff with detailed drawings or blueprints and soon after 29 March 1972, plaintiff began construction. On or about 3 May 1972, after plaintiff had performed considerable work, plaintiff and the male defendant entered into a written contract. Among other things, the contract provided that plaintiff would furnish all labor and materials necessary to construct the home according to the provisions of the contract and the specifications aforesaid, and that the male defendant would pay plaintiff $47,000, payable in installments at certain specified stages of construction. The contract also contained the following provision:

> 6. Without invalidating the contract, the owner may order extra work or make changes by altering, adding to or deduction [sic] from the work. Any adjustments on the price necessary for such change shall be agreed to by the Owner and the Contractor before the work is executed.

During the course of construction, at the request of defendants, numerous changes in construction were made but the parties at no time followed the procedure set forth in paragraph 6 of the contract above quoted. With respect to each change, plaintiff has prepared a "change order" which purports to set forth the cost of materials and labor attributed to the change; he added ten percent to the cost of labor and materials for each change as his profit. At trial plaintiff introduced 33 change orders and the amounts shown thereon aggregate $6,039.31. Plaintiff contended that defendants also owed him a balance of $3,000 on the contract price. The court concluded that plaintiff is entitled to recover on quantum meruit for the changes but is

not entitled to recover "profit" on the changes. The court also concluded that defendants were entitled to certain credits, and the amount awarded represents the amount claimed by plaintiff less $903.41 "profit" and less certain credits which the court allowed.

In *Concrete Co. v. Lumber Company,* 256 N.C. 709, 713-4, 124 S.E. 2d 905 (1962), the court, quoting from Am. Jur., said: " . . . There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing. . . . " (Citations omitted.) However, in *Bixler v. Britton,* 192 N.C. 199, 201, 134 S.E. 488 (1926), the court said: "A written contract may be abandoned or relinquished: (1) by agreement between the parties; (2) BY CONDUCT CLEARLY INDICATING SUCH PURPOSE; (3) by the substitution of a new contract inconsistent with the existing contract. (Citations omitted.)" (Emphasis added.)

[1] In the case at bar, we think the evidence warranted a finding by the court that the conduct of the parties clearly indicated that they were not adhering to the written provision of the contract relative to desired changes in construction. Upon abandonment of the quoted provision by the parties, it was proper for the court to allow recovery for the changes on the basis of quantum meruit or an implied contract. The assignment of error is overruled.

[2] Defendants assign as error the failure of the court to (1) make proper findings of fact " . . . designating and distinguishing between those items set forth in Plaintiff's Exhibit 4, entitled Change Orders, which actually represent changes and additions requested by the defendants, and those items which plaintiff was obligated to perform under the terms of the contract . . . " ; (2) make findings with respect to, and give defendants credit for, certain items furnished or paid for by defendants on behalf of plaintiff of the value of $2,771.03; and (3) make findings with respect to, and give defendants credit for, certain expenditures made by defendants in amount of $2,178 necessary to complete the house.

In cases in which the trial court passes on the facts, the court is required to do three things in writing: find the facts on all issues of fact joined on the pleadings; declare the conclusions

of law arising on the facts found; and enter judgment accordingly. *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971); *Littlejohn v. Hamrick,* 15 N.C. App. 461, 190 S.E. 2d 299 (1972); *Williams v. Williams,* 13 N.C. App. 468, 186 S.E. 2d 210 (1972). G.S. 1A-1, Rule 52.

In the instant case, the contentions of the parties based on the pleadings, and evidence presented by them, raised numerous questions for determination by the trial judge sitting as a jury. Plaintiff relied heavily on the 33 change orders introduced. Defendants asserted that many of the items contained in the change orders were embraced in the plans, specifications or contract, therefore, they were not proper subjects for additional charge as extras. Defendants were entitled to findings of fact on those items but the court did not make them. We do not deem it necessary to point out all instances in which the court should have made specific findings but will mention several.

In Change Order #3, plaintiff made a charge of $82.62 for a desk for the kitchen which defendants contend the specifications called for; they were entitled to a finding on this contention. In Change Order #7, plaintiff charged $45 for a shower door; the evidence indicates that plaintiff admitted the door was not supplied, but defendants were not given credit for it. In Change Order # 16, plaintiff charged $203.71 for fans in vents of bathrooms; defendants contend (and they appear to be correct) that the specifications called for fans; they were entitled to a finding on this item. In Change Order #26, plaintiff charged $250 for a marble hearth which defendants contend is in the specifications; defendants were entitled to a finding of fact on this item.

With respect to the $2,771.03 mentioned in (2) above, defendants contend, and presented evidence tending to show, that they furnished two toilets worth $180, and a shower door worth $45, called for in the specifications; that they paid $673.26 for light fixtures and that under the specifications plaintiff was obligated to pay $300 of that amount; that they paid $2,110.83 for carpet and vinyl that plaintiff was obligated to furnish; that they supplied plaintiff with 2500 brick worth $135.20; that they were not given credit for these items. We hold that defendants were entitled to findings of fact as to these items and the court erred in failing to make those findings.

Since a new trial is being awarded for failure of the court to make sufficient findings of fact, we deem it unnecessary to discuss the defendants' contentions with respect to the $2,178 item mentioned in (3) above. We feel certain that upon a retrial, the court will make proper findings with respect to that item.

Plaintiff argues in his brief that the court erred to his prejudice in not allowing interest and in not declaring the sum due him a lien on the real estate. Since plaintiff did not appeal from the judgment, we hold that those questions are not presented.

For the reasons stated, the judgment is vacated and this cause is remanded to the superior court for a

New trial.

Judges VAUGHN and ARNOLD concur.

ELIZABETH ANN McCARLEY v. LESLIE HARVEY McCARLEY

No. 7426DC329

(Filed 2 January 1975)

1. **Rules of Civil Procedure § 41— affirmative relief sought by defendant — dismissal by plaintiff improper**

A plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case; therefore, where defendant in the present action for absolute divorce filed answer affirmatively seeking a decree of absolute divorce, plaintiff could not thereafter defeat his rights by filing a notice of dismissal, and the trial court properly granted defendant's motion to set the notice of dismissal aside. G.S. 1A-1, Rule 41(a)(1).

2. **Rules of Civil Procedure § 15— "Application" for alimony — attempt to amend complaint — failure to comply with rule**

Where plaintiff in this action for absolute divorce did not seek alimony in her complaint or allege therein that she was a dependent spouse or otherwise give notice in her pleading of any facts which would entitle her to an award of alimony, her filing of an "Application" for alimony some four and one-half months after the filing of her complaint was in effect an attempt to amend her complaint so as to assert a completely different cause of action; this she could do only by leave of court or by written consent of the adverse party, neither of which she sought or obtained. G.S. 1A-1, Rule 15.

McCarley v. McCarley

APPEAL by plaintiff from *Robinson, District Judge,* 10 December 1973 Session of District Court held in MECKLENBURG County.

Plaintiff wife brought this action against her husband on 24 July 1973 seeking an absolute divorce on the grounds of one year's separation. On 9 August 1973 defendant answered admitting all allegations in the complaint and joining in the prayer for relief. On 18 November 1973 plaintiff's counsel filed a "Notice of Dismissal," giving notice that the action was dismissed without prejudice.

On 7 December 1973 plaintiff filed in the cause a verified document entitled "Application for Alimony Pursuant to N.C.G.S. Sec. 50-16.8(b)(1)." In this, plaintiff referred to the Notice of Dismissal which she had previously filed and stated that she "does not seek, nor does she intend to obtain, an absolute divorce by virtue of the Complaint filed herein." Plaintiff alleged that she is a dependent spouse actually substantially dependent upon the defendant for maintenance and support, that defendant had rendered her condition intolerable and her life burdensome by various alleged acts of misconduct, and that defendant was able-bodied and gainfully employed.

When the cause came on for hearing, the court allowed defendant's motion to set aside plaintiff's Notice of Dismissal on the ground that prior to the filing of the Notice defendant had filed answer seeking affirmative relief. Plaintiff then moved for a stay of the proceeding, giving as reasons, first, that a prior action was pending involving the same parties, in which action plaintiff had asserted a cause of action for alimony pendente lite, permanent alimony, custody of the minor children of the parties, and support for the children, and had received an award of temporary alimony but in which prior action no trial on the merits had yet been had, and second, as additional grounds for the motion to stay, plaintiff referred to the "Application" for an award of alimony which she had made in this cause. The court denied plaintiff's motion to stay and, neither party having demanded a jury trial, proceeded to hear evidence. Defendant testified as to the residence of the parties, their marriage, and their separation. On cross-examination, he testified that he had left the home of the parties only because the court in the prior proceeding had ordered him to do so and that he had been supporting his children and paying temporary alimony to his wife under a court order in that action. At conclusion of defend-

ant's testimony, the court denied plaintiff's motion that the court consider her application for permanent alimony filed in this cause, and entered judgment making findings of fact as to the residence, marriage, and separation of the parties. On these findings the court decreed the marriage dissolved and granted an absolute divorce. Plaintiff appealed.

Lila Bellar for plaintiff appellant.

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

PARKER, Judge.

[1] Plaintiff first assigns error to the court's action in granting defendant's motion to set aside her notice of dismissal. Plaintiff contends that under G.S. 1A-1, Rule 41(a)(1), a plaintiff in a civil action has the unfettered right to have the action dismissed by filing a notice of dismissal at any time before the plaintiff rests his case, regardless of whether defendant has filed an answer seeking affirmative relief. We do not agree.

Prior to adoption of our new Rules of Civil Procedure, it was settled practice in this State that when the defendant had asserted no counterclaim and demanded no affirmative relief, the plaintiff might take a voluntary nonsuit as a matter of right at any time before the verdict, *Mitchell v. Jones*, 272 N.C. 499, 158 S.E. 2d 706 (1968), but he was not allowed to do so when the defendant had set up some ground for affirmative relief. The rule in this regard was stated in 2 McIntosh, N. C. Practice and Procedure 2d, § 1645, at pages 124 and 125, as follows:

> "While the plaintiff may generally elect to enter a nonsuit, 'to pay the costs and walk out of court,' in any case in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. If the defendant sets up a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect to be nonsuited and allow the defendant to proceed with his claim."

This rule was held to apply to actions for divorce. *Cox v. Cox*, 246 N.C. 528, 98 S.E. 2d 879 (1957).

Rule 41(a) (1) of our new Rules of Civil Procedure, as first enacted by Sec. 1 of Chap. 954 of the 1967 Session Laws, was patterned closely upon the cognate Federal Rule and provided that an action or any claim therein might be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment. Before the new Rules became effective, however, Rule 41(a) (1) was amended by Sec. 10 of Chap. 895 of the 1969 Session Laws, so that as the Rule became effective and as it presently exists "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case." This had the effect of changing our former practice only to the extent that the plaintiff desiring to take a voluntary nonsuit must now act before he rests his case, whereas under our former practice he could do so at any time before the verdict. In other respects, however, our former practice was not expressly changed by Rule 41(a) (1) as it finally became effective. We hold, therefore, that our former practice still applies and that a plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case. The defendant in the present case having filed answer affirmatively seeking a decree of absolute divorce, plaintiff could not thereafter defeat his rights by filing a notice of dismissal, and the trial court properly granted defendant's motion to set the notice of dismissal aside.

[2] We also find no error in the court's denial of plaintiff's motion to stay the proceeding. Pendency of the prior action for alimony without divorce would not in itself prevent the court from proceeding to judgment in this action. Plaintiff offered no reason why a final hearing had not been had in the prior action, which apparently had been pending for more than a year before plaintiff herself commenced this action for an absolute divorce. Nor would filing of the "Application" for alimony in this action bar the court from proceeding to judgment. It is true, of course, that G.S. 50-16.8(b) (1) authorizes an order for payment of alimony upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from

bed and board. But plaintiff made no such application in her complaint nor did she allege therein that she was a dependent spouse or otherwise give notice in her pleading of any facts which would entitle her to an award of alimony. By filing the "Application" for an award of alimony in this proceeding, plaintiff was in effect attempting to amend her complaint so as to assert a completely different cause of action. This she could do only by leave of court or by written consent of the adverse party, G.S. 1A-1, Rule 15, neither of which she sought or obtained.

The judgment appealed from is

Affirmed.

Judges HEDRICK and VAUGHN concur.

LINDA H. RIGGS, ANGELA DENISE RIGGS (BY GUARDIAN AD LITEM), CYNTHIA GAIL RIGGS (BY GUARDIAN AD LITEM), ANTHONY CHARLES RIGGS (BY GUARDIAN AD LITEM), AND CHARLES LOUIS RIGGS v. R. G. FOSTER & COMPANY

— AND —

ELLIOTT D. HILL AND MICHAEL ELLIOTT HILL, THIRD-PARTY PLAINTIFFS v. R. G. FOSTER & COMPANY, THIRD-PARTY DEFENDANT

No. 748SC798

(Filed 2 January 1975)

1. **Appeal and Error § 48— testimony admitted over objection — subsequent similar testimony admitted without objection**

Testimony to which plaintiffs objected on the ground that it invaded the province of the jury and other testimony which plaintiffs contended was not preceded by a proper foundation was properly admitted by the trial court, but, in any event, subsequent witnesses were allowed to give testimony to the same effect without objection from plaintiffs.

2. **Appeal and Error § 30— assignment of error to evidence — inclusion of numerous exceptions improper**

The grouping under a single assignment of error of a number of exceptions which raise separate and distinct questions of law relating to the admission or exclusion of evidence does not comply with the provisions of Rule 19(c), Rules of Practice in the Court of Appeals.

3. **Appeal and Error § 48; Evidence § 25— drawing used to illustrate testimony — no prejudice**

Plaintiffs were not prejudiced by a witness's use of a drawing to illustrate his testimony where plaintiffs had a blackboard drawing almost identical to the drawing in question before the jury from the time the trial began and where other witnesses were allowed to use the drawing to illustrate their testimony without objection.

4. **Appeal and Error § 31— assignment of error to charge — inclusion of fifteen exceptions improper**

An assignment of error embracing some fifteen exceptions to the trial court's charge did not comply with Rule 19(c) of the Rules of Practice of the Court of Appeals.

APPEAL by plaintiffs from *Lanier, Judge,* 20 May 1974, Civil Jury Session, Superior Court, held in LENOIR County. Heard in Court of Appeals 10 December 1974.

This litigation arose from an automobile collision which occurred on 29 October 1970 in Lenoir County. On that day at about three o'clock p.m., Linda H. Riggs was operating a 1968 Chevrolet automobile, owned by Charles Louis Riggs, in a southerly direction on N. C. Highway No. 11 at a point where the Grifton Bypass, then under construction, intersected it from the south. Michael Hill, operating an automobile owned by his father, was travelling in a northerly direction on Highway 11. He had come through a barricade placed on the highway by R. G. Foster & Company to prevent traffic from entering that portion of the highway not then open to vehicular traffic. The barricade was in the form of well-marked barrels spaced at intervals across the highway but with sufficient space between the barrels and the median to the right (defendant Hill's right as he approached the closed portion of the highway) at least for a car to pass. There were no flagmen at the point which was supposed to be closed to traffic. Hill hit the car driven by Linda H. Riggs on its left front. The collision was almost head-on. The Hill car left eight feet of skid marks. Angela Denise Riggs, Cynthia Gail Riggs, and Anthony Charles Riggs are the children of Linda H. Riggs. They were all passengers in her car. Linda H. Riggs and the children all were painfully injured in the accident as was Michael Hill. Linda Riggs and her children through guardians ad litem, each brought a suit against R. G. Foster & Company, Continental Insurance Company and Michael Hill and his father for damages for personal injuries. Charles Louis Riggs also brought a suit for property damages. The Hills, as third-party plaintiffs, brought a claim against Foster and Con-

tinental and Linda Riggs for personal injuries and property damages. The Riggses subsequently filed a stipulation of dismissal with prejudice as to the Hills, and the Hills also entered into a similar stipulation as to Linda and Charles Louis Riggs.

The five cases were consolidated for trial, the only defendant being R. G. Foster & Company. The jury verdict was against all plaintiffs, and they appealed.

White, Allen, Hooten and Hines, P.A., by John R. Hooten, for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner, for defendant appellee.

MORRIS, Judge.

[1, 2] Plaintiffs urge that the court erred in admitting testimony of witnesses Edwards, Moore, and Johnson with respect to the barrels placed across the road. Witnesses Edwards and Moore testified that when they saw the barrels, they understood that they were to bear to the right, and witness Johnson testified that it appeared plainly marked which way he was supposed to go. Under the same assignment of error plaintiffs contend that the court should not have allowed witness Merritt, District Engineer for the North Carolina Department of Transportation, to testify that the barrels and barricades which he saw at the scene were in accordance with the plans and specifications on the highway project, nor should witness Howard have been permitted to testify that the barrels met the specifications and customs of the road building industry and that the signs leading up to the project were placed and located in accordance with the customs and practices of the industry. The assignment of error also embraces exceptions to the court's allowing witness Howard to testify that it was not customary to use a watchman under the circumstances existing at the scene of the collision. To support their exceptions grouped under this assignment of error, plaintiffs contend that as to witnesses Edwards, Moore and Johnson, the testimony elicited invaded the province of the jury in that the legal efficacy of the barricade was for the jury. The questions propounded to the witnesses, however, did not call for an opinion as to whether the barricade was legally sufficient. They merely requested the witness to relate what the barrels placed there indicated to him in terms of what the movement of his car should be in response to the barrels. This was relevant

and admissible. In any event, subsequent witnesses were allowed to testify to the same effect without objection from plaintiffs. As to witnesses Merritt and Howard, plaintiffs contend that no proper foundation was laid to permit them to testify as to customs and practices (as to Howard) and as to the specifications for the project then under construction (as to Merritt). We think a sufficient foundation was laid. In any event witness Rouse was subsequently allowed to testify to substantially the same effect without objection from plaintiffs. We call appellants' attention to *Nye v. Development Co.*, 10 N.C. App. 676, 679, 179 S.E. 2d 795 (1971), cert. denied 278 N.C. 702 (1971), where we said that our rules require that "any single assignment of error must present a single question of law. Clearly, more than one exception may be grouped under a single assignment of error, but this may be done only when all the exceptions relate to but a single question of law." The grouping under a single assignment of error of a number of exceptions which raise separate and distinct questions of law relating to the admission or exclusion of evidence does not comply with the provisions of Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina. *Duke v. Meisky*, 12 N.C. App. 329, 183 S.E. 2d 292 (1971).

[3] By assignment of error No. 2 plaintiffs argue that the court erred in allowing, over objection, Defense Exhibit No. 1 to be introduced into evidence for the purpose of illustrating the testimony of the witness Merritt, District Engineer for the North Carolina Department of Transportation. Plaintiffs contend that the exhibit had not been sufficiently authenticated. The witness testified that he could illustrate his testimony by the use of the drawing and that the barricade appeared thereon "at about where the one was at." Whether there is sufficient evidence of the correctness of such an exhibit to render it competent to be introduced into evidence for the purpose of use by the witness to illustrate or explain his testimony is "a preliminary question of fact for the trial judge." *State v. Gardner*, 228 N.C. 567, 573, 46 S.E. 2d 824 (1948). In any event, even if the evidence, at the time of introduction, was not adequate sufficiently to authenticate the exhibit, prejudicial error is not made to appear. The exhibit was almost identical to plaintiffs' Exhibit 48, the blackboard diagram, which had been observed by the jury and the witnesses since the trial began. Additionally, other witnesses used the exhibit to illustrate their testimony

without objection. We perceive no prejudice. This assignment is overruled.

[4] Appellants' remaining assignment of error embraces some 15 exceptions to the charge. This assignment of error is even more subject to criticism than the first one discussed above for failure to comply with Rule 19(c). See *Nye v. Development Co., supra,* and *Duke v. Meisky, supra.* Because they have failed to comply with the rules, appellants are not entitled to have us review their exceptions to the charge of the court. Nevertheless, we have examined each exception. The court instructed in accordance with the existing applicable statutory and case law and in accordance with the theory of the case adopted at trial by plaintiffs, who did not request additional or different instructions on any aspect of the case which they now say did not receive adequate treatment in the court's instructions. See *Miller v. Henry,* 270 N.C. 97, 153 S.E. 2d 798 (1967), and *Smith v. Bonney,* 215 N.C. 183, 1 S.E. 2d 371 (1939).

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. ANDREW WALLACE POOLE

No. 7427SC568

(Filed 2 January 1975)

Larceny § 7— larceny of automobile — sufficiency of circumstantial evidence

In a prosecution for larceny of an automobile, evidence though circumstantial was sufficient to be submitted to the jury where it tended to show that a building was entered and a car was stolen, a "junker" car was tampered with, fingerprints taken from the junker car matched defendant's prints, defendant admitted having the keys to a red 1966 Ford which still had dealer plates on it, defendant admitted driving the car, an officer from the town where the car was stolen saw a red 1966 Ford while he was in the city in which defendant was arrested, the officer checked the serial number of the car, and he identified it as being the stolen car.

APPEAL by defendant from *Ervin, Judge,* 4 March 1974 Session of Superior Court held in LINCOLN County. Argued before the Court of Appeals 21 October 1974.

Defendant was charged in a bill of indictment with larceny of an automobile. A plea of not guilty was entered, and a verdict of guilty as charged was returned.

On 29 May 1973 John Burgin returned to Tom's Used Cars, the car lot where he was employed, to find that the blades of an exhaust fan had been bent in such a manner as to afford entrance into the building. Burgin noticed that all the keys to the cars parked on the lot were missing. One of the cars, a red 1966 Ford Galaxie, was also missing.

Thomas Burgin, brother of John Burgin and a police officer with the City of Lincolnton, investigated the theft of the Ford from Tom's Used Cars. During his investigation Officer Burgin's attention was called to a 1963 Ford parked on the west side of the lot. This automobile was a "junker" car and would not start because it had a dead battery. A number of burned matches were scattered about the floorboard, and several wires were dangling from the dashboard as if someone had attempted to "straight wire" the car. Officer Burgin lifted a set of fingerprints from the dashboard of this car and mailed them to the State Bureau of Investigation.

On *voir dire* Officer Burgin testified about a conversation he had with defendant on 5 June 1973 in the Asheville Jail. Burgin stated that after being advised of his rights, defendant signed a waiver form and made a statement. Burgin then read the statement. It tended to show that defendant had been picked up while hitchhiking by a man in a 1966 Ford. The man told defendant that he was a car dealer and offered to sell the car to defendant for $300.00. He asked defendant to drive. Upon arriving in Asheville, the man, defendant, his wife, and a woman who had joined them went to a motel and then to a bar. Defendant stated that he "got loaded" and has not seen the man or woman since that time. When he was picked up by police, defendant admitted having the keys to the 1966 Ford in his possession. He also admitted driving the car, but denied ever having been in Lincolnton. Although the statement was not signed by defendant, Officer Burgin stated that defendant had adopted and approved it.

The trial court, after hearing this testimony, made findings of fact regarding the admissibility of the statement. The court found that it had been properly obtained and was admissible, provided parts concerning the prior arrest record of

defendant and the observation of an Asheville policeman that defendant had entered the motel alone were concealed from the jury's view.

Burgin further testified that while in Asheville he had seen a red 1966 Ford automobile and had matched the serial number of that car to the one stolen from Tom's Used Cars. When Burgin later went to Asheville to talk with defendant, he took one Roy Richards with him to drive the car back to Lincolnton.

The State also introduced the testimony of Steven R. Jones, Supervisor of the Identification Division of the State Bureau of Investigation. Jones stated that he had examined the prints taken from the dashboard of the 1963 "junker" automobile and had compared them with a set of prints taken from the defendant. In his opinion both sets were made by the same person.

The defendant offered no evidence.

From a verdict of guilty and a sentence of not less than three years nor more than five years imposed thereon, defendant appeals, setting forth three assignments of error.

Attorney General Carson, by Associate Attorney Reilly, for the State.

Wilson & Lafferty, by John O. Lafferty, Jr., for the defendant-appellant.

BROCK, Chief Judge.

By his second assignment of error defendant contends that the trial court erred when it denied his motions for judgment as of nonsuit.

It is well settled that on motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. Only the evidence favorable to the State is considered, and defendant's evidence in conflict with that of the State is not considered. 2 Strong, N. C. Index 2d, Criminal Law, § 104. The defendant does not dispute this, but argues that the evidence is "insufficient to raise more than a suspicion or conjecture that the crime charged" was committed. The crux of his contention is that the State's evidence

failed to place defendant in possession of the 1966 Ford Galaxie which was removed from Tom's Used Cars.

"The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both." *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682.

> " 'When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682, quoting *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661.

In the case at bar the State's case is grounded in circumstantial evidence which tends to show that a building was entered and a car was stolen; that a "junker" car was tampered with; that fingerprints taken from the junker car matched defendant's prints; that defendant admitted having the keys to a red 1966 Ford which still had dealer plates on it; that defendant admitted driving the car; that Officer Burgin, while in Asheville, saw a red 1966 Ford, checked the serial number, and identified it as being the car stolen from Tom's Used Cars. We believe this circumstantial evidence is sufficient evidence from which a reasonable inference of defendant's guilt can be drawn. In our opinion the evidence supports the jury's finding of guilty. The evidence was sufficient to withstand defendant's motions for judgment as of nonsuit. This assignment of error is overruled.

We have carefully considered defendant's two remaining assignments of error and conclude that they are without merit.

In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. LEE WILL TEEL

No. 743SC559

(Filed 2 January 1975)

1. **Assault and Battery § 5; Robbery § 1; Criminal Law § 26— armed robbery — assault with deadly weapon inflicting serious injury is not lesser included offense**

An assault with a deadly weapon inflicting serious injury, as charged against defendant and as defined in G.S. 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery; therefore, acquittal of defendant on a charge of assault with a deadly weapon inflicting serious injury would not bar conviction on an attempted armed robbery charge.

2. **Robbery § 2; Indictment and Warrant § 12— armed robbery — failure to allege taking of property from person — defective indictment — amendment improper**

The bill of indictment upon which defendant was tried for attempted armed robbery was fatally defective for failure to allege that defendant attempted to take any property or thing of value from anyone, and an amendment approved by the solicitor and counsel for defendant which purported to change the bill to charge attempted armed robbery was without legal authority.

APPEAL by defendant from *Martin (Perry), Judge,* 4 February 1974 Session of Superior Court held in CARTERET County. Argued in the Court of Appeals 12 November 1974.

Defendant was charged in two bills of indictment. The first bill purports to charge defendant with the felony of attempted armed robbery. G.S. 14-87. The second bill charges defendant with the felony of assault with a deadly weapon inflicting serious injury. G.S. 14-32(b). The victim of the attempted armed robbery was also the victim of the assault inflicting serious injury. Both offenses were alleged to have been committed at the same time.

The cases were submitted to the jury upon instructions to find defendant either guilty or not guilty of attempted armed robbery and, additionally, to find defendant either guilty or not guilty of an assault with a deadly weapon inflicting serious injury. The jury returned for its verdicts that defendant was guilty of attempted armed robbery and that defendant was not guilty of assault with a deadly weapon inflicting serious injury.

Judgment of confinement was entered upon the verdict of guilty of attempted armed robbery. Defendant appealed.

Attorney General Carson, by Associate Attorney Hirsch, for the State.

Wheatly & Mason, by L. Patten Mason, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that his acquittal of the assault charge bars his conviction of the attempted armed robbery charge because they arose out of the same transaction, and the assault is a lesser included offense of the armed robbery.

The crime of armed robbery includes an assault on a person with a deadly weapon. However, where the assault charged contains a necessary ingredient which is not an essential ingredient of armed robbery, the fact that the assault is committed during the perpetration of the armed robbery does not deprive the assault of its character as a complete and separate offense. *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102. Consequently, an assault with a deadly weapon inflicting serious injury, as charged against defendant and as defined in G.S. 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844. Defendant's argument upon this point is without merit.

[2] The bill of indictment upon which defendant was tried for attempted armed robbery was fatally defective for failure to allege that defendant attempted to take any property or thing of value from anyone.

The bill upon which defendant was arraigned reads as follows:

> "THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Lee Will Teel late of the County of Carteret on the 17th day of August 1973, with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously did make an assault on Clyde Watts with threatened use of a firearm, to wit: a 22 rifle and him in bodily fear and danger of his life did put, and _____, of the value of _____, from the person and possession of the said _____ then and there did unlawfully, wilfully, feloniously, forcibly and violently attempt to take, steal and carry away against the form of the statute in such case made and provided and against the peace and dignity of the State."

The trial judge suggested that the bill should be amended. The Solicitor and counsel for defendant approved an amendment which inserted after "carry away" and before "against the form" the following words: "the goods and chattels of Clyde Watts."

Assuming, without deciding, that with such amendment the bill sufficiently charged the felony of attempted armed robbery, the amendment was without legal authority. " 'In the absence of statute, an indictment cannot be amended by the court or prosecuting officer in any matter of substance without the consent of the grand jury which presented it.' (Citations omitted.) We do not consider to what extent, if any, a bill of indictment may be amended with the consent of a defendant and his counsel. Suffice to say, this defendant did not consent to the amendment." *State v. Jackson,* 280 N.C. 563, 568, 187 S.E. 2d 27.

Clearly the attempted amendment was in a matter of substance. Without the amendment the bill charged, if anything, a misdemeanor assault under G.S. 14-33(b)(1). The amendment purported to change the bill to charge the felony of attempted armed robbery under G.S. 14-87.

The defendant was tried, found guilty, and sentenced upon the bill of indictment which had been illegally amended. Judgment entered upon such conviction must be arrested. The State may, if it is so advised, proceed against defendant upon a proper bill of indictment charging the felony of attempted armed robbery.

Judgment arrested.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHN EARLEY

No. 7429SC785

(Filed 2 January 1975)

1. **Criminal Law § 13— receiving stolen property — no conviction — controversy over ownership of property — independent civil action required**

When a person from whose possession allegedly stolen property was seized as evidence was not convicted of (or was not charged with)

obtaining the property in violation of the law, and there is a controversy between him and the person from whom the property was allegedly stolen as to who has the right to it, a question is presented which cannot be determined in a criminal action but must be determined in an independent civil action.

2. **Appeal and Error § 1— no jurisdiction in trial court — jurisdiction of appellate court derivative**

If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal; therefore, the court on appeal does not reach a review of the merits of the trial court's disposition of property which was allegedly stolen and which defendant was charged with receiving, since the trial court did not have jurisdiction to determine the question of ownership of the property in a criminal case.

3. **Courts § 2— jurisdiction over subject matter**

Jurisdiction over subject matter cannot be conferred upon a court by consent, waiver or estoppel.

APPEAL by defendant-petitioner from *Martin (Harry C.), Judge,* 13 May 1974 Session of Superior Court held in RUTHERFORD County. Argued in the Court of Appeals 22 October 1974.

The defendant was charged in a bill of indictment with the felony of receiving stolen goods of a value of more than $200.00, knowing that the goods had been previously stolen. Forty-one rolls of cloth were seized from defendant, and they were introduced in evidence at his trial. At the close of the State's evidence, defendant's motion for nonsuit was allowed.

Thereafter defendant petitioned the trial judge for the return to defendant of the forty-one rolls of cloth seized from him. Piedmont-Interstate Warehouse System, from whom the cloth was alleged to have been stolen, also petitioned the trial judge for a declaration that it was entitled to possession of the forty-one rolls of cloth.

The trial judge heard evidence from both petitioners and made findings of fact from the evidence offered in this post-trial proceeding and from evidence offered in the criminal action which he had nonsuited. He thereafter decreed that Piedmont-Interstate Warehouse System was the owner and entitled to possession of the forty-one rolls of cloth.

Defendant-petitioner appealed.

Hamrick & Hamrick, by J. Nat Hamrick, for defendant-petitioner.

Owens & Arledge, by Hollis M. Owens, Jr., for Piedmont-Interstate Warehouse System.

BROCK, Chief Judge.

At the outset we are confronted with the question of Judge Martin's jurisdiction in a criminal case to adjudicate conflicting claims of title to allegedly stolen property which has been used in evidence and in which case the prosecution has been completed. We have no statute upon the subject, and we find no case law in this State which covers the subject.

Our research leads us to believe that sound reasoning dictates that under the facts presented, Judge Martin did not have such jurisdiction in a criminal case.

[1] When the person from whose possession the allegedly stolen property was seized as evidence was not convicted of (or was not charged with) obtaining the property in violation of the law, and there is a controversy between him and the person from whom the property was allegedly stolen as to who has the right to it, a question is presented which cannot be determined in a criminal action but must be determined in an independent civil action. After the final disposition of the criminal case, a civil action among the various claimants to the property is the proper action in which title or right to possession can be adjudicated. *See Lawrence v. Mullins,* 224 Tenn. 9, 449 S.W. 2d 224; *Homolko v. State,* 155 Tenn. 467, 295 S.W. 66; 68 Am. Jur. 2d, Searches & Seizures, § 119; 79 C.J.S., Searches & Seizures, § 114.

[2] We do not reach a review of the merits of the disposition of the property by Judge Martin because the jurisdiction of the appellate courts on an appeal is derivative. If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 1.

[3] Appellee urges that appellant petitioned the trial court in this criminal case for possession of the forty-one rolls of cloth and thereby voluntarily submitted the matter to its jurisdiction. It is a well-established principle that jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver, or estoppel. 2 Strong, N. C. Index 2d, Courts, § 2.

For lack of jurisdiction in the trial court, its order entered in this criminal action on 24 May 1974 adjudicating title and right to possession of the forty-one rolls of cloth must be vacated and the proceeding dismissed.

Order vacated.

Proceeding dismissed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. THOMAS EARL BLOUNT

No. 743SC713

(Filed 2 January 1975)

1. **Criminal Law § 143— suspended sentence revoked — grounds for attack**

A defendant who consents to the suspension of a sentence upon specified conditions may not attack an order putting the sentence into effect except on the ground that there is no evidence to support a finding of a breach of the conditions of suspension or on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

2. **Criminal Law § 143— suspended sentence revoked — violation of probation conditions — sufficiency of evidence**

Evidence was sufficient to support the trial judge's conclusion that defendant wilfully breached the terms and conditions of his probation where it tended to show that defendant moved away from his aunt's house where he was supposed to be each night between 11:30 p.m. and 6:00 a.m. and that defendant paid no monies into court in violation of the condition of his suspension that he pay $15 per week until all costs, restitution, and counsel's fee were paid.

APPEAL by defendant from *Rousseau, Judge,* 24 June 1974 Session of Superior Court held in PITT County. Argued before the Court of Appeals 10 December 1974.

At the January 1974 Session of Court held in Pitt County, defendant pleaded guilty to a charge of non-feloniously receiving stolen goods. An active sentence of two years imposed on defendant was suspended, and defendant was placed on probation for five years. Probation was subject to the usual conditions and to certain special conditions: (1) that defendant be in the home of his aunt by 11:30 p.m. each night and remain there until 6:00 a.m.; and (2) that defendant pay $15.00 each week to the office of the Clerk of Superior Court until all costs, restitution, and counsel's fee were paid.

On 20 May 1974 Ray E. Joyner, the State Probation Officer, filed a report with the court containing allegations that defendant had violated the two special conditions set forth above.

At a subsequent hearing on 24 June 1974, Joyner testified that defendant had failed and refused to remain in the home of his aunt and furthermore had failed to pay any monies into court. Joyner stated that he had visited the home of defendant's aunt and had been told that defendant no longer lived there. Joyner also checked the court records but found no record of any payment by defendant.

Defendant Thomas Earl Blount testified that he was working on a construction job in Charlotte and Virginia and was unable to stay at his aunt's house. Furthermore, defendant stated that he had been saving his money in order to pay a lump sum into court. Defendant testified that he gave this money to his sister to make the payment for him but that she failed to do so.

The trial court made findings of fact and entered an order revoking probation and directing that defendant's active sentence be put into effect. Defendant appeals.

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

Williamson & Shoffner, by Robert L. Shoffner, Jr., for the defendant-appellant.

BROCK, Chief Judge.

Defendant's sole assignment of error challenges the sufficiency of the findings of fact made by the trial judge and relied upon for the order revoking probation.

[1] A defendant who consents to the suspension of a sentence upon specified conditions may not attack an order putting the sentence into effect "except: (1) On the ground that there is no evidence to support a finding of a breach of the conditions of suspension; or (2) on the ground that the condition which he has broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Caudle,* 276 N.C. 550, 553, 173 S.E. 2d 778; *State v. Johnson,* 23 N.C. App. 696, 209 S.E. 2d 549.

Evidence sufficient to support a finding of breach of probationary conditions is that which reasonably satisfies "the judge, in the exercise of his sound discretion, that the defendant has violated a valid condition upon which the sentence was so suspended." *State v. Seagraves,* 266 N.C. 112, 113, 145 S.E.

2d 327; *State v. Johnson, supra.* The evidence must be substantial and "of sufficient probative force to generate in the minds of reasonable men the conclusion that the defendant has in fact breached the condition in question." *State v. Millner,* 240 N.C. 602, 605, 83 S.E. 2d 546; *State v. Johnson, supra.*

[2] In our opinion there is substantial evidence in the record to support the trial judge's conclusion that defendant wilfully breached the terms and conditions of his probation. Defendant's testimony in his own behalf reveals as much. This assignment of error is overruled.

In our opinion the order entered by the trial judge revoking probation was correct and was supported by the evidence.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. EDDIE LEE BURNS

No. 7418SC851

(Filed 2 January 1975)

Assault and Battery § 14— felonious assault — sufficiency of evidence

The State's evidence was sufficient to support the verdict finding defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant shot his brother twice without justification and that defendant's brother underwent three operations and suffered permanent injury as a result of the gunshot wounds.

ON writ of *certiorari* to review a trial before *Kivett, Judge,* 5 October 1973 Session of Superior Court held in GUILFORD County. Heard in the Court of Appeals 20 November 1974.

Defendant was charged in a bill of indictment with the felony of assault with a deadly weapon with intent to kill and inflicting serious bodily injury. G.S. 14-32(a). The jury found him guilty of the felony of assault with a deadly weapon and inflicting serious injury. G.S. 14-32(b).

Attorney General Carson, by Assistant Attorney General Hamlin, for the State.

Public Defender Harrelson, for the defendant.

BROCK, Chief Judge.

Defendant and his brother, the victim of the assault, went to their aunt's home for a visit. Defendant carried a bottle of whiskey. Defendant, his brother, their aunt, and a roomer in their aunt's home gathered in the living room. The four of them sat and talked while they had a few drinks. Defendant's aunt upset defendant's bottle of whiskey, and defendant became agitated. He drew a pistol from his pocket. His brother asked him to put it away. He shot his brother in the abdomen. As defendant's brother ran out the front door, defendant shot him in the back.

Defendant's brother was hospitalized, underwent three operations, and suffered permanent injury as a result of being shot by defendant.

Defendant's brother (the victim), defendant's aunt, and the roomer in the aunt's home each testified for the State. Their testimony was unequivocal upon the basic fact that defendant shot his brother twice and that he did so without justification. The State's evidence was clearly ample to support the verdict. The defendant offered no evidence.

We have reviewed defendant's several assignments of error. They are not sustained. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNY LONG EDWARDS

No. 7414SC797

(Filed 2 January 1975)

ON *certiorari* to review the order of *Clark, Judge,* 19 November 1973 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals 10 December 1974.

This is a criminal action in which the defendant was charged with seven counts of forgery and uttering in violation

of G.S. 14-119 and G.S. 14-120. Upon his plea of not guilty, the jury returned a verdict of guilty of uttering, the forgery counts having been dismissed at the close of the State's evidence. From judgment on the verdict sentencing him to be imprisoned for a term of ten years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Haskell, for the State.

Johnny L. Edwards, Affiant-Petitioner pro se, for defendant appellant.

MORRIS, Judge.

Defendant chose to represent himself at trial and on appeal. For his failure to comply with the Rules of Practice in the Court of Appeals of North Carolina, defendant's appeal is subject to dismissal. In the exercise of our discretion, however, we have decided to consider the merits of each of the defendant's assignments of error. We have carefully reviewed each of the defendant's contentions and find them to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONALD F. JACKSON

No. 7420SC793

(Filed 15 January 1975)

1. **Criminal Law § 155.5— record on appeal — time for filing**

Defendant's appeal is subject to dismissal where the record on appeal was filed more than ninety days after the date of the judgment appealed from.

2. **Criminal Law § 177— case remanded to lower court for new trial — time for placing on trial docket**

Literal compliance with the provision of G.S. 15-186 that "in criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing criminal session of court after receipt" of the certificate of the opinion of the appellate division is not necessary where extraordinary circumstances exist.

3. Constitutional Law § 30; Criminal Law § 177— new trial — 7½ month lapse between award of new trial and new trial — no denial of speedy trial

Defendant's right to a speedy trial was not abridged, though seven and one-half months elapsed between the certification date of the opinion of the Court of Appeals awarding him a new trial and the date of his retrial, where the criminal court docket was very heavy, defendant made no motion for a speedy trial until two months before his second trial, and there were a number of prisoners in jail awaiting trial, a number of jail cases were calendared, and defendant had been out on bail for nine months before his retrial.

4. Criminal Law § 15; Jury § 2— change of venue — special venire — motions properly denied

Defendant failed to show that the trial court abused its discretion in denying his motion for a change of venue pursuant to G.S. 1-84, or in the alternative for a special venire from another county pursuant to G.S. 9-12.

5. Constitutional Law § 31— confidential informant — identification not required

Defendant's motion to compel disclosure of an informant's identity was properly denied where there was evidence tending to show that defendant's attorney claimed to know already the informant's identity but made no effort to talk with him or secure his presence at trial and where the information supplied by the informant played no part in the conviction of the defendant.

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

In an armed robbery prosecution an in-court identification of defendant by his victims was based on their observation of him at the crime scene and it was not rendered inadmissible because of pre-trial photographic identification or a confrontation between defendant and one of the witnesses in a courtroom arranged for the purpose of identification.

7. Criminal Law § 62— polygraph evidence inadmissible

The trial court in an armed robbery prosecution did not err in refusing to allow the results of a polygraph examination into evidence.

8. Constitutional Law § 31; Criminal Law § 73— admission of arrest complaint and warrant — confrontation with witnesses — no hearsay

Defendant's assignment of error to the admission into evidence of the arrest complaint and warrant on the ground that such evidence constituted double hearsay is overruled where the warrant was prepared from statements made by the State's witnesses who were allegedly robbed by defendant, both witnesses testified regarding the same matters at trial under oath and without objection, and both witnesses were available for cross-examination and observation at that time.

Chief Judge BROCK dissenting.

State v. Jackson

APPEAL by defendant from *Copeland, Special Judge,* 15 April 1974 Session of Superior Court held in UNION County, and from *Seay, Judge,* 6 May 1974 Session of Superior Court held in Union County. Heard in the Court of Appeals 10 December 1974.

This is a criminal action in which the defendant was charged with armed robbery in violation of G.S. 14-87. Following his plea of not guilty, the defendant was first tried before Chess, Judge, 12 March 1973 Special Criminal Session of Superior Court held in Union County. Upon the jury's verdict of guilty as charged, judgment was entered sentencing the defendant to be imprisoned for a term of not less than ten years nor more than fifteen years. Defendant appealed.

In our opinion filed 12 September 1973, bearing a certification date of 24 September 1973, we granted defendant a new trial. In defendant's second trial pretrial defense motions were heard before Copeland, Special Judge, 15 April 1974 Special Criminal Session of Superior Court held in Union County. Thereafter, defendant was tried before Seay, Judge, 6 May 1974 Criminal Session of Superior Court held in Union County. Upon defendant's plea of not guilty, the jury returned a verdict of guilty as charged. From judgment imposing a sentence of not less than ten nor more than fifteen years, defendant appealed.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Edmisten, by Assistant Attorney General Magner, for the State.

David R. Badger for defendant appellant.

MORRIS, Judge.

[1] Rule 5 of the Rules of Practice in the Court of Appeals provides that the record on appeal must be "docketed within ninety days after the date of the judgment, order, decree, or determination appealed from." In this case judgment was entered on 10 May 1974. The record on appeal was filed more than 90 days later, on 26 August 1974. No extension of time for docketing the record on appeal appears in the record. For defendant's failure to comply with Rule 5, his appeal is subject to dismissal. In our discretion, however, we have decided to treat defendant's appeal as a petition for certiorari and to grant the

petition in order that the case may be considered on its merits. *State v. Small,* 20 N.C. App. 423, 201 S.E. 2d 584 (1974).

In his first assignment of error the defendant contends that the trial court erred in denying his motion to dismiss the indictment for failure of the prosecution to accord him his constitutional right to a speedy trial. Defendant bases this contention in part on the fact that approximately seven and one-half months passed from 24 September 1973, the certification date of the opinion of this Court awarding him a new trial, until 8 May 1974, the date of his retrial. During this period eight sessions of superior court were held in Union County before the defendant's case was placed on the calendar for trial. At the 8 March 1973 hearing on the defendant's pretrial defense motions, the trial court found that the reason for this delay was the heavy criminal case load in Union County, the number of prisoners in jail awaiting trial, the number of calendared jail cases and, the fact that no motion for a speedy trial was made by the defendant until 8 March 1973, some two months before his second trial. It also was noted that the defendant had been out on bail since August 1973. On the basis of these findings, the trial court concluded as a matter of law that under the circumstances, the District Attorney had proceeded as rapidly as he could with the trial of these cases and that no prejudice had resulted to the defendant from the delay. Defendant's motion for dismissal of the indictment for want of a speedy trial therefore was denied. On appeal, defendant cites G.S. 15-186 in support of his contention that the denial of this motion was error. We disagree.

[2] G.S. 15-186, in full, provides as follows:

> *"Procedure upon receipt of certificate of appellate division.* —The clerk of superior court in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the appellate division notify the sheriff, who shall proceed to execute the sentence which was appealed from. *In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing criminal session of the court after the receipt of such certificate."* (Emphasis supplied.)

Although we have been unable to find any North Carolina cases construing the pertinent portion of this statute, we interpret its language as merely a directive to the clerk of superior court

as to steps to take when the appellate division has affirmed or failed to affirm the trial court's judgment. Where, as here, a new trial was granted on appeal, the clerk is directed to schedule a case for retrial at the first ensuing session of court following receipt of the certificate ordering a new trial. We do not interpret the statute as a compelling mandate that the case actually be tried at the first ensuing session of court. We also are of the opinion that literal compliance with the statute is not necessary where exceptional circumstances arise or good cause for delay in scheduling the case for retrial exists. We find that statutes in other jurisdictions support this view. In our research we have found several comprehensive statutes dealing with the matter of retrial following remand by an appellate court. Arizona and California, for example, require retrial within 60 days after the order granting a new trial. ARIZ. REV. STAT. ANN., Rule 8.2(d) of the Arizona Rules of Criminal Procedure (1973); CAL. PENAL CODE, § 1382, (West Supp. 1974). Florida requires retrial within 90 days after the new trial order, FLA. STAT. ANN., Rule 3.191(g) of the Florida Rules of Criminal Procedure, (West Supp. 1971), and although the speedy trial statute in Illinois does not specifically refer to retrial situations, ILL. ANN. STAT., Ch. 38, § 103-5 (Smith-Hurd 1970), case law in that state has interpreted the statute to apply to retrial situations and to require retrial within 120 days after the order granting a new trial. Where the case against a defendant is not brought to trial within the time period specified, each statute ordinarily provides for dismissal of that particular case. We find it significant, however, that even these statutes provide that "exceptional circumstances" justify an extension of the time periods set forth and that dismissal of the case against a defendant is not required where there is "good cause" for delay in his retrial.

We feel that the so-called "good cause provisions" of the cited statutes give support to our view that literal compliance with G.S. 15-186 is not necessary where extraordinary circumstances exist. We hold that where a good cause for delay in the scheduling of a case for retrial is present, the case may be rescheduled for trial at a later session of court so long as defendant's constitutional right to a speedy retrial is not denied.

Whether there is good cause for delay in the scheduling of a case for retrial and whether the defendant has been denied his constitutional right to a speedy retrial must be answered in

light of the facts in a particular case. In answering these questions the same principles applied by our courts in deciding whether a defendant has been denied his right to a speedy trial should be applied.

[3] Applying these principles to the case at bar we hold that the congestion of the criminal court docket in Union County was a good cause for delay in scheduling defendant's case for retrial under G.S. 15-186 and that defendant's motion for dismissal of the indictment was properly denied. "The congestion of criminal court dockets has consistently been recognized as a valid justification for delay" in the trial of a defendant in this State. *State v. Brown,* 282 N.C. 117, 124, 191 S.E. 2d 659 (1972). Moreover, it is well settled that "length of delay in absolute terms is never *per se* determinative" in deciding whether a defendant's constitutional right to a speedy trial has been violated. "The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed." *State v. Brown, supra,* at 123. See *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972). With respect to each of these factors we find competent evidence in the record to support the trial court's findings, and they are binding on appeal. *State v. Wingard,* 9 N.C. App. 719, 177 S.E. 2d 330 (1970), appeal dismissed 277 N.C. 459 (1970); *State v. Shore,* 20 N.C. App. 510, 201 S.E. 2d 701 (1974), no error 285 N.C. 328 (1974). Defendant's first assignment of error is overruled.

[4] Defendant next contends that the trial court erred in denying his pretrial motion for a change of venue pursuant to G.S. 1-84, or in the alternative for a special venire from another county pursuant to G.S. 9-12. Defendant maintains that newspaper articles published prior to his trial made it impossible for him to obtain a fair trial in Union County and that, therefore, his motion should have been granted. We find defendant's contention without merit. Our courts have consistently held that a motion for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court, and that absent a showing of abuse of discretion the decision of the trial court is not reviewable. *State v. Brown* and *State v. Maddox* and *State v. Phillips,* 13 N.C. App. 261, 185 S.E. 2d 471 (1971) and cases cited therein, cert. denied and appeal dis-

missed 280 N.C. 723 (1972). Here, defendant has failed to show an abuse of discretion on the part of the trial court. Furthermore, we note that all of the publicity referred to by the defendant was favorable to his case and did not prejudice him in any way. For the foregoing reasons, this assignment of error is overruled.

[5] Defendant's third assignment of error relates to the denial of his motion to compel disclosure of an informant's identity. At the 8 March 1974 hearing on pretrial defense motions, counsel for the defendant suggested that the initial information concerning the defendant's alleged participation in the robbery, and further information leading to the identification of the defendant as a participant, may have been provided in bad faith. Defense counsel further claimed on information and belief that the informant had suppressed knowledge which tended to substantiate defendant's alibi and that disclosure of the informant's identity was therefore necessary to insure a fair determination of defendant guilt or innocence. After carefully reviewing the record we conclude defendant's motion was properly denied. Evidence in the record shows that the defendant's attorney claimed to know already the informant's identity but made no effort to talk with him or secure his presence at trial. Additionally, information supplied by the informant played no part in the conviction of the defendant. The State's two major witnesses were victims of the robbery and gave the jury positive identification of the defendant as a participant in the crime.

[6] In his fourth assignment of error defendant charges that the trial court erred in denying his motion to suppress the identification testimony. First, he argues that the photographic display shown to each of the two identification witnesses for the State was too limited. The record shows that each witness was shown a group of six photographs which included two photographs of the defendant and a single photograph of each of four other men. Defendant attaches great importance to the fact the photographs were of varying sizes and that only the defendant was depicted wearing a moustache.

Next, the defendant argues that the confrontation between the defendant and one of the State's witnesses in a Wadesboro courtroom for purposes of identification was impermissibly suggestive to such a degree that it gave rise to a substantial likelihood of misidentification. After being shown the six photographs, one of the State's witnesses stated that the picture of the

defendant resembled the individual that robbed him and that he would like to view the defendant in person. The witness subsequently was taken to Wadesboro to the courtroom in which the defendant was standing trial for another offense, and the witness positively identified the defendant as a participant in the crime. On the basis of this identification, a warrant was prepared and served on the defendant. The question of the legality of these procedures is before us only for consideration if the trial court erred in finding that both of the State's witnesses had an opportunity to observe the defendant during the robbery and that neither was influenced by the photographic arrays or the confrontation procedure employed by members of the Union County Sheriff's Department and that each in-court identification was based solely upon what the witness saw at the time of the crime. As we noted in *State v. McPherson,* 7 N.C. App. 160, 171 S.E. 2d 464 (1970) and cases cited therein, aff'd, 276 N.C. 482, 172 S.E. 2d 50 (1970),

> "[s]uch finding must be based on clear and convincing evidence. *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149; *State v. Stamey,* 3 N.C. App. 200, 164 S.E. 2d 547. [But] [w]here the evidence, as here, shows that the witness had a good and sufficient opportunity to observe a defendant at the time the offense was being committed, and testifies that his in-court identification is based on his observation made at that time, the test of 'clear and convincing evidence' is met and will support findings such as were made by the court in this case. *State v. Stamey,* 6 N.C. App. 517, 170 S.E. 2d 497. See also *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. . . ."

Here, both of the State's witnesses had a "good and sufficient opportunity to observe the defendant at the time the offense was being committed" and each witness testified that his in-court identification of the defendant was "based on his observation made at that time." After carefully reviewing the record, we conclude there was competent evidence to support the trial court's findings and they are binding on appeal. Therefore, defendant's fourth assignment of error is overruled.

[7] In his eighth assignment of error defendant contends the trial court erred in refusing to allow the results of a polygraph examination into evidence. Defendant recognizes the contrary

authority of *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961), in which the Supreme Court held that testimony regarding the results of lie detector tests was inadmissible. However, defendant maintains the *Foye* case left open the door for future acceptance of such testimony when the reliability of lie detector test results was more clearly demonstrated. He argues that today the polygraph's acceptability as an instrument of evidence in the trial of criminal cases has been established, at least to the extent that it might be employed as corroborative evidence with proper limiting instructions. Although we recognize the utility of the polygraph in the field of discovery and investigation, as did the Supreme Court in *Foye,* we do not feel compelled at this time to hold that testimony concerning the results of polygraph examinations should be admissible into evidence. In this regard we think it worthy of note that the polygraph examiner, himself, testified at the trial that in his opinion the polygraph had no place in the courts and only should be used as an investigative tool. Defendant's eighth assignment of error is overruled.

[8] Defendant's eleventh assignment of error relates to the admission of State's Exhibit No. 1, the arrest complaint and warrant. Defendant contends it was error to allow the warrant to be introduced into evidence as it constituted double hearsay in derogation of his right to confrontation, improper corroboration of the State's witnesses and improper rebuttal evidence. We are aware of the case of *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972), in which the Supreme Court held "[i]t is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. See *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206." We do not approve the introduction into evidence of the complaint to obtain the warrant. In this case, however, we are of the opinion that the defendant was not prejudiced by its introduction. The statements and allegations contained in the warrant are clearly written hearsay, but the bases on which hearsay statements ordinarily are held inadmissible are not present here. The reasons generally given for excluding hearsay are "[t]he lack of an oath, the inability of the adversary party to confront the declarant, the absence of opportunity for cross-examination, for investigation of the declarant's character and motives and for observation of his

deportment, the intrinsic weakness of such evidence, and the danger of fraud and error in its reception." 1 Stansbury, N. C. Evidence, § 139, pp. 462-464 (Brandis Revision). In the case at bar the warrant was prepared from statements made by the State's witnesses who were allegedly robbed by the defendant. Both of these witnesses testified regarding the same matters at trial, under oath and without objection; moreover, both witnesses were available for cross-examination and observation at that time. As the reasons for excluding hearsay are not present, defendant's eleventh assignment of error is overruled.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judge ARNOLD concurs.

Chief Judge BROCK dissents.

Chief Judge BROCK dissenting.

The majority opinion finds no prejudicial error in permitting the State to introduce into evidence the original warrant for defendant's arrest. The "warrant for arrest" within itself probably does not contain objectionable matter. However, as introduced into evidence by the State, the "complaint for arrest" was attached to the "warrant for arrest." The complaint reads as follows:

> "The undersigned, Frank McGirt, on information & belief, being duly sworn, complains and says that at and in the County named above and on or about the 30th day of Jan., 1973, the defendant named above did unlawfully, wilfully, and feloniously steal, and carry away personal property, to wit: approx. $300.00 in money, from the person and possession Bill Squires with the use of a firearm, to wit a pistol, whereby the life of Bill Squires endangered. The taking was accomplished by the commission of an assault upon Bill Squires through putting him in fear of bodily harm by threat of violence.

"The offense charged here was committed against the peace and dignity of the State and in violation of law. G.S. 14-87."

It is presumed that this document, regularly admitted into evidence without restriction, either was exhibited to the jury or its contents made known to them. *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881. It seems that allowing the "complaint for arrest" to be placed in evidence permitted the State to strengthen its case with clearly incompetent hearsay evidence. This appears to be the exact evil referred to by our Supreme Court in *State v. Spillars, supra.*

As to the majority's disposition of all other assignments of error, I concur. However, because of what I conceive to be prejudicial error in the admission into evidence of the "complaint for arrest," I vote for a new trial.

STATE OF NORTH CAROLINA v. ROBERT MARVIN PETERSON

No. 7428SC592

(Filed 15 January 1975)

1. **Homicide § 17— second degree murder — defendant's letter to deceased's wife — relevancy to show malice**

The trial court in a second degree murder prosecution did not err in admitting into evidence a letter which defendant admitted writing to deceased's wife, since such evidence was relevant to show malice of defendant toward deceased.

2. **Criminal Law § 51— expert witness — qualification to testify as to defendant's state of consciousness**

Where a witness in a second degree murder prosecution was tendered and accepted as an expert in clinical psychology, it still remained within the sound discretion of the trial judge to determine whether he was qualified as an expert to testify whether defendant was conscious or unconscious at the time he allegedly shot deceased.

3. **Homicide § 21— second degree murder — denial of nonsuit motion proper**

The trial court did not err in denying defendant's motion for nonsuit in a second degree murder prosecution, though defendant's expert witness testified to his opinion that defendant was unconscious at the time of the shooting, where there was evidence from which the jury could find that defendant acted as though he were conscious and from this could reasonably find that in fact he was conscious.

4. **Homicide § 28— second degree murder — self-defense — failure to give instruction proper**

The trial court in a second degree murder prosecution properly instructed the jury that self-defense was not applicable in this case where the evidence tended to show that deceased struck defendant outside his home, defendant entered his home, walked some 20 feet across the living room, picked up a rifle, operated the lever required to place a shell in the chamber and to cock the rifle, turned and walked back to the door, fired the rifle once through the door, proceeded through the door into the yard where he twice again operated the lever and fired the rifle at deceased, once striking him in the back and thereby killing him; furthermore, the defense of self-defense was completely inconsistent with defendant's own testimony that he was unconscious at the time of the shooting.

5. **Homicide § 28— second degree murder — defense of unconsciousness — instruction on burden of proof**

When the trial court's charge in a second degree murder prosecution is considered as a whole, there is no reasonable possibility that the jury could have failed to understand that the State had the burden of proving beyond a reasonable doubt that defendant was conscious at the time of the fatal shooting and that defendant had no burden to show that he was unconscious.

APPEAL by defendant from *Martin (Harry C.), Judge,* 7 January 1974 Criminal Session of Superior Court held in BUNCOMBE County.

By bill of indictment in the form prescribed by G.S. 15-144, defendant was charged with the murder of John Charles Moore. He was brought to trial for murder in the second degree and pled not guilty. The State's evidence showed that at approximately 11:00 p.m. on 7 September 1973 defendant and his uncle returned to their home. As defendant started to enter the back door, Moore ran out from behind some bushes and hit him. Defendant then entered the house and procured a 30-30 Winchester, Model 94, lever action rifle. Moore remained on the outside of the house. Defendant shot once from inside the house, then kicked open the screen door and went outside the house, shooting the rifle twice after he got outside. One of the shots struck Moore just behind the shoulder on his left side, passed through his heart and lungs, and exited from the right side of his chest, causing his death.

Defendant testified that he had known Moore and Moore's wife for about three months. At about 9:00 p.m. on 7 September 1973 Moore came to defendant's home and said he had to talk with defendant but what he had to say could not be said there.

The two men left in Moore's car. After parking, Moore started drinking from a six-pack of beer which he had purchased and started talking to defendant about a $400.00 bill for long-distance phone calls charged to Moore's telephone for calls made by defendant when he lived in Michigan during the preceding summer. When defendant would not give Moore money to apply on the bill right then, Moore got mad and drew a pistol, threatening to kill defendant. A scuffle ensued, but defendant managed to calm Moore and Moore gave defendant the pistol. Moore later demanded return of the pistol, but defendant refused, and instead ran away through the woods to the French Broad River, dropping the gun in the woods as he ran. After swimming across the river and hitchhiking back into town, defendant contacted his uncle, who picked him up and drove him home. Arriving at the house, defendant was near the back door when Moore suddenly ran up, asked about the gun, and hit him. Defendant entered the house, picked up the rifle, and levered it. Defendant testified that the next thing he remembered was standing in the kitchen holding the gun while his wife and uncle were in the room staring at him. He remembered then walking into the living room and looking out the window and seeing Moore lying on the ground outside. Defendant testified that on several prior occasions he had "blacked out" after receiving a blow on the head or after having fallen.

On cross-examination defendant admitted having written a love letter to Moore's wife and testified that they had talked of divorcing their respective spouses and marrying.

Dr. Edward Huffman, who was accepted by the court as a medical expert with a specialty in psychiatry, testified that he had examined defendant for approximately ninety minutes on 3 December 1973. In response to a hypothetical question which reflected the evidence as to the events of 7 September, Dr. Huffman testified that in his opinion defendant "was completely unconscious at the time Mr. Moore was shot."

The jury found defendant guilty of murder in the second degree, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Carson by Associate Attorney Sammy R. Kirby and Assistant Attorney General Raymond W. Dew, Jr. for the State.

Peter L. Roda, Public Defender, for defendant appellant.

PARKER, Judge.

[1] The letter which defendant admitted writing to Moore's wife was clearly relevant to show malice of defendant toward Moore and was thus relevant to prove one of the essential elements of the offense with which defendant was charged. There was no error in allowing it to be introduced into evidence.

In support of his defense that he was unconscious at the time of the shooting, defendant called as a witness Dr. William C. Matthews, a clinical psychologist. In the absence of the jury, Dr. Matthews testified that he had talked with defendant twice, on 12 October and on 12 November, that he had given the defendant certain preliminary psycho-diagnostic tests, and that as a result of his examination of defendant he had the opinion that there was a "strong possibility that he [the defendant] was unconscious in that he was experiencing a dissociative reaction at the time of the shooting." After hearing this testimony presented in the absence of the jury, the trial judge expressed the view that the testimony would not be admissible and the witness was not at that time presented before the jury. Later, after the psychiatrist, Dr. Huffman, had testified before the jury, Dr. Matthews was called to the stand with the jury present and was tendered and accepted as an expert in clinical psychology. He was not asked to express any opinion based upon his examination and testing of defendant on the two occasions he had seen him, but was asked if he had an opinion satisfactory to himself as to whether defendant was completely unconscious at the time of the shooting based upon a hypothetical question which reflected the evidence as to the events of 7 September. In response to this question, Dr. Matthews replied that based on the hypothetical facts, he had the opinion that defendant "could possibly and probably be in a state of complete unconsciousness" at the time he did the shooting. The court allowed the State's attorney's motion to strike this answer and instructed the jury not to consider it. Defendant's counsel then asked:

> "Assuming the hypothetical facts which have been alleged, state whether or not you have a definite opinion as to whether or not he was completely unconscious."

The court sustained an objection to this question. Had the witness been permitted to answer, he would have answered in the affirmative and would have testified that in his opinion defendant was completely unconscious.

[2] In the court's rulings relative to the testimony of Dr. Matthews we find no reversible error. A finding by the trial judge that a witness is not qualified to testify as an expert as to a particular matter will ordinarily not be reversed on appeal, unless there is abuse of discretion or the ruling is based on an erroneous view of the law. 1 Stansbury's N. C. Evidence, § 133 (Brandis Revision, 1973). Here, although the witness was tendered and accepted as an expert in clinical psychology, it still remained within the sound discretion of the trial judge to determine whether he was qualified as an expert to testify whether defendant was conscious or unconscious at the time of the shooting. Courts which have considered the qualification of a nonmedical psychologist to testify as to mental condition or competency are not in agreement, see Annot., 78 A.L.R. 2d 919, and in the present case we find no abuse of the trial court's discretion in excluding the opinion evidence of Dr. Matthews.

[3] Defendant next assigns error to the denial of his motion for nonsuit made at the close of all of the evidence. In support of this assignment defendant contends that since the expert opinion evidence of his witness, Dr. Huffman, that defendant was unconscious at the time of the shooting was uncontradicted, and since unconsiousness is not an affirmative defense, his motion for nonsuit should have been allowed. There is no merit in this contention. It is true, of course, that a person cannot be held criminally responsible for acts committed while he is completely unconscious, *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969), but in the present case there was ample evidence, when viewed in the light most favorable to the State, from which the jury could find that defendant was conscious at the time he shot Moore. An eyewitness to the shooting, defendant's uncle, testified to defendant's actions at the time of the shooting. From this testimony the jury could find that defendant then acted as though he were conscious and from this could reasonably find that in fact he was conscious. The jury was not bound to accept the psychiatrist's opinion to the contrary.

[4] The court instructed the jury that self-defense was not applicable in this case, and in this we find no error. There was no evidence that defendant acted in self-defense at the time of the shooting. On the contrary, all of the evidence shows that after defendant was struck by the deceased outside of his home, he entered the house, walked some 18 to 20 feet across the living room, picked up the rifle from behind the sofa, operated

the lever required to place a shell in the chamber and to cock the rifle, turned and walked back to the kitchen door, fired the rifle once through the door, and then proceeded through the door out into the back yard, where he twice again operated the lever and twice fired the rifle at the deceased. There was no evidence that the deceased was armed or that after he struck defendant one time, he made any attempt to follow defendant into the house. There was no evidence that at the time the shots were fired the deceased was advanced upon or otherwise threatening the defendant. On the contrary, the physical evidence as to the path of the bullet through the deceased's body and as to the place in the yard where his body fell strongly suggests that at the time the fatal shot was fired the deceased was turned and moving away from the defendant. There was simply no evidence that in shooting the deceased the defendant acted in a reasonable apprehension of his own death or great bodily harm. Moreover, the defense of self-defense is completely inconsistent with defendant's own testimony that he was unconscious at the time of the shooting. For the court here to instruct the jury on the law of self-defense would be to "give to the defendant the benefit of a theory which is negatived by his own testimony and to credit him with reactions which he does not profess to have had, and which no evidence in the record, standing alone, is sufficient to impute to him." *State v. Absher,* 226 N.C. 656, 660, 40 S.E. 2d 26, 28 (1946).

[5] Finally, defendant contends the court committed reversible error in its charge to the jury by failing adequately to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the defendant was conscious at the time of the shooting. We do not agree. At the outset of the charge the court clearly and emphatically instructed the jury that "in this case the State has the burden of proof from the beginning to the end" and that "[t]he defendant does not have any burden at all in the case." Further in the charge the court instructed:

> "Unconsciousness is not an affirmative defense. That is, the defendant does not have to prove that. The State has the burden of proving that the defendant intentionally shot the deceased and thereby proximately caused his death.
>
> "Now if the State has satisfied you from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased Moore thereby proximately causing his death, then the law presumes that the killing was unlaw-

ful and that it was done with malice, and nothing else appearing, the defendant would be guilty of murder in the second degree. A jury finding to that effect negates and refutes any contention that the defendant was then unconscious.

"Now if the defendant was in fact completely unconscious at the time he allegedly committed the crime charged, he would not be responsible for it. Unconscious means not knowing or perceiving, not possessing mind or consciousness, not being aware of what is happening. The absence of consciousness not only precludes the existence of any mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability."

In the mandate portion of the charge the court clearly placed the burden upon the State to satisfy the jury from the evidence and beyond a reasonable doubt that defendant intentionally and with malice shot Moore, thereby causing his death. Considering the charge as a whole, there is no reasonable possibility that the jury could have failed to understand that the State had the burden of proving beyond a reasonable doubt that defendant was conscious at the time of the fatal shooting and that defendant had no burden to show that he was unconscious.

In defendant's trial and in the judgment imposed we find

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES AUSTIN PEARSON

No. 7425SC832

(Filed 15 January 1975)

1. Criminal Law § 88— cross-examination — assumption of fact not in evidence

Even if the solicitor assumed a fact not in evidence in asking a witness on cross-examination to "point out where you say the defendant was when he fired the second shot," defendant was not entitled to a new trial by reason thereof.

2. **Criminal Law § 68— hair comparison — expert testimony**

In a homicide prosecution, the trial court properly allowed an expert witness for the State to testify that, as a result of a microscopic comparison, hair found on the murder weapon was sufficiently similar to hair removed from the victim to conclude that they could have had a common origin.

3. **Criminal Law § 89— bias of witness who hasn't testified**

The trial court properly excluded evidence showing bias on the part of a witness who had not yet testified.

4. **Criminal Law § 77— exculpatory statements — inadmissibility as part of res gestae**

In this homicide prosecution, an exculpatory statement made by defendant to an officer at the police station some time after the crime was not admissible as part of the *res gestae* and was properly excluded by the trial court.

5. **Criminal Law § 95— testimony competent for corroboration — instruction — no restriction on other testimony**

Trial court's instruction that the jury could "consider this evidence solely for the purpose of corroborating" defendant's wife clearly restricted only testimony concerning statements made by defendant's wife and did not restrict the remaining testimony of the witness which was independently admissible.

6. **Homicide § 28— instructions — failure to review testimony — absence of request**

Failure of the trial court in a homicide case to include in the charge defendant's testimony that he feared for his life was not error where defendant failed to call such failure to the attention of the court in time for correction.

7. **Homicide § 27— manslaughter instruction shown by record — jury not misled**

While the appellate court is bound by the record which shows that the court charged the jury that "In voluntary manslaughter as it applies to this case is the unintentional killing of a human being by an act done in a criminally negligent way," the jury could not have been misled by such a charge where the court went into a detailed definition of involuntary manslaughter and charged the jury in the final mandate as to what they must find in order to return a verdict of either voluntary or involuntary manslaughter.

8. **Homicide § 27— instructions on manslaughter — error cured by manslaughter verdict**

Where the jury in a homicide case returned a verdict of guilty of manslaughter, defendant was not prejudiced by the court's failure to instruct the jury to consider the actions of all three of defendant's assailants rather than only the actions of the deceased assailant in determining whether there was adequate provocation to reduce the crime to manslaughter.

9. **Homicide § 28— self-defense — actions of all three of defendant's assailants — instructions**

The trial court in a homicide case sufficiently instructed the jury to consider the acts of all three of defendant's assailants rather than only the actions of the deceased assailant in determining whether defendant acted in self-defense.

10. **Homicide § 28— instructions on self-defense — belief in necessity "to shoot" deceased**

The trial court in a homicide case did not err in its charge on self-defense in referring to defendant's belief that it was necessary "to shoot" the deceased.

11. **Homicide § 28— self-defense — use of deadly force — erroneous instruction cured by subsequent instruction**

While the trial court's charge that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault by someone who does not have a deadly weapon unduly restricted defendant's plea of self-defense, such error was cured by the court's subsequent instruction detailing what defendant must show to excuse his act on the ground of self-defense.

12. **Criminal Law § 101— use of notes by jurors**

The trial court in a homicide case did not err in refusing to prohibit the jurors from using notes in their deliberation which were written by them during the trial.

APPEAL by defendant from *Winner, Judge,* 1 April 1974 Session of Superior Court held in CALDWELL County. Heard in the Court of Appeals on 21 November 1974.

Defendant was tried upon a bill of indictment charging him with the murder of William Granthu Morgan.

The State's evidence tended to show the following occurrences leading to Morgan's death. On the evening of 28 September 1973, Morgan, Charles Miller, Leo King, and their wives attended a dance at the Cedar Rock Country Club. Shortly after midnight they left the Club to return home. The wives left first in a separate car. Moments later the men drove away from the Club, but they encountered another car parked in the exit. The driver of this other car was defendant. Defendant and his wife had also attended the dance. Approaching the exit, Miller and King saw defendant trying to force a woman into his car. Defendant yelled at the Morgan car, telling them to put out their headlights. Defendant then approached the driver of the car, Morgan, and Morgan asked him what was going on. After answering that it was none of his business, defendant reached through the open car window and struck at Morgan.

An ensuing struggle occurred outside the Morgan car, with Morgan and Miller attempting to subdue defendant. Defendant told Miller and Morgan that the woman was his wife. Hearing this, Miller and Morgan returned to their car. But before they could leave, defendant returned to the Morgan car with a gun. Miller and Morgan got out of their car begging defendant not to shoot. Defendant shot Morgan and immediately thereafter drove to the sheriffs office.

Defendant's evidence tended to show that his wife had gotten out of the car for the purpose of returning to the dance. Defendant was trying to put her back into the car when suddenly he was jumped by several men. The men were severely beating defendant even though he told them that the woman was his wife and that it was a family affair. During the course of the fight, defendant managed to get back into his car and grab a pistol which belonged to his sister. He got out of his car and fired a warning shot into the air. However, the fight continued, and he used the pistol as a club to flail Miller and Morgan. Morgan was struck on the head, the gun fired a second time, and Morgan fell to the ground. Donald Watson was running his hunting dogs that night and observed the fight from a distance of around seventy-five feet. He related a description of the fight that was substantially similar to defendant's.

From a jury verdict of voluntary manslaughter and a prison sentence of not less than sixteen nor more than twenty years, defendant appealed.

Attorney General Carson, by Associate Attorney Archie W. Anders, for the State.

Bailey, Brackett & Brackett, by Allen A. Bailey, for defendant appellant.

MARTIN, Judge.

[1] The following question was asked on cross-examination over defendant's objection:

> "Q. If you will point out where you say the defendant was when he fired the second shot."

Essentially, defendant argues the prosecutor improperly attributed testimony to the witness, Donald Watson, because Watson never stated that defendant "fired the second shot."

Watson did testify that defendant was swinging the gun and "[w]hen he came around with the gun I don't know whether he hit him or not, but the gun went off again and I saw the man fall." On cross-examination a question should not assume facts not in evidence; even so, we fail to see how this lone question from the prosecutor entitles defendant to a new trial where it was made for the purpose of requesting the witness to illustrate his testimony by reference to a drawing of the scene.

[2] Next, defendant contends the trial court erred in allowing an expert witness for the State to testify that, as a result of microscopic comparison, hair found on the murder weapon was sufficiently similar to hair removed from the victim to conclude that they could have had a common origin. The witness also stated that such a comparison did not provide a basis for absolute personal identification. Defendant argues this evidence lacked any probative value in showing the source of the hair. In *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971), the Court rejected a similar argument that such evidence was too speculative. This assignment of error is overruled.

[3] The trial court's exclusion of testimony from defendant's witness, Donald Watson, which would have shown animosity between Watson's sister and defendant forms the basis of defendant's next assignment of error. Watson's sister was a witness for the State, but she had not yet testified. The trial court properly excluded this evidence showing bias on the part of a witness who had not yet testified.

[4] Defendant also argues it was error for the trial court to exclude testimony of a deputy sheriff regarding a conversation he had with defendant at the police station after the fight. " 'What a party says exculpatory of himself after the offense was committed, and not part of the *res gestae,* is not evidence for him. Otherwise he might make evidence for himself.' *State v. Stubbs,* 108 N.C. 774, 13 S.E. 90." *State v. Mitchell,* 15 N.C. App. 431, 190 S.E. 2d 430 (1972). Defendant argues his declaration at the police station was admissible as part of the *res gestae.* "For a declaration to be competent as part of the *res gestae,* at least three qualifying conditions must occur: (a) The declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication; . . . (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable there-

from; . . . ; and (c) must have some relevancy to the fact sought to be proved." *Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757 (1944). The record does not disclose circumstances which would indicate that defendant's declaration, made at the police station some time after the criminal act, is of such spontaneous nature as to be trustworthy. The trial court correctly excluded the testimony. In addition, 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. Turner,* 21 N.C. App. 608, 205 S.E. 2d 628 (1974).

[5] Sherry Pearson Huffstetler, defendant's sister, was a passenger in defendant's car and testified on defendant's behalf. She began to testify about statements made by defendant's wife when the prosecutor objected. The trial court then stated, "Members of the jury, you may consider this evidence solely for the purpose of corroborating the testimony of the last witness (defendant's wife) if you find that it corroborates her testimony and for no other purpose." (Parenthesis added.) Defendant argues the failure of the trial court to lift its restriction erroneously restricted the remaining testimony of the witness which was independently admissible. It is apparent that the trial court restricted only that testimony concerning statements made by defendant's wife. Furthermore, counsel for defendant should have brought the matter to the attention of the trial court if he construed the court's ruling to be otherwise.

Defendant takes exception to the trial court's charge in seven respects.

[6] First, defendant contends the trial court should have included in its charge defendant's testimony that he feared for his life. "The general rule is that objections to the charge in stating contentions of the parties or in recapitulating the evidence must be called to the court's attention in apt time to afford opportunity for correction." *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). In the present case the trial court cautioned the jury to consider all the evidence whether it was included in the charge or not. We perceive no error in the charge in this respect.

[7] Secondly, defendant assigns as error the following portion of the court's charge:

> "Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and

deliberation. In voluntary manslaughter as it applies to this case is the unintentional killing of a human being by an act done in a criminally negligent way."

Defendant contends that the trial court sufficiently confused the jury regarding the difference between voluntary and involuntary manslaughter to justify a new trial. We disagree. The second sentence in the foregoing quote does not make good grammatical sense as it appears in the record. We do not know who is initially responsible for its presence, but we are bound by the record which the solicitor agreed to as the "Case on Appeal." Even so, the trial court went into a detailed definition of involuntary manslaughter, and in its final mandate the court instructed the jury as to what they must find in order to return a verdict of voluntary manslaughter and what they must find to return a verdict of involuntary manslaughter. We are convinced that the jury was not misled in this regard.

[8, 9] Thirdly, defendant argues the jury should have been instructed to consider the actions of all three assailants in determining whether there was adequate provocation to reduce the crime to manslaughter or to excuse it altogether on the ground of self-defense. The trial court instructed the jury that in order to reduce the crime to manslaughter the defendant must show that he shot W. G. Morgan in the heat of passion and that this passion was produced by the acts of W. G. Morgan which the law regards as adequate provocation. Since the verdict of the jury reduced the crime to manslaughter, we fail to see how defendant was prejudiced in this regard. Defendant also contends the charge precluded his plea of self-defense, because the jury was not instructed to consider the acts of all three assailants in determining whether defendant reasonably believed he was in danger of death or great bodily harm. We disagree. The trial court referred to the number of attackers, their size, the fierceness of the attack, and the circumstances as they appeared to defendant at that time. Furthermore, after some deliberation, the jury returned for additional instructions, and the trial court specifically instructed them to consider the number of assailants in determining the reasonableness of defendant's belief that it was necessary to shoot W. G. Morgan. We do not perceive that the jury had been misled in this respect.

[10] Fifthly, defendant questions portions of the charge on self-defense where the trial court referred to defendant's belief that it was necessary "to shoot" the deceased. Defendant ob-

jects to this characterization of his act because there was evidence tending to show that the gun accidentally discharged. We find no error in this respect. The jury was instructed that if Morgan died by accident then defendant would not be guilty if there was no criminal neglect on defendant's part. On the other hand, if Morgan did not die by accident then there is nothing objectionable in stating the right to self-defense in terms of defendant's belief that it was necessary "to shoot" Morgan. An intentional act cannot also be accidental. *State v. Phillips,* 264 N.C. 508, 512, 142 S.E. 2d 337, 339 (1965).

Sixthly, defendant argues that the trial court erred by failing to define "criminal negligence." The record discloses a full and accurate definition in the charge. Defendant's argument is without merit.

[11] Lastly, defendant argues the following instruction amounts to reversible error.

> "Now, members of the jury, under the law of this State a person may not normally avail himself of self-defense when he has used deadly force to quell an assault or attack by someone who does not have a deadly weapon."

The trial court repeated this instruction on three occasions. Immediately after such instructions, the court charged substantially as follows:

> "However, if you are satisfied that because of the number of attackers or their size or the fierceness of the attack or all three of those things put together the defendant believed from the circumstances that he was in danger of death or suffering great bodily harm and that the belief was reasonable under the circumstances as they appeared to him at that time and that the force was not excessive and that defendant was not the aggressor, then the defendant would have satisfied you of self-defense."

Defendant argues the above instructions conflict and the first one erroneously restricts his right to assert self-defense under the authority of *State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756 (1960). *State v. Francis* is relevant. However, *State v. Wooten,* 192 N.C. 35, 133 S.E. 161 (1926), presents an almost identical issue. The trial court's charge that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault, standing alone, unduly restricts defendant's plea of self-

defense. However, as in *State v. Wooten,* any error committed was completely removed by the subsequent instruction detailing what defendant must show to excuse his act on the ground of self-defense.

[12] Defendant, in his fifth assignment of error, argues the trial court erred by refusing to prohibit the jurors from using notes in their deliberation which were written by them during trial. "Most authorities in this Nation take the view that the making and use of trial notes by the jury is not misconduct but is proper, and may even be desirable, where it is unattended by undue consumption of time. [Citations.]" *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477 (1968). The present case was a rather long and serious one, and we find no error in the trial court's action.

We have carefully reviewed defendant's remaining two assignments of error and find them to be without merit.

No error.

Judges BRITT and HEDRICK concur.

VINCENT S. MEYER, ANNE K. MEYER AND ELIZABETH S. MEYER v. McCARLEY AND COMPANY, INC., BLEECKER MORSE, AND WHEAT, FIRST SECURITIES, INC.

No. 7414SC838

(Filed 15 January 1975)

Brokers and Factors § 4— failure of broker to follow instructions — issues of fact — summary judgment improper

In an action to recover for a loss of money allegedly resulting from the purchase and attempted sale of six hundred shares of corporate stock, the trial court erred in granting summary judgment for all defendants where there were issues of fact as to whether defendant Wheat's negligence, if any, in failing to follow the male plaintiff's instructions with respect to liquidation of his account and depositing funds resulting therefrom was a proximate cause of plaintiffs' loss in a subsequent transaction involving the purchase and sale of stock which was handled by defendant McCarley, whether defendant Wheat had reason to know that failure to follow plaintiff's instructions would result in some injury to plaintiff, and whether a "sell order" given by the male plaintiff to defendant Morse, who was an employee of defendant McCarley, referred only to the male plaintiff's stock and not that of the female plaintiffs.

Judge HEDRICK concurring in part and dissenting in part.

Meyer v. McCarley and Co.

APPEAL by plaintiffs from *Brewer, Judge,* 10 June 1974 Civil Session of Superior Court held in DURHAM County. Heard in the Court of Appeals on 21 November 1974.

Plaintiffs brought this action to recover for a loss of $12,400 allegedly resulting from the purchase and attempted sale of six hundred shares of corporate stock. All defendants moved for summary judgment. Copious depositions taken upon oral examination and two affidavits were submitted for consideration. The trial judge, being of the opinion that there was no genuine issue of any material fact, entered judgment in favor of defendant Wheat, First Securities, Inc. and against all plaintiffs. Also, summary judgment was entered on the same ground in favor of defendants McCarley and Company, Inc. and Bleecker Morse and against plaintiffs Anne K. Meyer and Elizabeth S. Meyer. Motion for summary judgment by defendants McCarley and Company, Inc. and Bleecker Morse against plaintiff Vincent Meyer was denied. Plaintiffs appealed.

Powe, Porter, Alphin & Whichard, by James G. Billings for plaintiff appellants.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by E. C. Bryson, Jr., for defendant appellee, Wheat, First Securities, Inc.

Haywood, Denny & Miller, by John C. Martin, for defendant appellees, McCarley and Company, Inc. and Bleecker Morse.

MARTIN, Judge.

The sole question presented on appeal is whether the trial court erred in granting defendants' motions for summary judgment. When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid,* 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

The materials considered on defendants' motions for summary judgment show the following when viewed in a light most favorable to the plaintiffs. Plaintiff Vincent Meyer is a stock speculator. He trades in his own name and in the name of his two daughters, plaintiffs Anne K. Meyer and Elizabeth S. Meyer, under third-party trading agreements. In September 1972 Vincent Meyer moved to Saluda, North Carolina. Prior to that time he lived in Richmond, Virginia where he had a securities account

with the brokerage firm of Wheat, First Securities, Inc. (Wheat). At Wheat he maintained three separate accounts for himself and his two daughters. Shortly after moving to North Carolina, he went to the office of McCarley and Company, Inc. in Hendersonville, North Carolina and spoke to defendant Morse, a broker employed by defendant McCarley and Company, Inc., about opening an account. On 6 September 1972, Mr. Meyer placed an order with Morse for the purchase of 600 shares of Levitz Furniture Co. stock, 200 shares for himself and 200 shares for each of his two daughters. His daughters paid for their shares with checks which were subsequently honored by the drawee banks. In order to pay for Mr. Meyer's 200 shares it was necessary to liquidate his account at Wheat which consisted of shares of Toyo Kogyo stock and cash. The Toyo Kogyo stock was transferred to McCarley and Company, Inc. where it was sold in partial payment for Meyer's 200 shares of Levitz stock. Mr. Meyer then paid the balance due on his Levitz stock with a check drawn on the Second National Bank in Richmond, Virginia. While the check was dated 7 September 1972, it was understood that McCarley and Company, Inc. would hold the check until 13 September in order to allow time for the cash in Mr. Meyer's account at Wheat to be placed in the Second National Bank in Richmond. On 7 September 1972 Mr. Meyer telephoned Mrs. Corby, a bookkeeper at Wheat, told her to deposit the cash balance of his Wheat account in his Richmond bank account, and gave her the account number. Mr. Meyer then left for California. According to Mrs. Corby, a clerical error caused only part of the cash balance to be deposited in the Richmond bank while the other part was sent to Meyers home in Saluda. As agreed, McCarley and Company, Inc. deposited Mr. Meyer's check on 13 September, and on 25 September the check was returned for insufficient funds. Meyer was notified and returned from California, arriving home 27 September. The money that had been sent to his home was then mailed special delivery to his bank in Richmond. McCarley and Company redeposited his check, and it cleared 2 October. In the meantime, on 28 September, Mr. Meyer told defendant Morse that he wanted "to get out of" the Levitz stock between "46" and "47." Morse replied that the stock had not been paid for. The 600 shares of Levitz stock were finally sold for around $26.50 per share on 10 October 1972. Plaintiffs allege that if the stock had been sold on 28 September, in accordance with their "sell order," it would have brought $47.00 per share.

APPEAL BY PLAINTIFF FROM SUMMARY JUDGMENT FOR DEFENDANT WHEAT, FIRST SECURITIES, INC.

Plaintiffs contend that the failure of Wheat's employees to deposit all of Vincent Meyer's cash in his Richmond bank, as instructed, renders Wheat liable to each plaintiff for their subsequent losses on the shares of Levitz stock. Primarily, defendant Wheat argues it was entitled to summary judgment as a matter of law for two reasons: First, its negligence, if any, was not a proximate cause of plaintiffs' loss; and second, its negligence, if any, was insulated by the subsequent negligence of its co-defendants McCarley and Company, Inc. and Morse.

The thrust of defendant Wheat's first argument is directed at the injury sustained by Elizabeth and Anne Meyer, Mr. Meyer's daughters. Clearly, it cannot be said that Wheat had no duty to exercise care in the performance of Mr. Meyer's instructions. Also, by reason of third-party trading agreements, Mr. Meyer was authorized to act in behalf of his daughters. "It is the duty of a broker to act in conformity with his authority and instructions in good faith and with reasonable care, skill, and diligence, and if he violates these duties he is responsible therefor to his principal." 12 C.J.S., Brokers, § 23, p. 66.

Citing *Phelps v. Winston-Salem,* 272 N.C. 24, 157 S.E. 2d 719 (1967), defendant Wheat argues that the causal connection between their negligence and plaintiffs' injury was too remote. Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Williams v. Boulerice,* 268 N.C. 62, 149 S.E. 2d 590 (1966). Furthermore, "[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292." *Slaughter v. Slaughter,* 264 N.C. 732, 142 S.E. 2d 683 (1965). "What is the proximate cause of an injury is ordinarily a question for the jury. Rarely is the court justified in deciding this question as a matter of law. [Citation.] In the language of *Justice Barnhill* in *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740, 'It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury

or not. But this is rarely the case.' Likewise, as stated by *Justice Seawell* in *Montgomery v. Blades,* 218 N.C. 680, 12 S.E. 2d 217, 'Usually the question of foreseeability is one for the jury.' " *McIntyre v. Elevator Co.,* 230 N.C. 539, 54 S.E. 2d 45 (1949). Keeping in mind the present pretrial status of the case at bar, we find that the following rule is also pertinent to our decision:

> "Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law." *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972).

According to Mr. Meyer's deposition, he telephoned Mrs. Corby about obtaining the cash in his account in order to pay for some shares of stock. She was told that the shares of stock had to be paid for by 13 September. The next day they discussed the accounts of his daughters, over which he had authority, and Mrs. Corby was instructed to deposit Anne Meyer's cash, as well as Mr. Meyer's, in certain Richmond bank accounts. However, there exist unanswered questions regarding the "facts as they existed." For instance, was Mrs. Corby unaware that Mr. Meyer was still trading for his two daughters? Were there no indications that such was the case? It remains unclear to what extent defendant Wheat and its employee, Mrs. Corby, knew or had reason to know that their failure to follow Mr. Meyer's instructions in depositing his money in the Richmond bank would result in some injury to Mr. Meyer and his daughters. In her deposition, Mrs. Corby merely stated that she could not recollect whether Mr. Meyer told her why he needed money deposited in his Richmond bank account. Summary judgment should be granted only when the movant is clearly entitled thereto. *Houck v. Overcash,* 282 N.C. 623, 193 S.E. 2d 905 (1973). It has not been shown that defendant Wheat was clearly entitled to summary judgment as a matter of law. Furthermore, we fail to discern how Wheat's negligence, if any, could be insulated by the subsequent negligence of its codefendants where the latter's negligence appears to be an issue for the jury, yet it has not been submitted to one.

"If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary disposition of issues of fact fairly presented in an action." 6 Moore's Federal Practice, § 56.15 [1.-2], at 2316. The

practice of determining issues of proximate cause on motion for summary judgment has not been recommended. *See* 51 N.C. L. Rev. 1196, 1202 (1973) and 9 Wake Forest L. Rev. 523, 540 (1973).

For the reasons stated, summary judgment in favor of defendant Wheat and against all plaintiffs is reversed.

APPEAL BY PLAINTIFFS ANNE K. MEYER AND ELIZABETH S. MEYER FROM SUMMARY JUDGMENT FOR DEFENDANTS MCCARLEY AND COMPANY, INC. AND BLEECKER MORSE

Defendants McCarley and Company, Inc. and Morse take the position that summary judgment was properly entered in their favor against plaintiffs Anne K. Meyer and Elizabeth S. Meyer because the so-called "sell order" given by Vincent Meyer to Morse on 28 September 1972 referred only to Mr. Meyer's 200 shares of stock. Morse disobeyed the "sell order" because Mr. Meyer's check was not honored due to insufficient funds. Viewing the depositions and affidavits in a light most favorable to the nonmovant plaintiffs, there clearly appears to be a dispute over the facts in this respect. Since defendants McCarley and Company, Inc. and Morse failed to show that there was no genuine issue of material fact, it was error to grant summary judgment in their favor.

The result is:

On the appeal by Vincent S. Meyer, Anne K. Meyer and Elizabeth S. Meyer from summary judgment for defendant Wheat, First Securities, Inc., the judgment is

Reversed.

On the appeal by plaintiffs Anne K. Meyer and Elizabeth S. Meyer from summary judgment for defendants McCarley and Company, Inc. and Bleecker Morse, the judgment is

Reversed.

Judge BRITT concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK concurring in part; dissenting in part.

I concur in that part of the majority opinion which reverses the summary judgment for defendant, Wheat, First Securites, Inc., as against the plaintiff Vincent S. Meyer, and that part of the majority opinion which reverses the summary judgment for defendants McCarley and Company and Bleecker Morse, as against the plaintiffs Anne K. Meyer and Elizabeth S. Meyer. However, I dissent from that part of the majority opinion which reverses summary judgment for the defendant Wheat, First Securities, Inc., as against the femme plaintiffs, Anne K. Meyer and Elizabeth S. Meyer. While I agree with the majority that the record shows a triable issue as to the negligence of the defendant Wheat, First Securities, Inc., in my opinion the record discloses no causal connection whatsoever between any negligence of defendant Wheat, First Securities, Inc., and any damages sustained by the femme plaintiffs Anne K. Meyer and Elizabeth S. Meyer. In my opinion, summary judgment for defendant Wheat, First Securities, Inc., as to the claims of the femme plaintiffs was appropriate.

JACK P. TILLEY v. MARY GOOD TILLEY AND EVA CROAFF GOOD

No. 7417SC858

(Filed 15 January 1975)

1. **Tenants in Common § 6— default on deed of trust — purchase by tenant in common — other tenant's interest not affected**

Where plaintiff and defendant owned the property in question as tenants in common, defendant in consideration of the right to exclusive possession of the property obligated herself to the plaintiff to make the payments on their joint obligation to a savings and loan association, defendant failed to make the payments, the deed of trust securing the indebtedness was foreclosed and defendant became the last and highest bidder at the foreclosure sale, defendant assigned her bid to her mother who purchased the property, obtained another loan secured by a new deed of trust, paid off the original indebtedness and reconveyed the property to defendant, the defendant's indirect purchase of the property inured to the benefit of her cotenant, and plaintiff is entitled to a one-half undivided interest in the property.

2. **Tenants in Common § 6— default on deed of trust — purchase by tenants in common — claim of other tenant on property — defense available to tenant defaulting**

Where defendant agreed to make payments on a loan secured by a deed of trust on property which the parties owned as tenants in common as consideration for her possession of the property, allegations by

defendant in her answer and the evidence offered in support thereof that she was financially unable to make the payments on the deed of trust because the plaintiff breached his contract to make payments for the support and maintenance of the children of the marriage did not constitute a defense to plaintiff's claim to be declared an owner of the property as a tenant in common after defendant purchased the property at a foreclosure sale.

APPEAL by defendant from *Rousseau, Judge,* 3 June 1974 Session of Superior Court held in SURRY County. Heard in the Court of Appeals on 20 November 1974.

In this civil action plaintiff, Jack P. Tilley, divorced husband of the defendant, Mary Good Tilley, prays (1) that the court adjudicate him the owner of a one-half undivided interest in certain real property subject to a deed of trust to Workmen's Federal Savings and Loan Association, Mt. Airy, N. C., (2) that he recover from the defendant $3,000.00 for breach of contract, and (3) that the court decree that the defendant has forfeited her right under a deed of separation to possession of the real property.

The following facts are established by the pleadings filed in this cause: Plaintiff and defendant were married on 28 December 1951. In October of 1968 they entered into a deed of separation which in pertinent part provides:

"1. The parties hereto acknowledge that they are the owners of a tract or parcel of land containing approximately ten acres in Mount Airy Township. The parties further acknowledge that their dwelling is located on the above-mentioned tract of land and all household and kitchen furniture accumulated during the marriage is located in said dwelling and that the aforesaid real property is subject to a deed of trust in favor of United Savings and Loan Association, Mount Airy, North Carolina.

The husband gives to the wife the right to possession of their dwelling, together with all household and kitchen furniture located therein, but only for use as a residence of the wife and children of the parties. The possession of the dwelling herein granted to the wife shall terminate at such time as the dwelling shall cease to be used as a residence for both the wife and one or more children or at such earlier time as the wife may become married to another.

The wife agrees that she will properly maintain the dwelling and will make the monthly payments to United

Savings and Loan Association, and will keep the loan current so long as she is entitled to possession of the above-described property and subject to such further agreements as may be reached by the parties relating to the possession or sale of the property. A violation of this paragraph shall cause wife to forfeit her right to possession under the terms of this agreement."

Under the deed of separation, defendant also received custody of the four minor children and plaintiff contracted to pay $200 per month to the defendant for their support. Subject to the defendant's right of possession, plaintiff and defendant retained title to the real property in their joint names.

Plaintiff and defendant obtained an absolute divorce on 1 December 1969. On 29 November 1972, upon default by the defendant in the payments under the note and deed of trust, the trustee sold the property at public auction. Defendant was the highest bidder at the foreclosure sale. She then assigned her bid to her mother, Eva Croaff Good. Mrs. Good obtained a new loan secured by a deed of trust on the property in favor of Workmen's Federal Savings and Loan Association, paid off the original deed of trust to United Savings and Loan Association, and reconveyed the property to the defendant subject to the new deed of trust.

In his complaint, plaintiff alleged that the defendant intentionally and fraudulently breached her contract to make the payments on the note secured by the deed of trust with the specific intent to defraud him of his one-half undivided interest in the property.

Defendant filed answer, making the judicial admissions enumerated above, but denied that she intentionally or fraudulently breached the contract with the plaintiff with the intent to defraud the plaintiff of his one-half undivided interest in the property. She alleged that her failure to make the payments as provided by the contract was occasioned by the plaintiff's breach of his contract to make certain payments for the support and maintenance of the children.

At trial, plaintiff introduced into evidence various paragraphs of the complaint and answer establishing the judicial admissions enumerated above and the various written documents, instruments, and records reflecting these admissions. The plaintiff also testified as to the value of the property.

The defendant offered evidence tending to show that she was financially unable to make the payments because the plaintiff had not made certain payments for the support and maintenance of the children as provided in the deed of separation.

At the close of all the evidence, the trial court allowed defendant Eva Croaff Good's motion for a directed verdict.

The following issue was submitted to and answered by the jury in favor of the plaintiff:

> "Did the defendant breach her contract with the plaintiff by failing to keep the payments current on the note and deed of trust so as to prevent foreclosure?"

From a judgment declaring plaintiff the owner of a one-half undivided interest in the property as a tenant in common with the defendant, declaring that the defendant had forfeited her right to possession of the property as granted by the deed of separation, and declaring that both plaintiff and defendant were entitled to possession of the property as tenants in common, defendant appealed.

William G. Reid for plaintiff appellee.

Gardner, Gardner and Bell by John W. Gardner for defendant appellant.

HEDRICK, Judge.

The defendant's several assignments of error raise two questions: (1) Does the record support the judgment; and (2) Did the trial court err in not considering as a defense to plaintiff's claim defendant's allegation and evidence offered in support thereof that she did not intentionally or fraudulently default in the payments on the note secured by the deed of trust on the property with the specific intent to defraud the plaintiff of his interest in the property, but that she was financially unable to make the payments because the plaintiff breached the contract to make certain payments for the support and maintenance of the children?

"In accordance with the general principle that adversary title acquired by a cotenant inures to the benefit of his cotenants, the rule in most states is that where property owned in common is sold at a judicial sale or pursuant to a power contained in a deed of trust for the purpose of satisfying an obligation which

rests alike upon all of the coproprietors, none of them can purchase the estate for his own sole benefit. If one of them buys it, he does so subject to the right of the others to contribute to the purchase price and participate in the benefits. Under this view, where one cotenant of an encumbered estate bids it in at a judicial sale (or a sale under a power) for the satisfaction of a common obligation, the purchase inures to the benefit of all the cotenants, provided they stand on their rights and seasonably contribute their respective proportions of the amount paid." 20 Am. Jur. 2d, Cotenancy and Joint Ownership, § 71, p. 169 (footnotes omitted).

This general rule has been applied in North Carolina in *Hatcher v. Allen,* 220 N.C. 407, 17 S.E. 2d 454 (1941), where it is stated:

> "If a cotenant purchases, either directly or indirectly, at a foreclosure sale under a mortgage or deed of trust binding on all the cotenants his purchase inures to the benefit of his cotenants and he will be regarded as holder for his cotenants. [citations omitted.]
>
> Where a tenant in common purchases an outstanding title, it is presumed to have been done for the common benefit, and as a general rule purchase or extinguishment of an outstanding title, encumbrance or claim by one tenant in common inures to the benefit of his cotenants at their option. However, such a purchase is not void, but the purchasing tenant is ordinarily regarded as holding the title or interest acquired in trust for all of the cotenants who must elect within a reasonable time to avail themselves thereof. [citations omitted.]
>
> Where the purchase by a third person was only nominal, he merely acting as agent for one of the cotenants, a deed to him will be considered as a matter of form merely and a conveyance from him to his principal will come under the well settled rule that if one cotenant purchases an outstanding title, and claims under it the common property as against the others, if they contest it his claim will not be allowed, because it must be presumed that each, as to the common interest, acts for all. [citations omitted.] That is to say, if one cotenant purchases, either directly or indirectly, at a foreclosure sale he cannot, by his own act, thus sever the cotenancy."

[1] The record contains judicial admissions that the plaintiff and the defendant owned the property in question as tenants in common; that the defendant in consideration of the right to exclusive possession of the property obligated herself to the plaintiff to make the payments on their joint obligation to United Savings and Loan Association; that the defendant failed to make the payments and the deed of trust securing the indebtedness was foreclosed, and the defendant became the last and highest bidder at the foreclosure sale; that the defendant assigned her bid to her mother who purchased the property and, after obtaining another loan secured by a new deed of trust to Workmen's Federal Savings and Loan Association, paid off the original indebtedness and reconveyed the property to the defendant. Under these circumstances, we think the conclusion is inescapable that the defendant's indirect purchase of the property inured to the benefit of her cotenant and that the plaintiff is entitled to a one-half undivided interest in the property.

The pleadings clearly show that the plaintiff and defendant were owners as tenants by the entireties of the property in question prior to the time they entered into the deed of separation. This estate was altered, and they became owners of the property as tenants in common by operation of law upon their absolute divorce on 1 December 1969. *Koob v. Koob,* 283 N.C. 129, 195 S.E. 2d 552 (1973); *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530 (1959). Thus, it is clear that neither their ownership of the property as tenants by the entireties nor as tenants in common was dependent on the deed of separation. *Hatcher v. Allen, supra.* It follows, therefore, that a breach of the terms of the deed of separation by either the plaintiff or the defendant would have no legal significance in determining their interest in the property as owners even though the deed of separation provided that the defendant in consideration of her making the payments on the joint obligation of the parties to United Savings and Loan Association was given the exclusive right to possession of the property.

The contract further provided that the plaintiff would make certain payments to the defendant for the support and maintenance of the children. Breach of this personal contract upon the part of either the plaintiff or the defendant would render that party liable to the other in damages for such breach, but such a breach could not and would not work a forfeiture of his or her interest in the property as an owner.

[2] We conclude, therefore, that the allegations by the defendant in her answer and the evidence offered in support thereof that she was financially unable to make the payments on the deed of trust because the plaintiff breached his contract to make payments for the support and maintenance of the children does not constitute a defense to plaintiff's claim to be declared an owner of the property as a tenant in common with the defendant.

It is our opinion and we so hold that no error prejudicial to the defendant was committed in the trial of this cause and the defendant's judicial admissions coupled with the jury's verdict support the judgment entered.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES CRAIG BELL

No. 745SC823

(Filed 15 January 1975)

1. **Searches and Seizures § 4— warrant to search premises — search of vehicle on premises proper**

Where a search warrant authorizing a search of the premises of defendant was supported by an affidavit referring to a house built on pilings with a storage room underneath, such description was sufficient to authorize the search of a vehicle parked under the house.

2. **Narcotics § 4— constructive possession of marijuana — sufficiency of evidence**

Evidence was sufficient to permit an inference that defendant was in possession of a vehicle and marijuana found therein where it tended to show that officers had seen defendant driving the car on several occasions, defendant's mother-in-law who owned the car let her daughter use it from time to time, and defendant admitted having driven it on the night of his arrest when it was found parked beneath the house occupied by him and rented in his name.

3. **Narcotics § 4— marijuana from which resin not extracted — sufficiency of evidence**

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in overruling defendant's motion for nonsuit based on his contention that the State failed to show that the substance in question was marijuana from which the resin had

not been extracted where an SBI chemist testified that he performed a test to detect the presence of the active ingredient of marijuana in the plant resin, and the results of such test were positive.

4. **Narcotics § 4; Criminal Law § 50— substance as Cannabis Sativa L. —sufficiency of expert testimony**

An SBI chemist's identification of green vegetable material seized from defendant's premises as marijuana constituted a sufficient showing by the State that it was Cannabis Sativa L., a controlled substance under G.S. 90-95(f).

5. **Narcotics § 3— admission of marijuana — chain of custody established**

Trial court properly admitted marijuana into evidence in a prosecution of defendant for possession with intent to distribute where there was competent evidence to account for every link in the chain of possession from the time the marijuana was seized from defendant's premises until it was introduced at trial and where there was no evidence that employees trusted with mailing the sealed envelopes tampered with the contents.

6. **Narcotics § 4.5— date of crime — reference to witness — instructions not prejudicial**

The trial judge did not commit prejudicial error in his charge to the jury when on one occasion he made an erroneous reference to the date of the alleged crime, nor did he express an opinion by referring to a State witness as a qualified chemist.

APPEAL by defendant from *Tillery, Judge,* 1 April 1974 Session of Superior Court held in NEW HANOVER County. Heard in the Court of Appeals 11 December 1974.

Defendant was charged in an indictment with possession with intent to distribute more than five grams of marijuana in violation of Schedule VI of the North Carolina Controlled Substances Act. He pleaded not guilty and was tried before a jury.

The State's evidence centered around 207 grams of marijuana found by police officers in a search of defendant's premises. Defendant denied any knowledge of the marijuana in question.

The jury found him guilty as charged. From judgment imposing sentence of five years imprisonment, defendant appealed to this Court.

Attorney General James H. Carson, Jr., by Assistant Attorney General Keith L. Jarvis, for the State.

Goldberg and Anderson, by Frederick D. Anderson, for defendant appellant.

ARNOLD, Judge.

Defendant's principal assignment of error concerns the lawfulness of the search which resulted in the seizure of marijuana introduced in evidence at trial. Upon defendant's motion to suppress, the court held a *voir dire* hearing at which Officer Milton R. Rice of the Wrightsville Police Department testified that on 9 December 1973 he obtained a warrant authorizing a search of "the premises and James Craig Bell and Carol Bell for the property in question." The premises were described in the supporting affidavit as follows: "Wood frame house, one story, built on pilings, gray asbestos siding with white trim, storage room under building, located at 111 Parmele Blvd., Wrightsville Beach, N. C. . . . " Rice and other officers went to 111 Parmele Boulevard to serve the warrant. They knocked several times and announced their presence. Receiving no answer, they entered the house. After reading the warrant to the Bells, the officers began the search. In the living room they found a pipe and several roach clips. Under the back seat of a red Volkswagen parked beneath the house they found ten plastic bags containing vegetable matter later identified as marijuana.

[1] Defendant contends that the trial court erred in concluding that "the use in the affidavit of the word 'premises' is sufficiently broad to justify a search of the automobile found parked under 111 Parmele Boulevard and described as a red Volkswagen," and in denying defendant's motion to suppress evidence. Following the rationale of our decision in *State v. Reid,* 23 N.C. App. 194, 208 S.E. 2d 699, *affirmed,* 286 N.C. 323, ___ S.E. 2d ___, we agree with the conclusion of the trial court. In the *Reid* case we held that an automobile search authorized by a "premises" search was not improper when the underlying affidavit referred to more than the building itself. In the case at bar, the affidavit referred to a house, built on pilings, with a storage room underneath. We hold that this description was sufficient to authorize the search of a vehicle parked under the house.

Defendant further assigns as error the trial court's denial of his motions for nonsuit on the grounds: (1) that defendant himself was not shown to have possessed any marijuana; (2) that the State failed to show that the substance in question was marijuana "from which the resin had not been extracted" as required by the statute then in force, G.S. 90-95(f); and (3)

that there was no substantial evidence that this marijuana was the species Cannabis Sativa L., the statutory definition of marijuana.

When the trial court denied his motion for nonsuit at the close of the State's evidence, defendant then put on evidence and thereby waived the right to except to that ruling on appeal. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. In considering his later exception, we therefore take into account all the evidence, and, viewing it in the light most favorable to the State, inquire as to whether there is any competent evidence to support the allegations in the indictment. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Roberts,* 270 N.C. 655, 155 S.E. 2d 303. Viewing the case in this light, we are of the opinion that there was ample evidence to go to the jury and to support the verdict.

[2] In the case of *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706, 714, it is stated:

> "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession."

See also State v. Allen, 279 N.C. 406, 183 S.E. 2d 680. Four police officers testified that they had seen defendant driving a red Volkswagen on several occasions. Defendant's mother-in-law, owner of the vehicle in question, testified that she let her daughter use it from time to time. Defendant admitted having driven it on the night of his arrest, when it was found parked beneath the house occupied by him and rented in his name. Taken together, the foregoing evidence is more than sufficient to permit an inference that defendant was in possession of the vehicle and its contents.

[3] Phillip Williamson, a chemist employed by the State Bureau of Investigation, identified the substance seized and testified that his analysis revealed it to be marijuana. He likewise testified on cross-examination that the chemical test he used detects the presence of tetrahydrocannabinol (THC), the active ingredient in marijuana, in the plant resin. Since the results of

the test were positive, it follows that the substance tested was marijuana from which the resin had not been extracted.

[4] Williamson was also cross-examined on his familiarity with theories that there are at least three species of Cannabis. He testified that as far as he knew the existence of the species Cannabis Indica and Cannabis Ruderalis had not been proven and that there is only one species of marijuana, Cannabis Sativa L. Defendant did not refute this testimony. Williamson's identification of the green vegetable material as marijuana constitutes a sufficient showing by the State that it was Cannabis Sativa L., a controlled substance under G.S. 90-95(f). There was ample evidence that defendant had in his possession more than five grams of this substance. His motion for nonsuit was therefore properly overruled.

[5] Defendant also contends that the State failed to establish a clear "chain of identity" between the substance found in the red Volkswagen and the substance introduced at the trial. In *State v. Jordan,* 14 N.C. App. 453, 188 S.E. 2d 701, we held on similar facts that the State's evidence established a clear "chain of identity" where the package containing the narcotics was sealed before mailing, remained sealed upon receipt, and there was no evidence of tampering by postal employees. In the instant case there was competent testimony to account for every link in the chain of possession and no evidence that employees entrusted with mailing the sealed envelopes tampered with the contents. We hold therefore that the evidence was properly admitted.

[6] Defendant's contention that the trial court erred in its charge with respect to the date of the alleged offense is without merit. The charge will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from objection. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476; *accord, State v. Bailey,* 280 N.C. 264, 185 S.E. 2d 683. In reading the bill of indictment, in reviewing the evidence obtained from the search, and in charging as to co-defendant Carol Bell, the court correctly put the date at 9 December 1973. The one omission of the date and the one reference to "on or about the 8th day of December 1973" in the charge were corrected by the charge as a whole.

We do not agree with defendant that the trial court expressed an opinion in the charge by referring to the witness

Williamson as a "qualified chemist." In context, this statement is distinguishable from that made in *State v. Melton,* 11 N.C. App. 180, 180 S.E. 2d 476. There the trial judge, in two different portions of his charge, told the jury that he himself had found the officer testifying as to fingerprint evidence to be an expert. There were intimations by the judge in the *Melton* case that the witness should be believed. In a later case, *Speizman Co. v. Williamson,* 12 N.C. App. 297, 183 S.E. 2d 248, *cert. denied,* 279 N.C. 619, 184 S.E. 2d 113, we found no prejudicial error in the trial court's finding in the presence of the jury that a non-party witness was an expert when the finding did not deal with any issue for the jury to decide. Finally, in *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, *vacated on other grounds,* 409 U.S. 1004 (1972), the North Carolina Supreme Court held that ruling in the presence of the jury that a witness was an expert could only be understood by the jury to mean the witness was qualified to give an opinion. *See* 1 Stansbury, N. C. Evidence 2d (Brandis rev.), § 133. The portion of the charge, in the case at bar, was merely a statement of what the State's evidence tended to show, *i.e.,* that certain substances were examined by a qualified chemist. In no way did the trial court insinuate that he believed the witness or that the jury should believe the witness.

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

No error.

Judges MORRIS and MARTIN concur.

IN THE MATTER OF THE WILL OF KIRBY WILLIAM LOFTIN, DECEASED

No. 748SC824

(Filed 15 January 1975)

1. Wills § 26— appeal from caveat proceeding — necessity for jury verdict

Once a caveat to a probate in common form has been filed, a jury's verdict is indispensable upon the issue of *devisavit vel non;* therefore, upon appeal from a jury verdict in favor of propounders of a holographic codicil, the appellate court cannot direct the trial court to enter judgment holding as a matter of law that the paperwriting in question is insufficient as a holographic codicil.

2. **Wills § 10— holographic codicil — name of testator in or on codicil**

The handwritten words "K. W. Loftin Store" on a purported holographic codicil and "Will of K. W. Loftin" on the envelope in which it was found, if proved in the manner prescribed by statute, satisfy the requirement of G.S. 31-3.4(2) that the writing be subscribed by the testator or have his name written in or on the will.

3. **Wills § 10— probate of holographic will**

The statute setting forth the requirements of a holographic will, G.S. 31-18.2, requires testimony from three witnesses that (1) the will is written entirely in the handwriting of the purported testator, and (2) his name appearing in or on or subscribed to the will is in his handwriting.

4. **Evidence § 46— opinion as to handwriting — competency of witness**

A witness is not competent to express an opinion as to handwriting unless he first has been properly qualified by inquiry into the basis of his ability to form such opinion.

5. **Evidence § 46; Wills § 20— witness "well acquainted" with decedent's handwriting — competency to testify**

When a witness swears that he is "well acquainted" with a decedent's handwriting and is not asked on cross-examination how he became familiar with it, he is *prima facie* competent to testify as to such handwriting.

6. **Wills § 20— handwriting of decedent — failure to qualify witness**

A witness who did not testify that he had acquired knowledge of decedent's handwriting or that he was familiar with it was not competent to give an opinion that the handwriting on a purported codicil was decedent's.

7. **Wills § 20— bank employee — competency to testify as to signature only**

A bank employee who had testified that he had had an opportunity to observe decedent's handwriting only on checks, bonds and safety deposit entry cards was competent only to express an opinion as to the signature on a purported holographic codicil and not to identify the handwriting thereon.

8. **Wills § 20— probate of holographic codicil — failure of proof**

Propounders of a purported holographic codicil failed to meet the requirements of G.S. 31-18.2 where one of the three witnesses they presented to testify as to the handwriting and signature was not competent to testify and another of the witnesses was competent to testify only as to decedent's signature.

APPEAL by caveator from *Browning, Special Judge,* 18 March 1974 Session of Superior Court held in LENOIR County. Heard in the Court of Appeals 11 December 1974.

This *in rem* proceeding, a caveat to a holographic codicil, was instituted on 23 October 1973, by Leonard W. Loftin, a son

of decedent Kirby William Loftin and a devisee under his holographic will. The will was admitted to probate on 1 August 1972 and the codicil on 2 February 1973. The caveat alleged that the paperwriting in question is not a holographic codicil because it is not subscribed by the testator, is not dated, was not prepared subsequent to the execution of the will, and was intended only to be the beginning of a new will.

Propounder, Kirby Carlton Loftin, also a son of decedent, testified that he found the will and purported codicil folded together in an envelope labelled "Will of K. W. Loftin" in his father's safe just after his death. M. E. Creech, Clerk of Superior Court, testified that only the holographic will was offered for probate on 1 August 1972. Three employees of First Citizens Bank and Trust Company appeared as witnesses to identify the handwriting on the will and purported codicil, which were introduced into evidence. Propounders also introduced evidence tending to show that the purported codicil was executed after the will, dated 22 March 1968.

Caveator offered no evidence and the case was submitted to the jury on the issue *devisavit vel non* as to both the will and the codicil. From judgment entered upon verdict for propounders, caveator appealed to this Court.

White, Allen, Hooten & Hines, P.A., by Thomas J. White III, for caveator appellant.

Jeffress, Hodges, Morris & Rochelle, P.A., by A. H. Jeffress, and Taylor, Allen, Warren & Kerr, by Lindsey C. Warren, Jr., for propounder appellees.

ARNOLD, Judge.

[1] Caveator urges this Court either to reverse the judgment below on the ground that the paperwriting in question is insufficient as a matter of law to constitute a holographic codicil or to order a new trial for errors committed in the caveat proceeding. Our courts have uniformly held once a caveat to the probate in common form has been filed, a jury's verdict is indispensable upon the issue *devisavit vel non*. *In re Will or Morrow*, 234 N.C. 365, 67 S.E. 2d 279; *In re Will of Hine*, 228 N.C. 405, 45 S.E. 2d 526; *In re Will of Redding*, 216 N.C. 497, 5 S.E. 2d 544; *In re Will of Mucci*, 23 N.C. App. 428, 209 S.E. 2d 332. Therefore, we cannot, even if we were so inclined, direct the

trial tribunal to enter judgment holding as a matter of law that the paperwriting in question is insufficient as a holographic codicil.

[2] Moreover, we hold that the handwritten words "K. W. Loftin Store" on the purported codicil and "Will of K. W. Loftin" on the envelope in which it was found, *if proved in the manner prescribed by statute,* satisfy the requirement of G.S. 31-3.4(2) that the writing be subscribed by the testator or have his name written in or on the will. *See in re Will of Rowland,* 202 N.C. 373, 162 S.E. 897; *Alexander v. Johnston,* 171 N.C. 468, 88 S.E. 785. *See generally* 7 Strong, N.C. Index 2d, Wills, § 4, pp. 559-60.

[3] Declining to hold as a matter of law that propounders may not probate the purported codicil, we now turn to the question of whether they have proved the codicil according to G.S. 31-18.2, which provides in part:

> "A holographic will may be probated only in the following manner:
>
> "(1) Upon the testimony of at least three *competent* witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be; . . . (emphasis added.)

The statute requires twofold testimony from three witnesses concerning handwriting of the purported testator: (1) that the will is written entirely in his handwriting, and (2) that his name appearing in or on, or subscribed to, the will is in his handwriting.

[4] A careful reading of the record reveals that propounders' evidence, while attempting to follow the statute, failed to do so.

> "[A] witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write or having, in the ordinary course of business, seen writings purporting to be his and which he has acknowledged or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance."

Nicholson v. Lumber Co., 156 N.C. 59, 66, 72 S.E. 86, 87. *Accord, In re Will of Bartlett*, 235 N.C. 489, 70 S.E. 2d 482; *Lee v. Beddingfield*, 225 N.C. 573, 35 S.E. 2d 696. *See also* 2 Stansbury, N. C. Evidence 2d (Brandis rev.), § 197. A witness is not competent to express an opinion as to handwriting unless he first has been properly qualified by inquiry into the basis of his ability to form such opinion.

[5] Sam Vause testified that he was employed as Assistant Cashier at First Citizens Bank and Trust Company in Kinston and that he knew Kirby William Loftin, who was a depositor at the bank. He also testified that he was familiar with Loftin's handwriting and signature. It has been held that when a witness swears that he is "well acquainted" with a decedent's handwriting, and is not asked on cross-examination how he became familiar with it, he is *prima facie* competent. *Barwick v. Wood*, 48 N.C. 306. Since caveator did not cross-examine on this point, the witness is presumed competent. He identified the following as being in decedent's handwriting: the words "Will of K. W. Loftin" on the envelope; the entire will and signature; the entire codicil and the words "K. W. Loftin Store." This testimony therefore met the requirements of G.S. 31-18.2.

[6] Lewis F. Medlin testified that he was Vice President of First Cittizens Bank and Trust Company and knew Kirby William Loftin, who did business with the bank and had deposits, accounts, and a safety deposit box there. However, he was not asked, and he did not testify, whether he had acquired knowledge of decedent's handwriting or whether he was familiar with it. This witness, therefore, was not competent to give an opinion as to handwriting, and his testimony did not satisfy the statutory requirements.

[7] Gerald Oliver testified that he was Assistant Vice President of First Citizens Bank and Trust Company, knew Kirby William Loftin as a customer and depositor, and was familiar with his signature and handwriting. He further testified on cross-examination that he had had no opportunity to observe decedent's handwriting other than on checks, bonds and safety deposit entry cards. Thus, the presumption of competency under *Barwick v. Wood, supra*, was rebutted, and this witness was competent only to express an opinion as to signature and not to identify the handwriting. Such testimony is insufficient under G.S. 31-18.2.

[8] Propounders presented only three witnesses to testify as to the handwriting and signature on the will and purported codicil. Since the second was not competent to testify at all and the third was competent to testify only as to decedent's signature, the requirements of G.S. 31-18.2 have not been met. We are compelled to hold that caveator is entitled to a new trial.

New trial.

Judges MORRIS and MARTIN concur.

SANDRA KAY WHITAKER GRIFFETH v. EMILY LOFTIN WATTS, AND RALPH COPPALA, LEONARD WILSON COPPALA, d/b/a COCHRAN & ROSS CONSTRUCTION COMPANY

No. 7426SC834

(Filed 15 January 1975)

Automobiles § 56— rear-end collision — sufficiency of evidence of negligence

In an action growing out of a rear-end collision in which defendant alleged she was struck from the rear by a third party's truck and knocked into the rear of plaintiff's vehicle, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in following too closely or in failing to keep a proper lookout where it tended to show that plaintiff was stopped at a traffic light with her left turn signal on, plaintiff heard a loud horn, glanced into the rearview mirror and may have seen defendant's car moving forward, defendant's car struck plaintiff's car from the rear with a substantial impact, and plaintiff sustained both personal injuries for which she has been under treatment and property damage in that her car will no longer run properly.

APPEAL by plaintiff from *Falls, Judge,* 10 June 1974 Session of Superior Court held in MECKLENBURG County. Argued before the Court of Appeals 19 November 1974.

This is a civil action to recover damages for personal injuries and property damage sustained when plaintiff's 1961 Dodge was allegedly struck in the rear by defendant Emily Watts' automobile. The collision occurred on Monday morning, 8 May 1972, at the intersection of Park Road and Hillside Avenue in Charlotte. Park Road has two lanes for northbound and two lanes for southbound traffic. It rained on the day of the

accident, but it was not clear whether the road was wet at the time of the collision.

Plaintiff alleges that her injuries were caused by the negligence of defendant Emily Watts or defendant Cochran & Ross Construction Company in "wilfully or recklessly or negligently" driving "a motor vehicle against the rear of Plaintiff's automobile as it was lawfully stopped for a city traffic light" at the intersection of Park Road and Hillside Avenue. Defendant Emily Watts answered, alleging that she had come to a stop behind plaintiff's automobile on Park Road when her car was struck in the rear by a truck owned by defendant Cochran & Ross, knocking her car into plaintiff's automobile. Defendant Emily Watts (hereinafter referred to as defendant) asserts that any negligence on her part is completely insulated by the intervening negligence of defendant Cochran & Ross. Defendant Cochran & Ross apparently filed no answer to the complaint. The record on appeal does not disclose what disposition, if any, has been made of plaintiff's action against defendant Cochran & Ross.

Plaintiff testified at trial that she was stopped in the left lane of traffic, about to turn left onto Hillside Avenue, when defendant's car struck her car in the rear. The traffic light was green, and traffic was heavy. As she waited for an opportunity to turn, plaintiff heard a loud horn and felt the impact of defendant's car. Plaintiff stated that she had been stopped "for quite a while" on Park Road, with her left turn indicator on, before the impact. She could not say definitely whether defendant's car was moving when she heard the loud horn and glanced into the rearview mirror and saw defendant's car. Plaintiff testified that as a result of the collision she sustained injuries which caused her to miss twelve days at her parttime job, where she worked after school. Specifically, plaintiff stated that she suffers from pain, frequent headaches, and stiffness in her shoulders, back, and neck. Plaintiff visited two doctors who examined her but did not prescribe medicine or therapy for her. She then visited, in May 1973, R. Fletcher Keith, a doctor of Chiropractic, and has remained in his care since that time. Plaintiff testified that her 1961 Dodge has been parked since the collision. On cross-examination she admitted driving the car home immediately after the collision and, five minutes later, returning to the scene in the same car. Plaintiff also admitted having told the investigating officer at the collision that she had not been injured.

Ben Gregory, step-father of plaintiff, testified that the frame of the 1961 Dodge had been bent and that the drive line had been shoved forward into the transmission, causing a leak. Two fenders and a bumper were also damaged.

Defendant moved for a directed verdict at the close of plaintiff's evidence, pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, on the ground that plaintiff's evidence failed to disclose either negligence on the part of defendant Watts or damage sustained by plaintiff. The trial judge granted the motion for directed verdict, and plaintiff appealed to this Court.

Edwards and Yates, by Reginald L. Yates, for plaintiff-appellant.

Wade and Carmichael, by J. J. Wade, for defendant-appellee Emily Watts.

BROCK, Chief Judge.

We believe that the directed verdict was improperly granted. In determining whether a motion for directed verdict should be granted, the test to be applied is whether the evidence, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, affords but one conclusion as to the verdict that reasonable men could have reached. *See generally Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297; Louis, *A Survey of Decisions Under The New North Carolina Rules of Civil Procedure,* 50 N.C. L. Rev. 729 (1972). In applying this test, it is elementary that the trial court must consider all the evidence in the light most favorable to the plaintiff. *Woodard v. McGee* and *Little v. McGee,* 21 N.C. App. 487, 204 S.E. 2d 871; *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897. "Whether [this] evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court." Wright and Miller, Federal Practice and Procedure, § 2524 (1971); *see Cutts v. Casey, supra* (concurring opinion).

"Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout." *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838, 842. We have held, however, that this is "by no means an absolute rule to be mechanically applied in every rear-end collision case. Whether in a particular case there be sufficient evi-

dence of negligence to carry that issue to the jury must still be determined by all of the unique circumstances of each individual case, the evidence of a rear-end collision being but one of those circumstances." *Racine v. Boege,* 6 N.C. App. 341, 345, 169 S.E. 2d 913, 916.

In the case at bar, the evidence, taken in the light most favorable to plaintiff, tends to show that plaintiff was stopped and had been stopped on Park Road "for quite a while" with her left turn signal on; that traffic was heavy, and she was waiting for an opportunity to turn; that the road may have been wet; that plaintiff heard a loud horn, glanced into the rear-view mirror and may have seen defendant's car moving forward; and that the impact was substantial. As a result of the collision, plaintiff's evidence shows that plaintiff sustained both personal injuries for which she has been under treatment and property damage in that her car would no longer run properly. We believe that this evidence at least creates a legitimate inference that defendant may have been negligent in following too closely or in failing to keep a proper lookout. While it is possible that defendant was exercising every care which a reasonable and prudent driver would have exercised under the circumstances confronting her, it appears that under plaintiff's evidence, reasonable and prudent men in the exercise of impartial judgment might reach a different conclusion as to both defendant's negligence and plaintiff's damage. In such a case a directed verdict will not lie. We find plaintiffs' assignment of error to the trial judge's granting of the motion for directed verdict to be meritorious.

Plaintiff has also assigned as error the trial court's failure to allow evidence of damage to the car on the ground that plaintiff failed to allege a separate cause of action for property damage. While we do not deem it necessary to reach the merits of plaintiff's contention in light of the holding above, we note that pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, plaintiff may yet apply to the trial court for leave to amend her complaint.

New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES KENLEY OXENDINE

No. 7416SC822

(Filed 15 January 1975)

1. **Criminal Law § 75— statements made by intoxicated defendant — voluntariness**

There was competent evidence to support the trial court's finding that statements made by defendant to an officer after he had been taken into custody were voluntary, and the mere fact of defendant's intoxication did not render inadmissible his statements which tended to incriminate him.

2. **Homicide § 24— second degree murder — instructions on burden of proof**

The trial court in a second degree murder prosecution properly instructed the jury that "upon proof beyond a reasonable doubt of intentional killing with a deadly weapon," the defendant had the burdent of satisfying the jury "not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfying the jury of facts and circumstances or provocation which will remove the element of malice, that is, rebut it, and reduce the crime to manslaughter."

APPEAL by defendant from *Hall, Judge,* 3 June 1974 Criminal Session of Superior Court held in ROBESON County. Heard in the Court of Appeals on 11 December 1974.

Defendant was charged in a bill of indictment, proper in form, with the murder of Kenley Oxendine. At the call of the case for trial, the district attorney announced the State would accept a verdict no greater than murder in the second degree. The defendant pleaded not guilty.

The State's evidence tended to show that the deceased was at home with other members of his family when the defendant entered the house with a pistol in his belt. The deceased and defendant were both under the influence of alcoholic beverages. The deceased and defendant had some words. Defendant pushed the deceased to the floor and fired one shot away from the deceased. A struggle ensued between the two, and everyone else left the room. Two more shots were fired, and two or three minutes later defendant was seen in the room with a pistol in his hand approximately ten feet from the body of the deceased. Defendant remained in the room and went to sleep on a couch where he was later handcuffed by the arresting officer. He was taken immediately to the officer's car, advised of the charge against him, and advised of his constitutional rights. Defendant

made no response to questions asked by the officer. On the way to jail defendant made several spontaneous statements that, "he was glad he killed the son of a bitch."

Defendant offered no evidence.

The jury returned a verdict of murder in the second degree, and the court adjudged that defendant be imprisoned for a term of not less than seventeen years nor more than twenty years with credit of 109 days confinement pending trial.

Defendant appealed, assigning errors.

Attorney General Edmisten, by Associate Attorney Raymond L. Yasser, for the State.

McLean, Stacy, Henry & McLean, by H. E. Stacy, Jr., for defendant appellant.

MARTIN, Judge.

[1] Defendant's first assignment of error is that the court erred in overruling defendant's objection to the testimony of Officer Luther Sanderson as to statements made to him by defendant after defendant had been taken into custody. Pursuant to defendant's motion to suppress, the court conducted a voir dire examination to determine the competency of the challenged evidence. The evidence on voir dire tends to show, and the court found:

> " . . . after the defendant had been taken into custody by Officer Luther Sanderson, Deputy Sheriff, and fully advised of his Constitutional Rights, as required by the Miranda Rule, the defendant declined to answer any questions asked by Officer Sanderson; that on the way to the jail the defendant made several spontaneous statements which were not in response to any questions asked by Officer Sanderson. The Court is of the opinion and finds and concludes that the spontaneous statements made by the defendant were freely and voluntarily made and are admissible in evidence. The Court finds that the defendant had been drinking but that he was not drunk and knew and understood what he was doing and saying."

The incriminating statement was thereupon admitted into evidence. It is settled law that the findings of the trial judge when

supported by competent evidence, as here, are binding and conclusive in appellate courts in this jurisdiction. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972). No waiver is involved with respect to voluntary statements. *State v. Haddock, supra.* Nor does the mere fact of intoxication render inadmissible his statements which tended to incriminate him. " ' . . . [T]he extent of his intoxication when the confession was made is relevant; and the weight, if any, to be given a confession under the circumstances disclosed is exclusively for determination by the jury.' [Citations.]" *State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (1971). The assignment of error addressed to the admission of defendant's statements is overruled.

[2] Defendant excepts to the following portion of the charge:

> " . . . upon proof beyond a reasonable doubt of intentional killing with a deadly weapon, the law then casts upon the defendant the burden of satisfying the jury of—not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfying the jury of facts and circumstances or provocation which would remove the elements of malice, that is, rebut it, and reduce the crime to manslaughter."

The defendant contends that the court's instruction "does not seem to correctly state defendant's burden." He contends that his burden is to satisfy the jury that the intentional killing with a deadly weapon was without malice and not to satisfy the jury of facts and circumstances or provocation which will remove the element of malice.

> "When the State satisfies the jury from the evidence beyond a reasonable doubt that defendant intentionally shot the deceased and thereby proximately caused his death, the law raises two presumptions against him: First, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. [Citations.] 'The law then casts upon the defendant the burden of showing to the satisfaction of the jury, if he can do so—not by the greater weight of the evidence nor beyond a reasonable doubt, but simply to the satisfaction of the jury—from all the evidence, facts and

> circumstances, the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon the ground of self-defense . . . . The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas, with the burden of satisfaction cast upon the defendant.' [Citation.]" *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970).

Thus, the challenged instruction is supported by the decisions of our Supreme Court and defendant's exception thereto is overruled.

Defendant's remaining assignment of error is without merit and is overruled.

No error.

Judges MORRIS and ARNOLD concur.

SUPERIOR FOODS, INC. v. HARRIS-TEETER SUPER MARKETS, INC., AND MERICO, INC.

No. 7426SC818

(Filed 15 January 1975)

1. **Contracts § 28— termination of contract — notice — usage of trade**

In an action to recover for a retail grocer's alleged breach of contract to purchase biscuits manufactured by plaintiff for sale under the grocer's private label, the trial court sufficiently instructed the jury on contract law relating to notice to be given upon termination of such a contract with no definite duration and did not err in failing to instruct the jury on statutory law in the Uniform Commercial Code pertaining to "usage of trade."

2. **Appeal and Error § 50— error in instructions cured by verdict**

Error, if any, in the court's failure to instruct the jury on statutes in the Uniform Commercial Code pertaining to plaintiff's remedies or damages upon breach of contract by defendant was not prejudicial where the jury found that defendant had not breached its contract with plaintiff.

APPEAL by plaintiff from *Ervin, Judge,* 1 April 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 11 December 1974.

Civil action to recover damages for breach of contract. Plaintiff's evidence tended to show the following: Plaintiff is a manufacturer of refrigerated biscuits. In 1968 he agreed to supply defendant Harris-Teeter with biscuits packaged under a private label. It was agreed that if Harris-Teeter ever stopped buying plaintiff's biscuits then Harris-Teeter would pay plaintiff for any finished goods, cans, and labels on hand. Before such an arrangement is terminated by a retailer, such as Harris-Teeter, it is customary for the retailer to give at least fifteen days notice. The retailer then chooses a new supplier, and this new supplier contacts the old one so that the latter's inventory of materials may be used by the new supplier. Harris-Teeter abruptly ended their purchase of plaintiff's biscuits and chose a new supplier, defendant Merico, Inc. Consequently, plaintiff was left with a large supply of unused cans and labels which apparently could not be resold and which defendants never purchased.

Defendant offered no evidence.

At the close of plaintiff's evidence the trial court entered a directed verdict in favor of defendant Merico, Inc. The question of defendant Harris-Teeter's liability was submitted to a jury which answered in favor of Harris-Teeter. From a decree that plaintiff recover nothing from defendant Harris-Teeter, plaintiff appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage, & Preston, by Gaston H. Gage, for plaintiff appellant.

Wade & Carmichael, by R. C. Carmichael, Jr., for defendant appellee Harris-Teeter Super Markets, Inc.

MARTIN, Judge.

Plaintiff contends the trial court erred in giving certain jury instructions where there was no evidence to support such instructions. It is obvious that the record on appeal does not contain all the evidence presented at trial. "If an exception is based upon the ground that there was no evidence to sustain the instruction, this Court cannot pass upon it unless all of the evidence is sent up." *Atwell v. Shook,* 133 N.C. 387, 45 S.E. 777 (1903). At any rate, that evidence which is in the record does not support plaintiff's contentions. Plaintiff's assignments of error in this regard are overruled.

[1] Next, plaintiff argues the trial court erred in its instructions regarding the notice to be given upon termination of a contract with no definite duration. The court's instruction was almost identical to this Court's statement of the law on this subject in *Hospital v. Whitley,* 18 N.C. App. 595, 197 S.E. 2d 631 (1973). This assignment of error is overruled.

Plaintiff also contends it was prejudicial error for the court not to instruct the jury on certain statutory law in the Uniform Commercial Code pertaining to "usage of trade." The evidence of "usage of trade" relevant to the transaction in question concerned the kind of notice customarily given by a retailer before terminating a contract similar to one between plaintiff and Harris-Teeter. In this regard, the trial court instructed the jury that they should consider "the prior dealings between the parties, . . . , the practice in the trade as it relates to these two parties, and all other circumstances which relate to this transaction." The trial court fully charged on contract law, and plaintiff made no request for additional instructions. If plaintiff desired fuller or more specific instructions on this aspect of the case, he should have asked for them, and not waited until the verdict had gone against him. *Miller v. Henry,* 270 N.C. 97, 153 S.E. 2d 798 (1967).

[2] Finally, plaintiff contends the trial court should have instructed the jury on statutory law in the Uniform Commercial Code pertaining to his various remedies or damages available *upon breach of contract* by Harris-Teeter. If there was error it was not prejudicial because the rights of the parties as to a breach of contract by Harris-Teeter were determined by the jury in favor of Harris-Teeter. The jury found, in effect, that Harris-Teeter had not breached any contractual duty it may have owed plaintiff. Where the rights of the parties are determined by the jury's answer to one of the issues, error relating to another issue cannot be prejudicial. 1 Strong, N. C. Index 2d, Appeal and Error, § 53, p. 211-212.

No error.

Judges MORRIS and ARNOLD concur.

WILLIAM F. COLLINS AND WIFE, LEONE COLLINS, PLAINTIFFS v. W. T. COMBS, JR., TRUSTEE, AND VIRGINIA-CAROLINA BUILDERS, INC., DEFENDANTS, AND NORTH CAROLINA NATIONAL BANK, N.A., INTERVENOR

No. 7417SC849

(Filed 15 January 1975)

Cancellation and Rescission of Instruments § 12; Judgments § 48— judgment permitting lien of deed of trust and lien of judgment — no support in pleadings and evidence

In an action to have a deed of trust declared null and void wherein defendant builder prayed for judgment against plaintiffs for the contract price of a house it constructed on plaintiffs' land, the trial court erred in the submission of issues and entry of judgment permitting recovery by defendant builder for the contract price of the house while also permitting the deed of trust, which had been assigned to intervenor bank, to remain a valid lien on the property.

APPEAL by plaintiffs from *Rousseau, Judge,* 15 April 1974 Session of Superior Court held in ROCKINGHAM County. Argued in the Court of Appeals 20 November 1974.

Plaintiffs filed a complaint alleging in substance that defendant Combs, as trustee, had published a notice of foreclosure of a deed of trust given to secure a note payable to defendant Builders, Inc., in the sum of $15,500.00. Plaintiffs further alleged that they did not execute the deed of trust and were not indebted to defendant Builders, Inc., in any sum. In their prayer for relief plaintiffs sought to have the deed of trust declared null and void and sought a permanent injunction against foreclosure.

Upon the *ex parte* application of plaintiffs a temporary restraining order was issued.

Defendant Builders, Inc., answered, alleging in substance that under contract with plaintiffs, defendant Builders, Inc., constructed a residence upon plaintiffs' land for the sum of $15,500.00 and a carport for $400.00. Defendants prayed for judgment against plaintiffs in the sum of $15,900.00.

Plaintiffs filed an amended complaint alleging in substance that plaintiffs and defendants negotiated for the construction of a residence and carport on their property for the sum of $10,400.00; that defendants commenced the construction in an unworkmanlike manner, and plaintiffs ordered them to cease;

that defendants constructed the residence and carport over plaintiffs' objections; that plaintiffs lived in the residence a short while but moved out because of faulty construction; and that defendants had trespassed upon plaintiffs' property, causing damages. The prayer for relief in the amended complaint sought a permanent injunction against foreclosure, a declaration that the deed of trust was null and void, and $10,000.00 damages for trespass.

Defendants answered the amended complaint, alleging in substance a contract for the construction of plaintiffs' residence and carport for $15,900.00 and praying for judgment for the sum of $15,900.00.

North Carolina National Bank was permitted to intervene as party defendant. It alleged that it was a holder in due course of a note for $15,500.00 executed by plaintiffs payable to defendant Builders, Inc., and a holder in due course of a deed of trust executed by plaintiffs to secure payment of the said $15,500.00 note.

With the pleadings in this posture the case went to trial.

Plaintiffs' evidence tended to show that they were dissatisfied with the manner in which defendant Builders, Inc., constructed the residence; that the residence was not constructed in a workmanlike manner; that they did not execute the note and deed of trust to Builders, Inc.; and that they want the residence removed from their land.

Defendant Builders, Inc., offered evidence which tended to show that the residence was built according to plans and specifications and was approved by a Federal Housing Administration Inspector, and that plaintiffs duly executed the note and deed of trust for $15,500.00 and a contract for the carport for $400.00.

Intervenor North Carolina National Bank offered evidence which tended to show that plaintiffs' note and deed of trust were endorsed and assigned to it by defendant Builders, Inc.

From an adverse judgment plaintiffs appealed.

Karl N. Hill, Jr., for plaintiffs.

W. T. Combs, Jr., for defendant Virginia-Carolina Builders, Inc.

Harrington & Stultz, for intervenor North Carolina National Bank.

BROCK, Chief Judge.

The issues submitted to the jury do not dispose of the crucial issue of which defendant is entitled to recover from the plaintiffs upon the $15,500.00 note. It would seem that this note, secured by the deed of trust, either was given in payment of the contract price of the residence (excepting the separate $400.00 contract for the carport) or was not supported by consideration. Yet the issues submitted and the judgment entered thereon permit the deed of trust, which secures the $15,500.00 note, to remain a valid lien on plaintiffs' property and, at the same time, give judgment against plaintiffs for $15,900.00. The note and deed of trust are held by the intervenor, North Carolina National Bank, and the judgment is in favor of Virginia-Carolina Builders, Inc. Under the judgment entered, the lien of the deed of trust is in addition to the lien of the judgment. They total $31,400.00. Two liens are not supported by any view of the pleadings or evidence, and there is no provision for the payment of one to constitute satisfaction of the other. Also, the jury's answer to the fifth issue awarding $15,900.00 to defendant Builders, Inc., "providing the house is brought up to specifications," is impossible of enforcement and should not have been accepted.

For these reasons, among others, the judgment must be vacated, the verdict set aside, and a new trial ordered.

New trial.

Judges HEDRICK and MARTIN concur.

SECURITY INSURANCE GROUP OF HARTFORD, A CORPORATION v. LUCILLE CROOM PARKER AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 7429SC795

(Filed 15 January 1975)

Insurance § 90— family automobile liability policy — use of non-owned vehicle in business — failure of proof

The trial court did not err in its determination that defendant insurer had failed to prove that at the time of an accident insured's spouse was operating a non-owned vehicle in a business or occupation within the meaning of an exclusion of such use from coverage under a "Family Automobile Policy" issued to insured.

Insurance Group v. Parker

APPEAL by defendant North Carolina Farm Bureau Mutual Insurance Company from *Martin (Harry C.), Judge,* 13 May 1974 Session of Superior Court held in RUTHERFORD County. Argued before the Court of Appeals 10 December 1974.

In a prior civil action entitled (abbreviated) *Yelton v. Dobbins and Parker,* a judgment upon a verdict was entered 29 April 1969, awarding to plaintiff Yelton the sum of $20,000.00 for personal injury growing out of an automobile accident. The judgment was rendered against defendants Dobbins and Parker jointly and severally as joint tortfeasors. Upon appeal by defendants the judgment was affirmed by this Court in *Yelton v. Dobbins and Parker,* reported at 6 N.C. App. 483, 170 S.E. 2d 552 (1969).

At the time of the accident involved in the case referred to above, the plaintiff in the present action was the liability insurance carrier for Dobbins, and the defendant in the present action was the liability insurance carrier for Parker. At the time of the accident involved in the case referred to above, Parker was driving a (non-owned) 1961 International truck with the permission and consent of its owner. The liability insurance carrier for the owner of said truck paid $5,000.00 (its policy limits) on the $20,000.00 judgment, plus $102.00 upon the court costs. Plaintiff (Insurance Group), liaibility carrier for Dobbins, paid the $15,000.00 balance on the $20,000.00 judgment, plus interest and the balance of court costs, and took an assignment of the judgment. Plaintiff (Insurance Group) in the present action seeks contribution from defendant (Farm Bureau), as liability insurance carrier of Parker, for the amount over one-half of the judgment and court costs which Insurance Group has paid. This excess payment amounts to $5,302.50.

The case was tried before Judge Martin without a jury. From judgment in favor of plaintiff, defendant appealed.

Hamrick, Bowen & Nanney, by Fred D. Hamrick, Jr., and Louis W. Nanney, Jr., for plaintiff (Insurance Group).

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant (Farm Bureau).

BROCK, Chief Judge.

Defendant concedes the existence of its "Family Automobile Policy" issued to Floyd E. Parker, husband of Lucille Croom Parker, and concedes that the policy covered Lucille

Croom Parker while operating a non-owned automobile. However, defendant asserts that it is not liable because the operation of the non-owned automobile (the 1961 International truck), at the time of the accident giving rise to the judgment for $20,000.00 damages, falls within the policy exclusion which specifically excluded coverage of a non-owned automobile operated by the insured or spouse *in any business or occupation.*

When the insurer asserts non-liability under an exception or exclusion in the policy, once a *prima facie* case of liability under the policy is established, the burden of proof is upon the insurer to establish that the loss falls within the exception or exclusion asserted. *Polansky v. Insurance Asso.*, 238 N.C. 427, 78 S.E. 2d 213; *Williams v. Insurance Co.*, 2 N.C. App. 520, 163 S.E. 2d 400; 12 Couch on Insurance 2d §§ 44:414, 44:421 (1964); 19 Couch on Insurance 2d § 75:383 (1968). Therefore, defendant in this case assumed the burden of proving that the (non-owned) 1961 International truck, at the time of the accident, was being operated by Lucille Croom Parker in a business or occupation.

It appears that defendant concedes that plaintiff established, *prima facie,* defendant's liability under the policy.

In seeking to carry its burden of proving that Lucille Croom Parker was operating the (non-owned) 1961 International truck in a business or occupation, defendant offered the testimony of Lucille Croom Parker. We have read the narration of her testimony carefully and with interest. Whether we would find the facts differently from those found by the trial judge is not the question. The trial judge had the opportunity to listen to and view the witness. These opportunites, like those afforded a jury, are essential to a determination of the weight and credit to be given to the testimony. A reviewing court has only the cold record. Here the defendant had the burden to satisfy the trial judge by the greater weight of the evidence that the loss came within the policy exclusion. This it failed to do, and the trial judge found in favor of coverage. If, upon this same evidence, a jury under correct instructions, had answered the issue as did the trial judge, should the verdict be upset? We think not.

In view of this disposition, the remainder of defendant's argument requires no discussion.

Affirmed.

Judges MORRIS and ARNOLD concur.

MARSHALL CHANDLER AND AUSTIENE CHANDLER v. CLEVELAND SAVINGS AND LOAN ASSOCIATION

No. 7427SC712

(Filed 5 February 1975)

1. **Mortgages and Deeds of Trust § 37— wrongful foreclosure — remedies of mortgagor**

When a mortgage or deed of trust is wrongfully foreclosed, the injured mortgagor who elects not to ratify the same may either (1) treat the sale as a nullity and sue to set it aside, or (2) permit the sale to stand and sue the mortgagee to recover damages suffered as a result of the wrongful foreclosure.

2. **Ejectment § 2— summary ejectment — small claim action**

The remedy of summary ejectment provided by G.S. 42-26 *et seq.* may now be obtained in a small claim action heard by a magistrate. G.S. 7A-210.

3. **Ejectment § 1— summary ejectment — necessity for landlord-tenant relationship**

When the remedy of summary ejectment is sought, an allegation that the relationship of landlord and tenant exists between the parties is no longer necessary as a jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of G.S. 42-26 before the remedy may be properly granted.

4. **Ejectment § 5; Mortgages and Deeds of Trust § 39; Rules of Civil Procedure § 13— summary ejectment — small claim action — wrongful foreclosure claim exceeding $300 — no compulsory counterclaim**

Since plaintiffs could not have asserted their claim in excess of $300 (now $500) for wrongful foreclosure of a deed of trust in a small claim action for summary ejectment brought by defendant savings and loan association against plaintiffs following the foreclosure, they are not estopped by G.S. 1A-1, Rule 13 from asserting such claim in the present action.

5. **Mortgages and Deeds of Trust § 39— action for damages for wrongful foreclosure — default judgment in ejectment action — no estoppel**

While plaintiffs might have elected to attack defendant's title derived through foreclosure in a small claim summary ejectment action brought by defendant against plaintiffs following the foreclosure, they were not required to do so and are not estopped from asserting a claim for damages for wrongful foreclosure by the fact that they permitted judgment by default to be taken against them in the summary ejectment proceeding.

6. **Mortgages and Deeds of Trust § 39— action for damages for wrongful foreclosure — summary judgment improper**

In an action to recover damages for wrongful foreclosure of a deed of trust, summary judgment was improperly entered in favor of

defendant savings and loan association where genuine issues of fact existed as to whether the loan secured by the deed of trust was in default when, according to plaintiffs' affidavits, the femme plaintiff tendered payment of a monthly installment and such payment was rejected by defendant, and even as to whether such tender was in fact made.

7. **Rules of Civil Procedure § 43— motion for summary judgment — oral testimony**

Although Rule 43(e) permits the court to hear oral testimony in ruling upon a motion for summary judgment, such testimony should normally be utilized only if a small link of evidence is needed and not for a protracted hearing to determine whether there is to be a trial.

APPEAL by plaintiffs from summary judgment dated 29 April 1974 entered by *Falls, Judge,* after hearing held 12 April 1974 in Superior Court in CLEVELAND County.

Civil action to recover damages for wrongful foreclosure of a deed of trust on real property.

In complaint filed 25 January 1974 plaintiffs alleged: In July 1969 they obtained a $9,900.00 loan from defendant and secured the same by a deed of trust on a certain lot owned by them in Cleveland County. Although from time to time delinquent in paying monthly installments, plaintiffs had paid all arrearages on the loan by 13 May 1971. Defendant accepted the June 1971 payment of $107.63, but refused the feme plaintiff's tender of the July 1971 installment, informing her that the account was in arrears. Plaintiffs received no written explanation concerning the account other than a letter in August 1971 demanding a payment of $325.38 to bring the loan current. In fact no deficiency existed, but if any did exist it resulted from defendant's mistake in erroneously paying from plaintiffs' tax escrow fund administered by defendant taxes on a parcel of land owned by plaintiffs which was not included in the deed of trust. Despite such error on the part of defendant, defendant foreclosed upon the deed of trust and subsequently ejected the plaintiffs from their residence. Plaintiffs alleged that the reasonable value of their residence at the time of the wrongful foreclosure was $16,000.00, that they were indebted to defendant in the amount of $8,986.14 at the time defendant wrongfully refused to accept further monthly payments, and that they had been damaged in the amount of $6,113.86 (sic) by reason of the wrongful foreclosure. Plaintiffs prayed for recovery of actual damages of $6,113.86 and punitive damages of $50,000.00.

Defendant did not file answer but moved for summary judgment under Rule 56, asserting among other grounds that defendant had previously brought proceedings in summary ejectment against plaintiffs in which default judgment had been entered after personal service. Defendant contended that under the Rules of Civil Procedure plaintiffs were required to plead in the summary ejectment action any defenses which they allegedly had with respect to the foreclosure proceedings, and having failed to plead in that action, plaintiffs are now estopped from doing so.

At the hearing on defendant's motion for summary judgment, defendant did not present any affidavits but presented the oral testimony of its President, who testified at length concerning plaintiffs' transactions with defendant in connection with the loan account. By stipulation and by introduction of records, the following facts were also made to appear: Defendant bid the property in at the foreclosure sale and in October 1971 received deed from the trustee. On 4 November 1971 defendant brought a proceeding in summary ejectment against plaintiffs in which personal service was had upon the plaintiffs. No answer was filed in that proceeding, and on 23 November 1971, the magistrate entered judgment that the defendants in that proceeding (the plaintiffs here) be removed from and that the Savings & Loan Association be put in possession of the premises. Thereafter, by deed dated 17 January 1972, defendant sold the property to third parties.

Affidavits of the plaintiffs were presented in opposition to defendant's motion for summary judgment. These tended to show that defendant had erroneously paid taxes from the escrow account on the wrong piece of property and that plaintiffs were not actually in default when the July 1971 payment was tendered and refused.

Following the hearing on defendant's motion for summary judgment, the court entered judgment dated 29 April 1974 in which the court found as facts that plaintiffs made no payment on their loan after 11 June 1971; that the trustee under the deed of trust notified plaintiffs by letter of this default; that foreclosure proceedings were commenced by notice of sale dated 26 August 1971 and were completed as required by statute; that defendant was the purchaser at the foreclosure sale; that when plaintiffs refused to vacate the premises, defendant commenced the summary ejectment proceeding; and that when plaintiffs

failed to plead or defend, judgment was entered in favor of defendant to recover possession of the premises.

The court concluded as a matter of law that the loan was in default when the foreclosure proceedings were commenced, that the foreclosure was in all respects regular, and further concluded:

> "That the plaintiffs were compelled, by and under the provisions of Rule 13 of the North Carolina Rules of Civil Procedure, to plead any defense or other remedy which they may have had with respect to their assertion of wrongful foreclosure, in the ejectment proceedings commenced subsequent to the foreclosure, by the defendant, and their failure to do so now bars and estops them from the assertion of their alleged remedy in damages for wrongful foreclosure by this action."

On these findings of fact and conclusions, the court granted defendant's motion for summary judgment and dismissed plaintiffs' action. Plaintiffs appealed.

Mullen, Holland & Harrell P.A. by Graham C. Mullen for plaintiff appellants.

Hamrick & Hobbs by L. L. Hobbs for defendant appellee.

PARKER, Judge.

[1] When a mortgage or deed of trust is wrongfully foreclosed, the injured mortgagor who elects not to ratify the sale may either (1) treat the sale as a nullity and sue to set it aside, or (2) permit the sale to stand and sue the mortgagee to recover damages suffered as a result of the wrongful foreclosure. *Smith v. Land Bank*, 213 N.C. 343, 196 S.E. 481 (1938); *Burnett v. Supply Co.*, 180 N.C. 117, 104 S.E. 137 (1920); 55 Am. Jur. 2d, Mortgages, § 535; 5 Strong, N. C. Index 2d, Mortgages and Deeds of Trust, § 37. In the present case, plaintiffs have elected to pursue the second remedy.

In the light of the above statement of applicable legal principles, we first examine defendant's contention, which was adopted by the trial court as one of the bases upon which it rested its judgment, that plaintiffs' failure to assert their claim in the prior summary ejectment proceeding now bars and estops them from doing so in the present action. Determination of this

question requires that we examine the nature of the summary ejectment proceeding and the laws applicable thereto.

The remedy by summary proceedings in ejectment is provided for in G.S. Chap. 42, which deals with the rights and remedies as between landlord and tenant, and is restricted to those cases expressly provided for by G.S. 42-26. *Morris v. Austraw,* 269 N.C. 218, 152 S.E. 2d 155 (1967). Under our former practice, when the remedy of summary ejectment was obtained in a proceeding before a justice of the peace, in the absence of an allegation that the relationship of landlord and tenant existed between the parties and that the tenant was holding over, it was held that the justice of the peace was without jurisdiction, and on appeal, "[t]he jurisdiction of the Superior Court was derivative only and was limited to the powers which the justice of the peace could have exercised." *Howell v. Branson,* 226 N.C. 264, 265, 37 S.E. 2d 687, 688 (1946). In a case in which a mortgagor retained possession after foreclosure of the deed of trust and refused to surrender possession after demand by the mortgagee and by the purchaser at the foreclosure sale, our Supreme Court held that the relationship of landlord and tenant did not exist between the parties within the meaning of the summary ejectment statute and that in such case the remedy was not available. *McCombs v. Wallace,* 66 N.C. 481 (1872).

[2, 3] Following the adoption of the 1962 amendment by which Article IV of our State Constitution was rewritten, and since the enactment of statutes implementary thereto, the remedy of summary ejectment provided for by G.S. 42-26 et seq. may now be obtained in a small claim action heard by a magistrate. G.S. 7A-210. A magistrate is an officer of the district court, G.S. 7A-170, and the judgment of the magistrate in a civil action assigned to him by the chief district judge is the judgment of the district court. G.S. 7A-212. Therefore, under our present practice when the remedy of summary ejectment is sought, the allegation that the relationship of landlord and tenant exists between the parties is no longer necessary as a jurisdictional matter. Nevertheless, it is still necessary to show that the relationship exists in order to bring the case within the provisions of G.S. 42-26 before the remedy may be properly granted.

[4, 5] In the present case, when, in November 1971, the defendant brought the summary ejectment proceeding against the

present plaintiffs, the case was assigned to the magistrate as a small claim action. As such, the practice and procedure provided for small claim actions generally were to be observed. G.S. 7A-223. Among the applicable statutes governing procedure in small claim actions generally was G.S. 7A-219 which, in 1971, read as follows:

> "§ 7A-219. *Certain counterclaims; cross-claims; third party claims not permissible.* — No counterclaim, cross-claim or third party claim which would make the amount in controversy exceed three hundred dollars ($300.00) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action."
>
> (Effective 1 July 1974 G.S. 7A-219 was amended to substitute "five hundred dollars ($500.00)" for "three hundred dollars ($300.00)" in the first sentence.)

By reason of the express language of G.S. 7A-219, even if plaintiffs' present claim be considered to be a compulsory counterclaim, as defendant now contends it should, which by reason of Rule 13 of the Rules of Civil Procedure plaintiffs would have been required to plead had the ejectment proceeding been brought otherwise than as a small claim action, plaintiffs could not have asserted it in the small claim action which was brought and they are not now estopped from doing so in the present action. It is true that plaintiffs could have attacked defendant's title in the summary ejectment action and if they had done so the action would have been placed on the civil issue docket of the district court division for trial before a district judge. G.S. 7A-223. However, as above noted, plaintiffs had a choice of remedies, and while they might have elected to attack defendant's title derived through the foreclosure proceeding, they were not required to do so. They were free to pursue the alternate remedy of seeking damages for the wrongful foreclosure, and we see no inconsistency between plaintiffs' present position in so doing and their prior position in permitting judgment by default to be taken against them in the summary ejectment proceeding. We hold that plaintiffs are not estopped by reason of the prior action and judgment from presently asserting their

claim and that the summary judgment dismissing plaintiffs' action cannot be sustained on that ground.

[6] Turning to the other grounds upon which defendant's motion for summary judgment was allowed, we note that a comparison of the facts as disclosed by the oral testimony of defendant's President offered in support of the motion and the facts as set forth in plaintiffs' affidavits offered in opposition thereto reveals the existence of genuine issues as to material facts. For example, such comparison reveals that a genuine issue of fact exists between the parties as to whether the loan was in default when, according to plaintiffs' affidavits, the feme plaintiff tendered payment of the monthly installment due in July 1971 and such payment was rejected by defendant, and even as to whether such tender was in fact made. In view of the existence of genuine issues between the parties as to material facts, defendant's motion for summary judgment should have been denied.

[7] In passing, we note that although Rule 43(e) of the Rules of Civil Procedure does permit the court to hear oral testimony in ruling upon a motion for summary judgment, "[t]his 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., ¶ 56.02[9], p. 2042. In discussing the use of oral testimony at a hearing on a motion for summary judgment, the same treatise points out that receiving evidence at the hearing, as distinguished from considering supporting affidavits or depositions which are normally required to be filed before the hearing,

> "may not give the other party a fair opportunity to rebut; and this is particularly important in the case of the party opposing the motion for summary judgment.
>
> "Also the summary judgment procedure is apt to be wasteful and burdensome if the summary judgment hearing is a protracted hearing, in effect a trial, to determine that a trial must be held." 6 Moore's Federal Practice, 2d Ed., ¶ 56.11[8], p. 2206.

We find these comments particularly pertinent to the present case.

The judgment allowing defendant's motion for summary judgment is reversed and this case is remanded for trial.

Reversed and remanded.

Chief Justice BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE CHAPMAN

No. 7427SC902

(Filed 5 February 1975)

1. **Searches and Seizures § 3— search warrant for heroin — sufficiency of affidavit**

An affidavit was sufficient to support issuance of a search warrant for heroin where the affidavit affirmatively showed by its detailed description of the premises and the heroin therein that the affiant's informer was speaking from firsthand knowledge of the defendant's activity and where the affiant swore that his informer was reliable.

2. **Criminal Law § 84; Narcotics § 3— bag of heroin — admissibility — chain of custody established**

In a prosecution for felonious possession of heroin, the trial court properly allowed into evidence a bag of heroin where the State established a chain of custody from the moment the heroin was seized from defendant's home until the time it appeared in the courtroom, and the bag was positively identified by the chemist who had tested the substance.

3. **Criminal Law § 70— tape recording of impeaching statements — admissibility — failure to authenticate**

The trial court did not err in refusing defense counsel's request to play before the jury a recording of previous statements made by one of the State's witnesses at a preliminary hearing which contradicted certain testimony given by that witness at trial where defense counsel did not attempt to authenticate the recording or actually to offer the tape into evidence.

ON *certiorari* from *Falls, Judge,* 24 June 1974 Session of CLEVELAND County Superior Court. Heard in the Court of Appeals 13 January 1975.

The defendant was charged in a bill of indictment with felonious possession of heroin on 3 October 1973, in violation of the North Carolina Controlled Substances Act, Schedule I. Upon arraignment, the defendant entered a plea of not guilty.

After the jury was empaneled and left the courtroom, the defendant made a motion to suppress this evidence on the grounds that the search warrant, pursuant to which it was obtained, was invalid. The evidence on voir dire consisted of the search warrant, the affidavit upon which it was based, and the testimony of the affiant therein, Harold Smith, Shelby Police Captain. The motion was denied. At trial, the State offered the testimony of Officer Smith and other law officers who went to the defendant's home soon after the search warrant was issued. There the warrant was served on the defendant, and in the search they found a plastic bag containing white powder under the bar in the basement, the place where the confidential informant said he had seen it.

The State further offered "chain of identity" evidence and the testimony of a chemist employed by the Charlotte-Mecklenburg Crime Laboratory that the white powder weighed twelve grams and contained heroin.

The evidence for the defendant consisted of his testimony and that of his wife, both of whom generally denied that there was heroin present in their home, but that he did have there a plastic bag containing milk sugar.

The defendant's motions for judgment as of nonsuit at the close of the State's case and his own were denied. The jury returned a verdict of guilty as charged. From a judgment imposing prison sentence, the defendant appealed.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney Diederich Heidgerd for the State.

Levine and Goodman by Arthur Goodman, Jr., for defendant appellant.

CLARK, Judge.

The defendant contends that the trial court erred in denying his motion to suppress evidence seized at the defendant's house. The motion was made on the grounds that the search warrant was invalid because the affidavit upon which it was based was insufficient to enable a magistrate to make an independent determination of probable cause, and that, therefore,

the search warrant was issued in contravention of the Fourth Amendment to the Constitution of the United States.

The affidavit of which the defendant complains and on which the search warrant was issued is as follows:

"AFFIDAVIT TO OBTAIN A SEARCH WARRANT

STATE OF NORTH CAROLINA

County of Cleveland

STATE

v.

JOHNNY LEE CHAPMAN
Rural Paved Road 1224, Holly Oak Park section
Cleveland County N. C.

Harold E. Smith, Captain, Shelby Police Department being duly sworn and examined under oath, says under oath that he has probable cause to believe that Johnny Lee Chapman has on his premises certain property, to wit: Narcotics, Heroin, a controlled substance, the possession of which is a crime, to wit: G.S. 90-95(a) (3) on October 3, 1973 on his premises.

The property described above is located on the premises described as follows: A block residence with a brick front facing in a westerly direction. This residence is located between the intersections of Rural paved road 1224 and rural paved road 1287 and rural paved road 1224 and rural paved road 1241. This structure will be the first house on the left after passing the intersection of rural paved road 1224 and rural paved road 1287. This structure is on rural paved road 1224 facing a westerly direction. Cause for the issuance of a search warrant are as follows: The facts which establish probable cause for the issuance of a search warrant are as follows: A confidential source of information that affiant believes to be reliable stated to affiant on this date that this confidential source of information observed a white powder substance at the residence of Johnny Lee Chapman that is believed to be Heroin. This confidential source of information who affiant believes to be reliable further stated that Johnny Lee Chapman stated to this confidential source of information that Johnny Lee

Chapman stated that this white powder was in fact Heroin. The above information was obtained by this confidential source of information who affiant believes to be reliable within the two days prior to the issuance of this search warrant. This confidential source of information who affiant believes to be reliable stated that this heroin was contained in a ladies stocking hanging on a coat hanger under the bar located in the basement of the residence. This confidential source of information who affiant believes to be reliable further stated that this confidential source of information observed needles located above the light fixtures over the pool table located in the basement of the residence. This confidential source of information further stated that this confidential source of information has personally observed Johnny Lee Chapman cut this heroin with sugar, this sugar being located at the bar in the basement of the residence. This confidential source of information further stated to affiant that this heroin cut with sugar was cut on the glass portion of a picture frame containing the pictures of two children and the glass of this picture frame is broken across the front. This confidential source of information who affiant believes to be reliable further stated that on this date a person approached this confidential source of information on this date and stated to this confidential source of information that they had just purchased $10.00 worth of heroin at the residence of Johnny Lee Chapman on this date. Detective Paul Barbee of the Cleveland County Sheriff's Department further stated under oath before the magistrate that he has received information in the past that Johnny Lee Chapman has sold heroin in Cleveland County. Also James C. Woodard, Special Agent for the State Bureau of Investigation stated under oath before the magistrate that he has received information in the past that Johnny Lee Chapman has sold Heroin in Cleveland County.

s/ HAROLD E. SMITH
Affiant"

In support of his claim that the search warrant used by the officers was invalid, the defendant relies principally upon the case of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). In that case, Aguilar's conviction was reversed because certain requirements laid down by the Court for the issuance of search warrants were not met. The U. S.

Supreme Court announced a two-pronged test to determine the sufficiency of affidavits upon which search warrants are issued. The Court said that " . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed, [citations omitted], was 'credible' *or his information 'reliable.'* " *Aguilar v. Texas, supra,* at 114, 84 S.Ct. at 1514, 12 L.Ed. 2d at 729 (Emphasis added). The constitutional policy being preserved here is the requirement that inferences from the facts be drawn by a neutral and detached magistrate.

[1] In this case the first prong of the *Aguilar* test is met since the affidavit affirmatively shows that the informer was speaking from firsthand knowledge of the defendant's activity. He personally observed the defendant cutting heroin with sugar, utilizing the glass portion of a picture frame containing the pictures of two children. From a perusal of the remaining details recited in the affidavit concerning the exact location of needles, etc., in the basement of the defendant's residence, it is perfectly obvious that the informer was speaking entirely from firsthand observation. The underlying circumstances here clearly distinguish this case from *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974).

Regarding the second prong of the test, we believe it was similarly satisfied. In *State v. Ellington,* 18 N.C. App. 273, 196 S.E. 2d 629 (1973), an affidavit recited that an informer was 100% reliable and that information obtained from him had previously led to the confiscation of other drugs in New York City. In reference to this recital, this Court said that "[e]ven in the absence of this statement the informant's reliability may reasonably be inferred from the very nature of his detailed report." *State v. Ellington, supra,* at 277, 196 S.E. 2d at 632. We believe that this statement finds support in the emphasized portion of the *Aguilar* test quoted above and in the case of *United States v. Ventresca,* 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed. 2d 684, 689 (1965), wherein its was stated that:

> " . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. . . . [A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. . . . Technical requirements of elab-

orate specificity once exacted under common law pleadings have no proper place in this area."

Furthermore, the Supreme Court of the United States has never suggested that an averment of previous reliability is necessary. The inquiry is whether the informant's present information is truthful or reliable. *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed 2d 723 (1971).

We believe that when the detailed nature of the report and the fact that the officer swore that his informer was reliable are considered in a common sense and practical fashion, it would induce a prudent and disinterested magistrate to credit the report and conclude that the informant's information was reliable and not a causal rumor or a conclusory fabrication. In our opinion, the affidavit in the present case was sufficient to warrant a finding of probable cause to search the defendant's house.

[2] The defendant next contends that the trial court erred in admitting into evidence the bag of heroin because it was inadequately identified as being related to the case. At trial, a chain of custody was established by the State from the moment the heroin was seized to the time it appeared in the courtroom and the bag was positively identified by the chemist who had tested the substance. We find that a sufficient foundation and chain of custody was established to warrant the admissibility of the bag and its contents.

[3] The defendant further contends that the trial court erred in refusing to allow the defendant's counsel to play a recording of previous statements made by one of the State's witnesses at a preliminary hearing which contradicted certain testimony given by that witness at trial. As the record is devoid of any attempts by defendant's counsel to authenticate the recording or to actually offer the tape into evidence, it was not error for the trial court to refuse counsel's request to play it in front of the jury. See *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386 (1967).

The defendant's last assignment of error is that the trial court erred in denying his motions for judgment as of nonsuit. Reviewing the evidence in the light most favorable to the State,

we find no error in denying these motions and submitting the case to the jury.

We find no error in the trial below.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN CALVIN GOINS

No. 7427SC706

(Filed 5 February 1975)

1. **Homicide § 21— second degree murder — death by shooting — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where it tended to show that deceased's death resulted from a gunshot wound inflicted by defendant, that at the time this wound was inflicted defendant shot at deceased from close range not once but twice, that both shots struck deceased, and that a statement made by defendant at the hospital subsequent to the crime tended to show animosity toward the man he shot.

2. **Homicide § 30— second degree murder case — submission of manslaughter issue proper**

The trial court did not err in submitting an issue as to defendant's guilt of manslaughter where the evidence would support a finding that defendant unlawfully killed deceased, but without malice, express or implied, or that he acted in self-defense but used excessive force.

3. **Criminal Law § 57— death by shooting — firing rifle and pistol into treated paper — admissibility of test results**

The trial court in a second degree murder prosecution did not err in admitting testimony of two SBI employees concerning certain tests which they had made of the clothing worn by defendant and deceased at the time of the shooting to determine the presence of burned gunpowder particles and concerning tests which they had made by firing defendant's rifle and deceased's pistol at various distances into specially treated paper to determine the distances at which these weapons had been fired at the time of the fatal shooting.

4. **Criminal Law § 75— statement by defendant in hospital emergency room — admissibility**

The trial court properly determined that a statement by defendant in a hospital emergency room was voluntary and admissible where the evidence tended to show that an officer not in uniform and defendant were the only people in the room, defendant had his face turned toward the wall and his eyes were open when he made the

statement, the officer said nothing before or after defendant spoke, and the officer did not know whether defendant knew he was in the room.

ON *Certiorari* to review trial before *Grist, Judge,* and judgment rendered at the 25 February 1974 Session of Superior Court held in CLEVELAND County.

Defendant was indicted for the first-degree murder of John Hugh Howell II and pled not guilty.

Evidence introduced by the State tended to show that on the afternoon of 26 August 1973, the defendant, who had been drinking, quarreled with his wife. In response to a telephone call received by the Lincoln County Sheriff's Department, Howell, an officer in the Department, went to defendant's residence near Lincolnton, taking with him a capias for defendant's arrest. Howell, who was in uniform, knocked on the front door. Receiving no reply, he went across the road to a store where he found Mrs. Goins and several of the couple's children. Following a brief conversation with Mrs. Goins, Howell returned to the house, accompanied by Keith Goins, defendant's son. Keith crawled through a window, opened the front door, and then rejoined his family at the store. Howell entered the house through the front door. After ten or fifteen seconds, seven gunshots were heard coming from within the house. Moments later, Howell, holding his chest, came out of the house and collapsed on the hood of the Goins' car, which was parked directly in front of the house. He then crawled several feet to his patrol car and at approximately 6:39 p.m. radioed for help.

Other law enforcement officers arriving at the house shortly thereafter found Howell, wounded in the chest and wrist, lying by his car. Defendant Goins was found lying in the hallway of the house with a wound in his lower torso. Howell's .38 caliber revolver, containing one unfired cartridge and five fired cartridge casings, was found in Howell's belt holster. A .22 caliber rifle was found lying beside Goins and two discharged .22 caliber cartridge casings were found in the hallway.

Both Howell and Goins were taken to Lincoln County Memorial Hospital, where Howell died at approximately 7:30 p.m. The pathologist who conducted an autopsy testified that in his opinion Howell died of a gunshot wound that entered his left chest and caused massive internal hemorrhage. Ballistic tests of a .22 caliber bullet taken from his spinal column showed the bul-

let to have been fired from the rifle found beside Goins. While at the hospital that evening, defendant Goins was heard to say, "I shot that big son-of-a-bitch." The pathologist testified that Howell was "a very large man," six feet two inches tall.

The rifle, the cartridge casings, the bullet removed from Howell's body, Goins's pants, and Howell's .38 caliber pistol and the shirt he was wearing when shot were sent to the State Bureau of Investigation in Raleigh for testing. The SBI conducted several chemical tests to determine the quantity and pattern of gunpowder on Howell's shirt and on Goins's pants. Based upon the results of these tests two SBI agents, accepted as experts in the field of ballistics and firearms, testified to their opinions that the .22 rifle when fired was approximately three feet from Howell's shirt, and Howell's .38 pistol when fired was approximately six or more feet from Goins's pants.

At the conclusion of the State's evidence the trial court dismissed the charge of first-degree murder. The defendant offered no evidence. The court submitted the case to the jury on charges of second-degree murder or manslaughter. The jury found defendant guilty of second-degree murder and from judgment imposing a prison sentence, defendant gave timely notice of appeal. To permit perfection of the appeal, this Court subsequently granted his petition for writ of certiorari.

Attorney General Carson by Assistant Attorney General Roy A. Giles, Jr. for the State.

C. E. Leatherman for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the denial of his motion for nonsuit on the charge of second-degree murder, contending that the evidence was insufficient to support a reasonable inference that the killing was done with malice, express or implied. Specifically, defendant argues that the evidence was insufficient to show that the killing resulted from an intentional use of a deadly weapon such as to give rise to a presumption of malice and that there was no showing of express malice. We do not agree. Viewing the evidence in the light most favorable to the State and giving the State the benefit of the legitimate inferences which may be reasonably drawn therefrom, we find the evidence sufficient to warrant a jury finding that Howell's death resulted from a gunshot wound inflicted by the defendant, that

at the time this wound was inflicted defendant shot at Howell from close range not once but twice, and that both shots struck Howell. These findings would reasonably support an inference that defendant intentionally used his rifle as a deadly weapon in an assault upon Howell and that Howell's death resulted from such intentional use. A presumption of malice arises when one intentionally assaults another with a deadly weapon and thereby proximately causes his death. *State v. Price,* 271 N.C. 521, 157 S.E. 2d 127 (1967). In addition, in this case the evidence of defendant's statement at the hospital tended to show animosity toward the man he shot. We hold the evidence sufficient to support a jury finding of malice and that there was no error in denying defendant's motion for nonsuit as to the charge of murder in the second degree.

[2] There also was no error in submitting an issue as to defendant's guilt of manslaughter. The evidence would support a finding that defendant unlawfully killed Howell, but without malice, express or implied, or that he acted in self-defense but used excessive force. Either finding would warrant a verdict of manslaughter. 4 Strong, N. C. Index 2d, Homicide, § 6.

[3] Two employees of the State Bureau of Investigation, Satterfield and Hurst, testified to certain tests which they had made of the clothing worn by defendant and by Howell at the time of the shooting to determine the presence of burned gunpowder particles and concerning tests which they had made by firing defendant's rifle and Howell's pistol at various distances into specially treated paper to determine the distances at which these weapons had been fired at the time of the fatal shooting. Defendant's counsel recognized Satterfield as an expert in ballistics and firearms and the court accepted Hurst as an expert in his field of "firearms and tool mark identification," including "clothing examination, and powder pattern tests, shot tests and test firings." Defendant assigns error to the admission into evidence over his objections of the testimony of these witnesses concerning these tests and to admitting the test papers for the purpose of illustrating their testimony. In support of this assignment defendant contends that it does not appear from the evidence that the experiments were carried out under substantially similar circumstances to those which existed at the time Howell was killed, and in particular he questions why it would not have been better in making the test firings to use other portions of the shirt worn by Howell and of the pants worn by defendant rather than the specially treated paper.

In ruling on the admissibility of experimental evidence, the trial court is generally accorded a broad latitude of discretion, especially with reference to determining whether the conditions under which the experiment was conducted were sufficiently similar to the conditions existing at the time of the crime. *State v. Carter,* 282 N.C. 297, 192 S.E. 2d 279 (1972). "The want of exact similarity would not perforce exclude the evidence, but would go to its weight with the jury." *State v. Phillips,* 228 N.C. 595, 598, 46 S.E. 2d 720, 722 (1948). In *State v. Atwood,* 250 N.C. 141, 108 S.E. 2d 219, 86 A.L.R. 2d 602 (1959) the trial court permitted a special agent of the SBI to testify concerning test firings very similar to those disclosed by the testimony in the present case. In that case, as here, the test firings were made from varying distances into paper and the powder residue on the paper was then compared with the powder residue found on the deceased's clothing in order to determine the distance from which the fatal shot was fired. Our Supreme Court found no error in the admission in evidence of testimony as to the results of such experiments and in permitting the SBI agent to testify to his opinion based thereon as to the distance between gun and victim in that case. We find no error in the admission of similar evidence in the present case. For cases from other jurisdictions, see Annot., 86 A.L.R. 2d 611, "Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired."

[4] Defendant assigns error to the court's overruling his objection to testimony by the State's witness, Danny Hallman, concerning a statement which Hallman overheard defendant make in the emergency room of the hospital shortly after the shooting. Before admitting this testimony, the court conducted a voir dire hearing at which Hallman and defendant testified. Hallman, a member of the Lincolnton Police Department, testified that he saw defendant lying on a bed in the emergency room with his head turned toward the wall, that at the time there was no one else in the room other than himself and the defendant, that he did not have his uniform on and did not say anything to the defendant and did not know whether defendant knew he was there, that he overheard defendant say, "I shot that big son-of-a-bitch," that defendant's eyes were open looking toward the wall when he said this, and that defendant did not turn around or do or say anything more. Defendant testified that he had never seen Hallman to his knowledge,

did not know if he had been in the emergency room, and did not remember anything until the following morning. At the conclusion of the voir dire hearing, the court made detailed findings of fact as to the circumstances existing at the time defendant's statement was made, including a finding that the statement was spontaneous and not prompted by any question, and concluded that testimony concerning the statement might be offered in evidence. In this ruling we find no error. The court's finding that the statement was spontaneous was fully supported by the evidence at the voir dire. A volunteered statement is not barred by the Fifth Amendment and its admissibility is not affected by the holding in *Miranda*. The credibility of the State's witness and the weight to be given his testimony were for the jury to determine.

We have examined all remaining assignments of error and find none such as to warrant the granting of a new trial. The charge of the court was free from prejudicial error and gave the defendant full benefit of the law as to the right of self-defense. In the trial and in the judgment imposed, we find

No error.

Chief Judge BROCK and Judge MARTIN concur.

MRS. GERALDINE P. NIVENS, JR., WIDOW OF WILLIAM B. NIVENS, DECEASED, EMPLOYEE, PLAINTIFF v. FIRESTONE TIRE & RUBBER COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 7427IC593

(Filed 5 February 1975)

Master and Servant § 89— workmen's compensation death benefits — amounts received from tortfeasor under terms of suspended sentence — credit on benefits payable

Where the employer had filed a written admission of liability for workmen's compensation benefits for the death of an employee by shooting, and a judgment suspending a prison sentence imposed on the tortfeasor for voluntary manslaughter recited that defendant had deeded his homeplace to the employee's widow as payment on damages and ordered that the tortfeasor pay an additional sum of $2,500 to the widow, the value of the real estate conveyed and the cash payment constitute amounts obtained by the widow "by settle-

ment with . . . or otherwise" from the third party tortfeasor by reason of her husband's death within the purview of G.S. 97-10.2(f), and the employer and its insurance carrier are entitled to credit for such amounts upon the benefits they are obligated to pay.

Chief Judge BROCK dissenting.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 15 March 1974 in Docket E-8247.

Plaintiff is the surviving spouse and sole dependent of the deceased employee, William B. Nivens, who was shot and killed on 20 April 1972 by one Dewey Rimmer. The shooting occurred in an incident which arose out of and in the course of Nivens's employment. Defendants are Nivens's employer and its workmen's compensation insurance carrier.

On 10 May 1972 defendants entered into an agreement with plaintiff on Industrial Commission Form 30 by which defendants admitted liability for and agreed to pay to plaintiff workmen's compensation benefits on account of the employee's death at the rate of $56.00 per week for 348.22 weeks and to pay $500.00 toward burial expenses, the agreement providing for total benefits in the amount of $20,000.00.

Dewey Rimmer was indicted for the murder of Nivens and was brought to trial in the Superior Court in Gaston County before Judge W. K. McLean. He pled guilty to voluntary manslaughter, and on 24 July 1972 Judge McLean signed judgments sentencing him to prison for not less than twelve nor more than fifteen years. On motion of Rimmer's attorney and with Rimmer's consent, this prison sentence was suspended for a period of five years upon certain conditions. Paragraph 2 of Judge McLean's judgment suspending the prison sentence is as follows:

> "2. It appearing to the Court that the defendant has deeded over the place where he now lives to the widow of the deceased as payment on damages, it is further ordered that he shall forthwith pay to Mrs. Geraldine Nivens, the sum of $2,500.00 in addition thereto, as full compensation."

By deed dated, acknowledged and recorded on 28 July 1972 Rimmer and his wife conveyed their homeplace to plaintiff, reserving life estates unto themselves. Rimmer also paid into

the office of the Clerk of Superior Court the sum of $2,500.00 for the use and benefit of the plaintiff, and this sum was remitted by the Clerk to and accepted by the plaintiff.

By letter dated 16 April 1973 addressed to the North Carolina Industrial Commission, the attorneys for defendants set forth in substance the foregoing facts, asserted that defendants are entitled to credit for the value of the real estate transferred and the cash paid to plaintiff by Rimmer, reported that defendants were unable to reach an agreement with plaintiff, and requested that the matter be set for hearing. The matter was calendared and heard on 23 August 1973 before Deputy Commissioner Leake, who on 12 September 1973 entered his opinion and award. In this, the Deputy Commissioner made findings of fact in substance as above set forth and in addition found that the fair market value of the real estate conveyed by the Rimmers to plaintiff was $6,500.00, the cash value of the retained life estates was $3,500.00, the reasonable fair market value of the remainder interest conveyed to plaintiff was $3,000.00, and found that plaintiff had received total benefits from the Rimmers of approximately $5,500.00. The Deputy Commissioner concluded as a matter of law, however, that the judgment in the criminal case "does not come within the purview of G.S. 97-10.2" and entered award that the defendants "are not entitled to any credit upon the benefits that they are obligated to pay to Mrs. Geraldine Nivens as a result of anything she has received pursuant to the judgment entered in the Criminal Action of State vs. Dewey Rimmer."

On appeal by defendants to the Full Commission, the Full Commission on 15 March 1974 filed its opinion and award in which it adopted as its own the Findings of Fact made by Deputy Commissioner Leake. However, the Full Commission concluded as a matter of law that defendants are entitled to credit on the compensation to be paid by them for benefits received by her from Dewey Rimmer and entered its award containing the following:

> "1. Defendants are entitled to a credit in the amount of $5,500.00 on the agreement for compensation for death previously approved herein, so that net payment by defendants under said Award shall not exceed $14,500.00.
>
> "2. Defendants shall continue to comply with the Notice of Death Award previously entered herein until the sum of $14,500.00, including burial benefits, has been paid."

From this opinion and award, plaintiff appealed.

Bob W. Lawing for plaintiff appellant.

Mullen, Holland & Harrell, P.A., by James Mullen for defendant appellees.

PARKER, Judge.

By express language of the statute G.S. 97-10.2, compensation and other benefits under the North Carolina Workmen's Compensation Act for disability, disfigurement, or death are not affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor. In such case, the respective rights and interests of the employee-beneficiary under the Act, the employer, and the employer's insurance carrier, if any, in respect of the cause of action against the third party tort-feasor and the damages recovered shall be as set forth in that section of the statute. Subsection (f) (1) of G.S. 97-10.2 is as follows:

> "(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with, or if an award final in nature in favor of the employee has been entered by, the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> "a. First to the payment of actual court costs taxed by judgment.
>
> "b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.
>
> "c. Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer under award of the Industrial Commission.

"d. Fourth to the payment of any amount remaining to the employee or his personal representative."

In this case, the record reveals that the employer has filed a written admission of liability for benefits under the Workmen's Compensation Act and those benefits have been and are being paid to the plaintiff. In addition, plaintiff has received from the tort-feasor a cash payment of $2,500.00 and a remainder interest in real property which, on competent evidence, the Deputy Commissioner has found to have a reasonable fair market value of $3,000.00 The Full Commission has adopted that finding as its own, and on this appeal no question has been raised as to the valuation so established. The question presented by this appeal is whether the cash payment and the value of the remainder interest conveyed to plaintiff constitute amounts obtained by her "by settlement with, judgment against, or otherwise" from the third party tort-feasor by reason of her husband's death so as to subject such amounts to the disbursement authority of the Industrial Commission under G.S. 97-10.2(f). We hold that they do.

It is, of course, true that plaintiff was not a party to the criminal action in which the tort-feasor, Rimmer, was charged with the murder of her husband, and she cannot be bound by the recitations in the judgment entered in that case to the effect that the real property was deeded to her "as payment on damages" and that the sum of $2,500.00 was to be paid in addition thereto "as full compensation." It is also true that, apart from any implications arising from such recitations in the judgment entered in the criminal case, there was here no finding or evidence that by accepting the deed and the cash payment plaintiff intended to make a final and binding settlement with the tort-feasor, although, except for the restriction imposed by Subsection (h) of G.S. 97-10.2, it would have been legally possible for her to have done so by negotiations undertaken during the course of the criminal proceeding. See *Jenkins v. Fields*, 240 N.C. 776, 83 S.E. 2d 908 (1954); *Hamrick v. Beam*, 19 N.C. App. 729, 200 S.E. 2d 337 (1973). G.S. 97-10.2(h) does contain the restriction that "[n]either the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join

therein"; (subject to a proviso not here applicable). Nevertheless, if plaintiff had brought a civil action against Rimmer for the wrongful death of her husband, Rimmer would have been entitled to credit for the payment previously made by him and for the value of the property he had previously conveyed to her. *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794 (1941). To the extent of such credit, at least, plaintiff's acceptance of the deed and payment have effectuated a "settlement" of Rimmer's civil liability for the wrongful death of her husband. In our opinion, and we so hold, the amount of such credit does constitute an amount obtained by plaintiff "by settlement with . . . or otherwise from the third party" by reason of such wrongful death so as to bring such amount within the purview of G.S. 97-10.2(f)(1). We also hold that the award of the Industrial Commission correctly applied that section under the circumstances of this case.

Affirmed.

Judge MARTIN concurs.

Chief Judge BROCK dissents.

Chief Judge BROCK dissenting:

I dissent from that portion of the majority opinion which permits a credit upon the employer's obligation for the $2,500.00 paid by Rimmer in lieu of serving a prison sentence.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. MILLS MANUFACTURING COMPANY

No. 7428SC563

(Filed 5 February 1975)

1. Highways and Cartways § 1—connector road — limited access — authority of Board of Transportation

The State Board of Transportation had statutory authority under G.S. 136-89.50 to designate a new road across defendant's property a controlled-access facility as a part both of the State highway system and of the National System of Interstate Highways where the principal purpose of the road is to move traffic between Highway 70 and Interstate 40, notwithstanding the road has been given a secondary road number.

2. **Highways and Cartways § 1— connector road — designation as limited access facility — action not arbitrary**

The State Board of Transportation did not act arbitrarily and capriciously in designating a road across defendant's property between Highway 70 and Interstate 40 as a controlled-access facility while failing to designate another connector between the two highways as a controlled-access facility where the court found that the shorter distance of the road across defendant's property created a hazardous traffic condition which did not exist in the other road.

3. **Highways and Cartways § 1— designation of connector as limited access facility — equal protection**

Defendant's right to equal protection of the laws was not violated when a road across defendant's property between Highway 70 and Interstate 40 was designated a controlled-access facility while other connectors between the two highways were not so designated.

APPEAL by defendant from *Friday, Judge,* 25 February 1974 Session of Superior Court held in BUNCOMBE County.

The State Highway Commission (now the Board of Transportation) commenced this action in 1968 to condemn a portion of defendant's land for Highway Project No. 8.1909302. Defendant's land is located on the south side of U. S. Highway 70 a few miles east of Asheville in Buncombe County. At that point Highway 70 runs generally east and west and is a five-lane paved highway which serves as a major traffic artery for traffic moving between Asheville and Black Mountain and points on either side of those cities. When this action was commenced, defendant's property was a tract of approximately 11 acres, triangular in shape, bounded on the north by Highway 70, on the southeast by the tracks of the Southern Railway, and on the southwest by SR 2753, also known as Porter Cove Road. Porter Cove Road (SR 2753) was a dirt road which ran southward from Highway 70 along the southwestern boundary of defendant's property and then continued southward across the railroad tracks and for a short distance into a mountain cove known as Porter Cove, where it came to a dead end.

South of the railroad tracks and on the other side of the tracks from defendant's property, Interstate Highway 40 has been constructed. At this point, Interstate Highway 40 runs generally east and west and approximately parallel with, but on the other side of the railroad tracks from, Highway 70. When completed, Interstate Highway 40 will also carry traffic between Asheville and Black Mountain and points east and west of those cities.

In the present action plaintiff seeks to condemn a strip of land containing approximately 3 acres running in a corridor north and south through the middle of defendant's 11-acre tract. This corridor runs from Highway 70 on the north to the railroad tracks on the south and splits defendant's remaining property into two separate tracts, one lying west of the corridor and containing 3.37 acres and the other lying east of the corridor and containing 4.30 acres. Both of these remaining tracts abut upon and have access to Highway 70. Over this corridor which plaintiff has condemned, plaintiff has placed a fill and has constructed thereon a paved four-lane road which runs south from Highway 70, crosses over the railroad tracks on a bridge, and then continues south until it passes underneath Interstate 40. Entrance and exit ramps on either side of and connecting into and from Interstate 40 and the new road allow for interchange of traffic moving in either direction along Interstate 40 and the new road. South of these ramps the new road narrows from a four-lane to a two-lane road and runs into the old Porter Cove Road, which still dead ends in Porter Cove.

In condemning the property for the new road which runs across defendant's property, plaintiff designated the portion of the road which runs between Highway 70 and Interstate 40 as a controlled-access facility, and it is the right and power to make this designation which defendant seeks to challenge by this appeal.

In its answer as originally filed on 23 December 1969, defendant did not contest plaintiff's right to designate the new road across defendant's property as a controlled-access facility, but defendant did stress the diminution in value to its remaining property caused by the fact that defendant would be denied access from its two remaining and separated tracts into and from the new road. By motion filed on 5 October 1973 defendant for the first time challenged plaintiff's right to designate the road as a controlled-access facility. In this motion defendant prayed that plaintiff be ordered to allow defendant reasonable access to the new road. On 11 February 1974 defendant moved to be allowed to amend its answer to conform to its motion filed 5 October 1973 in order to present in the pleadings the questions sought to be raised by that motion. After hearing on these motions, the court entered an order dated 20 February 1974 in which the court made findings of fact and conclusions of law on the basis of which the court denied defendant's 5 October

1973 motion. By separate order dated and filed 28 February 1974 the court allowed defendant's motion to amend its answer.

Defendant appeals from the order denying its 5 October 1973 motion.

Attorney General Carson by Deputy Attorney General R. Bruce White, Jr. and Assistant Attorney General Guy A. Hamlin for plaintiff appellee.

Bennett, Kelly & Cagle, P.A., by E. Glenn Kelly for defendant appellant.

PARKER, Judge.

Article 6D of G.S. Chap. 136, entitled "Controlled-Access Facilities," contains the following:

> G.S. 136-89.49: *"Definitions.*—When used in this Article:
>
> * * * * *
>
> "(2) 'Controlled-access facility' means a State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right or easement of access."
>
> G.S. 136-89.50: *"Authority to establish controlled-access facilities.*—The Board of Transportation may designate, establish, abandon, improve, construct, maintain and regulate controlled-access facilities as a part of the State highway system, National System of Interstate Highways, and Federal Aid Primary System whenever the Board of Transportation determines that traffic conditions, present or future, justify such controlled-access facilities, or the abandonment thereof."

[1] Defendant contends that plaintiff has statutory power to establish a controlled-access facility only over a section of highway which is either a part of the State highway system, a part of the National System of Interstate Highways, or a part of the Federal Aid Primary System, and that the road here involved does not fall into any of these classifications but is part of the secondary road system. In support of this contention, defendant points to testimony in the record that the new road across its property has been designated State Road 2838 and that

"SR 2838 was constructed for the purpose of relocating the Porter Cove Road to lead to the Porter Cove area" and that it "serves as a county road." The trial court, however, found that the new road was condemned both for the relocation of Porter Cove Road (old SR 2753) and for access to and exit from Interstate 40, and there is ample evidence in the record to support such a finding. There is evidence that Porter Cove Road south of its underpass beneath Interstate 40 is a two-lane road which dead ends a short distance south of Interstate 40, that the portion of the road north of Interstate 40 and connecting into Highway 70 is a four-lane road which serves as a connector between Interstate 40 and Highway 70, and that the traffic projections for the road were for 4000 vehicles per day in 1968 and for 7800 vehicles per day in 1988. It is apparent from all of the evidence that although the new road across defendant's property does serve to carry the same limited local traffic into and out of Porter Cove which was formerly carried by the old Porter Cove Road, the principal purpose of the new road is to carry traffic to and from the Interstate Highway. From the design of the new road and from the projected traffic volume to be carried thereon, it is apparent that by far the largest portion of such traffic will be traffic moving between Highway 70 and Interstate 40. Whatever the new road is called or by whatever number it is designated, its principal functional purpose is to serve as an important connector between these two major traffic arteries. We hold that plaintiff had statutory authority under G.S. 136-89.50 to designate the new road across defendant's property a controlled-access facility as a part both of the State highway system and of the National System of Interstate Highways.

[2] Defendant next contends that if it be found that plaintiff had statutory authority to designate the new road as a controlled-access facility, its action in so doing in this case was arbitrary, capricious and whimsical. In support of this contention defendant points to the fact that a similar connector between Interstate 40 and Highway 70, known as Patton Cove Road, which is located some two miles east of defendant's property, was not designated by plaintiff as a controlled-access facility, and defendant contends that there is no reasonable basis to justify plaintiff's making one road and not the other a controlled-access facility. There is, however, an important difference between the two connector roads. In the case of the road across defendant's land, the distance between Interstate 40 and Highway 70 is

approximately 920 feet, while in the case of the Patton Cove Road, the distance between Interstate 40 and Highway 70 is 1825 feet. The trial court found that the shorter distance in the one case created a hazardous traffic condition which did not exist in the other. Although plaintiff may not exercise its statutory power to establish controlled-access facilities in an arbitrary or capricious manner, necessarily plaintiff must be accorded a wide latitude in making a determination that traffic conditions, present or future, justify creating a controlled-access facility in one place and not in another. Certainly the evidence in the present case is not such as to compel a finding that plaintiff here exercised its statutory powers in an arbitrary or capricious manner and the trial court committed no error in refusing to make such a finding.

[3] We also find no merit in defendant's further contention that plaintiff's action in creating a controlled-access facility over defendant's land, while failing to create such facilities along Patton Cove Road and along other connecting links between Highway 70 and Interstate 40, resulted in a denial of defendant's constitutional right to the equal protection of the laws. As noted above, the difference in length of the connector link over defendant's property, as compared with the Patton Cove Road connector, furnished a rational basis for plaintiff's determination that traffic hazards over the two connectors would not be the same. Furthermore, we do not understand that the equal protection clause of the Fourteenth Amendment operates to prohibit the Board of Transportation from establishing a controlled-access facility over one tract of land unless it also creates such facilities over every other tract which might be somewhat similarly situated. Of course, when, as here, such a facility is created, that fact must be taken into account in arriving at just compensation. G.S. 136-89.52.

Finally, defendant's assignments of error directed to the court's refusal to adopt defendant's tendered findings of fact are overruled. The findings which the court did make were supported by the evidence and these in turn supported the conclusions of law made and the order entered.

The order appealed from is

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. LARRY J. MITCHELL

No. 7412SC873

(Filed 5 February 1975)

1. **Criminal Law § 113—instructions — acting in concert — aiding and abetting**

If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the trial judge must explain and apply the law of "acting in concert"; if the defendant was actively or constructively present and did no act necessary to constitute the crime but aided and abetted another in the commission thereof, the trial judge must explain and apply the law of "aiding and abetting."

2. **Criminal Law § 113— instructions — acting in concert — insufficiency of evidence**

Where the evidence showed that defendant did all of the acts necessary to constitute the crime of armed robbery of one person but none of the acts necessary to constitute armed robbery of a second person, the trial court erred in applying the law of "acting in concert" to the charge of armed robbery of the second person.

3. **Criminal Law § 134— necessity for sentence as "committed youthful offender"**

The trial court may not sentence a youthful offender as a "regular youthful offender" without finding that defendant would not derive benefit from treatment and supervision as a "committed youthful offender," but such finding need not be accompanied by supporting reasons. G.S. 148-49.4.

APPEAL by defendant from *Smith, Judge,* 20 May 1974 Session of Superior Court held in CUMBERLAND County. Heard in the Court of Appeals 14 January 1975.

In separate bills of indictment, defendant was charged with (1) armed robbery of Gary M. Twing, and with (2) armed robbery of Russell M. Wyler. The cases were consolidated for trial and defendant pled not guilty to both charges.

It appears from the State's evidence that about 3:00 o'clock a.m. on 30 May 1974, Gary M. Twing and Russell M. Wyler, soldiers stationed in nearby Ft. Bragg, were standing at a bus stop with about twenty other people on the 500 block of Hay Street, a main street in the City of Fayetteville, in an area where various forms of entertainment, including go-go clubs and massage parlors, are offered to the public in general and soldiers in particular. The lighting conditions were good.

Defendant, age 17, walked up about five or six feet from the waiting group and said to Wyler, "Come here." Wyler walked over and defendant pulled out a razor, held it a few inches from his upper body and told Wyler that he wanted his wallet. Wyler's friend, Twing, then walked over and one Donald Tucker, standing near the defendant, put a knife against Twing's throat and demanded his wallet. Each soldier complied with the demand. The defendant took $3.00 from Wyler's wallet and Tucker took $50.00 from Twing's wallet.

Witness for the State, Scott Smith, testified that he was standing across the street and that it appeared to him that a robbery was taking place; that he lived in the area and observed a lot of robberies there and that he just usually looked at them and went on. He saw the defendant and Tucker leave the scene, walk across Hay Street and enter the Rose Hotel. The robbery was immediately reported to the city police, and they apprehended the defendant and Donald Tucker together in a room at the Rose Hotel.

The jury found defendant guilty in each case and also found Donald Tucker guilty of armed robbery of Wyler and armed robbery of Twing. Judgment was entered sentencing defendant for the armed robbery of Russell E. Wyler (File No. 74CR10258) to imprisonment for a term of not less than sixteen nor more than twenty years as a "regular youthful offender." For the armed robbery of Gary M. Twing, (File No. 74CR14017) he was sentenced to imprisonment for a term of not less than sixteen nor more than twenty years as a "regular youthful offender." Defendant appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General Ann Reed for the State.

Assistant Public Defender H. Gerald Beaver for defendant appellant.

CLARK, Judge.

The defendant assigns as error the following portion of the Judge's charge:

> "[F]or a person to be guilty of a crime, it is not necessary that he, himself do all the acts necessary to constitute a crime.

That two or more persons acting together with a common purpose to commit a crime, and in this case, a crime of robbery with a dangerous weapon, each of them is held responsible for the acts of the others condoning in the commission of a crime."

The defendant contends that "condone" means silent approval and that the court misstated the law of "aiding and abetting."

A participant in the commission of a felony may be a principal in the first degree or a principal in the second degree. A person who actually commits the offense or is present with another and does some act which forms a part thereof, although not doing all of the acts necessary to constitute the crime, is a principal in the first degree. One who is actually or constructively present when the crime is committed and aids or abets the other in its commission is a principal in the second degree. Both are equally guilty. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952); *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56 (1966). In *State v. Allison,* 200 N.C. 190, 156 S.E. 547 (1931), the distinction between principals in the first and second degree was characterized as a distinction without a difference, but the distinction is still maintained in recent decisions. See *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972); *State v. Lyles,* 19 N.C. App. 632, 199 S.E. 2d 699 (1973).

[1] Though "principals in the first and second degree" have disappeared from courtroom parlance, the trial judge has the burden of recognizing the difference where there is evidence that the defendant and another are associated in the perpetration of the crime charged. If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of "acting in concert." This would constitute a principal in the first degree under common law. If a defendant was actively or constructively present and did no act necessary to constitute the crime but aided and abetted the other in the commission thereof, the trial judge must explain and apply the law of "aiding and abetting." This would constitute a principal in the second degree under common law. Too, the evidence may require the judge to charge on both "acting in concert" and "aiding and abetting."

[2] According to the evidence in these cases, the defendant did all of the acts necessary to constitute the crime of armed

robbery of Russell Wyler, but none of the acts necessary to constitute the crime of the armed robbery of Gary Twing. Under these circumstances, the law of "acting in concert" was not applicable to the charge of armed robbery of Gary Twing by the defendant, though the evidence may have been sufficient to constitute "aiding and abetting." Since a new trial is ordered on this charge, we do not rule on the use of the word "condone" in the challenged portion of the charge, which could possibly be a *lapsus linguae* or a transcript error since the charge otherwise is the same as that in "Pattern Jury Instructions."

[3] The defendant contends that the court erred in sentencing the defendant as a "regular youthful offender" without finding that the defendant would not derive benefit from treatment and supervision as a "committed youthful offender."

Article 3A, Chapter 148 of the General Statutes, (G.S. 148-49.1 through 148-49.9) entitled "Facilities and Programs for Youthful Offenders" defines a "youthful offender" as a person under the age of twenty-one and a "committed youthful offender" as one sentenced under the article. The purpose of the Article, stated in G.S. 148-49.1, is to separate the youth from other and more experienced criminals, to provide a better method for treating youthful offenders, and to rehabilitate and successfully return them to the community.

To accomplish this purpose, the trial judge was given the sentencing option of committing the youthful offender to the custody of the Secretary of Correction for treatment and supervision, fixing a maximum term. G.S. 148-49.4. The "committed youthful offender" so sentenced receives special treatment in that he is to have a diagnostic and classification study, (G.S. 148-49.5); is to be placed in special facilities and given vocational, educational, and correctional training, (G.S. 148-49.7); is to be conditionally released in the discretion of the Secretary and Parole Commission, (G.S. 148-49.8(a)); and must be conditionally released within four years, (G.S. 148-49.8(b)).

The language in the Article affecting the sentencing role of the trial judge is found in the last sentence of G.S. 148-49.4 as follows:

> " . . . If the court shall find that the youthful offender will not derive benefit from treatment and supervision pursuant to this Article, then the court may sentence the

youthful offender under any other applicable penalty provision."

It appears that our legislature followed the Federal Youth Corrections Act of 1950, 18 U.S.C.A. 5005, *et seq.*, since Section 5010(d) provides as follows:

> "If the court shall find that the youthful offender will not derive benefit from treatment . . . then the court may sentence the youth offender under any other applicable penalty provision."

In a recent decision, *Dorszynsky v. United States*, ____ U.S. ____, 94 S.Ct. 3042, 41 L.Ed. 2d 855 (1974), the Supreme Court of the United States ruled that in sentencing a youthful offender under other applicable penal statutes, a Federal District Court must make an express finding on the record that the offender would not benefit from treatment under the Federal Youth Corrections Act. The court did not require that such finding be accompanied by supporting reasons.

The quoted last sentence of G.S. 148-49.4 expresses a clear legislative intent that a youthful offender receive the benefit of a sentence as a "committed youthful offender," unless the trial judge shall find that he will not derive benefit from such sentence.

To comply with the manifest desires of the legislature that sentencing as a "committed youthful offender" be considered as one option when the defendant is eligible for it, the trial judge must make a "no benefit" finding or make some other finding that makes clear that he considered such option and decided that the defendant would not derive benefit therefrom, but it is not required that such finding be accompanied by supporting reasons.

In the case charging armed robbery of Gary Twing, (File No. 74CR14017) a new trial is ordered.

In the case charging armed robbery of Russell Wyler, (File No. 74CR10258) the judgment is vacated and this cause is remanded to the end that the Superior Court conduct further proceedings consistent with this opinion and resentence the defendant.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOHN WILLIE GARNETT

No. 7426SC863

(Filed 5 February 1975)

1. **Criminal Law §§ 34, 66— participation in prior robbery — evidence admissible for identification of defendant**

In a prosecution of defendant for armed robbery of a restaurant, the trial court did not err in allowing an eyewitness to testify that defendant had committed a similar robbery of the same store three days before the crime for which he was on trial, since that testimony tended to identify defendant as the perpetrator of the crime for which he was on trial.

2. **Criminal Law § 43— photographs of robbery — admissibility for illustration**

The trial court in an armed robbery case properly allowed photographs of the robbery into evidence where a witness testified that the pictures clearly depicted the man who was robbing her, his clothing, the pistol he was carrying, and herself, and the trial judge instructed the jury that the photographs were being allowed into evidence solely for the purpose of illustrating the witness's testimony.

3. **Criminal Law § 75— statement made by defendant in patrol car — voluntariness**

Although defendant testified that officers threatened him and elbowed him in the ribs, the record contains sufficient competent evidence to support the findings of the trial judge and the findings support his conclusion that a statement to an officer made while defendant was seated in a patrol car was freely, understandingly and voluntarily made.

APPEAL by defendant from *Copeland, Judge,* 3 June 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals on 14 January 1975.

This is a criminal prosecution wherein the defendant, John Willie Garnett, was charged in a bill of indictment, proper in form, with armed robbery.

The State offered evidence tending to show the following: On 5 January 1974 Mrs. Fay Ingram was employed as a cashier at the Kentucky Fried Chicken restaurant on Belhaven Boulevard in Charlotte, N. C. Shortly after 5:00 p. m. the defendant entered the restaurant, pointed a pistol at Mrs. Ingram and said: "All right. Let me have it. This is it. Give it up." As directed, Mrs. Ingram then placed all the money from the cash register into a bag and gave it to the defendant. He was wearing a tan coat, green pants, and a dark shirt and was inside

the restaurant less than fifteen minutes. In order to illustrate the testimony of Mrs. Ingram, the State introduced into evidence, over the defendant's objection, five photographs of the 5 January 1974 robbery that had been taken by a hidden camera while the robbery was being committed. Mrs. Ingram testified that the pictures clearly depicted the man who was robbing her, his clothing, the pistol she had described, and herself. Also over the defendant's objection, Mrs. Ingram testified that the defendant had robbed the Kentucky Fried Chicken restaurant three days earlier, on 2 January 1974, while she was working as cashier. On this prior occasion the defendant and two other persons entered the restaurant between 5:00 p.m. and 6:00 p.m. After waiting in line for several minutes, the defendant pulled a shotgun from under his coat and said: "All right, this is it. Let me have it." He was wearing a tan coat and was inside the restaurant for approximately thirty minutes.

Officer D. L. Beveridge, a patrolman with the Charlotte Police Department, arrested the defendant at his home on 16 January 1974. He read the arrest warrant to the defendant, handcuffed him and placed him in the patrol car. At this point, a voir dire was conducted in the absence of the jury to determine the admissibility of a statement allegedly made by the defendant to Officer Beveridge. Officer Beveridge testified on voir dire that he advised the defendant of his Miranda rights after placing the defendant in the patrol car. Two other officers were present. Officer Dennis was driving and Officer Christmas was in the back seat with the defendant and Officer Beveridge. The defendant appeared sober and appeared to talk in a normal manner. He told Officer Beveridge that he understood his rights and agreed to answer questions without the presence of an attorney. The defendant then confessed to having robbed the Kentucky Fried Chicken restaurant on both 2 January 1974 and 5 January 1974. Officer Beveridge estimated that the reading of the Miranda warning and the confession occurred during the ten minutes it took to drive from the defendant's house to the Law Enforcement Center. During this period of time the defendant did not ask to speak to an attorney. Officer Christmas also testified on voir dire for the State. He stated that the defendant confessed to the robbery when Officer Beveridge advised him of his rights and asked the defendant if he desired to make a statement.

The defendant testified on voir dire that the officers had elbowed him in the ribs several times each and had threatened

to take him "behind some building and do something to [him]." He denied having confessed to any crime.

At the conclusion of the voir dire the trial judge made specific findings of fact and concluded as a matter of law "that the defendant knowingly and intelligently waived the presence of a lawyer and such statement as he made was freely and voluntarily made without promise of any kind or without threat of any kind, either physical or mental."

Thereafter, Officer Beveridge testified before the jury that he advised the defendant of his constitutional rights and that no promises or threats were made to the defendant. Upon asking the defendant about the 5 January 1974 robbery, the defendant told him that a "dude" in a black-over-gold Buick Electra had taken him to the Kentucky Fried Chicken restaurant for the purpose of robbing it and that this man had given him a gun. After the robbery the unidentified man had given the defendant a percentage of the stolen money and had kept the remainder for himself.

The defendant did not offer any evidence.

Upon the jury's verdict of guilty as charged, the trial court sentenced the defendant to a prison term of not less than twenty (20) nor more than thirty (30) years. Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Walter H. Bennett, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends that the trial court erred in allowing Mrs. Ingram to testify that the defendant robbed the Kentucky Fried Chicken restaurant on 2 January 1974. He also contends it was error for the trial judge to summarize this testimony in his instructions to the jury. We do not agree.

Although evidence of separate offenses is not admissible on the issue of guilt if its only relevancy is to show the character of the defendant or his disposition to commit an offense of the nature of the one charged, 1 Stansbury's N. C. Evidence (Brandis Revision) § 91, such evidence will not necessarily be excluded if it tends to identify the defendant as the perpetrator of the crime for which he is on trial. *State v. McClain,* 240 N.C.

171, 81 S.E. 2d 364 (1954). Due to the similarities of the two robberies and the proximity in time and place, the testimony objected to here is clearly relevant to prove that the defendant robbed the Kentucky Fried Chicken restaurant on 5 January 1974. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). Furthermore, the trial judge specifically instructed the jury to disregard the testimony of Mrs. Ingram insofar as it might tend to show the commission of a separate criminal offense and to consider it only as it might relate to the identification of the defendant as the person who committed the offense for which he was standing trial. On the facts of this case, we hold there was no prejudicial error in overruling defendant's objections to this testimony.

[2] Defendant next contends that the trial court allowed the photographs of the robbery to be admitted into evidence without requiring the State to lay a proper foundation for their authenticity. We do not agree. In this State, the general rule is that where there is evidence of the accuracy of a photograph, it will be admitted into evidence for the limited purpose of explaining or illustrating the testimony of a witness that is relative and material to the matter in controversy. *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Foster,* 284 N.C. 259, 200 S.E. 2d 782 (1973). Accuracy of the photograph is oftentimes established, as here, by the testimony of a witness who is familiar with the scene, object, or person portrayed therein. *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824 (1948); 1 Stansbury's N. C. Evidence (Brandis Revision) § 34. In the case at bar Mrs. Ingram sufficiently authenticated the photographs and the trial judge properly instructed the jury that the photographs were being allowed into evidence solely for the purpose of illustrating the testimony of Mrs. Ingram.

[3] Finally, defendant contends that the trial judge erred in admitting into evidence the statement allegedly made by him to Officer Beveridge. The test of the admissibility of the defendant's confession is whether it was voluntarily and understandingly made. *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820 (1971).

> "'. . . When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481. The trial judge hears the evidence, observes the demeanor of the witnesses, and re-

solves the question. *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51. His findings as to the voluntariness of the confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841.' " *State v. Fox,* 277 N.C. 1, 24, 175 S.E. 2d 561, 575 (1970).

Here, upon the defendant's objection, the trial judge properly conducted a voir dire in the absence of the jury. After hearing evidence from both the State and the defendant on the question of the voluntariness of the defendant's confession, the trial judge made detailed findings of fact. Although defendant testified that the officers threatened him and elbowed him in the ribs, the record contains sufficient competent evidence to support the findings of the trial judge and the findings support his conclusion that the statement to Officer Beveridge was freely, understandingly and voluntarily made by the defendant.

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

JOHN WHITE HUBBARD v. LUMBERMEN'S MUTUAL CASUALTY COMPANY

No. 7423DC936

(Filed 5 February 1975)

1. **Insurance § 77— theft and vandalism insurance — personal effects — fire and lightning**

Plaintiff was not entitled to recover under a theft and vandalism provision of an automobile policy for damage to a police monitor radio as a "personal effect" where there was no evidence that the radio was damaged by fire or lightning as required by the policy.

2. **Insurance § 77— theft and vandalism insurance — damage to car — supporting evidence**

The trial court did not err in finding that plaintiff was entitled to recover $600 for damage to his automobile under the theft and

vandalism provision of an automobile policy based on plaintiff's testimony as to the value of the automobile before and after the theft.

3. **Attorney and Client § 7; Costs § 3— damage to automobile — insurer's unwarranted refusal to pay claim — attorney's fee**

In an action to recover for damage to an automobile under the theft and vandalism provision of an automobile policy, the trial court did not err in finding that there was an unwarranted refusal by defendant insurance company to pay the claim and in allowing plaintiff to recover an attorney's fee of $200 under G.S. 6-21.1 where plaintiff recovered $600 for damages to his automobile and defendant insurer had offered only $280 to settle the case before a suit was filed and had offered a $500 settlement immediately prior to the beginning of the trial.

APPEAL by defendant from *Osborne, Judge,* 22 July 1974 Session of District Court held in WILKES County. Heard in the Court of Appeals on 22 January 1975.

This is a civil action wherein plaintiff, John White Hubbard, seeks to recover from the defendant, Lumbermen's Mutual Casualty Company, upon the comprehensive coverage provisions of an insurance policy issued by defendant insuring plaintiff's 1964 Ford automobile against loss from theft, malicious damage, and vandalism. Among other things, plaintiff seeks to recover $600.00 for the damage to his vehicle, $20.00 damages to a police monitor radio, and $200.00 attorney's fees.

The record indicates that prior to the trial before the judge without a jury, the parties stipulated:

> ". . . that the only issue before the Court was as to the amount and extent of coverage in this case under that portion of policy number LK 120 207 concerning the plaintiff's 1964 Ford automobile."

After hearing the evidence offered by both parties, Judge Osborne made the following pertinent findings of fact:

> "That on December 10, 1973, the plaintiff was the owner of a 1964 Ford automobile. That on that date said automobile was covered under an insurance policy which was introduced into evidence as plaintiff's Exhibit No. 2. That on said date said automboile was stolen from the plaintiff and vandalized, and that some unknown vandals fired numerous bullets into the vehicle, smashed the windows in said automobile, and did other damage to the vehicle. That shortly prior to said date the plaintiff had spent approxi-

mately $800.00 on said automobile in rebuilding the engine and transmission, affixing the power windows, installing new carpet and seat covers, and paintwork. The plaintiff had purchased the car when it was new, and said vehicle had some 38,000 miles on it since the engine was rebuilt. That the Court finds from the evidence that said vehicle had a fair market value in excess of $625.00. That in addition, the plaintiff had a radio device which was his personal property which had been permanently installed upon the vehicle. That said vehicle had a salvage value of $25.00 after said damage. That the defendant insurance company made a maximum offer to the plaintiff in the amount of $280.00 to settle the case prior to litigation and the Court finds as a fact that there was unwarranted refusal on the part of the defendant insurance company to make a higher offer in settlement of plaintiff's claim."

Based on the above findings, the trial judge made the following pertinent conclusions:

"(1) That the plaintiff is entitled to recover in the sum of $600.00 for the loss in fair market value of his vehicle under the terms of said insurance policy.

(2) That the plaintiff is entitled to recover the sum of $25.00 for the loss of his radio device which was a personal effect as defined under the terms of the policy.

(3) That the plaintiff is entitled to recover a reasonable attorney's fee pursuant to G.S. 6-21.1 for the defendant insurance company's refusal to pay the plaintiff's claim."

From judgment that plaintiff recover of the defendant $625.00 for the damage to his automobile and police monitor radio and $200.00 as a fee for plaintiff's attorney, defendant appealed.

John S. Willardson for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and James H. Kelly, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends the trial court erred in concluding that plaintiff was entitled to recover $25.00 for the damage

to the police monitor radio as a "personal effect." The pertinent provision of the insurance policy is as follows:

> "COVERAGE E (2)—Personal Effects
>
> (2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile."

While the trial judge denominated the police monitor radio as a "personal effect . . . under the terms of the policy," there is no allegation, evidence, or finding that the plaintiff's radio was destroyed by fire or lightning. Therefore, since the record does not support the award of $25.00 for the damage to the radio, the judgment will be modified by eliminating $25.00 therefrom.

[2] The defendant contends the trial court erred in finding and concluding that the plaintiff was entitled to recover $600.00 for the damage to his automobile. The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such finding will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted. *Brooks v. Brooks,* 12 N.C. App. 626, 184 S.E. 2d 417 (1971). The trial judge accepted plaintiff's testimony as to the value of his automobile before and after the theft and based the award thereon. There is competent evidence in the record to support the court's findings with respect to the value of plaintiff's vehicle, and these findings support the conclusion that the damage to the vehicle was $600.00.

[3] Finally, defendant contends Judge Osborne erred in finding that there was an unwarranted refusal on the part of the defendant to make a higher offer in settlement of the plaintiff's claim and in concluding that the plaintiff was entitled to recover reasonable attorney fees pursuant to G.S. 6-21.1, which provides:

> *"Allowance of counsel fees as part of costs in certain cases.*—In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record,

where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs."

The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. *Hicks v. Albertson,* 284 N.C. 236, 200 S.E. 2d 40 (1973). This legislation, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. *Hicks v. Albertson,* supra.

The record in the present case discloses that the amount offered by the defendant in settlement before suit was instituted was less than fifty percent of the damages ultimately determined by the judge. The record also shows that after all the evidence was presented, defendant's counsel advised the judge that $500.00 had been offered to settle the case immediately prior to the beginning of the trial. While the difference between the amount offered before suit was instituted and the amount ultimately found to be the damage to plaintiff's vehicle is only $320.00, it represents a difference of more than one hundred percent. This evidence, coupled with the fact that the defendant offered to settle the case for $500.00 immediately before the trial commenced, is sufficient, in our opinion, to support the finding by the judge that the defendant was not warranted in refusing to make a higher offer of settlement before the plaintiff incurred the expense of employing an attorney to institute suit. Defendant, although it knew plaintiff was demanding that his attorney's fee be taxed as a part of the costs, failed to explain why it was willing to pay $220.00 more immediately before the trial than it was willing to pay before suit was instituted. There is nothing in the record to show that the defendant had any information regarding the damage to the vehicle available to it when it made the $500.00 offer that it did not have when it made the $280.00 offer. The obvious conclusion is that the defendant increased its original offer by eighty percent simply because plaintiff had employed counsel, instituted suit, and demonstrated his willingness to have the court determine the

whole matter. The allowance of counsel fees under the authority of G.S. 6-21.1 is, by express language of that statute, in the discretion of the presiding judge. *Callicutt v. Hawkins,* 11 N.C. App. 546, 181 S.E. 2d 725 (1971). Under the circumstances of this case, we conclude that the defendant has failed to show the trial court abused its discretion in taxing as a part of the costs an attorney's fee in the amount of $200.00.

The result is: the $25.00 awarded for damage to plaintiff's radio is eliminated from the judgment; the judgment awarding $600.00 for damage to the motor vehicle and $200.00 as a fee for plaintiff's attorney, to be taxed as a part of the costs, is affirmed.

Modified and affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM ELBERT SMITH

No. 7410SC904

(Filed 5 February 1975)

1. **Constitutional Law § 32— indigent defendant — no right to choose counsel**

An indigent defendant is not entitled to have the court appoint counsel of his own choosing.

2. **Constitutional Law § 32— right to handle own case**

The defendant in a criminal case has a right to handle his own case without interference by or assistance of counsel forced upon him by the court against his wishes.

3. **Constitutional Law § 32— indigent defendant — refusal of appointed counsel — refusal to sign written waiver**

When an indigent defendant has refused to accept court-appointed counsel unless he could choose the counsel to be appointed, and all of the provisions of G.S. 7A-457 have been otherwise fully complied with, refusal of defendant to sign a written waiver of counsel will not defeat a determination that defendant freely, voluntarily and understandingly waived representation by counsel, and the State may proceed with the trial of the indigent defendant without counsel.

4. **Criminal Law § 116— necessity for charge on defendant's failure to testify**

The trial court did not err in the failure to instruct the jury upon the effect of defendant's failure to testify absent a request for such instruction by defendant.

5. Criminal Law § 145.1— revocation of probation — denial of procedural rights — absence of prejudice

Although defendant's rights were violated when the trial court revoked defendant's probation upon his conviction of six narcotics charges without a notice of hearing and a bill of particulars having been served on defendant and without an offer of court-appointed counsel having been made, defendant was not prejudiced thereby since the sentence placed in effect by the probation revocation will run concurrently with a longer sentence imposed in the narcotics cases.

APPEAL by defendant from *McLelland, Judge,* 8 July 1974 Session of Superior Court held in WAKE County. Heard in the Court of Appeals 14 January 1975.

Defendant was charged and convicted under six bills of indictment, proper in form, with the felonies of (1) sale of cocaine on 13 March 1974, (2) sale of marijuana on 13 March 1974, (3) sale of marijuana on 20 March 1974, (4) possession of cocaine on 13 March 1974 with intent to sell, (5) possession of marijuana on 13 March 1974 with intent to sell, and (6) possession of marijuana on 20 March 1974 with intent to sell.

The State's evidence tends to show that an undercover agent for the Raleigh Police Department saw defendant in possession of cocaine and marijuana on 13 March 1974 and at that time purchased cocaine and marijuana from defendant. The same undercover agent saw defendant in possession of marijuana on 20 March 1974 and at that time purchased marijuana from defendant. Defendant offered no evidence.

Attorney General Edmisten, by Associate Attorney Bunting, for the State.

Richard O. Gamble, for the defendant.

BROCK, Chief Judge.

The trial of defendant was conducted without defendant being represented by counsel. Defendant assigns this as error and argues that it entitles him to a new trial.

Defendant was arrested on 14 May 1974. On 16 May 1974 counsel was appointed to represent defendant. On 23 May 1974 appointed counsel was permitted to withdraw because of new employment which prohibited his general practice of law. Defendant was brought before Judge McLelland at the 3 June 1974 Session for the appointment of counsel. Defendant stated that

he did not want appointed counsel and if he had not employed counsel at the time of trial, he would defend himself. During the second week of the 8 July 1974 Session, on 16 July 1974, defendant appeared again before Judge McLelland without counsel. The charges against defendant were duly calendared for trial, and the cases were called for trial by the assistant district attorney.

Before arraignment the trial judge explained fully to defendant his right to court-appointed counsel and inquired whether defendant wanted the court to appoint counsel to represent him. Judge McLelland offered to appoint counsel and continue the trial to a later date. The substance of defendant's replies to the court's questions and offers was that if his bond had been less, he could have gotten out of jail and employed counsel; that he did not want the court to appoint counsel unless defendant could choose counsel to be appointed. In spite of defendant's intractable refusal to accept court-appointed counsel, Judge McLelland patiently and tediously explained and reexplained defendant's right to have counsel appointed, the consequence of his refusal, and the possible punishment if convicted of the charges against him. The judge further clearly explained that defendant was not entitled to have the court appoint counsel of his own choosing but that counsel would be appointed from the list filed with the court for that purpose. After numerous clear and unequivocal refusals by defendant to be represented by court-appointed counsel, if not of his own choice, Judge McLelland asked defendant to sign a waiver of counsel. Defendant steadfastly refused to sign a waiver. Based upon these preliminary proceedings, Judge McLelland found that defendant had "freely, understandingly and voluntarily" waived appointment of counsel, and directed that the trial proceed. Defendant displayed the same attitude throughout the trial: he refused to plead to the charges, and pleas of not guilty were entered for him by the court; he refused to answer the judge's inquiry of whether defendant wished to question the jurors; he refused to answer the judge's inquiry of whether defendant wished to question the State's witnesses; he refused to answer the judge's inquiry of whether defendant wished to offer any evidence. Finally, in response to the judge's inquiry, defendant did state that he did not wish to argue the case to the jury. In the light of this the district attorney did not present argument.

[1, 2] Clearly, and for cogent reasons, an indigent defendant is not entitled to have the court appoint counsel of his own choosing. *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652. The defendant in a criminal proceeding has a right to handle his own case without interference by, or assistance of, counsel forced upon him by the court against his wishes. *State v. Mems,* 281 N.C. 658, 190 S.E. 2d 164.

Defendant argues, however, that regardless of his refusal of appointed counsel, he did not sign a waiver of his right, and therefore the trial could not proceed. G.S. 7A-457(a) provides that an indigent may, in writing, waive his right to in-court representation by counsel. Defendant argues that failure to obtain his waiver in writing violated the statute and entitles him to a new trial.

[3] In this case the trial judge did everything required by the statute and more. There was no way the trial judge or anyone else could compel defendant to sign the waiver. To accept defendant's argument would be to give an indigent the right to block every effort to place him on trial by the simple refusal of the indigent to accept appointed counsel, coupled with his simple refusal to sign his name to a waiver of counsel. Clearly it was not the legislative intent to create such an impasse as that. It is equally clear that the two words of G.S. 7A-457(a), "in writing," are directory only and not mandatory. When all of the provisions of G.S. 7A-457 have been otherwise fully complied with, as in this case, and the indigent defendant has refused to accept court-appointed counsel, his refusal to sign a waiver of counsel will not defeat a determination that such defendant freely, voluntarily, and understandingly waived in-court representation by counsel. In such case the State may proceed with the trial of the indigent defendant without counsel.

[4] Defendant assigns as error the failure of the trial court to instruct the jury upon the effect of defendant's failure to testify. This assignment of error has no merit. Such an instruction is not required unless specifically requested by defendant, *State v. Rankin,* 282 N.C. 572, 193 S.E. 2d 740, and it is a better practice to give no instruction concerning defendant's failure to testify unless such an instruction is requested by the defendant. *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 754.

[5] After defendant was convicted of the six charges in this case, the trial judge entered judgments of confinement on two

of the charges providing for a ten-year sentence and a two-year sentence to run consecutively. Sentences imposed in the other four cases run concurrently with the first ten-year sentence. At the time of these convictions, defendant was on probation under a sentence of not less than seven nor more than ten years. The trial judge advised defendant that his convictions on these six charges constituted a showing of violation of the conditions of his probation; that if the probation were revoked, the seven to ten year sentence would run concurrently with the total of twelve years now imposed, and asked defendant if he objected to immediate revocation. Defendant stated that he had no objection. No notice of hearing was served on defendant. No bill of particulars was served on defendant. No offer of court-appointed counsel was made. Defendant argues that it was error to revoke probation under these circumstances.

We agree that defendant's procedural rights were not fully safeguarded in the revocation of his probation; however, we fail to see prejudice to defendant in the event his convictions and sentences on the present six charges are upheld. In such a situation the service of the sentence, theretofore suspended, concurrently with the sentences presently imposed constitutes an advantage to defendant. He clears all of his obligations at one time without additional burden. *See State v. Riddler,* 244 N.C. 78, 92 S.E. 2d 435; 3 Strong, N. C. Index 2d, Criminal Law, § 171.

In the trial and the revocation of probation, we find no prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. RONALD LEE MULL

No. 7429SC876

(Filed 5 February 1975)

1. Homicide § 21— second degree murder — death by stabbing — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where it tended to show that defendant and

deceased were imprisoned in the same prison unit, a prison guard saw them arguing, later the guard saw defendant approaching deceased who was lying on his bunk, the guard saw defendant make a striking lick toward deceased's body, the guard saw no knife or other weapon in defendant's hand, but a small knife was later discovered in a heater, and deceased died from a stab wound in the chest.

2. **Criminal Law § 168— erroneous instructions — no prejudicial error**

Though the trial court's statements that defendant struck deceased on his chest and that defendant and deceased had had trouble before down in the Shelby Prison Unit were unsupported by the evidence and were erroneous, such error was not prejudicial.

3. **Homicide § 30— second degree murder — failure to submit issue of manslaughter proper**

In a second degree murder prosecution where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, the trial court did not err in failing to instruct the jury on manslaughter as a lesser included offense, since defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising on the evidence.

APPEAL by defendant from *Martin, Judge,* 17 June 1974 Session of Superior Court held in MCDOWELL County. Heard in the Court of Appeals 15 January 1975.

Defendant was charged with first degree murder. The solicitor announced in open court that he would not place defendant on trial for murder in first degree but would place him on trial for murder in second degree or manslaughter as the evidence might warrant. Upon a plea of not guilty, the jury returned a verdict of guilty of second degree murder. From judgment sentencing him to be imprisoned for a term of not less than 22 years nor more than 24 years, the defendant appealed.

State's evidence tended to show that on 24 February 1974 defendant and Kenneth Keeter were imprisoned in a prison unit in McDowell County; that a prison guard saw them arguing in one of the prison dormitories and told them to break it up; that following the incident Keeter returned to his bunk and lay down; that a short time later, just as he was leaving the dormitory, the guard saw someone coming across the room toward Keeter; that the guard went back into the dormitory, saw that the person approaching Keeter was the defendant and saw defendant make "a striking lick toward Keeter's body"; that although the guard did not see a knife or other weapon in defendant's hand, he

observed blood on Keeter's undershirt when Keeter "raised up in his bed"; and that the rescue squad was called and Keeter was taken to the hospital. Other evidence introduced by the State tended to show that when Keeter reached the hospital he was pronounced dead and that an autopsy revealed that his death was caused by a stab wound which penetrated the heart and caused massive bleeding into the chest cavity. In a later search of the dormitory for weapons it was discovered that a small knife had been thrown into a heater.

Defendant testified that he did not kill Keeter; that he and Keeter "got along fine" and that he did "not have any reason to be mad or angry at Kenneth Keeter"; that he had never had the knife in his possession and that he was in another part of the dormitory talking with some other prisoners when Keeter was stabbed. Defendant's testimony was corroborated by the testimony of other inmates in the dormitory at the time of the stabbing.

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

Dameron & Burgin, by E. P. Dameron, for defendant appellant.

MORRIS, Judge.

Because defendant has failed to argue in his brief his first and fifth assignments of error, they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Defendant's second assignment of error relates to the denial of his motions to nonsuit at the close of the State's evidence and at the close of all the evidence. "By introducing testimony at the trial, defendant waived his right to except on appeal to the denial of his motion for nonsuit at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at the close of *all* the evidence, however, draws into question the sufficiency of all the evidence to go to the jury. (Citations omitted.)" *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971).

[1] It is well settled in this State that upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable

inference to be drawn therefrom, and that nonsuit should be denied when there is sufficient evidence, direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Here, evidence tendered by the State, and set forth above, did more than raise suspicions as to defendant's involvement and possible guilt. In our opinion, there was substantial evidence of each of the elements of the offense charged and defendant's guilt or innocence was a question for the jury. Defendant's motion to nonsuit was properly denied.

[2] In his third and fourth assignments of error, defendant contends that the trial court erred in summarizing the evidence in its charge to the jury. In one instance the trial court stated that the prison guard had testified that he saw defendant strike Keeter on the chest, when in fact the guard stated that defendant made "a striking lick towards Keeter's body." At another point in the charge the trial court instructed the jury that the State had offered evidence tending to show that defendant and Keeter "had had some difficulty before down in the Shelby Prison Unit." Nowhere in the record is there evidence to support this statement. While the district attorney asked the defendant and several other witnesses if there had been some trouble or difficulty between the defendant and Keeter at the Shelby Prison Unit, in each instance knowledge of any such trouble was denied.

As we stated in *State v. Blackmon,* 6 N.C. App. 66, 73, 169 S.E. 2d 472 (1969):

> "It is well settled that a slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford an opportunity for correction; on the other hand, an instruction containing a statement of a material fact not shown in evidence must be held prejudicial, even though not called to the court's attention at the time. 3 Strong, N. C. Index 2d, Criminal Law, § 113, p. 15, and cases cited."

In our opinion the statement by the trial judge that defendant struck Keeter "on Keeter's chest" rather than that defendant made "a striking lick towards Keeter's body" is clearly a slight inaccuracy which cannot be held reversible error, especially in light of the fact that defendant failed to call the matter to

the court's attention in apt time to permit correction. We also fail to see how defendant was prejudiced by the trial court's statement that defendant and Keeter "had had some difficulty before down in the Shelby Prison Unit." Conceding it was error for the trial court to so charge, we conclude such error was harmless on these facts. Here, the trial judge made it abundantly clear that he was summarizing only a part of the evidence, that it was the duty of the jury to remember it all, that if their recollection of the evidence differed from his they should take their own recollection concerning the evidence because they must find the facts and decide the truth of the matter. Moreover, in summarizing the contentions of the parties the trial court stressed equally or greater the defendant's contentions concerning this aspect of the evidence. The court stated that the defendant had produced evidence tending to show that he had never had any trouble with Keeter, that he did not have any trouble with Keeter down in the Shelby Prison Unit and that he had no reason to attack Keeter. This assignment of error is overruled.

[3] In his sixth and final assignment of error defendant maintains that the trial court violated G.S. 1-180 by failing to instruct the jury on manslaughter as a lesser included offense of second degree murder. It is defendant's contention that a charge on manslaughter was necessary in this case since the presumption of malice which arises from proof of an intentional killing with a deadly weapon was rebutted by his testimony that he and Keeter always "got along fine" and that he had no reason to attack Keeter. We disagree.

> " '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." *State v. Morrison,* 19 N.C. App. 717, 720, 200 S.E. 2d 341 (1973).

Here there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure. Defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in this case.

Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STARKEY PAINT COMPANY, INC. v. SPRINGFIELD LIFE INSURANCE COMPANY, INC.

No. 7414SC901

(Filed 5 February 1975)

1. **Insurance § 37— life insurance — instructions — burden of proving suicide**

In an action to recover under a life insurance policy, the trial court erred in instructing the jury that, once defendant insurer presented evidence of suicide, plaintiff had the burden of proving that insured's death was caused by external violence or accidental means, since the burden of proving suicide rested with defendant throughout the trial.

2. **Evidence § 41; Insurance § 37— life insurance — suicide exclusion — statement that decedent committed suicide — statistics on suicide**

In an action on a life insurance policy wherein defendant insurer contended that coverage was excluded because death resulted from suicide, the trial court erred in failing to exclude (1) testimony by a sheriff that when he saw decedent's body he stated that "he has committed suicide" since it invaded the province of the jury, and (2) testimony by two psychiatrists concerning the number of suicides in North Carolina in 1970, the number accomplished by gunshot wounds, and different rates among population groups since it did not tend to prove suicide in this particular case.

3. **Evidence § 33; Insurance § 37— physician's statement that decedent was not suicidal — hearsay**

In an action to recover under a life insurance policy, testimony by decedent's personal physician that he once told decedent's father that in his opinion decedent was not suicidal was properly excluded as hearsay.

4. **Evidence § 50; Insurance § 37— suicidal tendencies — expert testimony**

In an action to recover under a life insurance policy, an expert in psychiatry was properly allowed to express an opinion that decedent could be considered a person likely to commit suicide.

APPEAL by plaintiff from *Brewer, Judge,* 20 May 1974 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals 17 January 1975.

Plaintiff brought this action to recover $50,000.00 allegedly payable under an insurance policy issued by defendant on the life of Danny William Starkey, who died on or about 5 November 1971 as a result of a gunshot wound. Under a provision in the policy excluding death by suicide, defendant denied responsibility other than return of premiums paid.

Defendant's evidence tended to show that decedent was found in his bed on 6 December 1971 with a .22 calibre pistol at his side and a bullet wound in his head. An autopsy revealed the wound to be the cause of death. Decedent's personal physician testified that decedent had complained about his work and had been taking mild tranquilizers. A psychiatrist testified that in his opinion decedent could be considered a person likely to commit suicide.

Plaintiff's witnesses testified that they saw decedent the day before his body was found. He was in a jovial mood and did not appear nervous or upset. The jury found that decedent intentionally committed suicide, and the trial court accordingly entered judgment for defendant. Plaintiff appealed to this Court.

Norman E. Williams, Richard M. Hutson II, and R. Hayes Hofler III, for plaintiff appellant.

Bryant, Lipton, Bryant & Battle, P.A., by James B. Maxwell and Lee A. Patterson II, for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff's first assignment of error is directed to the following instruction given by the trial court:

> "Now, members of the jury, I want to instruct you that in a suit to recover upon a policy of life insurance where the Insurance Company contends upon the grounds that the insured's death was caused by suicide, the burden of proof is upon—once the defendant has presented its evidence relating to the defense of suicide, then the burden of proof is upon the plaintiff to show by the greater weight of the evidence that the death of the insured was caused by external violence or accidental means within the terms and provisions of the policy. You are instructed that the burden of proof which rests upon the plaintiff to show that the death of the insured was caused by external violent and accidental means, and that the defendant is liable under

> the terms of the policy is aided by the presumption that the death of the insured was not due to suicide."

Plaintiff contends that this instruction constitutes prejudicial error. We agree.

In an action to recover on a life insurance policy of general coverage, plaintiff makes out a *prima facie* case by showing execution and delivery of the policy, payment of premiums, and death of the insured. *Terrell v. Insurance Co.*, 269 N.C. 259, 152 S.E. 2d 196 (1967); *Thaxton v. Insurance Co.*, 143 N.C. 34, 55 S.E. 419 (1906); 4 Strong N. C. Index 2d, Insurance, § 37, pp. 507-08. In the case at bar, these facts were stipulated by the parties. The only issue to be tried was whether the insured intentionally committed suicide. The burden of proving suicide as an affirmative defense rested with defendant throughout trial. *Hedgecock v. Insurance Co.*, 212 N.C. 638, 194 S.E. 86 (1937); *Baker v. Insurance Co.*, 168 N.C. 87, 83 S.E. 16 (1914). *See also* 2 Stansbury, N. C. Evidence (Brandis rev.), § 205.

In the above-quoted portion the trial court apparently attempted to integrate into the charge a burden of proof which obtains only in actions on policies insuring against accidental death. *See Warren v. Insurance Co.*, 215 N.C. 402, 2 S.E. 2d 17 (1939); 2 Stansbury, *supra*, § 224. Since plaintiff here sued on an ordinary life insurance policy, the charge was erroneous. Misplacing the burden of proof, it was also prejudicial. *Wiles v. Mullinax*, 275 N.C. 473, 168 S.E. 2d 366 (1969); *Williams v. Insurance Co.*, 212 N.C. 516, 193 S.E. 728 (1937); 7 Strong N.C. Index 2d, Trial, § 35, pp. 338-39.

Defendant calls to our attention the numerous instances in the charge where the trial court correctly instructed on burden of proof. Nevertheless, it is well settled that erroneous instructions on burden of proof are not cured by contextual construction. 7 Strong, *supra*, at 339. Quoting *State v. Overcash*, 226 N.C. 632, 39 S.E. 2d 810 (1946), our North Carolina Supreme Court has said:

> " 'When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted. We may not assume that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their

guide. We must assume instead that the jury in coming to a verdict, was influenced by that part of the charge that was incorrect.' "

Barber v. Heeden, 265 N.C. 682, 686, 144 S.E. 2d 886, 889 (1965). In the instant case, we cannot say that the charge as a whole did not confuse the jury to the prejudice of the plaintiff.

[2] We now turn to plaintiff's remaining assignments of error, all of which concern evidentiary questions. The first involves the testimony of Sheriff Earl Rhew that, after he saw decedent's body lying on the bed, he said, "Damn, Lynch, he has committed suicide." Such testimony constitutes an expression of the very fact in issue and invades the province of the jury. *See Wood v. Insurance Co.,* 243 N.C. 158, 90 S.E. 2d 310 (1955). Its admission, over plaintiff's objection, was error.

Plaintiff contends that the trial court also should have excluded testimony of two psychiatrists concerning the number of suicides in North Carolina in 1970, the number accomplished by gunshot wounds, and different rates among population groups. While such statistics may be relevant to an understanding of suicide generally, their tendency to prove suicide in a particular case is nonexistent. It follows that this evidence was not competent and should have been excluded. *See generally* 3 Strong N. C. Index 2d, Evidence, § 15, pp. 619-20.

[3] Plaintiff's next contention, that the trial court erred in refusing to allow decedent's personal physician to testify on cross-examination that he once told decedent's father that in his opinion decedent was not suicidal, is without merit. This was a prior statement offered for substantive purposes only and not to impeach the witness. It was proper to exclude it as hearsay. *See* McCormick's Handbook on the Law of Evidence, § 251 (2d ed. 1972).

[4] Finally, plaintiff contends that it was error to allow Dr. John A. Gergin to express an opinion as to "whether the deceased was on [6 November 1971] a person who could or would be considered likely to commit suicide." The witness was qualified as an expert in psychiatry and responded to a properly-phrased hypothetical question. *See* 2 Stansbury, *supra,* §§ 133 and 137. We find no merit in plaintiff's contention.

For reasons stated earlier in this opinion, we hold that plaintiff is entitled to a new trial.

New trial.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. PHILLIP JOSEPH TRAVATELLO

No. 7419SC926

(Filed 5 February 1975)

1. **Searches and Seizures § 3— search warrant — sufficiency of affidavit**

An officer's affidavit concerning a crowbar identified as a tool used in the break-in of a drug company and found in defendant's truck and stating that defendant had been charged with the offense was sufficient to support a magistrate's finding of probable cause for issuance of a warrant to search defendant's vehicle and premises for property missing from the drug company.

2. **Searches and Seizures § 4— warrant to search premises — search of tool shed**

Scope of a warrant to search defendant's premises was not exceeded by search of a tool shed as well as the house itself.

3. **Criminal Law § 76— confession — influence of drugs — findings supported by evidence**

Trial court's finding that defendant was not under the influence of drugs when he confessed to police was supported by an officer's testimony that, knowing defendant had used drugs in the past, officers specifically asked whether he was ill or under the influence of drugs, and that defendant replied that he was not and signed a waiver of his rights.

4. **Criminal Law § 119— failure to give requested instructions**

The trial court did not err in failing to give requested instructions where the court gave such instructions in substance.

APPEAL by defendant from *Crissman, Judge,* 20 May 1974 Session of Superior Court held in CABARRUS County. Heard in the Court of Appeals 21 January 1975.

Defendant was tried on an indictment charging him with feloniously breaking and entering a building occupied by Moose Drug Company in Mt. Pleasant on 27 January 1974 and with larceny and receiving of hypodermic syringes, syringe needles, and miscellaneous controlled drugs valued at $232.00.

Witnesses for the State testified that pursuant to a warrant law enforcement officers conducted a search and found on defendant's premises a quantity of drugs and other items fitting the description of property reported missing after a break-in at Moose Drug Company. Over defendant's objection and motion to suppress, the items were introduced in evidence. The State also introduced testimony concerning defendant's in-custody statement that he went to the rear of Moose Drug Company on the night of 27 January 1974 and, standing on some milk crates, opened a window and entered the building. He remembered taking drugs, film, syringes, needles and other items. Defendant's motion to suppress this evidence was also overruled. His only evidence was his testimony denying that he broke into Moose Drug Company and asserting that he was under the influence of narcotics at the time of his arrest.

He submitted a request for numerous instructions, all of which were denied, and the jury found him guilty as charged. From judgment imposing a prison sentence, defendant appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Thomas K. Spence for defendant appellant.

ARNOLD, Judge.

Defendant assigns as error the trial court's denial of his motions to suppress evidence. Upon each motion the court conducted a *voir dire* hearing and concluded that the evidence was admissible. We agree.

[1, 2] A search warrant will be presumed regular if no irregularity appears on the face of the record. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1971). Attached to the warrant was the affidavit of Officer D. C. Frey of the Albemarle Police Department. Among other things set forth was the affiant's familiarity with the investigation of a breaking and entering at Phillips Drug Company on 24 December 1973, information concerning a crowbar identified as a tool used in that break-in and found in defendant's truck, and the fact that defendant had been charged with the offense. This affidavit was clearly adequate to support an issuing magistrate's independent finding of probable cause to authorize a search of defendant's vehicle and premises for property missing from Phillips Drug Company.

The search of defendant's premises did not exceed the scope of the warrant by including a tool shed as well as the house itself. *See State v. Reid,* 286 N.C. 323, 210 S.E. 2d 422 (1974). While conducting a lawful search, officers found in plain view property identified as that reported missing from Moose Drug Company. These items were lawfully seized, *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974), and the motion to suppress was properly denied.

[3] Defendant contends that his confessison was inadmissible because he was under the influence of drugs when taken into custody. In determining whether an in-custody statement is voluntarily and understandingly made, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1970); *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37 (1970); *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681, *cert. denied* 396 U.S. 934 (1969). The trial court found that defendant was fully apprised of his rights to counsel and to remain silent, that he said he understood them, that he did not appear to be under the influence of drugs, and that he knew what he was doing. These findings were supported by the testimony of Officer J. G. Berrier which shows that defendant was given full warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966), and that the officers, knowing defendant had used drugs in the past, specifically asked whether he was ill or under the influence of drugs at the time. Defendant replied that he was not and signed a waiver of his rights. The trial court ruled correctly that his subsequent confession was admissible. *See State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972).

[4] Defendant's contention that the trial court erred by failing to give requested instructions is without merit. Defendant submitted an exhaustive list of definitions which was repetitious at best. It is sufficient that the court gave the requested instructions in substance. *State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165 (1961). It is our opinion that the charge is adequate in all respects. The evidence against defendant was strong and convincing and more than sufficient to support the verdict.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. KEVIN JEROME BURCH

No. 7427SC924

(Filed 5 February 1975)

1. **Burglary and Unlawful Breakings § 5— break-in of store — apprehension of defendant at crime scene — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for felonious breaking and entering where it tended to show that officers observed two or three people approach the rear of a store, the subjects hit the window part of the door, moved a barrel to the door, pried in the area of the top portion of the door, and removed several boxes from the store, and officers moved in and arrested defendant.

2. **Criminal Law § 9— aider and abettor — instructions proper**

In a prosecution for felonious breaking and entering, the trial court properly instructed that if defendant was merely in close proximity to the scene of the crime and just happened to be there, then this would not be sufficient to convict him of being an aider and abettor but that the jury must find actual participation.

APPEAL by defendant from *Tillery, Judge,* 22 July 1974 Session of Superior Court held in GASTON County. Heard in the Court of Appeals on 21 January 1975.

Defendant was tried on a bill of indictment charging him with felonious breaking and entering of a building occupied by Paul Shook, doing business as Shook's Clothing Store, a sole proprietorship. Upon the defendant's plea of not guilty, the State offered evidence tending to show that on 9 February 1974 Paul Shook operated a clothing store at 105 South Main Street in Stanly, North Carolina, and that he closed his business around 5:30 o'clock p.m., secured the building and left. Police officers and SBI agents took up surveillance observing the rear of the store at 8:05 o'clock p.m. Around 8:15 o'clock p.m. one of the officers saw either two or three people approach the back of the store. They observed them picking up what appeared to be wooden objects and hitting the window part of the door. They observed both subjects move a barrel to the area of the door, get up on the barrel, and use objects to pry in the area of the top portion of the door. One subject reached inside and removed several boxes. After observing the subjects for 30 to 45 minutes, the officers moved in and arrested the defendant. The other subject ran.

The defendant offered evidence tending to show that he was in the home of Mary Love Dixon on the night in question

and left during the TV program "MASH" or around 8:30 o'clock. He walked from Mary Love Dixon's home to the vicinity of Shook's Store, it being his intention to go to a restaurant called the "Golden Skillet" to meet a friend of his that worked at said restaurant. As defendant walked down Main Street, he looked into an alley next to Shook's Store and saw two men. He thought he recognized them and started back to see if they were the people he knew when both men ran. Almost immediately thereafter, Officer Furr came up and put defendant in custody.

In rebuttal, the State offered evidence tending to show that Officer Handsel took his position at 8:05 p.m.; that he had a good view of Main Street, the front of the building, and the south side; and that the first time he saw defendant was when defendant came out of the alleyway in custody of Officer Furr.

From a verdict of guilty of felonious breaking or entering and judgment pronounced thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris and Assistant Attorney General Thomas B. Wood, for the State.

Ramseur & Gingles, by Ralph C. Gingles, Jr., for defendant appellant.

MARTIN, Judge.

"Upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. [Citations omitted.] All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion." *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

[1] Applying these principles to the evidence in the present case, we conclude that the court properly denied the motion for nonsuit. The State having introduced substantial evidence of each element of the offense of breaking or entering the building as charged in the indictment and that defendant was one of

the persons who committed the offense, the question of his guilt or innocence was therefore properly submitted to the jury.

[2] In his only other assignment of error defendant contends there is prejudicial error in the charge of the court in respect to the law relating to aiding and abetting. This contention is without merit. Defendant pleaded an alibi and claimed that he just happened upon the scene of the crime during its commission. The court instructed the jury that if defendant was merely in close proximity to the scene of the crime and just happened to be there then this would not be sufficient to convict him of being an aider and abettor but that they must find actual participation. In this matter we find no error.

The defendant was afforded a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

MARCIE GAYNELL EUDY v. VAN PATRICK EUDY

No. 7420DC880

(Filed 5 February 1975)

1. **Divorce and Alimony § 2— divorce from bed and board — failure to allege residency**

The trial court erred in treating this cause as an action for divorce from bed and board where the complaint does not allege that either party has resided in the State for six months next preceding institution of the action. G.S. 50-8.

2. **Divorce and Alimony § 8— error in instructing on constructive abandonment**

In this action for divorce from bed and board, the trial court erred in instructing on constructive abandonment where plaintiff's evidence tended to show an actual abandonment by defendant.

3. **Divorce and Alimony § 17— alimony — insufficiency of findings**

The trial court did not make sufficient findings to support its award of alimony and counsel fees upon divorce from bed and board where the court made findings as to the estate, income and expenses of plaintiff but failed to make sufficient findings as to the estate, income and expenses of defendant.

Eudy v. Eudy

ON *certiorari* to review judgment of *Webb, Judge,* entered at the February 1974 Session of District Court held in UNION County.

This is an action in which plaintiff wife seeks to recover from defendant husband temporary and permanent alimony, possession of and title to certain real and personal property, attorney fees and other relief. As grounds for her action she alleges abandonment, cruelty, adultery and indignities.

In his answer, defendant denies material allegations of the complaint. He admits his separation from plaintiff but alleges that the separation was justified because of plaintiff's abusive treatment of him. Issues were submitted to and answered by the jury as follows:

1. Were the plaintiff and the defendant lawfully married as alleged in the complaint?

ANSWER: Yes

2. Did the defendant abandon his wife without adequate provocation as alleged in the complaint?

ANSWER: Yes

3. Did the defendant by cruel or barbarous treatment endanger the life of the plaintiff without adequate provocation as alleged in the complaint?

ANSWER: Yes

4. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome without adequate provocation as alleged in the complaint?

ANSWER: Yes

The parties agreed that the court would pass upon the questions of whether plaintiff is a dependent spouse and defendant a supporting spouse. Following a hearing, the court determined that plaintiff is a dependent spouse and defendant is a supporting spouse. The court made further findings as to plaintiff's financial circumstances and needs.

From judgment granting plaintiff a divorce from bed and board, alimony, and attorney fees, defendant appealed. Certiorari was allowed on 1 August 1974.

Henry T. Drake and James E. Griffin for plaintiff appellee.

Coble Funderburk and Clark & Griffin, by Richard S. Clark and Lewis R. Fisher, for defendant appellant.

BRITT, Judge.

The complaint alleges an action for alimony without divorce; it does not allege an action for divorce from bed and board and does not ask for that relief. It appears from certain interlocutory orders entered, particularly Judge Crutchfield's order dated 25 August 1972, that prior to trial the cause was treated as an action for alimony without divorce. While the court at trial did not submit all the issues required in an action for divorce from bed and board, it charged the jury with respect thereto and in the judgment granted plaintiff a divorce from bed and board. Although defendant has not assigned this as error, we feel that it is error appearing upon the face of the record which we cannot ignore.

It is clear that in order to obtain a valid divorce in North Carolina, the plaintiff or defendant must have resided in this State for at least six months next preceding the institution of the action for divorce. G.S. 50-8. The residence requirement is jurisdictional. *Donnell v. Howell,* 257 N.C. 175, 125 S.E. 2d 448 (1962). The cited statute requires that the plaintiff set forth in his or her verified complaint " . . . that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint. . . . " The period of residence applies to an action for divorce from bed and board as well as to an action for absolute divorce. G.S. 50-8. 1 Lee, North Carolina Family Law § 42, at 190.

[1] The complaint filed in this action does not allege that either party had resided in the State for six months next preceding institution of the action. We are aware of the amendment of the pleadings by implied consent principle envisioned by G.S. 1A-1, Rule 15(b), and approved in *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972), but do not think the principle would apply in this case where the omitted allegation was necessary to confer jurisdiction. We hold that the trial court erred in treating this cause as an action for divorce from bed and board.

[2] Defendant contends the court erred in charging the jury on constructive abandonment. We agree with the contention. In

3 Strong, N. C. Index 2d Divorce and Alimony § 8, at 330, we find: "It is not necessary, to constitute abandonment of a wife by the husband, that he leave her, but he may constructively abandon her by treating her with such cruelty as to compel her to leave him. . . . "

In the instant case, there was no contention, or evidence tending to show, that plaintiff left defendant; her evidence tended to show an *actual* abandonment by defendant. It is true that defendant contended that his separation from plaintiff was justified by her wrongful conduct toward him, and it might be argued that there is a similarity between conduct constituting constructive abandonment and conduct justifying one spouse to separate from the other. Nevertheless, we think defendant was entitled to have his defense of justification in leaving plaintiff submitted on instructions that were clear and unambiguous.

We hold that the errors discussed above were sufficiently prejudicial to compel vacating the judgment and awarding a new trial.

[3] With respect to the findings of fact, conclusions of law and award of alimony and attorney fees, defendant contends the trial court did not find sufficient facts to permit a fair and complete review by the appellate court. We agree with this contention.

G.S. 50-16.5(a) provides that "[a]limony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case."

In the case at bar, the court made certain findings as to the estate, income and expenses of plaintiff, but it failed to make sufficient findings as to the estate, earnings, income and expenses of defendant. See *Briggs v. Briggs,* 21 N.C. App. 674, 205 S.E. 2d 547 (1974). For example, the court found that defendant received a salary in excess of $11,000 per year; although there was evidence tending to show defendant's compensation after deductions for retirement and income taxes was much less, the court made no finding as to that. The court made no finding as to defendant's other expenses and obligations. Considerable evidence was presented as to income received by the parties many months prior to the trial, but an award of alimony should be based on the estate, earnings, income, obliga-

tions and expenses of the parties at the time the award is made. *Robinson v. Robinson,* 10 N.C. App. 463, 179 S.E. 2d 144 (1971).

For the reasons stated, the judgment appealed from is vacated and this cause is remanded for a

New trial.

Chief Judge BROCK and Judge CLARK concur.

DOSTEY M. GIBSON v. BILLY RAY GIBSON

No. 7426DC869

(Filed 5 February 1975)

1. **Divorce and Alimony § 23— child support order — ability to comply — sufficiency of findings**

Evidence was sufficient to support the trial court's finding that defendant had the ability to comply with a child support and alimony order where it tended to show that defendant's income was as much or more than it was when the order was entered, defendant had ready cash from severance pay, sale of an automobile, and $300 worth of Quaker Oats stock, defendant also had some additional income from his job as resident manager of an apartment complex, and defendant's living expenses decreased because his employer provided him with an automobile and he had a rent-free apartment.

2. **Divorce and Alimony § 23— child support increase — finding of changed circumstances**

The trial court did not err in increasing the amount of child support defendant was required to pay where the court found that the cost of supporting the children had increased substantially since the original order was entered and defendant had substantially more net spendable income than he did at the time of the original order.

APPEAL by defendant from *Griffin, Judge,* 13 May 1974 Session of District Court held in MECKLENBURG County. Heard in the Court of Appeals on 15 January 1975.

This is a civil action wherein the plaintiff, Dostey M. Gibson, filed a motion in the cause on 26 March 1974 to have her husband, Billy Ray Gibson, held in contempt for his failure to comply with a 25 March 1971 court order awarding her child support in the amount of $110.00 per month for each of two adopted minor children and alimony *pendente lite* in the amount

of $137.32 per month. Based upon an allegation of a change of condition, plaintiff also petitioned for an increase in the alimony and child support payments.

A hearing was held on plaintiff's motion and plaintiff testified as follows: The defendant abandoned her in March of 1971. Since then the living expenses for herself and the two children have increased from $543.07 per month to $734.90 per month due in part to the increasing cost of food, clothing, and the cost of educating the children. Although the defendant has paid her some money each month, he has fallen behind in his alimony and child support payments in the amount of $1,405.64. To the plaintiff's knowledge, defendant's salary has increased since 1971. Since 25 March 1971, defendant has also become the resident manager of an apartment complex. By virtue of this position, defendant lives in an apartment rent-free. All of his utilities, including telephone service, are paid for him. Defendant also receives $3.00 per hour for parttime work at the apartment complex. His primary employer, JFG Coffee Company, provides him with a car and pays all the expenses with respect to it.

Plaintiff next called the defendant as one of her witnesses and defendant testified as follows: At the time the 1971 order was entered, he was employed by the Quaker Oats Company. Defendant is now employed by the JFG Coffee Company. He received severance pay when he left the employ of Quaker Oats in 1971, but defendant could not remember whether he received as little as $1.00 or as much as $5,000.00. Defendant's federal tax return indicated that he earned $10,345.00 in 1971. His income in 1973 was at least $10,350.00. He was unable to estimate what his income would be in 1974. He was also unable to to remember what he earned in 1972. Defendant further testified he could not remember how much money he spent each month for living expenses. He did admit, however, that his employer provides him with a company car free of charge and allows him to drive it for his personal use. When he began working for JFG Coffee Company, he sold the car he had been driving but could not remember the sales price. The rental value of the apartment he now lives in rent-free is $150.00 per month. Defendant, however, could not remember what he had previously paid for rent. He earned between $100.00 and $150.00 for part-time employment at the apartment complex in 1973. Defendant further stated that he owns fifteen shares of Quaker Oats Company stock valued at approximately $20.00 per share.

At the conclusion of the hearing, the trial judge made the following pertinent findings of fact:

> "14. That the defendant has had the means and ability to comply with the terms of the aforesaid Order and does presently have the means and ability to comply with the terms of the aforesaid Order.
>
> 15. That the defendant's failure to make all payments that previously were ordered by the Court, has been willful and without justification or excuse."

In its order, dated 16 May 1974, the trial court found defendant in willful contempt for his failure to comply with the 25 March 1971 order and adjudged that he be imprisoned until he paid the total arrearage due the plaintiff ($1,405.64), plus plaintiff's counsel fees ($200.00). The court also increased alimony payments to plaintiff from $137.32 to $200.00 per month and increased child support payments from $110.00 to $150.00 per month for each child. Defendant appealed.

Leonard and Austin by William O. Austin for plaintiff appellee.

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

HEDRICK, Judge.

[1] Defendant contends the trial court erred in holding him in contempt and ordering him confined until he pays the total arrearage on his alimony and child support payments because there is no evidence in the record to support the finding by the court that he presently has the means to comply with the order of 25 March 1971.

Despite defendant's obvious unwillingness to cooperate when he was called as a witness for plaintiff, and his evasive and incredible testimony with respect to his assets and liabilities and his ability to comply with the order to pay child support and alimony, the record is sufficient to show that the defendant's income is as much or more than it was when the order was entered. In addition, the defendant has had ready cash from his severance pay, sale of an automobile, and $300.00 worth of Quaker Oats stock. The defendant has also had some additional income from his job as resident manager of the apartment

complex. From the record, it also appears that his living expenses have decreased because his present employer provides him with an automobile and he has a rent-free apartment valued at $150.00 per month. We conclude there is ample evidence in the record to support Judge Griffin's finding that the defendant has had and presently has the ability to comply with the order dated 25 March 1971.

[2] Defendant next contends that the trial court erred in increasing the amount of child support he is required to pay. The ultimate object in setting awards of child support is to secure support commensurate with the needs of the children and the ability of the father to meet the needs. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967); *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963). In the instant case, the trial court found sufficient facts to justify an increase in the child support payments. Not only did he find facts showing that the cost of supporting the children has increased substantially since the 1971 order, but he found facts showing that the defendant, due in part to becoming the resident manager of an apartment complex, has substantially more net spendable income now than he did on 25 March 1971. Furthermore, these findings are supported by competent evidence in the record.

Finally, defendant contends that the alimony and child support payments ordered by the court are excessive. The amount awarded by the trial court for alimony and child support will be disturbed only upon a showing of an abuse of discretion. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967); *Rayfield v. Rayfield,* 242 N.C. 691, 89 S.E. 2d 399 (1955); *Swink v. Swink,* 6 N.C. App. 161, 169 S.E. 2d 539 (1969). Suffice it to say, defendant has failed to show any abuse of discretion upon the part of Judge Griffin in the order entered.

For the reasons stated, the orders entered finding the defendant in contempt and imprisoning him until he has paid the arrearage of $1,405.64 plus counsel fees and ordering him to pay alimony at the rate of $200.00 per month and child support in the amount of $150.00 per month for each child are

Affirmed.

Judges MORRIS and PARKER concur.

JOHN PREVATTE v. EARLIE CABBLE AND LEROY CABBLE

No. 7420SC837

(Filed 5 February 1975)

Automobiles § 50— two car collision — sufficiency of evidence of negligence

In an action to recover for personal injuries suffered as a result of a collision with a car driven by defendant, the trial court erred in directing verdict for defendant where evidence of the physical facts of the accident scene, together with defendant's plea of guilty to the offense of driving an automobile at a speed greater than reasonable and prudent, was sufficient to support a reasonable inference that defendant was negligent and his negligence was a proximate cause of the collision.

APPEAL by plaintiff from *Seay, Judge,* 28 May 1974 Session of Superior Court held in RICHMOND County. Argued before the Court of Appeals 14 January 1975.

Plaintiff instituted this civil action to recover $100,000.00 damages for personal injuries suffered as a result of a collision with a car owned by Leroy Cabble and driven by Earlie Cabble. The collision occurred on 23 December 1970 at about 9:00 p.m. on Highway 74 in Richmond County. At the time of the collision, Highway 74, a two-lane blacktop, was being widened to four lanes with two northern lanes for westbound travel and two southern lanes for eastbound travel. A grass median separated the westbound and eastbound lanes. Only two lanes were open at the time of the accident, and a connecting strip had been constructed so that traffic could pass across the median. On 23 December 1970 plaintiff was driving east on Highway 74, and defendant Earlie Cabble was driving west. The two cars met on the connecting strip and collided. Plaintiff suffered injuries and was confined to the hospital for extensive medical treatment.

Plaintiff complains that the collision was caused by defendant Earlie Cabble's negligence in operating his vehicle carelessly and at a speed greater than was reasonable under the circumstances and by his failure to maintain a proper lookout. Plaintiff alleges that defendant Earlie Cabble's negligence is imputed to defendant Leroy Cabble, the owner of the car. Defendants deny that they were negligent and contend that the collision was caused by plaintiff's negligence.

At trial plaintiff offered evidence which, taken in the light most favorable to him, tends to show the following: Prior to the collision, plaintiff was driving in the right-hand lane at the speed of 35 or 40 miles per hour. After the collision plaintiff's car was found, burning, approximately 500 feet from the highway on a steep embankment. The left side of plaintiff's car was completely demolished. The left front door of plaintiff's car had been ripped off by the force of the impact and was lying in plaintiff's right-hand lane. Other debris was found in plaintiff's lane, but none was found in defendant Earlie Cabble's lane. Plaintiff's car was consumed by fire. Plaintiff was found lying on the edge of the highway. Cabble's car was found west of the connecting strip, on the southern part of the highway, some 50 feet beyond a group of barricades. It had sustained extensive damage on the left front side. The highway patrolman who investigated the collision charged defendant Earlie Cabble with driving an automobile at a speed greater than was reasonable and prudent under the circumstances. Cabble waived trial and pleaded guilty.

At the conclusion of plaintiff's evidence, defendants made a motion for a directed verdict on the grounds that plaintiff had failed to show negligence on the part of defendants and, further, that plaintiff had failed to show that any negligence on the part of defendants was the proximate cause of his injuries. The trial court granted the directed verdict motion.

Jones & Mason, by F. O'Neil Jones, for the plaintiff-appellant.

Leath, Bynum & Kitchin, by Fred W. Bynum, Jr., for the defendants-appellee.

BROCK, Chief Judge.

The sole assignment of error challenges the granting of defendants' motion for directed verdict. It is plaintiff's contention that evidence of the plea of guilty to the offense of driving an automobile at a speed greater than reasonable or prudent is, when taken with physical facts of the evidence, enough to withstand the motion.

In four cases involving two car collisions in which the basic issue was in whose lane the collision occurred, the Supreme Court established certain principles which we find applicable. In *Dixon v. Edwards,* 265 N.C. 470, 144 S.E. 2d 408, two cars

collided on an unpaved road, and defendant was charged with driving a car at a speed greater than was reasonable under the circumstances. The plaintiff's evidence consisted of the testimony of an expert witness who examined the automobiles sixteen days after the collision. Based on his observations, and in response to hypothetical questions propounded over objection, the expert laid the blame for the collision on the defendant's negligence. The court found that no inference could reasonably be drawn from this testimony that the defendant's car was being driven left of the center of the road and stated that defendant's motion for nonsuit should have been allowed. In *Parker v. Flythe,* 256 N.C. 548, 124 S.E. 2d 530, plaintiff alleged that defendant drove his car across the center line and collided with plaintiff's intestate's car. Plaintiff introduced evidence concerning the relative position of the cars but was unable to offer additional evidence. The court held that this evidence did not permit a reasonable inference of negligence on the part of defendant and affirmed the judgment of nonsuit as to defendant. In a more recent case, *Lyle v. Thurman,* 11 N.C. App. 586, 181 S.E. 2d 813, this Court reached the same result when the plaintiff's evidence failed to indicate how the collision occurred or who was at fault. A judgment of involuntary nonsuit was also affirmed in *Boyd v. Harper,* 250 N.C. 334, 108 S.E. 2d 598, when plaintiff could not show, other than by inference, that his intestate died because of the negligence of defendant. However, the court stated that "direct evidence of negligence is not required, but the same may be inferred from attendant facts and circumstances." 250 N.C. at 339. We do not believe, therefore, that eyewitness testimony is essential in a case involving a two-car collision. In our opinion the case at bar is distinguishable from the cases cited above, and the evidence, which is much stronger here, is sufficient to support a reasonable inference that defendant Earlie Cabble was negligent in crossing the center line of the road and that his negligence was a proximate cause of the collision.

It is clear that when a defendant moves for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure, the trial court must consider all the evidence in the light most favorable to the plaintiff. "Whether [this] evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court." Wright and Miller, Federal Practice and Procedure, § 2524 (1971).

We believe that, in this case, the evidence justifies a reasonable inference that defendant was negligent and that his negligence was a proximate cause of the collision. In our opinion this is not a case in which reasonable and prudent men, in the exercise of impartial judgment, would reach but one conclusion that there was no evidence of actionable negligence. Therefore, the granting of the directed verdict as to defendant Earlie Cabble was error. However, because there was no evidence that the car driven by defendant Earlie Cabble either was owned by defendant Leroy Cabble or was registered in his name, the granting of the directed verdict in favor of defendant Leroy Cabble was proper.

Affirmed as to defendant Leroy Cabble.

New trial as to defendant Earlie Cabble.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM PERCELL SOLOMON

No. 7415SC870

(Filed 5 February 1975)

Burglary and Unlawful Breakings § 5; Larceny § 7— possession of recently stolen property — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for breaking and entering and larceny under the doctrine of possession of recently stolen property where it tended to show that a home was broken into and property was stolen therefrom, including an old penny bearing file marks and other coins, that later the same afternoon defendant was in the company of two men some two miles from the crime scene and was helping them put water in the radiator of a vehicle which had been seen earlier that day near the crime scene, that the stolen penny bearing a file mark was found in the vehicle, and that when deputies approached the vehicle defendant attempted to hide his jacket containing $9.02 in coins.

APPEAL by defendant from *Clark, Judge,* 3 June 1974 Session of Superior Court held in CHATHAM County. Heard in the Court of Appeals 16 January 1975.

Defendant was indicted on charges of felonious breaking and entering and felonious larceny on 27 March 1974 at the

residence of Meade Dark near Pittsboro. He pleaded not guilty and was tried before a jury.

Witnesses for the State testified that shortly after the break-in was discovered defendant was found in the company of two other men standing around an automobile containing some of the stolen property. Defendant put on no evidence but moved for a directed verdict of not guilty. This motion was denied and the case was submitted to the jury with instructions on circumstantial evidence and the doctrine of recent possession. The jury found defendant guilty as charged. From judgment imposed thereon, defendant appealed to this Court.

Attorney General James H. Carson, Jr., by Associate Attorney Noel Lee Allen, for the State.

T. F. Baldwin for defendant appellant.

ARNOLD, Judge.

Defendant's sole assignment of error is the trial court's denial of his motion for a directed verdict. When by such motion a defendant challenges the sufficiency of circumstantial evidence to go to the jury, the trial court must determine whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779; *State v. McKnight,* 279 N.C. 148, 181 S.E. 2d 415; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, *cert. denied* 414 U.S. 874; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. The motion should be denied if there is evidence, considered in the light most favorable to the State, from which the jury could find that a crime has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469.

Viewing the evidence in this manner, we hold that defendant's motion for a directed verdict was properly overruled. Testimony of the State's witnesses tended to show that on the afternoon of 27 March 1974, when he returned home from work, Meade Dark reported these items missing from his house: an RCA television set with instruction booklet taped to the back, a rifle, a shotgun, silver coins, and old pennies including one bearing file marks. Deputy Sheriff Whitt, responding to a call to go to the Dark residence, radioed to Deputies Hipp and Tripp and gave them the description of a vehicle he had seen in the vicinity. Driving by a service station some two miles

away, Hipp and Tripp spotted three black males, one of them defendant, pouring water into the radiator of a car matching that description. They stopped and, with the owner's consent, searched the vehicle. Under the front seat was a paper bag containing silver coins and an old penny bearing file marks identified by Dark. Deputy Whitt arrived and found in the car an instruction booklet for an RCA television set. Deputy Tripp observed defendant, wearing a blue jacket, go into the men's room at the service station and come out without the jacket, which was found in a trash can inside. There was $9.02 in coins inside the pocket.

"When goods are stolen, one found in possession so soon thereafter that he could *not have reasonably got the possession unless* he had stolen them himself, *the law presumes* he was the thief." *State v. Graves,* 72 N.C. 482, 485. This presumption, known as the doctrine of recent possession, obtains when there is proof "[t]hat the property described in the indictment was stolen . . . that the property shown to have been possessed by the accused was the stolen property . . . [and] that the possession was recently after the larceny. . . . " *State v. Foster,* 268 N.C. 480, 485, 151 S.E. 2d 62, 66. When there is additional evidence that the building has been broken into and entered and the property thereby stolen, the presumption is that the possessor is guilty of both larceny and breaking and entering. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441; *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428.

Citing the case of *State v. English,* 214 N.C. 564, 199 S.E. 920, defendant contends that the doctrine of recent possession does not apply to constructive possession. In *English,* defendant, the owner of a truck found containing stolen goods, put on evidence that he had let a friend borrow the truck on the night before the theft and had gone fishing with others. The North Carolina Supreme Court therefore held it error to deny his motion for nonsuit. But, in *State v. Foster, supra,* at 487, 151 S.E. 2d at 67, the Court said, "It is not always necessary that the stolen property should have been actually in the hands or on the person of the accused, it being sufficient if the property was under his exclusive personal control," and in *State v. Frazier,* 268 N.C. 249, 150 S.E. 2d 431, the Court followed the rule that exclusive possession may be joint possession if persons are shown to have acted in concert or to have been *particeps criminis. See also* Annot., 51 A.L.R. 3d 727 (1973).

In the case at bar, the State's evidence placed defendant two miles from the scene of the crime on the afternoon it was discovered. He was in the company of two men and was helping them put water into the radiator of a vehicle which had been seen earlier about a quarter of a mile from the Dark residence and in which was found an old coin identified as one of the coins stolen. When the deputies approached the car, defendant attempted to hide his jacket inside the pockets of which was found $9.02 in coins. The evidence is sufficient to constitute a showing that the men were in actual joint possession of stolen property and is sufficient to require submission of the question of defendant's guilt to the jury. In the trial court's ruling on defendant's motion for a directed verdict, we therefore find no error.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. EARL COLEMAN

No. 742SC919

(Filed 5 February 1975)

1. **Indictment and Warrant § 9— words "with force and arms"**

Indictments for escape and larceny were not rendered invalid by use of the words "with force and arms" since such words constitute a formal phrase traditionally included in bills of indictment and have no significance as an element of the specific crimes charged.

2. **Larceny § 6— testimony as to "value"**

Witness's opinion of the "value" rather than the "market value" of a stolen automobile was properly admitted where defendant did not object to the form of the question or move to strike the answer, and such testimony was sufficient to require submission to the jury of an issue as to defendant's guilt of felonious larceny under G.S. 14-72.

3. **Larceny § 7— failure of evidence to show serial number of stolen car — no fatal variance**

There was no fatal variance between a larceny indictment describing the stolen property as a 1970 Plymouth with a certain serial number, the personal property of a named person, and evidence showing a taking by defendant of a 1970 Plymouth owned by the person named in the indictment but failing to show the serial number of the vehicle.

4. Escape § 1— escape while working for Highway Commission — escape from State Prison System

An escape by a prisoner assigned by an official of the Department of Correction to work under an employee of the State Highway Commission constituted an escape from the State Prison System.

APPEAL by defendant from *James, Judge,* 3 September 1974 Session of Superior Court held in WASHINGTON County.

By indictments proper in form defendant was charged with (1) felonious escape and (2) felonious larceny of a 1970 Plymouth automobile. He pled not guilty. The State's evidence showed: On 16 May 1973 defendant was in custody of the North Carolina Department of Correction serving a sentence imposed upon him for robbery. On that date he was assigned to work for the State Highway Commission. He escaped and drove away in a 1970 Plymouth belonging to one Biggs, taking the car without authority of its owner. He was apprehended a short time later while driving alone in the stolen automobile.

Defendant offered no evidence. He was found guilty on both charges, and from judgments imposed on the verdicts, appealed.

Attorney General Edmisten by Assistant Attorney General Alfred N. Salley for the State.

Arthur E. Cockrell for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to denial of his motion to quash the indictments made on the ground that they were "too vague and insufficient, too broad and general." The bills of indictment contained allegations sufficient to set forth fully and clearly all essential elements of the offenses charged. The words, "with force and arms," included in each bill, constitute a formal phrase traditionally included in bills of indictment and have no significance as an element of the specific crimes charged. *State v. Acrey,* 262 N.C. 90, 136 S.E. 2d 201 (1964). Defendant's first assignment of error is overruled.

[2] Defendant next assigns error to the court's permitting the owner of the stolen automobile to testify that in his opinion the car had a "value" of about eighteen hundred dollars, contending that the question should have been limited to the witness's opinion as to "market value" and citing *State v. Dees,*

14 N.C. App. 110, 187 S.E. 2d 433 (1972) for the proposition that the market value of the stolen item is generally used in determining whether the crime is felonious or non-felonious. We note that no objection was made to the form of the question, no motion was made to strike the witness's answer, and no assignment of error was made to the charge of the court to the jury, which is not included in the record on this appeal. We hold that the witness's testimony as to his opinion of the "value" of the stolen automobile was properly admitted and was sufficient to require submission to the jury of an issue as to defendant's guilt of felonious larceny under G.S. 14-72. Defendant's second assignment of error is overruled.

[3] Defendant's motions for directed verdict were properly overruled. There was no fatal variance between the allegations in the bills of indictment and the State's proof in either case, as defendant now contends. In the larceny case the stolen property was described in the bill of indictment as "a 1970 Plymouth, Serial #PM14360F239110, the personal property of George Edison Biggs." The evidence showed the taking by defendant of a 1970 Plymouth automobile which was owned by George Edison Biggs. The fact that there was no evidence as to the serial number is immaterial.

[4] In the escape case the bill of indictment charged that defendant escaped while lawfully confined in the North Carolina State Prison System in the lawful custody of the North Carolina Department of Correction. The evidence showed he escaped while assigned by an official of the Department of Correction to work under an employee of the State Highway Commission. This constituted an escape from the State Prison System. *State v. Whitley,* 264 N.C. 742, 142 S.E. 2d 600 (1965).

In defendant's trial and in the judgments appealed from we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

SHOOK BUILDERS SUPPLY COMPANY v. EASTERN ASSOCIATES, INC., ROBERT E. OSBORNE, JANET S. OSBORNE, H. HUGHES MOORE AND JEFFRIE G. MOORE

No. 7425SC898

(Filed 5 February 1975)

Contracts § 27; Rules of Civil Procedure § 56— contract action — summary judgment improperly granted

In an action to recover an amount allegedly due under the terms of a contract and purported subsequent settlement agreement providing for the completion of four houses and payment for building materials furnished by plaintiff wherein plaintiff's motion for summary judgment was supported by the pleadings, original contract, purported settlement agreement and an affidavit of plaintiff's president, summary judgment was improperly entered for plaintiff since the credibility of plaintiff's president, an interested witness, may itself be such an issue of fact as will take the case to trial, and since it is not clear that the purported settlement agreement is not just a memorandum of successive offers to settle.

APPEAL by defendants from *Winner, Judge,* 26 August 1974 Session of Superior Court held in CATAWBA County. Heard in the Court of Appeals 16 January 1975.

Plaintiff instituted this action to recover damages for breach of contract. The complaint alleged that defendants, officers and agents of Eastern Associates, Inc., a housing contractor, had become indebted to plaintiff for building materials furnished in the construction of four houses. The parties entered into a contract providing that plaintiff would complete the houses and recover the amount of the indebtedness from profits upon sale. If no profits were realized, defendants would be liable for the debt plus additional expenses and service charges.

Plaintiff further alleged that, after the execution of this contract, costs of completing construction on the houses exceeded original estimates, and

> "on December 7, 1971, a meeting was held between Defendant Robert E. Osborn, Defendant H. Hughes Moore and officers and agents of the Plaintiff and an oral agreement was entered into; thereafter, on January 6, 1972, the Plaintiff received from the Defendants a paper writing dated December 17, 1971, a copy of the same being attached and marked, 'Plaintiff's Exhibit B'; that Plaintiff executed said

agreement and mailed it back to Defendant H. Hughes Moore on January 26, 1972, along with a letter in which he agreed that the settlement figure of $16,000.00 would apply through and including March 1, 1972; a copy of said letter is hereto attached marked, 'Plaintiff's Exhibit C' and made a part hereof."

Attached to the complaint was the following:

"PLAINTIFF'S EXHIBIT 'B'

Since John's handwritten notes of December 7, 1971, still refers to the 5% as a part of the total settlement and since we have released the final deed to you per our verbal agreements, we would like for you to confirm the minutes as spelled out below of the December 7, 1971, meeting between Mr. Bill Reece, Mr. John Shook, Mr. Robert Osborne, and Mr. H. H. Moore.

s/ H. H. MOORE

Minutes of December 7, 1971, meeting:

Prior to the December 7 meeting we had agreed, by telephone, to release the deed for the last of the four Eastern Associates, Inc. houses in Eastview Acres at a reduced selling price of $25,000 and in return John Shook had agreed to relinquish the 5% interest charge as spelled out in our contract and agreement with Shook Builders dated July 15, 1970. This 5% charge amounts to approximately $2500.00.

During the meeting of December 7, 1971, Mr. Moore and Mr. Osborne requested that, since the July 15 estimate to complete including outstanding bills, land value, and loans of $96,000 for the (4) houses was exceeded by such a large amount and had actually run beyond the total estimated selling price of the houses, Mr. Shook should make some concession as far as the total due from Eastern Associates to Shook Builders was concerned. Mr. Reece stated that the $96,000, as he recalled, did not include the $10,000 estimate of Mr. Shook to complete the houses from the point at which they stood on July 15, 1970. However, Mr. Shook agreed to forfeit the 1% carrying charge as referred to in our July 15, 1971 agreement, in order to get settled provided the balance were paid in full within 30 days

from December 7, 1971. The balance being approximately ~~$13,720.50~~ $16,000.00. (J.H.S.; R.E.O. 2/5/72) The 1% reduction, amounting to $7,000.00, would be re-added to the balance if the 30 day requirement was not met. The balance of ~~$13,720.50~~ $16,000.00 (J.H.S.; R.E.O. 2/5/72) was over the total selling price of the four houses.

s/ H. H. MOORE
s/ R. E. OSBORNE
s/ JOHN H. SHOOK"

Plaintiff returned the minutes to defendants on 26 January 1972, under a cover letter which reads in part:

"Enclosed are the final figures up to this date, which is somewhat more than the figure we discussed December 7, 1971. The figure we talked about on the 7th. was stated as an approximate amount, but some other charges have come in since then plus, several mistakes we corrected by going over the invoices more thoroughly.

I feel that I made a mistake in the beginning, by the concession of the 5% and the service charges that Shook Builders Supply was entitled to receive. I did offer to make this concession provided the account would be cleared up in 30 days from Dec. 7th. I did not hear anything from you till January 6th, 1972 and Bill Reece gave me the paper you had typed, being somewhat similar to our conversation of the 7th. By this time the 30 day offer proposed for settlement had expired, and you still did not mention any arrangement or intention about getting this matter settled. Therefore I am taking a different view about this settlement which I will explain in some detail.

. . . .

I am making one more proposal that I think is fair to all involved under the circumstances that exist. According to our records the loss is $14,995.19 and I am asking in addition $1,004.81 which is a total of $16,000.00 to help take care of the unforeseen cost that we have and some that we might incur. Providing the above terms are met in full on or before March 1, 1972. If we do not come to an agreement by then, we will take whatever procedures are necessary to get a settlement."

Defendants in their answer admitted entering into the original contract but alleged plaintiff's breach and counterclaimed for $10,000.00 in damages. They denied all allegations concerning a settlement. In response to plaintiff's requests for admissions, defendant Hughes Moore denied the genuineness of the paper-writing Exhibit "B" but admitted that it was signed by all parties.

Plaintiff then moved for summary judgment, and the trial court granted the motion as to defendants Eastern Associates, Inc., Robert E. Osborne, and H. Hughes Moore. From judgment against them, jointly and severally in the amount of $23,000.00 plus interest, defendants appealed to this Court.

Tate, Weathers and Young, by E. Murray Tate, Jr., for plaintiff appellee.

Sowers, Avery and Crosswhite, by William E. Crosswhite, for defendant appellant.

ARNOLD, Judge.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides in part that summary judgment shall issue "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." The moving party has the burden of showing that there is no triable issue of fact. For this reason his papers "are carefully scrutinized." 6 Moore, Federal Practice § 56.15[8] (2d ed. 1971). *See Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

In the instant case, plaintiffs' motion for summary judgment was supported by: (1) the pleadings; (2) Exhibit A, the original contract; (3) Exhibit B, the purported settlement; and (4) defendants' admission to signing Exhibit B. Plaintiff also submitted the affidavit of John Shook stating that the facts set out in the motion were true, that he participated in the negotiations leading up to and the execution of Exhibits A and B, and that defendants had paid none of the amounts agreed upon. After carefully reviewing the record, we are of the opinion that plaintiff's papers are insufficient to foreclose issues of fact raised by the pleadings.

As plaintiffs' president, John Shook is an interested witness. His credibility itself may be such an issue of fact as will take the case to trial. *See Cross v. United States,* 336 F. 2d 431 (2d Cir. 1964); *United States v. United Marketing Association,* 291 F. 2d 851 (8th Cir. 1961). In *Lee v. Shor,* 10 N.C. App. 231, 235, 178 S.E. 2d 101, 104 (1970), this Court said: "The fact that the witness is interested in the result of the suit has been held sufficient to require the credibility of his testimony to be submitted to the jury. *Sonnentheil v. Christian Moerlein Brewing Co.,* 172 U.S. 401, 408, 19 S.Ct. 233, 236, 43 L.Ed. 492, 495." *See generally* 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright ed. 1958).

John Shook's affidavit in effect verifies the motion for summary judgment, which in turn reiterates the allegations in the complaint. It does not establish that plaintiff's allegations unquestionably are true. Moreover, considering the minutes of the December meeting in conjunction with Shook's letter explaining the corrected figures, we cannot agree with plaintiff that as a matter of law these minutes represent an integrated settlement agreement and are not just a memorandum of successive offers to settle. An affidavit as to legal effect does not make it so.

We are mindful that under Rule 56(e) "an adverse party may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Nevertheless, defendants' failure to file affidavits in opposition to plaintiff's motion is not fatal since plaintiff initially has not met the burden imposed by Rule 56(c) of showing the absence of a genuine issue of material fact. *See Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972); *Whitley v. Cubberly,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974); *Tolbert v. Tea Co.,* 22 N.C. App. 491, 206 S.E. 2d 816 (1974); *Borden, Inc. v. Wade* and *Moore v. Brown,* 21 N.C. App. 205, 203 S.E. 2d 666 (1974). *See also Adickes v. Kress & Co.,* 398 U.S. 144 (1970). Plaintiff, as movant for summary judgment, did not make it perfectly clear that it was entitled to judgment as a matter of law. Summary judgment was error.

Reversed.

Judges VAUGHN and MARTIN concur.

ALLSTATE INSURANCE COMPANY v. INTEGON INDEMNITY CORPORATION

No. 7428SC900

(Filed 5 February 1975)

1. **Insurance § 133— fire insurance — policy prohibiting other insurance — coverage on dwelling precluded**

Where plaintiff and defendant both insured property against loss by fire, plaintiff paid homeowners pursuant to the policy it had issued, and plaintiff then sought to recover from defendant that portion of the loss which the amount insured by defendant bore to the total amount of insurance coverage, defendant's liability with regard to the dwelling only was precluded by the existence of plaintiff's policy since defendant's policy contained a provision prohibiting other insurance and plaintiff's policy constituted other insurance within the meaning of that provision.

2. **Insurance § 133— fire insurance — policy prohibiting other insurance — contribution required for loss to contents and additional living expenses**

Where plaintiff and defendant both insured a home against loss by fire and defendant's policy prohibited other insurance covering the dwelling, defendant was accountable to plaintiff for its pro rata share of the loss to contents and for additional living expenses, since plaintiff, in making full payment for all damages, did not act as a mere volunteer.

APPEAL by defendant from *Martin, (Harry C.), Judge,* 7 January 1974 Session of Superior Court held in BUNCOMBE County. Heard in the Court of Appeals on 17 January 1975.

Frank W. Coffey and his wife, Jeanne C. Coffey, were the owners of a house in the City of Asheville. On 29 June 1971 the house and its contents were damaged by fire to the extent of $20,000.00. Plaintiff Allstate paid the Coffeys $20,000.00 pursuant to Allstate's insurance policy. Allstate alleges that defendant Integon also insured the property against loss by fire. Consequently, Allstate seeks to recover from Integon that portion of the loss which the amount insured by Integon bears to the total amount of insurance coverage—in this case, three-sevenths of $20,000.00 or $8,571.42.

The matter was heard by the court without a jury. The trial court made findings of fact which, for the sake of brevity, will be summarized in part.

Wachovia Mortgage Company financed the purchase of the Coffey home. On 28 January 1970 Integon issued its policy

insuring the Coffeys for a period of time beginning on 28 January 1970 and ending on 28 January 1973. This policy provided coverage of $15,000.00 for the dwelling, $7,500.00 for the contents, and $3,000.00 for additional living expenses.

In the Spring of 1971, a loan became available to the Coffeys through the North Carolina State Employees Credit Union (Credit Union). Mr. Coffey paid off the original loan of Wachovia, and Credit Union became the new mortgagee. While the Coffeys did not request that Integon's policy be endorsed to cover Credit Union, there is no evidence that the hazard insured against was at any time increased in any manner. On 27 May 1971 plaintiff Allstate issued its policy to the Coffeys with effective dates of 21 May 1971 through 21 May 1974. (Coverage under this policy actually began 27 May 1971 and expired 27 May 1974). Allstate's policy provided coverage of $20,000.00 for the dwelling, $10,000.00 for the contents, and $4,000.00 for additional living expenses.

Fire damaged the insured property on 29 June 1971 with a loss of $8,041.26 to the dwelling, $10,508.74 to the contents, and $1,450.00 for additional living expenses. After the loss by fire, Integon caused a check, dated 8 July 1971, to be made payable to the Coffeys for the sum of $35.00. This sum represented a refund of an unearned premium on the Integon policy calculated from 27 May 1971 when the Wachovia loan was paid in full. The check was received and negotiated by the Coffeys. There is no evidence indicating that plaintiff Allstate knew anything about the check. Following a denial of liability by Integon, Allstate, acting in good faith after a full investigation, paid a total of $20,000 to the Coffeys—$8,041.26 for damages to the dwelling, $10,508.74 for damages to the contents, and $1,450.00 for additional living expenses.

Both the plaintiff Allstate's policy and defendant Integon's policy contained the following provisions:

(1) "Pro Rata Liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

(2) "GENERAL CONDITIONS

* * *

6. APPORTIONMENT — SECTION 1:

a. Loss by fire or other perils not provided for in 6b. below:

This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this policy than:

(1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; nor

(2) for a greater proportion of any loss than the amount hereby insured bears to all insurance, whether collectible or not, covering in any manner such loss or which would have covered such loss except for the existence of this insurance."

(3) "CONDITIONS APPLICABLE ONLY TO SECTION 1

* * *

2. OTHER INSURANCE: Other insurance covering the described dwelling building (except insurance against perils not covered by this policy) is not permitted."

From a judgment by the trial court that plaintiff recover $8,571.42 defendant appealed.

Van Winkle, Buck, Wall, Starnes, Hyde & Davis, by Roy Davis, Jr., for plaintiff appellee.

Morris, Golding, Blue, and Phillips, by William C. Morris, Jr., for defendant appellant.

MARTIN, Judge.

Essentially, Allstate argues that it has conferred a benefit upon Integon by paying Integon's share of the loss, and it requests reimbursement on the grounds that Integon has been unjustly enriched thereby. To this end, Allstate invokes the equitable doctrine of subrogation.

[1] Integon argues that its liability was totally precluded due to breach of its policy provision that prohibited other insurance. In support thereof, Integon contends: (1) the Integon policy unambiguously prohibits other insurance; (2) Allstate's policy constitutes "other insurance" within this provision; (3) Integon has not waived the right to assert this provision; and (4) the trial court's findings of fact to the contrary are not supported by the evidence. In each of these contentions we concur. However, while Integon's liability was precluded by the existence of the Allstate policy, it was precluded only with regard to the dwelling. The Integon policy only prohibited other insurance covering the dwelling. Thus, Integon is accountable to Allstate for its pro rata share of the loss to contents and for additional living expenses.

Our decision requires us to reject Allstate's argument that the total loss should be distributed between the two insurers on a pro rata basis. Since both policies contain provisions prohibiting other insurance, Allstate argues that such provisions are mutually repugnant and should be ignored. Such an argument is not without a sound basis in reason. See *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*, 219 Or. 110, 341 P. 2d 110, 76 A.L.R. 2d 485 (1959). However, in this matter we feel bound by the decision in *Sugg v. Ins. Co.*, 98 N.C. 143, 3 S.E. 732 (1887). There plaintiffs sued to recover on a policy containing the following clause:

> "Or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof at the time this policy is issued, or at any time during its continuance, without the consent of this company written hereon, or if the risk be increased by any means within the control of the assured, this policy shall be void," etc.

In forgetfulness, and without intent to defraud defendant insurer, plaintiff Mittie Sugg took out additional policies of insurance on the same property, and each contained similar clauses as the one set forth above. The Court held that plaintiff's violation of defendant's provision prohibiting other insurance precluded defendant's liability.

In the present case, if the insured could not recover under Integon's policy for loss to the dwelling, then clearly Allstate cannot. If *Sugg* is good law then it follows that there is no right

in the insured against Integon for loss to the dwelling to which Allstate can be subrogated.

[2] In holding Integon liable for a pro rata share of the loss to contents and for additional living expenses, we reject Integon's argument that Allstate acted as a mere volunteer in the payment of these items. "A payment made under compulsion is not voluntary; payment made under a moral obligation, or in ignorance of the real state of facts, or under an erroneous impression of one's legal duty, is not a voluntary payment." *Boney, Insurance Comr. v. Insurance Co.*, 213 N.C. 563, 197 S.E. 122 (1938). *See also* Dobbs, Law of Remedies, § 4.9, p. 305 (1973).

We hold that Integon is liable for a pro rata share of the loss to contents and for additional living expenses which in this case will amount to three-sevenths of $11,958.74, or $5,125.17.

This cause is remanded to the Superior Court of Buncombe County for the entry by it of a judgment in accordance with this opinion.

Reversed and remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROY LEE LEDFORD AND HOWARD MASHBURN

No. 7429SC882

(Filed 5 February 1975)

Burglary and Unlawful Breakings § 10— burglary tools — failure to show constructive possession — nonsuit proper

The State in a prosecution for possession of burglary tools can overcome a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the contraband as to justify the jury's concluding that the contraband is in the accused's possession; however, the State in this case showed only that defendants were passengers in a vehicle driven by another who was convicted for possession of burglary tools found under the hood, and there was no evidence that either defendant was acting in concert or that they were *particeps criminis*.

State v. Ledford

ON *certiorari* to review a trial before *Martin (Harry C.), Judge,* 20 May 1974 Session of Superior Court held in RUTHERFORD County. Heard in the Court of Appeals 20 January 1975.

Defendants were arrested for possession of burglary tools. Pleas of not guilty were entered by the defendants, and verdicts of guilty were returned. From active sentences imposed thereon, defendants appealed to this Court.

On 29 October 1973 at 3:00 a.m., Carol Guest, Deputy Sheriff of Rutherford County, saw a 1971 Maverick parked near the steps of the Tri-Community Drugstore in Henrietta. Twenty minutes later Guest saw a similar car at the post office. When he approached the car, it pulled away and proceeded onto a road where it passed through a traffic light. Guest stopped the car. Inside were Devoyd Eugene Glaze, who was driving, Kenneth Larry Stafford, and the defendants. Guest asked each for identification and returned to his car to radio for assistance. Keith Mitchem, Deputy Sheriff of Rutherford County, arrived, and Guest returned to the Maverick to ask Glaze's permission to search the car for burglary tools. Glaze opened the trunk, but Guest found nothing. On *voir dire* Guest testified:

> "After I looked in the trunk we stepped back around to the side of the vehicle and I asked Mr. Glaze if he would mind for me to look under the hood and Mr. Glaze stated something like 'I don't care,' and got back into the car and sat down."

Guest found, under the hood, various burglary tools including two hammers, one pick, one pick handle, gloves, one brace and bit, one file, two wood bits, one screwdriver, one flashlight, one pair of tin snips, one pair of wire cutters, two saw blades, and one mechanical mirror.

The trial judge made findings of fact concluding that Glaze had consented to the search; that the search did not violate the defendants' constitutional rights; and that the fruits of the search were competent and admissible.

Keith Mitchem, Deputy Sheriff of Rutherford County, testified for the State and substantiated Guest's testimony. Alex Williams and Bert Homesley, police officers with the Gaston County Rural Police, were allowed to testify after examination on *voir dire.* Williams stated that he had known Ledford for five years and defendant Mashburn for eight years, and, during this

time, had never known either of the defendants to be engaged in any kind of employment requiring the use of the tools found under the hood of the car. Homesley made similar statements.

Defendants offered no evidence.

Attorney General Edmisten, by Assistant Attorney General Zoro Guice, Jr., for the State.

J. H. Burwell, for defendant-appellant Roy Lee Ledford.

Robert L. Harris, for defendant-appellant Howard Mashburn.

BROCK, Chief Judge.

By way of their fourth assignment of error, defendants contend that the trial court erred when it denied their motions for nonsuit. The fact that there was no evidence that defendants had control over or knowledge or possession of the burglary tools found under the hood is the crux of their contention.

In *State v. Glaze,* 24 N.C. App. 60, 210 S.E. 2d 124, arising out of these same facts, we upheld the conviction of the driver of the 1971 Maverick in which defendants were passengers. There we held that the State could overcome a motion for nonsuit by presenting evidence which placed the accused within such close juxtaposition to the contraband as to justify the jury's concluding that the contraband was in the accused's possession. Glaze, as the driver of the car, had control of its contents, a fact sufficient to give rise to a rebuttable inference of knowledge and possession sufficient to take the case to the jury.

We decline, however, to apply the same principles to defendants. Taking the evidence in the light most favorable to the State, all that is shown is that defendants were passengers in the vehicle driven by Glaze. There is no evidence that any of the defendants was acting *in concert* or that they were *particeps criminis.* In *State v. Godwin,* 269 N.C. 263, 152 S.E. 2d 152, an accused was charged with the possession of burglary tools without lawful excuse when he was stopped while riding in an automobile driven by its owner. When the trunk of the automobile was opened on the following day, various burglary tools were found. After reviewing all the evidence, the court reversed the denial of the accused's motion for nonsuit on the ground that "[t]here [was] no evidence defendant had any control over

either the automobile or the articles in it. . . . " 269 N.C. at 266. This Court reached a similar conclusion in *State v. Franklin* and *State v. Hughes,* 16 N.C. App. 537, 192 S.E. 2d 626, in respect of an accused who was shown to be only a passenger in a stolen automobile.

The question of constructive possession has been considered in other jurisdictions upon similar facts. *See generally,* Annot., 33 A.L.R. 3d 798 (1970). Thus, it has been held that if tools are deposited in some place mutually agreed upon by implication of the facts, and to which any number of persons can resort, then a court could find that all the persons had constructive possession of the tools. *People v. Birnbaum,* 208 App. Div. 476, 203 N.Y.S. 697 (1924). In a case from another jurisdiction involving an automobile, defendant-driver and two occupants of a car were stopped, and the car was found to contain burglary tools. The defendant contended that the tools were owned by and were in the possession of one of the passengers. However, the court found that ownership was immaterial and possession unnecessary since two persons could have constructive possession or one could have actual possession and the other constructive possession, where both have power of control and intent to control jointly. *Phillips v. State,* 154 Neb. 790, 49 N.W. 2d 698 (1951). The offense of possessing implements of housebreaking does not require the proof of "intent" in North Carolina. *State v. Vick,* 213 N.C. 235, 195 S.E. 779. Thus, we believe that the State need not always prove an actual possession, but may show constructive possession by circumstantial evidence. *Compare Johnson v. State,* 246 Miss. 182, 145 So. 2d 156, *appeal dismissed and cert. denied,* 372 U.S. 702, 83 S.Ct. 1018, 10 L.Ed. 2d 125 *with Sullivan v. State,* 254 So. 2d 762 (Miss. 1971).

The State, in the case at bar, has failed to show anything other than the fact that defendants were mere passengers in the vehicle driven by Glaze. Although the evidence raises a suspicion of defendants' guilt, this is not enough. Defendants' motions for nonsuit should have been granted.

Reversed.

Judges BRITT and CLARK concur.

JAMES OTIS JONES v. C. J. PETTIFORD, JAMES MELVIN RAMSEY, AND WILLIAM D. RAMSEY

No. 7415SC914

(Filed 5 February 1975)

1. **Compromise and Settlement § 1; Torts § 7— plea of release — ratification — claim barred**

In an action against the driver and the owner of an automobile to recover for injuries sustained by plaintiff in an automobile accident, plaintiff's plea of a release given by defendant driver in bar of defendants' counterclaim constituted a ratification of the release and barred plaintiff's claim against both defendant driver and defendant owner whose liability would be derivative.

2. **Compromise and Settlement § 2— release from liability — effect on person not party thereto**

Release given by the driver of an automobile in settlement of a claim for personal injuries was not binding on the owner of the automobile who was not a party thereto and did not bar the owner's claim for property damages.

APPEALS by plaintiff and defendant William D. Ramsey from *Tillery, Judge,* 27 May 1974 Session of Superior Court held in ALAMANCE County. Heard in the Court of Appeals 17 January 1975.

This action was instituted by plaintiff to recover damages for personal injuries allegedly sustained in the collision of a 1966 Ford pickup truck owned and operated by him and a 1964 Ford automobile owned by defendant William Ramsey and driven by either defendant C. J. Pettiford or defendant James Ramsey. The accident occurred at the intersection of N. C. Highway 119 and Rural Paved Road 2123 in Alamance County on 29 October 1972 at approximately 5:00 p.m. Plaintiff was driving east on Road 2123, the servient road. Defendants C. J. Pettiford and James Ramsey were proceeding south on Highway 119. After plaintiff entered the intersection, his truck was hit by defendants' automobile. Plaintiff suffered serious bodily injuries and damage to his truck as a result of the collision.

Defendant C. J. Pettiford filed an answer denying the material allegations in the complaint, alleging contributory negligence, and counterclaiming for personal injuries. Plaintiff's reply realleged Pettiford's negligence. Pettiford also filed a third party complaint against defendants Ramsey, but this action was tried separately.

Defendants Ramsey in their answer denied the material allegations in the complaint, alleged contributory negligence, and counterclaimed for property damage and personal injuries. Plaintiff replied, realleged defendants' negligence and further alleged as a plea in bar a release given by James Ramsey. Defendants Ramsey then filed a response in which they asserted that by raising the plea in bar to their counterclaim plaintiff ratified the settlement and therefore was barred from recovery against them. They also moved for judgment on the pleadings, but the court did not rule on the motion.

The case came on for trial and, at the close of plaintiff's evidence, the court granted defendants' motion for directed verdict on grounds of contributory negligence. Plaintiff gave notice of appeal. Thereafter, defendants presented evidence on the issue of damages. Plaintiff then moved for directed verdict against defendants Ramsey on grounds of the release executed by James Ramsey. The court granted the motion and defendant William Ramsey appealed. The record does not show the disposition of defendant Pettiford's counterclaim.

Latham, Cooper and Ennis, by Thomas D. Cooper, Jr., for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Willliam L. Stocks, for defendant appellees William Ramsey and James M. Ramsey and defendant appellant William D. Ramsey.

ARNOLD, Judge.

APPEAL OF JAMES OTIS JONES

Plaintiff contends that the trial court erred in directing a verdict against him. Without passing on the merits of his contentions with respect to the issue of contributory negligence, we hold that plaintiff's claim against defendants Ramsey is barred by his plea of settlement with James Ramsey.

[1] Although the trial court did not rule on defendants' motion for judgment on the pleadings, an order granting the motion would have been proper. By alleging as a plea in bar to the counterclaim of defendants Ramsey that James Ramsey had released plaintiff from any and all claims arising out of the accident, plaintiff ratified the settlement. *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665; *White v. Perry,* 7 N.C. App. 36, 171 S.E. 2d 56. This bars his claim against James Ramsey. *See*

McNair v. Goodwin, 262 N.C. 1, 136 S.E. 2d 218. Since his claim against William Ramsey is based solely upon a theory of derivative liability, his claim against William Ramsey also is barred. *See May v. R. R.,* 259 N.C. 43, 129 S.E. 2d 624; *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366.

The judgment of the trial court dismissing the complaint is affirmed.

APPEAL OF WILLIAM D. RAMSEY

[2] Defendant William Ramsey contends that the trial court erred in directing a verdict against him on his counterclaim for property damage. The court based its ruling on the release given by James Ramsey. His father, William Ramsey, argues that this release is not binding on him, and we agree. Nowhere in the record does it appear that William D. Ramsey was a party to the settlement of his son's claim for personal injuries. He is not bound by its terms. *See generally* 2 Strong, N. C. Index 2d, Compromise and Settlement, § 2, pp. 162-63. It was error to grant plaintiff's motion for directed verdict as to him. The order of the trial court dismissing his counterclaim is reversed.

Affirmed as to appeal of plaintiff.

Reversed as to appeal of defendant William D. Ramsey.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. WALTER EUGENE SPINKS, JR.

No. 7415SC857

(Filed 5 February 1975)

1. **Indictment and Warrant § 5— failure to sign bill of indictment — signature on report — error amendable**

The report of the grand jury, signed by the foreman, in which was listed the bill against defendant as having been returned a true bill charging a non-capital felony, rendered the failure to sign the bill itself amendable, and the trial court properly denied defendant's motion to quash the indictment.

2. **Criminal Law § 99— questioning witness by judge — no expression of opinion**

Trial court's question put to two State's witnesses for the purpose of clarifying their testimony did not prejudice defendant.

3. **Criminal Law § 95— limiting instructions — necessity before testimony given and in charge**

Defendant was not prejudiced where the trial court gave a limiting instruction following a witness's corroborating testimony but failed to give such instruction before admitting the testimony and failed to repeat the instruction in the charge.

APPEAL by defendant from *Clark, Judge,* 20 May 1974 Session of Superior Court held in CHATHAM County. Heard in the Court of Appeals 14 January 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery.

The State's evidence tended to show that defendant, along with one Raeford and Black, robbed Henry Kimbrell of $2,502.00 and that Black used a pistol to threaten and endanger the life of the victim. Raeford testified for the State and fully implicated Black and defendant along with himself.

Defendant's evidence tended to show that defendant did not participate in the robbery and that Raeford's testimony was given upon promise of a light sentence for his part in the robbery.

The jury found defendant guilty as charged.

Attorney General Edmisten, by Associate Attorney Wallace, for the State.

Gunn & Messick, by Robert Gunn and Paul Messick, for the defendant-appellant.

BROCK, Chief Judge.

[1] Defendant assigns as error that the trial judge denied his motion to quash the indictment for failure of the foreman of the grand jury to sign it.

A hearing was held upon defendant's motion to quash. The evidence on this hearing tended to show that the grand jury examined two of the State's witnesses and voted a true bill; that the foreman marked the witnesses examined but inadvertently failed to sign the bill; and that the report of the grand

jury for the session, signed by the foreman, listed the bill against defendant as having been found a true bill. The judge found facts substantially as the evidence tended to show and permitted the former foreman to sign the bill in open court. The report of the grand jury, signed by the foreman, in which was listed the bill against defendant as having been returned a true bill charging a non-capital felony, rendered the failure to sign the bill itself amendable. *See generally State v. Cox*, 280 N.C. 689, 187 S.E. 2d 1; *State v. Avant*, 202 N.C. 680, 163 S.E. 806; *State v. Reep*, 12 N.C. App. 125, 182 S.E. 2d 623; 41 Am. Jur. 2d *Indictments and Informations* § 54 (1968). This assignment of error is overruled.

[2] Defendant contends that the trial judge violated G.S. 1-180 when, during the testimony of the State's witness Henry Kimbrell, he said: "Let me ask you this for clarification, you say 'they left' you have mentioned two, I believe, William Black, and you said something about a fellow named Raeford?" The witness had not identified Raeford in his testimony, although he had testified that "they" (defendant, Black, and Raeford) had robbed him. Defendant argues that the trial judge's question improperly suggested the identification of Raeford, who followed Kimbrell to the stand as a witness for the State. We do not believe that the question prejudiced defendant for two reasons: first, the trial judge did not refer to defendant, and second, Raeford admitted that he participated in the robbery with defendant and Black. While we do not believe there was error in propounding this question, if error exists, it is harmless.

Defendant similarly contends that several questions asked by the trial judge of the witness Raeford for the purpose of clarification "went beyond mere clarification" and invaded the province of the jury. It is clear that the "criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury, and in applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made." 2 Strong, N. C. Index 2d, Criminal Law, § 99 (Supp. 1974). It is well established that a trial judge may propound competent questions in order to clarify a witness' testimony. We fail to see how the trial judge's questions in the case at bar, propounded solely for the purpose of clarification, prejudiced defendant or deprived him of his right to a fair trial. This assignment of error is overruled.

[3] After the witness Raeford testified, the State's witness Brown testified, for the purpose of corroboration, to a prior consistent statement of Raeford's. Following the admission of this statement, the trial judge gave a limiting instruction. Defendant argues that the trial judge erred in failing to give a limiting instruction before admitting the statement and in failing to repeat the instruction in the charge. While it may be a better practice to give such a limiting instruction before the evidence is admitted, we see no prejudice to defendant in the procedure followed in this case. Furthermore, the fact that the limiting instruction was not repeated in the charge is not error in the absence of a request for a special instruction. 1 Stansbury, N. C. Evidence, § 52 (Brandis Revision, 1973); 3 Strong, N. C. Index 2d, Criminal Law, § 113 (1967). This assignment of error is overruled.

Finally, defendant contends that the trial judge erred in his charge to the jury. We have reviewed the charge and find that it sufficiently applied the law to the facts of the case.

In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

JULIAN T. MATHEWS v. ULDINE H. MATHEWS

No. 746DC884

(Filed 5 February 1975)

Infants § 8— custody order of another state — requisites for awarding full faith and credit

The district court had the authority to recognize and accord full faith and credit to the custody decree of the S. C. court and to implement this judgment by ordering that the parties' son, who was in N. C., be returned to the jurisdiction of that court, provided that it determine, pursuant to G.S. 50-13.5(c)(5), that the S. C. Family Court had assumed jurisdiction and that the best interests of the child and the parties would be served thereby.

Mathews v. Mathews

APPEAL by plaintiff from *Gay, Judge,* 27 May 1974 Session of District Court held in HERTFORD County. Heard in the Court of Appeals 17 January 1975.

Plaintiff and defendant were married on 20 April 1952, and lived with their two minor children in Lexington County, South Carolina. They separated in August 1969.

On 19 October 1972, plaintiff filed action in South Carolina for divorce and custody of the two children, alleging that he had taken his son, Julian T. Mathews, Jr., now age 13, at his request, to his sister's home in North Carolina. By order of the same date, the Lexington County Family Court set the custody hearing for 19 December, 1972, awarding temporary custody of the son to plaintiff.

The parties and their counsel were present for the hearing, and the court found that it could not make a determination without having the son before the court, and by order dated 19 December, 1972, directed that plaintiff return the son to the home of defendant on 24 December 1972 for a visit of three days and to have the son in court on 27 December, 1972 for the determination of permanent custody.

Plaintiff did not return the child to defendant or to the court as ordered. He immediately left South Carolina and went to Hertford County in this State where he has since resided with his son.

On 19 July 1973, plaintiff filed this action seeking divorce and custody of the son. Defendant filed answer and counterclaim alleging abandonment and indiginities and seeking custody of the son.

At the custody hearing on 30 May 1974, Judge Gay received in evidence court records of the South Carolina proceedings and affidavits of defendant and her physician relative to her fitness. Plaintiff offered no evidence. The court thereupon found facts and adjudged that the order of the South Carolina Family Court, dated 2 December 1972, be given full faith and credit, and that to implement the same, plaintiff return the son to defendant in South Carolina. From this judgment, plaintiff appeals.

Howard P. Satisky for plaintiff appellant.

Revelle, Burleson and Lee by L. Frank Burleson, Jr., for defendant appellee.

CLARK, Judge.

Plaintiff assigns as error the judgment of the District Court giving full faith and credit to the order of the South Carolina Family Court and implementation.

G.S. 50-13.5(c) (5) reads as follows:

"(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody.—

* * *

(5) If at any time a court of this State having jurisdiction of an action or proceeding for the custody of a minor child finds as a fact that a court in another state has assumed jurisdiction to determine the matter, and that the best interests of the child and the parties would be served by having the matter disposed of in that jurisdiction, the court of this State may, in its discretion, refuse to exercise jurisdiction, and dismiss the action or proceeding or may retain jurisdiction and enter such orders from time to time as the interest of the child may require."

The courts of this State will accord full faith and credit to the custody decree of a sister state which had jurisdiction of the parties and the cause as long as the circumstances attending its rendition remain unchanged. However, when a child comes to this State, our court has jurisdiction to order a change in custody if it is found that conditions and circumstances have changed since the entry of the last decree and that the child's best interests will be served. The rule is that the welfare of the child whose custody is in controversy is "the polar star by which the courts must be guided in awarding custody." *Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973); *Taylor v. Taylor,* 20 N.C. App. 188, 201 S.E. 2d 43 (1973).

The District Court had the authority to recognize and accord full faith and credit to the custody decree of the South Carolina Court and to implement this judgment by ordering that the son be returned to the jurisdiction of that court, *provided* that it determine, pursuant to G.S. 50-13.5(c) (5), that the South Carolina Family Court assumed jurisdiction and that the best interests of the child and the parties would be served. It is noted that the son has been in the State of North Carolina with

the plaintiff since the entry of the decree by the South Carolina Court in December 1972.

The judgment is vacated, and this cause is remanded to Hertford County District Court with directions that the court conduct proceedings consistent with this opinion.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LEON WILLIAMS, ALIAS DANNY McNEIL

No. 7421SC816

(Filed 5 February 1975)

Criminal Law §§ 34, 66— evidence of prior escape — admissibility to show identity of defendant

Generally, evidence of separate and independent crimes is inadmissible to prove the guilt of a person on trial, but such evidence is admissible for the purpose of establishing identity; therefore, defendant was not prejudiced when an officer testified that defendant gave him a false name while he was being booked, but it was later determined that defendant's fingerprints matched those of an escapee from another county.

APPEAL by defendant from *Smith, Judge,* 10 June 1974 Session of Superior Court held in FORSYTH County. Heard in the Court of Appeals 13 January 1975.

The defendant was charged in one bill of indictment with the larceny of an automobile on 16 March 1974, and in another with breaking and entering a furniture store and with larceny therefrom in the early morning of the following day. The three charges, to each of which defendant pled not guiltly, were consolidated for trial.

In substance, the State's evidence discloses that the sound of an alarm in the furniture store attracted three Winston-Salem policemen to the scene. There they found a glass door of the store broken, a TV set on the sidewalk about a half block from the store, and two TV sets, a tool box and tapes in a nearby Mustang automobile. Defendant was observed nearby; he ran and was pursued and apprehended in a tree where he was trying to hide.

The store owner identified the TV sets, tool box and tapes. The owner of an automobile sales lot identified the Mustang, which apparently had been removed from the lot by straight-wiring the switch. Defendant's fingerprints were found in the automobile.

Defendant did not offer any evidence.

Upon verdicts of guilty as charged to all three offenses, the trial court imposed sentences of imprisonment, and defendant appealed.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney Raymond L. Yasser for the State.

William Z. Wood, Jr., for defendant appellant.

CLARK, Judge.

A city policeman testified that he was present when the defendant was booked and that the defendant gave his name as Leon Williams, but that it was later determined that the defendant's fingerprints matched those of Daniel McNeil, an escapee from Davie County. The officer further testified that after being advised of this information, the defendant stated to him that his name was Daniel McNeil and that he had escaped.

The admissiblity of this evidence of the defendant's escape is the only assignment of error which merits consideration by the Court.

The evidence appears in the record in narrative form and does not disclose whether the challenged testimony was in response to a specific and relevant question. But no objection, no motion to strike, and no motion for mistrial was made. Nevertheless, on both occasions after the witness stated that the defendant was an escapee, the trial judge instructed the jury to disregard and not consider the statement.

Generally, such evidence of separate and independent crimes is inadmissible to prove the guilt of a person on trial. However, such evidence is admissible for other purposes when it meets the tests of relevancy and materiality. 1 Stansbury, N. C. Evidence, § 91 (Brandis Rev. 1973). This evidence relating to

escape became relevant and material for the purpose of establishing identity and to explain the defendant's alias after he gave a false name to the booking officer. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Engle,* 5 N.C. App. 101, 167 S.E. 2d 864 (1969).

The burden was on the defendant to request instructions limiting jury consideration to the purposes for which it was competent. *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362 (1967); *State v. Hardee,* 6 N.C. App. 147, 169 S.E. 2d 533 (1969); *State v. Rhodes,* 10 N.C. App. 154, 177 S.E. 2d 754 (1970). But here the trial judge, *ex mero motu,* withdrew the evidence from jury consideration for any purpose and instructed the jury not to consider it, which ordinarily is sufficient to cure error in all but exceptional circumstances. *State v. Carnes,* 18 N.C. App. 19, 195 S.E. 2d 588 (1973).

Further, this claim of error cannot be sustained because the defendant's failure to object or to move to strike the evidence relating to the escape constituted a waiver. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. Crouse,* 22 N.C. App. 47, 205 S.E. 2d 361 (1974).

No error.

Judges BRITT and MORRIS concur.

DONALD CLARK, PETITIONER v. DONALD W. RICHARDSON, BUILDING INSPECTOR, AND JAMES G. JOYCE, CHAIRMAN OF THE BOARD OF ADJUSTMENTS OF THE TOWN OF MAYODAN, RESPONDENTS

No. 7417SC947

(Filed 5 February 1975)

1. **Appeal and Error § 26— exception to judgment — conclusions**

An exception to the judgment presents for review the conclusions of law of the trial court even though they are denominated findings of fact.

2. **Municipal Corporations § 30— zoning — enclosure of existing porch — no extension of nonconforming use**

The enclosure of an existing porch on a building used for a grocery store in an area zoned for residential use would not constitute an en-

largement or extension of a nonconforming use within the meaning of a town's zoning ordinance, and petitioner's application for a permit allowing him to enclose the porch should have been granted.

APPEAL by respondents from *Bailey, Judge,* 9 September 1974 Session of Superior Court held in ROCKINGHAM County. Argued in the Court of Appeals on 23 January 1975.

This action arose from the denial of petitioner's application for a permit allowing him to enclose an existing porch on his building. Stipulations agreed to by the parties disclose:

Petitioner owns a building located at 808 West Main Street in the Town of Mayodan, N. C. The location is within an area zoned by the town as R-6, a residential classification. Petitioner's building, including a front porch, is 24 feet by 37 feet. The porch has a cement floor and a roof which is supported by columns at the outer edge of the roof. Petitioner operates a grocery store in the building and uses the floor area of the building and the porch in displaying and selling his merchandise. The structure is a nonconforming building under the town zoning ordinance. Petitioner's application for a permit to enclose his porch was denied by the town building inspector, and petitioner appealed to the Board of Adjustments who also denied the application.

Petitioner's application to the superior court for a writ of certiorari to review the action of respondents was allowed. The cause was presented to the court on stipulations, the parties agreeing that the sole issue for determination was " . . . whether the enclosing of the porch on petitioner's building . . . is an enlargement or extension of a nonconforming use" pursuant to the zoning ordinance of the Town of Mayodan. The ordinance provided that nonconforming uses of land would not " . . . hereafter be enlarged or extended in any way" and that nonconforming buildings and uses of buildings would not hereafter be "enlarged."

The court entered judgment reversing the findings and decision of respondents and remanded the cause with direction that respondents issue the permit applied for. Respondents appealed.

Bethea, Robinson and Moore, by D. Leon Moore, for respondent appellants.

Frazier, Frazier, Mahler & Walker, by Harold C. Mahler, and E. Thomas Maddox, Jr., for petitioner appellee.

BRITT, Judge.

[1] The record does not disclose any exception to any of the proceedings. Rule 21 of the Rules of Practice in the Court of Appeals of North Carolina states: " . . . No exceptions not thus set out, or filed and made a part of the record on appeal, shall be considered by this Court . . . . " Nevertheless, in 1 Strong, N. C. Index 2d Appeal and Error § 26, at 152-54, we find: "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper. . . . [R]eview is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form . . . . " Our Supreme Court has held that an exception to the judgment presents for review the conclusions of law of the trial court even though they are denominated findings of fact. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590 (1962).

[2] "Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of the property owner." 5 Strong, N. C. Index 2d Municipal Corporations § 30, at 683. We hold that the trial court properly concluded that the enclosing of the existing porch on petitioner's building would not constitute an enlargement or extension of a nonconforming use under the zoning ordinance in question. The facts stipulated by the parties support the judgment and no error of law appears upon the face of the record.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. WAYNE BRANDON

No. 7414SC567

(Filed 5 February 1975)

1. Criminal Law § 113— inaccurate recapitulation of evidence — no prejudicial error

While the trial court in a prosecution for assault with a deadly weapon with intent to kill was inaccurate in stating that codefendants

had testified that they had pled guilty to assault with a deadly weapon inflicting serious injury, defendant was not prejudiced since he introduced evidence of one codefendant's plea and did not object to introduction of evidence as to the other codefendant's plea.

2. **Criminal Law § 118— jury charge — more time devoted to State's contentions — no error**

Where defendant did not take the stand or present any other witnesses, but the State presented six witnesses, the trial court did not give more weight to the State's contentions by devoting different lengths of time to stating contentions of the State and defendant.

APPEAL by defendant from *Brewer, Judge,* 11 February 1974 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious bodily injury. He pled not guilty and the jury returned a verdict of guilty of assault with a deadly weapon inflicting serious bodily injury. From judgment imposing sentence of three years as a youthful offender, he appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles J. Murray, for the State.

William Alexander Graham III for the defendant appellant.

BRITT, Judge.

[1] All of defendant's assignments of error relate to the trial court's instructions to the jury. First, he contends that in recapitulating the testimony, the court stated that codefendants Webb and Riggins had each testified that he (Webb and Riggins) had pled guilty to assault with a deadly weapon inflicting serious injury when in fact Webb and Riggins had not so testified; and that in another portion of the charge, the court stated that Webb and Riggins and a third codefendant, Roberts, each had testified that he had pled guilty to assault with a deadly weapon inflicting serious injury when in fact they had not so testified.

The record reveals that defendant's counsel on appeal did not appear at trial and was not employed by defendant until after the record on appeal was filed in this court. After defendant's brief was filed, in which brief he raised the questions covered by this assignment, this court granted the Attorney General's motion to be allowed to file a second addendum to the record. That addendum discloses that Webb did plead guilty

to assault with a deadly weapon inflicting serious injury and that defendant appellant introduced the transcript of Webb's plea into evidence. The addendum also discloses that Riggins testified, without objection or motion to strike by defendant, that he had pled guilty. Webb, Riggins and Roberts were presented as witnesses for the State.

In 3 Strong, N. C. Index 2d Criminal Law § 113, at 15, we find: "Generally, an inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial court's attention in time for correction. Thus, a slight inaccuracy in stating the evidence will not be held reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction."

While the trial court was inaccurate in stating that codefendants Webb and Roberts had testified that they had pled guilty to assault with a deadly weapon inflicting serious injury, we perceive no prejudice to defendant appellant. Certainly, testimony by Webb that he had pled guilty would have been no more detrimental to defendant than was the introduction of Webb's transcript of plea. Evidence of Webb's plea having been introduced by defendant, and evidence of Riggins' plea having been admitted without objection of defendant, we perceive no prejudice to defendant by the court's inaccurate statement that Roberts had testified that he had pled guilty. Neither of the inaccuracies was called to the attention of the judge in time for him to have corrected them.

[2] Defendant next contends that the trial judge expressed an opinion in his instructions to the jury by giving more weight to the State's contentions than to defendant's contentions. This assignment has no merit. Defendant did not take the witness stand nor did he present any other witness; six witnesses were presented by the State. Applicable here is the following statement from *State v. Evers,* 1 N.C. App. 81, 82, 159 S.E. 2d 372 (1968): ". . . Our Supreme Court has held many times that a mere disparity in the length of time devoted by a judge in stating contentions of parties does not constitute prejudicial error. (Citations)." This rule particularly applies in cases where the number of witnesses presented by one side greatly exceeds the number presented by the other side.

We have considered defendant's other assignments relating to the charge but find them also to be without merit.

Defendant's appeal itself constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). We have reviewed the record proper and find it to be free from prejudicial error.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. LOUIS GUNN

No. 7427SC920

(Filed 5 February 1975)

1. **Criminal Law § 86— cross-examination of prosecuting witness**

In a prosecution for feloniously discharging a firearm into an occupied dwelling, the trial court did not abuse its discretion in refusing to allow defense counsel to ask the prosecuting witness on cross-examination whether he had been putting out feelers to see if defendant would pay him some money since it is not clear that an affirmative response would have directly challenged the credibility of the witness.

2. **Assault and Battery § 15— discharging firearm into occupied dwelling — intoxication — instructions**

In a prosecution for feloniously discharging a firearm into an occupied dwelling, the trial court did not err in failing to relate the defense of intoxication to "wanton" conduct where the court explained the meaning of a "wilful" and a "wanton" act, told the jury that in order to find defendant guilty it must find that he acted "intentionally," and further instructed that such intent could be negated by the voluntary intoxication of defendant.

APPEAL by defendant from *Tillery, Judge,* 22 July 1974 Session of Superior Court held in GASTON County. Heard in the Court of Appeals on 14 January 1975.

This is a criminal prosecution wherein the defendant, Louis Gunn, was charged in a bill of indictment, proper in form, with feloniously discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1.

The State offered evidence tending to show, among other things, that at approximately 11:45 p.m. on 8 October 1973 the

defendant, armed with a .38 caliber pistol, fired four times into a dwelling occupied by Terry Pruitt, Cindy Campbell, and Crystal Gann. The defendant testified in his own behalf that he did not own a .38 pistol and that he was so intoxicated on the day in question that he had no recollection of his actions after one o'clock in the afternoon.

The jury returned a verdict of "guilty as charged" and the trial court sentenced the defendant to a jail term of two (2) years. Defendant appealed.

Attorney General Edmisten by Associate Attorney James E. Delany for the State.

Childers and Fowler by Max L. Childers and Henry L. Fowler, Jr., for defendant appellant.

HEDRICK, Judge.

[1] On the cross-examination of the prosecuting witness, Terry Pruitt, the trial court sustained an objection by the State to the following question:

> "Q. And I'll ask you if you haven't been putting out feelers to see if Louis wouldn't pay you some money, isn't that right?"

Defendant contends this was prejudicial error as he was attempting to establish bias on the part of the State's witness. We do not agree.

Although wide lattitude is allowed a defendant on cross-examination to show the bias or hostility of a State's witness against the defendant, the trial judge does have some discretion to confine the cross-examination within reasonable limits. *State v. Carey,* 285 N.C. 497, 206 S.E. 2d 213 (1974). In the case at bar, the record does not disclose what Pruitt would have said had he been permitted to answer the question. Furthermore, based upon the issues involved in the case, it is not at all clear whether an affirmative response would have directly challenged the disinterestedness or credibility of the State's witness. *State v. Carey, supra.* Therefore, we are unwilling to say that the trial judge abused his discretion. The burden is on appellant not only to show error but to show prejudicial error. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972). See also, *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971), vacated and remanded on other grounds, 408 U.S. 940.

[2] Defendant also contends the trial court erred in its instructions to the jury with respect to his defense of intoxication in that the court only related the defense to an intentional or willful shooting and not to a shooting arising from *wanton* conduct on the part of the defendant. He, therefore, argues that the trial judge permitted the jury to find him guilty without determining whether he had the specific intent to discharge a firearm into an occupied dwelling. We do not agree.

G.S. 14-34.1 provides: "Any person who *wilfully or wantonly* discharges a firearm into or attempts to discharge a firearm into any building . . . while it is occupied is guilty of a felony punishable as provided in § 14-2." [Emphasis ours.]

> "The attempt to draw a sharp line between a 'wilful' act and a 'wanton' act in the context of G.S. 14-34.1 would be futile. The elements of each are substantially the same.
>
> We hold that 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,* 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973).

Here, the trial judge explained to the jury the meaning of a "wilful" and a "wanton" act. However, he also specifically instructed the jury that before it could find the defendant guilty it must find beyond a reasonable doubt that the defendant acted "intentionally." This was clearly proper. *State v. Williams, supra.* The court further instructed the jury that this intent was a specific intent which could be negated by the voluntary intoxication of the defendant. When considered contextually as a whole, the charge to the jury is free from prejudicial error.

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOSEPH MARION HEAD, JR.

No. 7429SC892

(Filed 5 February 1975)

Criminal Law § 114; Rape § 6— expression of opinion in jury charge — prejudicial error

In a prosecution for rape and crime against nature, the trial court committed prejudicial error by expressing an opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant committed the crime charged and when he went on to say "not satisfied with that, the evidence tends to show that he [the defendant] again had intercourse with her. . . ."

APPEAL by defendant from *Crissman, Judge,* 6 August 1974 Session of Superior Court held in RUTHERFORD County. Heard in the Court of Appeals on 16 January 1975.

This is a criminal prosecution wherein the defendant, Joseph Marion Head, Jr., was charged in separate bills of indictment, proper in form, with the felonies of rape and crime against nature.

Defendant entered a plea of not guilty to each charge, and the State offered evidence tending to show the following: At approximately 6:00 p.m. on 15 April 1974, Sheene Marie Griffin was walking along the Asheville Highway near Spartanburg, S. C., when the defendant, accompanied by Arnold Cooper, offered to give her a ride. Rather than taking Miss Griffin to Whitney, S. C., about five miles from Spartanburg, as they had promised, the defendant and Cooper bought some beer and began "riding around all over the place . . . . " They crossed over into North Carolina, and sometime after dark the defendant parked his pickup truck at an isolated spot along a dirt road in Rutherford County. At this point, the defendant hit Miss Griffin in the face and threatened her with a large knife resembling a machete. He ordered her to take off her clothes and forced her to have intercourse with him. Several minutes later, defendant raped Miss Griffin a second time. Miss Griffin further testified that the defendant forced her to commit the act of fellatio. The State also offered the testimony of Arnold Cooper, who corroborated the testimony of Miss Griffin.

Defendant testified in his own behalf that Miss Griffin had agreed to have intercourse with him for $20.00 and a ride halfway to Myrtle Beach, S. C., and that he did have intercourse

with her on that basis. Miss Griffin became angered, however, when he refused to pay her. Defendant also denied the act of crime against nature.

The jury found the defendant guilty of second degree rape and crime against nature. From consecutive sentences of thirty-five (35) years for rape and ten (10) years for crime against nature, defendant appealed.

Attorney General Edmisten by Associate Attorneys Raymond L. Yasser and Joan H. Byers for the State.

Robert L. Harris and Robert W. Wolf for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his timely motions for judgment as of nonsuit. However, when the evidence is considered in the light most favorable to the State, it is clearly sufficient to require submission of these cases to the jury. This assignment of error is overruled.

Defendant further contends the trial judge erred to defendant's prejudice when he instructed the jury that "there was some evidence . . . *considerable evidence* that [the defendant] took [Miss Griffin's] clothes off and that she was saying, 'no, no' all the time, but that he proceeded to have intercourse [with her] . . . " and when the judge stated, "[*n*]*ot satisfied with that,* the evidence tends to show that he [the defendant] again had intercourse with her . . . . " [Emphasis ours.] Defendant argues that the trial judge expressed an opinion in violation of G.S. 1-180 by these statements as to the weight and credibility of the State's evidence.

G.S. 1-180 in pertinent part provides: "No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury . . . . " It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury; and, therefore, the court must be careful to see that neither party is prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial. *State v. Ownby,* 146 N.C.

677, 61 S.E. 630 (1908); *State v. McLean,* 17 N.C. App. 629, 195 S.E. 2d 336 (1973).

The instruction challenged by this exception clearly amounts to an expression of opinion on the part of the trial judge upon the critical evidence tending to show that the defendant committed the crimes charged. By stating that there was "considerable evidence," we think the trial judge inadvertently intimated to the jury his opinion as to the sufficiency of the evidence. Moreover, we think the judge's use of the phrase "[n]ot satisfied with that" again intimated to the jury that it was his opinion that the defendant had raped Miss Griffin.

Since there must be a new trial, it is not necessary that we discuss defendant's additional assignments of error.

For error in the charge there must be a

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. VAUGHN BAGNARD

No. 743SC918

(Filed 5 February 1975)

Indictment and Warrant § 10— identification of accused in indictment

Bills of indictment identifying the accused in the body thereof as "John Doe AKA 'Varne'" were insufficient to charge a defendant named Vaughn Bagnard with any offense.

APPEAL by defendant from *Thornburg, Judge,* 10 June 1974 Session of Superior Court held in CARTERET County. Heard in the Court of Appeals on 21 January 1975.

Vaughn Bagnard was tried on two bills of indictment purporting to charge him with the sale and distribution and possession of a Schedule I controlled substance, to wit: LSD. The first bill of indictment is as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 16th day of January, 1974, in Carteret County John Doe AKA 'Varne' unlawfully and

wilfully did feloniously sell and deliver to Ricky A. Mires, a controlled substance, to wit: lysergic acid diethylamide, which is included in Schedule I of the North Carolina Controlled Substances Act."

The second bill of indictment contains identical language except that it purports to charge that the defendant possessed LSD.

The title for each bill of indictment is as follows:

"The State of North Carolina
vs.
(VAUGHN BAGNARD)
John Doe AKA 'Varne' "

(Note: Name in parenthesis is handwritten.) The record before us does not show with certainty whether Vaughn Bagnard's name was written in the title to the bills before or after action by the Grand Jury.

The defendant's motions to quash the bills of indictment were denied, and defendant pleaded not guilty. The jury returned verdicts of "guilty as charged"; and from a judgment imposing a prison sentence of five (5) years, he appealed.

Attorney General Rufus L. Edmisten by Deputy Attorney General Andrew A. Vanore and Associate Attorney Robert R. Reilly for the State.

McCotter & Mayo by Charles K. McCotter, Jr., for defendant appellant.

HEDRICK, Judge.

The general rule is that, for an indictment to be valid, the name of the accused must be alleged in a manner sufficient to identify him with certainty. Annot., 15 A.L.R. 3d 968. The indictment or information must describe an accused in such a manner as to identify him as the person charged, and if the accused's name does not appear in the indictment or information, particularly in the part which charges the offense, the charge is fatally defective. 42 C.J.S., Indictments and Informations, Sec. 127, p. 1015; *State v. Finch,* 218 N.C. 511, 11 S.E. 2d 547 (1940). A warrant or bill of indictment is defective where the defendant is not clearly and positively charged with the commission of the purported offense. *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133 (1954).

Nowhere in the body or charging portion of the bills of indictment upon which these prosecutions are bottomed and judgment entered is Vaughn Bagnard identified by name or otherwise. Whether this fatal defect is cured by the appearance of Vaughn Bagnard's name in the title to the bills is not presented, because the charging portions of the bills refer only to an unidentified "John Doe AKA 'Varne' ".

Because the judgment entered against Vaughn Bagnard is not supported by proper bills of indictment against him, it must be arrested. If so advised, the State may proceed against Vaughn Bagnard on proper bills of indictment.

Judgment arrested.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. WELDON MASON

No. 7414SC948

(Filed 5 February 1975)

1. **Conspiracy § 6; Robbery § 4— conspiracy to commit armed robbery — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit armed robbery where it tended to show that defendant and two others met in a vacant lot to discuss how they could make some money, one of the conspirators suggested the movies, defendant indicated that he needed a gun, defendant stated that he was "going to show all how to pull a robbery," defendant demanded money at a theater, and the theater employee complied by placing money in a bag held by one of the conspirators.

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

In a prosecution for armed robbery, the trial court properly determined that testimony of a theater manager identifying defendant as one of the men who robbed a theater employee was based solely on the manager's observation of defendant at the crime scene.

3. **Criminal Law § 173— objectionable testimony of State's witness — error invited by defendant**

The trial court did not err in failing to strike a portion of testimony by a police detective where the objectionable testimony was brought out by defendant's counsel on cross-examination of the State's witness.

State v. Mason

APPEAL by defendant from *Brewer, Judge,* 28 May 1974 Session of Superior Court held in DURHAM County. Heard in the Court of Appeals on 23 January 1975.

Defendant was tried upon separate bills of indictment charging him with assault with a deadly weapon with intent to kill, inflicting serious injury, armed robbery, and conspiracy to commit armed robbery. The jury returned a verdict of guilty on all charges, and from a judgment imposing prison sentences totaling fifty years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Vann & Vann, by Arthur Vann III, for defendant appellant.

MARTIN, Judge.

Defendant contends in his first assignment of error that the trial court erred in denying his motion for nonsuit on the charge of conspiracy. It is argued that the State's evidence raised only a suspicion that the crime of conspiracy was committed.

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act unlawfully. *State v. Miller,* 15 N.C. App. 610, 190 S.E. 2d 722 (1972). "Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside,* 204 N.C. 710, 169 S.E. 711 (1933).

[1] We are of the opinion, and so hold, that defendant's motion for nonsuit was properly overruled. State's evidence, through testimony by one McGill, tended to show that on 15 December 1973 defendant, Joe McGill, and Aubrey Johnson met together at a vacant lot. Defendant asked, "How can we make some money?" or "Where can we make some money?" McGill suggested the movies. According to testimony, McGill knew defendant was speaking of robbery. Defendant indicated that he needed a gun, and McGill said, "Yes, man." A shotgun was obtained from Johnson's home. McGill testified that en route to the theatre defendant said, "I am going to show all how to pull a robbery." Arriving at the Yorktown Theatre in Durham, defendant demanded money, and the theatre employee complied,

placing money into a bag held by Johnson. McGill also testified that he participated in the robbery out of a fear of defendant. We find the evidence sufficient to survive a motion for nonsuit on the charge of conspiracy.

[2] James Beaulieu, manager of the Yorktown Theatre, was allowed to testify that defendant was one of the men who robbed his theatre and shot him. Before admitting this testimony, a voir dire examination was held to determine its admissibility. Based on ample evidence, the trial court found that the in-court identification was not the result of any impermissibly suggestive pre-trial identification procedures and that the in-court identification was based solely on what the witness saw at the time of the crime. Such a finding, supported by competent evidence, is conclusive on appeal and must be upheld. Defendant's assignment of error in this matter is overruled.

[3] Defendant argues the trial court erred in failing to strike a portion of testimony by Detective Moore of the Durham police. The record shows that this testimony was brought out by defendant's counsel on cross-examination of the State's witness. "Defendant may not complain of the admission of testimony brought out by his counsel in the cross-examination of a witness for the state . . . . " 3 Strong, N. C. Index 2d, Criminal Law, § 173, p. 145.

We conclude defendant's trial was free of prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY CLAYTON PUTNAM

No. 7427SC868

(Filed 5 February 1975)

Homicide § 30— second degree murder — reckless handling of firearm — failure to instruct on involuntary manslaughter erroneous

In a prosecution for second degree murder where there was no evidence from which the jury could find that defendant killed deceased in the heat of passion or in self-defense by using excessive force, the trial court properly failed to instruct on voluntary manslaughter; however, since there was some evidence that defendant was handling a

firearm which he thought was unloaded in a reckless manner, the trial court should have instructed on involuntary manslaughter.

APPEAL by defendant from *Grist, Judge,* 8 July 1974 Session of Superior Court held in CLEVELAND County. Heard in the Court of Appeals on 16 January 1975.

Defendant was tried upon a bill of indictment charging him with the murder of Charles Edwin McSwain. The State elected to put defendant on trial for second degree murder, and defendant entered a plea of not guilty.

State's evidence tended to show that the defendant and several other men participated in an all night poker game with defendant providing the house, food, and poker chips. As the game began to break up, defendant left the others and went into the kitchen. Suddenly, a shotgun blast was heard. One Mial Putnam and the deceased, Charles McSwain, were struck by the blast. Defendant immediately exclaimed that he didn't know the gun was loaded.

Two witnesses stated that they had seen defendant bring the gun into the house on past occasions. Some thirty minutes before the incident, defendant and McSwain had argued over some money. Lastly, there was testimony that defendant said he had been hurt when the hammers on the outside of the shotgun had hung on his side.

Defendant offered no evidence.

The jury returned a verdict of guilty of second degree murder, and from a judgment sentencing defendant to not less than ten nor more than fifteen years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Archie W. Anders, for the State.

Hamrick, Mauney & Flowers, by Fred A. Flowers, for defendant appellant.

MARTIN, Judge.

"Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit defendant's guilt of the lesser included offense to the jury; if he fails to do so, the error is not cured by a verdict

convicting defendant of the offense charged." *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969).

In the present case the trial court instructed the jury on second degree murder and death by accidental means. Defendant argues he was entitled to an instruction on voluntary and involuntary manslaughter.

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Reaves,* 15 N.C. App. 476, 190 S.E. 2d, 358 (1972). The evidence in this case is very meager. There is evidence that defendant and McSwain had argued over some money but that it had ended twenty-five to thirty minutes prior to the shooting. It also appears that defendant was cashing in chips less than five minutes before the shooting. That is the extent of the evidence with regard to defendant's emotional state. In our opinion there was no evidence from which the jury could find that defendant killed McSwain in the heat of passion or in self-defense by using excessive force. Thus, the absence of any instruction as to voluntary manslaughter was not error. *See State v. Moore, supra.*

However, we feel defendant was entitled to an instruction on involuntary manslaughter. One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter. *State v. Moore, supra.* In this regard, there is some evidence that defendant was handling a firearm which he thought was unloaded in a reckless manner.

Failure to submit the issue of involuntary manslaughter to the jury entitles defendant to a new trial.

New trial.

Judges VAUGHN and ARNOLD concur.

VERNON W. RAYNOR v. MUTUAL OF OMAHA

No. 746SC907

(Filed 5 February 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— summary judgment on punitive damages claim only — no right of appeal

In an action to recover disability benefits and punitive damages for defendant's failure to pay the benefits, order of summary judgment in favor of defendant on the claim for punitive damages was not immediately appealable where the trial court made no determination that there is no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiff from *Wells, Judge,* 12 August 1974 Civil Session of HALIFAX County Superior Court. Heard in the Court of Appeals on 17 January 1975.

This is a civil action to recover $150.00 per month plus interest from 15 October 1972 under an insurance policy issued by defendant to plaintiff. Plaintiff amended his complaint to allege that he was entitled to punitive damages of $200,000.00 for defendant's refusal to pay the monthly payments.

Defendant moved for summary judgment against plaintiff on the claim for punitive damages. After reviewing materials submitted for its consideration, the trial court granted defendant's motion. Plaintiff appealed.

Pritchett, Cooke & Burch, by William Pritchett, Jr., for plaintiff appellant.

Jeffress, Hodges, Morris & Rochelle, by A. H. Jeffress, for defendant appellee.

MARTIN, Judge.

"A party against whom a claim . . . is asserted . . . , may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." G.S. 1A-1, Rule 56(b). In the present case the trial court granted summary judgment against that part of plaintiff's case which sought punitive damages.

The preliminary question arises as to whether this "partial summary judgment" is appealable.

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or

> third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." G.S. 1A-1, Rule 54(b).

The trial court made no determination to the effect that there is no just reason for delay. "By making the express determination in the judgment that there is 'no just reason for delay,' the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal. In the absence of such an express determination in the judgment, Rule 54(b) makes 'any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties,' interlocutory and not final." *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974). It is readily apparent why this appeal should be delayed. If it should be determined that appellant is not entitled to disability benefits under the insurance policy, then appellee could not be held to answer in puntive damages for the failure to pay such benefits. This appeal is premature.

Appeal dismissed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN CANTRELL

No. 7426SC949

(Filed 5 February 1975)

1. **Assault and Battery § 15; Criminal Law § 112— failure to charge on presumption of innocence — self-defense — burden of proof**

The trial court in a felonious assault prosecution did not shift the burden of proof to defendant by instructing on self-defense without reiterating the presumption of innocence where the court repeatedly instructed the jury that the burden of proof was on the State.

2. **Assault and Battery § 15— self-defense — instructions on apparent necessity**

In a felonious assault prosecution, the trial court's instructions on self-defense effectively conveyed to the jury that it must determine the reasonableness of defendant's belief in the necessity of force from the circumstances as they appeared to him at the time.

APPEAL by defendant from *Falls, Judge,* 29 July 1974 Session of Superior Court held in MECKLENBURG County. Heard in the Court of Appeals 23 January 1975.

Defendant was tried on an indictment charging him with assault with a deadly weapon with intent to kill John William Cohens, inflicting serious bodily injury not resulting in death, by shooting him twice in the chest.

The incident occurred on 2 February 1974 at Cohens' home in Charlotte. Witnesses for the State, who were present at the time of the shooting, gave testimony tending to show that Cohens and his wife were having a party when defendant Cantrell arrived, entered the house, and was told by Cohens to leave. Cohens escorted Cantrell out of the house. Witnesses heard what sounded like firecrackers and found Cohens on the front porch with two bullet wounds in his chest. They took a .22 caliber pistol from Cantrell, who fled but was stopped at the street by Cohens' wife.

Defendant Cantrell testified that he had been invited to the party by Cohens' sister but when he arrived was told by Cohens that he would have to leave. As he reached the door, Cohens grabbed him and tried to throw him off the porch, whereupon defendant drew a gun and shot Cohens. Then Cohens' wife and sister-in-law threw him off the porch and beat him with his crutch.

The jury found defendant guilty as charged. From judgment imposing a sentence of eighteen to twenty years imprisonment, defendant appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Clayton S. Curry, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant's two assignments of error relate to the charge of the court. He first contends that the court shifted the burden of proof to defendant by instructing on the defense of self-defense and its applicability to the offense charged and lesser included offenses without reiterating the presumptions of innocence. We disagree. The Court repeatedly instructed that the burden of proof was on the State, and that the defendant should be acquitted if there was any reasonable doubt of his guilt. "Reasonable doubt" was fully defined. The charge was sufficient. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917. *See also* 3 Strong N. C. Index 2d, Criminal Law, § 112, pp. 4-5.

[2] Defendant's contention that the trial court's definition of the defense of self-defense was erroneous is equally without merit. Read as a whole, the language used effectively conveyed to the jury that it must determine the reasonableness of defendant's belief in the necessity of force from the circumstances as they appeared to him at the time of the assault. *See State v. Jackson,* 284 N.C. 383, 200 S.E. 2d 596; *cf. State v. Francis,* 252 N.C. 57, 112 S.E. 2d 756.

We find no error.

No error.

Judges VAUGHN and MARTIN concur.

GLADYS H. THOMPSON v. PEOPLES BANK AND TRUST COMPANY, AND CHARLES E. JOHNSON, TRUSTEE

No. 741SC864

(Filed 5 February 1975)

Rules of Civil Procedure § 41— failure of plaintiff to appear — dismissal proper

The trial court did not err in dismissing plaintiff's case with prejudice where neither plaintiff nor her counsel appeared for the trial of her case and counsel gave no justifiable reason for such failure to appear.

APPEAL by plaintiff from *Collier, Judge,* 24 June 1974 Session of Superior Court held in PERQUIMANS County. Heard in the Court of Appeals 15 January 1975.

The 24 June 1974 order of Judge Collier dismissed plaintiff's case with prejudice when her attorney failed to answer the call of the calendar at 10:00 a.m. on the date set forth for the trial of her case. Plaintiff appealed.

The order provides as follows:

"This cause coming on for trial and being called for trial at 10:00 A.M., upon the convening of this Court, said cause being on the trial calendar and scheduled for trial, a copy of said calendar being hereto attached and by reference made a part hereof, the first two cases appearing on the trial calendar having been settled prior to the convening of this session of Court, and upon the call of said case for trial plaintiff and her counsel were not in Court, and the sheriff, pursuant to direction from the Court, called out the plaintiff in open Court as by law provided, and there was no response from either the plaintiff or her counsel, Mr. James R. Walker, Jr., and it appearing to the Court and the Court finding as a fact that said attorney for the plaintiff had been forwarded, by United States Mail, a copy of said calendar, same being forwarded by certified mail, as reflected by postal receipt appearing in the Court folder, a copy of which is attached hereto and by reference made a part hereof; that after the call of said case, as aforesaid, and the failure of plaintiff and her counsel to respond and appear, the Court directed that the panel of jurors summoned for the Session be dismissed for the Session, and the Court further directed at that time that said

case be dismissed with prejudice, and removed from the docket; that after the aforesaid proceedings had taken place, and particularly after the plaintiff and her counsel had been called and they failed to appear, and after the Court had dismissed the panel of jurors for the Session, there being no other jury matters to be taken up during the Session, and after the Court had directed that the cause be dismissed with prejudice, and removed from the docket, the said attorney for plaintiff, James R. Walker, Jr., appeared in Court and advised the Court that he desired that the cause be reinstated, but said counsel offered no excuse to the Court as to why he was not in Court at the call of said case, and further said counsel advised the Court that his client, the plaintiff, was not in Court but that she was somewhere in the community where she lives;

That after the foregoing had occurred, the said attorney for plaintiff, James R. Walker, Jr., advised the Court that he wished to file a paper, to wit, a Motion for Continuance, whereupon the Court advised said counsel that said cause was already dismissed with prejudice, as aforesaid, but the Court advised said counsel that he was permitted to file such paper as he had;

WHEREUPON, IT IS ORDERED, ADJUDGED AND DECREED That this cause be dismissed with prejudice, and removed from the docket.

This the 24th day of June, 1974.

ROBERT A. COLLIER, JR.
Judge Presiding."

James R. Walker, Jr., for plaintiff appellant.

No counsel contra.

MORRIS, Judge.

Defendant has failed properly to set forth his exceptions. "Such exceptions are completely ineffectual and will not be considered on appeal. Rule 21, Rules of Practice in the Court of Appeals. [Citations omitted.] However, in the absence of exceptions, or when exceptions have not been properly preserved in accordance with our Rules of Practice, the appeal will be taken as an exception to the judgment. *Holden v. Holden,* 245

N.C. 1, 95 S.E. 2d 118 (1956)." *Moore v. Strickland,* 23 N.C. App. 732, 733, 209 S.E. 2d 830 (1974). Our inquiry is thus limited to the question whether error appears on the face of the record.

We find no error appearing on the face of the record. Indeed, a review of the entire record reveals no prejudicial error. We note that defendant's brief contains statements probably intended as explanation or justification. However, nothing appears in the record which would indicate that there was a justifiable reason for counsel's failure to appear, nor does the record contain anything which would indicate any abuse of discretion on the part of the court in refusing to reopen the case and continue it.

Affirmed.

Judges PARKER and HEDRICK concur.

JIM WALTER HOMES, INC. v. WILLIE HERMAN PEARTREE

No. 742DC929

(Filed 5 February 1975)

Appeal and Error § 16— grant of new trial while appeal pending

The trial court had no jurisdiction to enter an order granting defendant a new trial while an appeal of the cause was pending.

APPEAL by plaintiff from *Manning, Judge,* 6 May 1974 Session of District Court held in BEAUFORT County. Argued in Court of Appeals 22 January 1975.

Plaintiff instituted this action to recover balance allegedly due on a building contract. Defendant admitted the existence of the contract but counterclaimed, alleging defects in the building constructed by plaintiff. The case was scheduled for trial on 6 May 1974. On that date, counsel for defendant moved for a continuance based upon a doctor's letter stating that because of ill health, defendant would be unable to attend the trial on 6 May, but that he would be able to attend "any time after that date." The trial judge denied the motion for continuance, the case was tried before a jury who returned a verdict of $4,100

against the defendant, and on 7 May 1974 judgment was entered on the verdict.

On 16 May 1974 defendant filed a motion for a new trial and also filed notice of appeal from the judgment. On 23 May 1974, he posted bond staying execution of the judgment. On 25 July 1974, the trial judge entered an order granting defendant a new trial. From the order granting a new trial, plaintiff appealed.

W. Faison Barnes for the plaintiff appellant.

John H. Harmon for the defendant appellee.

BRITT, Judge.

Plaintiff's sole assignment of error is to the entry of the order granting a new trial. Plaintiff contends that the trial court did not have jurisdiction to enter the order since the case had been appealed to the Court of Appeals. We agree.

In *Wiggins v. Bunch,* 280 N.C. 106, 108, 184 S.E. 2d 879 (1971), we find:

> For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court. In *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659, it was stated:
>
> "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* ' . . . (A) motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal."

The record in this case discloses that defendant gave notice of appeal on 16 May 1974 and on 23 May 1974 posted bond staying execution of the judgment. The appeal removed the case from the jurisdiction of the trial court unless one of the three exceptions stated above was applicable. It is clear that none of the exceptions applied. The cause was not *in fieri* on 25 July 1974,

the appeal had not been adjudged abandoned, and the order appealed from was not a settlement of the case on appeal.

For the reasons stated, the order awarding a new trial is

Vacated.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. ARLIN GEORGE

No. 7412SC872

(Filed 5 February 1975)

1. **Criminal Law § 92— consolidation of charges for trial**

The trial court did not err in consolidating for trial charges against defendant for four offenses of felonious breaking and entering and four offenses of felonious larceny which allegedly occurred on two separate dates.

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

The State's evidence was sufficient for the jury on three charges of felonious breaking and entering and three charges of felonious larceny but was insufficient for the jury on a fourth charge of each crime.

ON *certiorari* to review judgments of *Braswell, Judge,* entered at the 10 June 1974 Criminal Session of Superior Court held in CUMBERLAND County.

By indictments, proper in form, defendant was charged with four offenses of felonious breaking or entering and four offenses of felonious larceny. Six of the offenses allegedly occurred on 4 January 1974 and the other two on 9 January 1974. Over defendant's objection and on motion of the State, the cases were consolidated for trial. Defendant pleaded not guilty to all charges.

A jury found defendant guilty as charged and the court entered judgments imposing prison sentences under the Youthful Offender Statute (G.S. 148-49.2) for the following terms: In no. 74-CR-4083, 10 years; in no. 74-CR-4084, two years, to begin at expiration of sentence imposed in 74-CR-4083; in no.

74-CR-4085, two years, to begin at expiration of sentence imposed in no. 74-CR-4084; and in no. 74-CR-4086, 10 years, to run concurrently with sentence imposed in no. 74-CR-4083.

Defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorneys Robert P. Gruber and Jesse C. Brake, for the State.

Rose, Thorp and Rand, by Anthony E. Rand, and Cherry and Grimes, by Sol G. Cherry, for defendant appellant.

BRITT, Judge.

[1] Defendant contends the trial court erred in consolidating the cases for trial. This contention has no merit. Allowance of the State's motion to consolidate the cases was within the discretion of the trial judge, *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972), and no abuse of discretion is shown.

[2] Defendant contends the trial court erred in overruling his motions to nonsuit all charges. We have carefully reviewed the evidence and conclude that it was sufficient to withstand the motions for nonsuit on all charges except charges alleged in no. 74-CR-4085; we hold that the evidence in that case was insufficient and the motions for nonsuit as to it should have been allowed.

In nos. 74-CR-4083, 74-CR-4084, and 74-CR-4086, no error.

In no. 74-CR-4085, reversed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. JAMES C. MOORE

No. 7425SC896

(Filed 5 February 1975)

Criminal Law § 91— motion for continuance — jurors serving in prior trial of another defendant for same offense

In a prosecution for felonious escape, the trial court did not abuse its discretion in the denial of defendant's motion for continuance made on the ground that jurors who had just tried another defendant represented by the same attorney and convicted him of escape would be called to sit in the trial of defendant's case.

State v. Moore

APPEAL by defendant from *Thornburg, Judge,* 15 July 1974 Regular Criminal Session of Superior Court held in CATAWBA County.

By indictment, proper in form, defendant was charged with felonious escape from a unit of the North Carolina Department of Correction, this being a second offense. He pled not guilty, was found guilty as charged, and from judgment imposing prison sentence of two years, to begin at expiration of sentence being served, he appealed.

Attorney General James H. Carson, Jr., by Deputy Attorney General Robert N. Hunter and Assistant Attorney General Millard R. Rich, Jr., for the State.

Cagle and Houck, by William J. Houck, for defendant appellant.

BRITT, Judge.

The only assignment of error that defendant brings forward and argues in his brief is that the trial judge erred in denying defendant's motion for a postponement of his trial. The reason stated for the motion was that just before defendant's case was called for trial, another defendant, represented by the same attorney who represented defendant, had been tried on a charge of escape and convicted; that some of the same jurors who had served in the trial of the other case would be called to serve in the trial of defendant's case. We find no merit in this assignment.

Rulings on motions for postponement of trials and competency of jurors are discretionary with the trial judge and will not be reviewed absent a showing of abuse of discretion or an error of law. G.S. 9-14; *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289 (1972); *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469 (1948). We hold that under the facts appearing in this case, defendant was not entitled to a continuance as a matter of law and the court did not abuse its discretion in denying the motion. *See State v. Martin,* 21 N.C. App. 645, 205 S.E. 2d 583 (1974); and *State v. Haltom,* 19 N.C. App. 646, 199 S.E. 2d 708 (1973).

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT CROSS

No. 7421SC885

(Filed 5 February 1975)

Larceny § 7— larceny of shirts from store — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for misdemeanor larceny where it tended to show that employees of a department store saw defendant leave the store with five shirts without stopping at the cash register to pay for them, an employee followed defendant from the store and asked to see his receipt, defendant began running and dropped the shirts, the shirts were identified as belonging to the store, and after his arrest defendant asked a store employee to let him "pay for this and forget about the whole deal."

APPEAL by defendant from *Armstrong, Judge,* 13 May 1974 Criminal Session of Superior Court held in FORSYTH County.

Defendant was charged in a warrant with misdemeanor larceny of merchandise from a Sears, Roebuck and Company store. He was convicted in district court and appealed to superior court where he was given a trial *de novo.* He pleaded not guilty, was found guilty, and from judgment imposing prison sentence of not less than 18 nor more than 24 months, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Myron C. Banks, for the State.

Ira Julian for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error is that the trial court erred in not granting his motion for nonsuit. The evidence, viewed in the light most favorable to the State, tended to show:

Around 3:00 p.m. on 10 November 1973, Sears' employees observed defendant, acting suspiciously, in the men's department of the store. Thereafter, they observed defendant leaving the store with five shirts; he did not stop at any cash register to pay for the shirts. A store employee followed defendant out of the store and an employee yelled at defendant "to see a receipt, please." Defendant began running and an employee gave chase and got to within a few feet of defendant at which time he dropped the shirts, identified as belonging to the store. Police were alerted, arrested defendant and carried him to the police station where he was identified by a Sears employee as the man

who had taken the shirts. Defendant asked the employee to "[l]et me pay for this and forget about the whole deal."

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

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. FRANKIE RUSSELL AND JAMES LEALON TATUM

No. 7418SC906

(Filed 5 February 1975)

Criminal Law § 161— appeal as exception to judgment

An appeal constitutes an exception to the judgment and presents the case for review for error appearing on the face of the record.

ON *certiorari* to review judgments of *Crissman, Judge,* entered at the 3 September 1973 Criminal Session of Superior Court held in GUILFORD County. (Certiorari allowed 16 August 1974.)

By separate indictments, proper in form, defendants were charged with armed robbery on 24 April 1973. They pled not guilty, a jury found them guilty as charged, and from judgments imposing prison sentences of not less than 15 nor more than 20 years, to run concurrently with certain sentences imposed in Rowan County, they gave notice of appeal.

Attorney General Rufus L. Edmisten, by Assistant Attorney General H. A. Cole, Jr., for the State.

Z. H. Howerton, Jr., for defendant appellants.

BRITT, Judge.

Although defendants have assigned no error, the appeal of each defendant constitutes an exception to the judgment imposed on him and presents the case for review for error appearing on the face of the record. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). We have reviewed the record proper and find

it to be free from prejudicial error. The verdicts and judgments will not be disturbed.

No error.

Chief Judge BROCK and Judge CLARK concur.

R. L. JORDAN SERVICE STATIONS OF NORTH CAROLINA, INC. v. JAMES B. PRESSLEY AND WIFE, ALMA M. PRESSLEY

No. 7428SC975

(Filed 5 February 1975)

Appeal and Error § 39— failure to docket record within extended time

Appeal is dismissed for failure of appellant to docket the record on appeal within the extended time allowed by the trial court.

APPEAL by defendant from *McLean, Judge,* 6 June 1974 Session of Superior Court held in BUNCOMBE County. Heard in the Court of Appeals on 24 January 1975.

Plaintiff instituted this action against the defendants to require specific performance to convey realty as set forth in a lease agreement between the parties. Issues were submitted to and answered by the jury in favor of the plaintiff. From the entry of judgment on the verdict requiring defendants to convey the real estate described in the complaint to the plaintiff in accordance with the option set out in the lease agreement between the parties, defendants appealed.

Adams, Hendon & Carson, P.A. by George Ward Hendon for plaintiff appellee.

Cecil C. Jackson, Jr., for defendant appellants.

HEDRICK, Judge.

Although the trial court extended the time for the defendants to docket their appeal in this court the full 150 days permitted by Rule 5 of the Rules of Practice in this court, the appeal was not docketed within the 150 days from the date of the entry of the judgment from which the appeal was taken.

For defendants' failure to comply with the Rules of Practice in the Court of Appeals of North Carolina, the appeal is dismissed.

Appeal dismissed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN B. BOYETTE

No. 747SC861

(Filed 5 February 1975)

Criminal Law § 177— death of defendant pending appeal

Where defendant died while his appeal from a criminal conviction was pending, the action is abated and the appeal is dismissed.

ON *certiorari* to review trial before *Martin, (Robert M.), Judge,* 10 December 1973 Session of Superior Court held in WILSON County.

Defendant was convicted of voluntary manslaughter and judgment imposing a prison sentence was entered. The appeal was argued before this Court on 10 December 1974.

Attorney General Rufus L. Edmisten by Assistant Attorney General Roy A. Giles, Jr., for the State.

Connor, Lee, Connor, Reece & Bunn by Cyrus F. Lee; Lucas, Rand, Rose, Meyer, Jones & Orcutt by David S. Orcutt, attorneys for defendant appellant.

VAUGHN, Judge.

It appearing that defendant died on 8 January 1975, the action stands abated and the appeal is dismissed.

Action abated.

Appeal dismissed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM McKINLEY LINGERFELT

No. 7424SC871

(Filed 5 February 1975)

APPEAL by defendant from *Thornburg, Judge,* 27 May 1974 Session of Superior Court held in MADISON County. Heard in the Court of Appeals 14 January 1975.

Defendant was charged in a bill of indictment with felonious breaking or entering and with felonious larceny.

The State's evidence tended to show that during the night of the offense defendant's automobile was near the scene, some twelve to fourteen miles from defendant's residence. Several of the items stolen at the time of the breaking or entering were found in and near defendant's residence.

The defendant's evidence tended to show that during the night in question he remained at home all night; that one Norris came by his house and borrowed his car; about two hours later Norris returned his car, left the seized items at defendant's residence and stated that he would return to pick them up. Norris cannot now be found.

The case was submitted to the jury under the doctrine of possession of recently stolen property. From a verdict of guilty as charged and judgment entered thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Magner, for the State.

Ronald W. Howell, for the defendant.

BROCK, Chief Judge.

Defendant has preserved his assignments of error and has brought them forward for consideration on appeal. We have studied the record on appeal and have given careful consideration to each assignment of error and defendant's argument upon each. In our opinion no prejudicial error has been made to appear.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. JIMMY LEE EDWARDS

No. 7426SC889

(Filed 5 February 1975)

APPEAL by defendant from *Hasty, Judge,* 3 June 1974 Session of MECKLENBURG County Superior Court. Heard in the Court of Appeals 17 January 1975.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury. The defendant pled not guilty and was tried before a jury.

The evidence for the State tended to show that the defendant was angry with the victim; that he threatened her in the parking lot of a bar in Charlotte; that he borrowed a friend's gun; and that he shot her in the back as she stooped over.

The evidence for the defendant tended to show that the friend dropped the gun causing the hammer to hang up in the cocked position and that while the defendant was seeking to free the hammer, the gun discharged accidentally and struck the victim.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury, and from a judgment sentencing the defendant to a term of imprisonment, the defendant appealed.

Attorney General Rufus L. Edmisten by Associate Attorney Archie W. Anders for the State.

Edward T. Cook for the defendant appellant.

CLARK, Judge.

There are no assignments of error brought forward in the appellant's brief. Consequently, the appeal, being an exception to the judgment, presents the face of the record for review. We have carefully reviewed the record and find that the defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. ALONZO McDOWELL

No. 7425SC897

(Filed 5 February 1975)

APPEAL by defendant from *Thornburg, Judge,* 15 July 1974 Criminal Session of Superior Court held in CATAWBA County. Heard in the Court of Appeals 13 January 1975.

Defendant was charged with felonious escape from the North Carolina Department of Correction in violation of G.S. 148-45. Upon his plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of two years to begin at the expiration of sentences which the defendant is now serving, defendant appealed.

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

Cagle and Houck, by William J. Houck, for defendant appellant.

MORRIS, Judge.

Counsel for the defendant candidly concedes that his review of the record on appeal reveals no error in the trial of this matter but asks that we review the record to determine whether the trial court committed error. We have examined the record proper, including the organization of the court, the warrant and indictment, the arraignment and plea, the verdict and the judgment. Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. JACQUELINE B. GRAHAM

No. 743SC429

(Filed 19 February 1975)

1. **Conspiracy § 4— conspiracy to murder — indictment**

Indictment was sufficient to charge that defendant and others did unlawfully conspire and agree, each with the other and with another named person, to murder one Mary Waldo.

2. **Conspiracy § 4— prosecution of only one person**

Although at least two persons are required to create a conspiracy, it is not required that more than one person be prosecuted for the offense.

3. **Conspiracy § 6— conspiracy to murder — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit murder where it tended to show that defendant discussed with another the murder of the wife of a man with whom defendant was having an affair and the means by which this might be accomplished, that defendant sent the coconspirator a picture of the victim for identification purposes, that she sent sums of money to the coconspirator, and that after an unsuccessful attempt was made upon the victim's life, defendant stated to a friend who had introduced her to the coconspirator that the coconspirator knew somebody who would "finish the job."

4. **Criminal Law § 34; Conspiracy § 5— conspiracy to murder lover's wife — evidence of shooting of defendant's husband**

In this prosecution for conspiracy to murder the wife of defendant's lover, evidence tending to connect defendant with the shooting of defendant's husband was competent to show a plan or design on her part to bring about a situation in which she might be free to marry her lover.

5. **Criminal Law § 69— telephone conversations — identity of voice**

In a prosecution for conspiracy to murder the wife of defendant's lover, testimony by defendant's lover as to statements made by defendant in telephone conversations with him was not inadmissible on the ground that no foundation was laid to establish that the witness recognized defendant's voice so as to identify her as the speaker where defense counsel interposed only general objections to the testimony and at no time questioned whether the witness could identify defendant by her voice, and where the witness testified positively that defendant was the person with whom he spoke on the telephone and there was ample evidence to support the conclusion that he had had full opportunity to become familiar with and could identify defendant by her voice.

6. **Criminal Law § 89— corroborating evidence — variation — general objection**

The trial court did not err in the denial of defendant's motion to strike an officer's testimony as to statements made to him by two

State's witnesses made on the ground that portions of the statements did not corroborate the prior testimony of the witnesses where substantial portions of the statements did corroborate the prior testimony, the motions to strike were directed to the entire statements, and the court correctly instructed the jury upon the purpose of corroborative evidence and directed the jury not to consider those parts of the statements which did not corroborate the witnesses.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 15 November 1973 in Superior Court, CRAVEN County. Heard in the Court of Appeals 18 June 1974.

Defendant was indicted for conspiring with Samuel McCotter and others to murder Mary Waldo. Defendant pled not guilty. The State's evidence showed: During the fall of 1972 and continuing into the spring of 1973, defendant, a married woman, engaged in an extramarital love affair with Kenneth Waldo, the husband of Mary Waldo. During this period defendant and Kenneth discussed the possibility of getting married if anything ever happened to Mary. Defendant also told Kenneth that if she could get some money together she would like to do away with her husband, Thomas Graham, and that there was a Marine who would do the job for $250.00. In December 1972 defendant and Thomas separated, and Thomas moved to Connecticut. During the Christmas holidays Thomas returned to North Carolina to discuss a possible reconciliation with defendant. While defendant and Thomas were riding in an automobile together, with defendant driving and Thomas sitting on the passenger side of the front seat, defendant stopped the car to pick up a hitchhiker. The hitchhiker got into the back seat, shot Thomas in the head, and then fled. Thomas was taken to the hospital, where he recovered from his wound. Defendant subsequently told Kenneth that the same Marine who shot Thomas had a friend who would plant explosives in Mary's automobile. On another occasion defendant told Kenneth she wanted him to inject air into Mary's veins with a hypodermic needle.

Verna Swift, a fellow employee and friend of defendant's, testified that on one occasion defendant asked her if she knew "any Muslim or Klans or anybody that would do anything for money," to which Verna replied that she did not, but that a relative of Verna's, Samuel McCotter, might know somebody. Verna introduced defendant to Samuel McCotter and was pres-

ent and heard a conversation between defendant and McCotter. Concerning this conversation, Verna Swift testified:

> "Mrs. Graham stated that she wanted to do away with Mrs. Waldo, but that she didn't want her shot or anyway that would show that, you know, that—she wanted it to look like an accident. And they discussed it. Blowing up the car and using hypo needles to shoot air in the vein, which won't show."

On two occasions defendant gave Verna Swift money which, at defendant's direction, Verna delivered to Samuel McCotter. Also at defendant's request, Verna delivered a photograph of Mary Waldo to Samuel McCotter. Defendant had been given this photograph by Kenneth Waldo, who testified:

> "Mrs. Graham wanted a picture for identification purposes, so she could get someone to take care of my wife. . . . I didn't report it to the police, because I was having an affair with Mrs. Graham and I did not want it publicized."

Kenneth Waldo also testified:

> "Mrs. Graham had called me one evening, and told me that it was going to cost fifteen hundred dollars to have my wife done away with. And when she told me that I was more, I guess you might say relaxed, because I knew that I didn't have fifteen hundred dollars and I was fairly sure that she didn't either, and that she didn't have access to the money. So I wasn't too concerned about it. But then she told me she had cashed in some bonds, and that she had borrowed five hundred dollars from a man. But she would not tell me who he was.
>
> * * * * *
>
> " . . . She told me that she had delivered the money to someone in New Bern who was the contact for, I guess you might say, the hit person or the hit man."

Between 19 and 22 April 1973 Kenneth Waldo was a patient in the Craven County Hospital. On 20 April defendant phoned and asked him if his wife would be at the hospital that day. He replied that she would but that their children would be with her. The next day defendant again phoned him and asked if his wife would be at the hospital and if she would be alone. Kenneth replied that she would, but that he did not know if she would be alone. At 8:30 p.m. that evening, as Mary Waldo

returned to and entered her automobile in the hospital parking lot after a visit with her husband, she was struck and injured, but not fatally, by flying glass and pellets from a shotgun blast fired through the windshield of her car by an unknown assailant.

After Mary Waldo was shot, defendant again phoned Kenneth, who told her, "Boy, they really botched that up," to which defendant responded that he was "not to worry about it, that it would be taken care of." On 24 April 1973 Verna Swift talked with defendant at work and asked her what had happened about Mrs. Waldo, to which defendant replied, "The guy blew it. He just blew it." In this conversation defendant also told Verna that "Sammie" knew somebody who would finish the job.

Defendant testified and admitted her affair with Kenneth Waldo but denied that she participated in any conspiracy to injure or murder his wife.

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

Attorney General Morgan by Assistant Attorney General John M. Silverstein for the State.

Charles K. McCotter, Jr. for defendant appellant.

PARKER, Judge.

[1, 2] Defendant's motion to quash the indictment was properly denied. Although somewhat awkwardly expressed, the allegations of the indictment were sufficient to charge that defendant and others did unlawfully conspire and agree, each with the other and with Samuel McCotter, to murder Mary Waldo. This is the crime which the prosecution sought to prove, which defendant's evidence was designed to rebut, and upon which the trial judge charged. At all stages of the trial defendant was fully apprised of the exact accusation against her, and the language of the indictment was sufficient to protect defendant from a subsequent prosecution for the same offense and to enable the court to proceed to judgment. It is of no consequence that defendant was the only person charged and brought to trial on this indictment. "Although at least two persons are required to create a conspiracy, it is not required that more than one person be prosecuted for the offense." *State v. Horton,* 5 N.C. App. 141, 145, 167 S.E. 2d 871, 873 (1969), *aff'd,* 275 N.C.

651, 170 S.E. 2d 466 (1969), *cert. denied,* 398 U.S. 959 (1970). Defendant's first assignment of error is overruled.

[3] Defendant's motions for nonsuit were also properly denied. There was evidence that defendant discussed with Samuel McCotter the murder of Mary Waldo and the means by which this might be accomplished, that defendant sent McCotter a picture of Mary Waldo "for identification purposes," that she sent sums of money to McCotter, and that after the unsuccessful attempt was made upon Mary Waldo's life, defendant stated to the friend who had introduced her to Samuel McCotter that "Sammie" knew somebody who would "finish the job." This evidence was amply sufficient to support a jury verdict finding that defendant and McCotter had conspired and agreed to effect the murder of Mary Waldo. Defendant's assignments of error directed to the denial of her motions for nonsuit are overruled.

[4] Defendant assigns error to the court's overruling her objections to testimony which tended to implicate her in the shooting of her husband, contending that this testimony was inadmissible as tending to show that she had committed another distinct, independent and separate offense. The rule is that "[e]vidence 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 tending to connect defendant with the shooting of her husband was relevant to show a plan or design on her part to bring about a situation in which she might be free to marry her lover. An integral part of that plan called for the elimination of Mrs. Waldo. "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *State v. McClain,* 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954). There was no error in allowing in evidence the testimony which tended to link defendant with the shooting of her husband.

[5] Defendant assigns error to the admission in evidence over her objections of testimony by Kenneth Waldo concerning statements made to him by defendant during telephone conversations

between the witness and the defendant. The witness testified that these conversations took place while he was in the hospital on 20 and 21 April 1973, the day before and the day on which his wife was shot, when defendant inquired if Mary Waldo would be visiting at the hospital and if she would be alone. He also testified to statements made to him by defendant in telephone conversations which took place a few days after Mary Waldo was shot. Defendant now contends it was error to admit this testimony because, so she now argues, no sufficient foundation was first laid to establish that the witness recognized defendant's voice so as to properly identify her as the speaker. We note, however, that defendant's counsel interposed only general objections to the witness's testimony concerning these telephone conversations and at no time during the trial questioned whether the witness could or did properly identify defendant as the person talking at the other end of the telephone line. "The broad statement that the conversation of a person at the other end [of a telephone line] is never admissible until he is identified cannot be sustained by authority. . . . It is only necessary that identity of the person be shown directly or by circumstances somewhere in the development of the case, either then or later." *State v. Strickland,* 229 N.C. 201, 208, 49 S.E. 2d 469, 474 (1948). Here, the witness, Kenneth Waldo, had been intimately associated with defendant for many months prior to the time the telephone conversations to which he testified took place. He testified positively that defendant was the person with whom he spoke on the telephone, and there was ample evidence to support the conclusion that he had had full opportunity to become familiar with and could identify defendant by her voice. We note that defendant's counsel, during cross-examination of Kenneth Waldo, at no time attempted to question his ability to identify defendant accurately by her voice. Defendant's assignment of error directed to admission of the testimony concerning statements made by defendant over the telephone is overruled.

[6] Officer M. E. Windom of the New Bern Police Department, who investigated the shooting of Mrs. Waldo, testified to statements which Verna Swift and Kenneth Waldo had given him during the course of his investigation. Defendant did not object to the introduction of this testimony when it was presented, but after the witness had testified concerning the statement given to him by Verna Swift and after he had testified concerning the statement given him by Kenneth Waldo, defendant's counsel in each instance moved to strike on the grounds that por-

tions of the statements did not corroborate the prior testimony of Swift and of Waldo and on the further grounds that some portions of the statements related to matters which were not within the personal knowledge of Swift or Waldo and were hearsay. The denial of these motions to strike constitutes the basis of defendant's assignments of error numbers 18, 19 and 20. A careful comparison of the statements given by Swift and Kenneth Waldo to Officer Windom with their prior testimony reveals that, although there were variations between the statements and the prior testimony, substantial portions of the statements did directly corroborate the prior testimony. Defendant's motions to strike were directed to the entire statements and did not point out the portions which defendant contended were objectionable. "Where portions of a document are competent as corroborating evidence and other parts incompetent, it is the duty of the party objecting to the evidence to point out the objectionable portions. Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *State v. Brooks,* 260 N.C. 186, 189, 132 S.E. 2d 354, 357 (1963). Both before and after the statements were read to the jury, the trial court correctly instructed the jury upon the purpose of corroborative evidence. The last of these instructions ended with a clear direction that the jury should not consider those parts of the statements which did not corroborate the witnesses. Under these circumstances we find no reversible error in the court's denial of defendant's motions to strike, and her assignments of error 18, 19 and 20 are overruled.

Defendant's counsel has been diligent to bring forward in his brief and to argue a large number of additional assignments of error. We have carefully considered all of these and find no prejudicial error. In defendant's trial and in the judgment appealed from we find

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WALTER ELI OWEN

No. 7429SC638

(Filed 19 February 1975)

1. **Criminal Law § 91— bill of indictment returned at same session as trial — continuance properly denied**

The trial court did not err in denying defendant's motion for continuance where the only reason given for such motion was that the bill of indictment was returned at the same session of court at which defendant was tried and the case was not on the calendar.

2. **Kidnapping § 1— removal of victim from scene of prior crime — sufficiency of evidence of kidnapping**

Evidence was sufficient under *S. v. Dix*, 282 N.C. 490, and *S. v. Roberts*, 286 N.C. 265, to support a verdict of guilty of kidnapping where it tended to show that defendant had completed the commission of the crime of shooting deer at night, defendant removed his victim by force to a place one half mile away, and such removal was a separate and distinct offense committed for the purpose of affording defendant safe passage out of the area and was not incidental to the first crime of shooting the deer.

3. **Criminal Law § 115— kidnapping — failure to instruct on lesser included offense proper**

The trial court in a kidnapping prosecution did not err in failing to submit a lesser included offense to the jury.

4. **Kidnapping § 1— distance victim removed immaterial — instruction not prejudicial**

In this prosecution for kidnapping where the distance the victim was carried was immaterial, trial court's instruction that "any carrying away is sufficient, members of the jury, that is the distance he is carried is immaterial," though disapproved in *S. v. Dix*, 282 N.C. 490, did not constitute reversible error.

APPEAL by defendant from *Friday, Judge.* Judgment entered 21 February 1974 in Superior Court, HENDERSON County. Heard in the Court of Appeals 13 January 1975.

Defendant was charged with and convicted of kidnapping. The court entered judgment sentencing defendant to serve an active sentence of not less than 12 nor more than 16 years under the supervision of the State Department of Corrections. Defendant appealed. Facts necessary for decision are set out in the opinion.

Attorney General Rufus L. Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

Edwin R. Groce for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the court's refusal to grant his motion for continuance. It appears that the bill of indictment upon which defendant was tried was returned at the same session of court at which he was tried. He was represented by court-appointed counsel who was appointed some five days after the warrant was served on defendant and approximately three weeks prior to trial. Defendant was under bond to appear in court on 11 February 1974 and remain until released or discharged. On Monday, 18 February 1974, the solicitor called defendant's case for trial after the grand jury had returned a true bill. The court continued the case until later in the week for the benefit of defendant's counsel. When it was again called, counsel made an oral motion for continuance until the next session of court. He gave no reason other than that the bill of indictment had just been returned at that session and the case was not on the calendar. He did not reduce his motion to writing and give other reasons therefor. There is no showing that any witnesses for defendant would not be available who could and would be available at the next session. There is no statement by counsel that he had not had adequate time to prepare defendant's defense.

The mere fact that a true bill is returned and the case is called for trial at the same session does not entitle defendant to a continuance to the next session. *State v. Gay,* 273 N.C. 125, 159 S.E. 2d 312 (1968).

"Motions to continue are addressed to the sound discretion of the trial judge and his rulings thereon will not be upset on appeal absent a showing of such abuse of discretion as would deprive the defendants of a fair trial. (Citations omitted.)" *State v. Shue,* 16 N.C. App. 696, 193 S.E. 2d 481 (1972). Here defendant has shown no abuse of discretion.

Defendant next contends the court erred in failing to grant his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the end of all the evidence. In order to reach a conclusion as to this question, we must examine the evidence in the light of recent opinions of the Supreme Court of North Carolina. The State's evidence pertinent to the questions raised on this appeal would tend to show the following: At the time of the incident complained of, the prosecuting witness, Naman Arthur Wallin, hereinafter referred to as "Wallin",

was visiting in the home of his brother-in-law, Howard McElreath, hereinafter referred to as "McElreath". McElreath lived on North Mills River in Henderson County on property owned by him adjacent to the Pisgah National Reserve. At about 1:15 a.m. on 26 December 1973, Wallin, in response to a call from McElreath, went with McElreath out in his driveway, which was about 200 yards from the house. They separated, McElreath going "on up the main road" and Wallin remaining in the driveway. McElreath, a special deputy sheriff, had noticed a car go down the road and immediately come back. He had heard a .30 caliber gun fire and immediately got up to investigate. He asked Wallin to go with him, and when they got outside, he asked Wallin to stay at the intersection of the driveway and the public road. In about three minutes, Wallin heard someone coming down the road and called to McElreath. The person who was approaching answered "Yes", and Wallin thought it was McElreath. He looked down the road and felt "something poke" him in the back. The defendant said "Hell, no, this is not Howard, drop your gun and don't say a word or I'll blow you in two", and "I have just killed deer up there in the fields and they have got these roads sealed off and you are my ticket out of here." Wallin further testified that he went with defendant because he was afraid not to go because defendant had told him he, defendant, would kill him, Wallin. Defendant had a .44 Magnum rifle. He ordered Wallin to go up over by a house and then "cut down in another road" which was about 75 yards from where Wallin first encountered defendant. Wallin's nephew lived in the house by which they went, and, as they were going by, the nephew turned on the outside lights. Defendant told Wallin's nephew to turn off the lights or he would kill Wallin. The lights were turned off, and defendant and Wallin continued walking. Defendant instructed Wallin that they would be walking a while because they were going down on the main highway where he would rendezvous with his pick up man. Wallin's guess was that they walked a half mile. When they got to the highway, defendant made Wallin lie down in a gutter, and held the gun on him telling him that if he wished to see another Christmas day, he "had better cooperate with him and do what he said." Defendant kept Wallin in the ditch about a half hour until he saw car lights approaching. He said that would be his pick up man and instructed Wallin to march on ahead of him; that he, defendant, would get in the car, drive on and leave Wallin's gun at the little fruit stand. The car

approaching contained one Owen, and his car was followed by McElreath in his car. When Owen's car stopped, McElreath saw Wallin come over the ditch bank followed by defendant. Defendant started to Owen's car, and McElreath approached him. Defendant drew his gun on McElreath and one Renegar, the County Game Protector who had joined McElreath. Both tried to talk with defendant and at that time, Wallin took the chance to jump behind Owen's car to safety. The defendant had his gun cocked, pointing it at McElreath and Renegar as he backed down the road. He told them if they continued to follow him he would shoot them. After he had backed down the road about a quarter of a mile, two Henderson County deputies sheriff came up. As they started out of their car, defendant was distracted, stumbled, and Renegar was able to grab his gun. He, McElreath, and the two deputies disarmed defendant. One of the deputies unloaded defendant's gun. There were 12 shells in his gun and 17 shells in defendant's pocket.

Defendant contends that the evidence is insufficient under *State v. Dix,* 282 N.C. 490, 193 S.E. 2d 897 (1973), and *State v. Roberts,* 286 N.C. 265, 210 S.E. 2d 396 (1974), to support a verdict of guilty of kidnapping.

In *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971), Justice Huskins, speaking for a unanimous Court, approved this definition of false imprisonment, a common law crime for which North Carolina has no statute:

> " 'Any unlawful restraint of one's liberty, whether in a common prison, in a private house, on the public streets, in a ship, or elsewhere, is in law, a false imprisonment. . . . The offense is a misdemeanor at common law.' (Citations omitted.)" Supra, at 51.

In distinguishing the crime of false imprisonment from the crime of kidnapping, the Court said:

> "On the other hand, common-law kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained. *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907), quotes Bishop's definition of kidnapping as 'false imprisonment aggravated by conveying the imprisoned person to some other place.' See also *State v. Lowry, supra.* Blackstone and the early English authorities held that a carrying away to *another country* was necessary to constitute kidnapping. The asportation requirement has

now been relaxed, however, so that *any* carrying away is sufficient. The distance the victim is carried is immaterial. *State v. Lowry, supra.*" *State v. Ingland, supra,* at 51.

In *State v. Dix, supra,* Justice Sharp writing for the majority, disapproved the *use* of the statement in *State v. Ingland, supra,* " . . . *any* carrying away is sufficient. The distance the victim is carried is immaterial", saying that it was first used in this State as dictum in *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, appeal dismissed sub. non., 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965). Justice Sharp noted that this apothegm was first laid down by the California Supreme Court in *People v. Chessman,* 38 Cal. 2d 166, 238 P. 2d 1001 (1951), and followed in *People v. Wein,* 50 Cal. 2d 383, 326 P. 2d 457, cert. den., 358 U.S. 866, 79 S.Ct. 98, 3 L.Ed. 2d 99, reh. den., 358 U.S. 896, 79 S.Ct. 153, 3 L.Ed. 2d 122 (1958), but that "18 years after the Chessman decision, when time had demonstrated, the unwisdom of the Chessman-Wein apothegm, the California Supreme Court confessed error in its previous construction of Sections 207 and 209 of the Penal Code and overruled Chessman and Wein. (Citations omitted.)"

In *Dix* the Court, in our opinion, does not by any means lay down a rule requiring lineal measurement of the distance of the asportation in order to fit a kidnapping charge to the definition. What the Court does do, we think, is to point out that the danger of the use of the *Lowry* statement adopted from *Chessman* and *Wein* is the very real possibility that many prosecutions for kidnapping may be brought for the purpose of securing much greater punishment than could be assessed for the crime which was committed to which the asportation of the victim was incident, or securing greater punishment by creating multiple offenses from a single crime even though the victim might have been removed only slightly and the risk of harm to the victim was not substantially increased over and above that necessarily present in the offense committed to which the asportation was incidental. In other words, the movement of the victim by the defendant must manifest the commission of a separate crime. In *Dix,* the Court held that the facts did not support conviction of kidnapping although they would justify the charges of and support conviction for the felony of assault with a firearm upon a law enforcement officer and the misdemeanors of false imprisonment and aiding and abetting prisoners to escape from jail.

In *State v. Roberts, supra,* Chief Justice Bobbitt wrote the opinion for the majority and followed the rationale of *Dix*. There the asportation of the victim was some 80 to 90 feet, defendant having dragged the victim, a seven year old girl, to the back door of a building, the lock to which had been forcibly broken. From the evidence, the only logical inference was that his purpose was to take her inside the building to assault her. The Supreme Court said:

> "As held in Ingland, the word KIDNAP, as used in G.S. 14-39, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation. In the present case, the questions are whether the evidence was sufficient to show (1) that defendant falsely imprisoned Kathy, and (2) that he unlawfully carried her away by force, *in such manner as to constitute the felony of kidnapping.*" (Emphasis added.)

In holding that the evidence in *Roberts* was not sufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping, the Court specifically noted that it made no attempt "to mark out the limits of what constitutes a false imprisonment or a carrying away sufficient to satisfy" the elements in the crime of kidnapping promulgated in *Ingland.* We think in a proper case, the removal of the victim only a few feet could be sufficient to constitute kidnapping under either *Dix* or *Roberts.*

[2] In the case now before us, the removal of the victim was a distance of some one half mile. The distance, however, we deem immaterial. The evidence, taken in the light most favorable to the State, tends to show that defendant had completed the commission of the crime of shooting deer at night. The removal of Wallin by force was not for the purpose of committing that crime nor was it incidental thereto. The forcible removal of Wallin was a separate and distinct offense committed for the purpose of affording defendant safe passage out of the area. He was, in his own words, using Wallin as his "ticket out of here". This was a type of holding for ransom, an element of the true and independent crime of kidnapping.

We think this case is clearly factually distinguishable from *Dix* and *Roberts.* Unquestionably the facts bring it within the requirements set out in *Dix* as being necessary to support a conviction for kidnapping.

[3] Defendant next asserts, by his third assignment of error, that the court erred in its mandate to the jury in submitting only the issue of whether defendant was guilty or not guilty of the charge of kidnapping. We disagree. True, there could be no kidnapping without there first being a false imprisonment. Nevertheless, where as here the State's evidence is "positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime", the court is not required to submit an issue as to defendant's guilt or innocence of a lesser included offense. *State v. Harvey,* 281 N.C. 1, 13-14, 187 S.E. 2d 706 (1972). Defendant's defense was that the one half mile trip was taken by Wallin willingly and in an effort to help defendant get out of the area without being apprehended. The evidence did not require the submission of a lesser included offense.

[4] Defendant excepts to the court's instructing the jury that "[a]ny carrying away is sufficient, members of the jury, that is the distance he is carried is immaterial." This, of course, is the language used in *Ingland,* and, concededly, the use of this language was disapproved in *Dix.* Nevertheless, in the case now before us, the undisputed facts are such that the use of this language by the court in its charge to the jury did not constitute reversible error. We are of the opinion that this is a case in which the distance the victim was carried is immaterial.

Defendant has had a fair trial, represented both at trial and on appeal by competent counsel.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN R. BANKS

No. 7420SC845

(Filed 19 February 1975)

1. False Pretense § 1— obtaining property by false pretense — elements of crime

The elements of the offense of obtaining property by false pretense are a false representation by the defendant, by conduct, word or writing, of a subsisting fact, which is calculated and intended to

deceive, which does in fact deceive, and by which defendant obtains something of value from another without compensation.

2. **False Pretense § 3— obtaining money by false pretense — sale of encumbered property — sufficiency of evidence**

In a prosecution for obtaining money by false pretense where defendant allegedly received a sum from a buyer as a portion of the sale price of a house and lot upon the representation made to the buyer by defendant that the lot was free and clear of all liens when in fact defendant knew that there was an outstanding indebtedness secured by a recorded deed of trust on the property, evidence was sufficient to support a jury finding that the buyer did rely upon defendant's representation when he parted with his money and that in signing and delivering the deed and accepting buyer's check, defendant knew he was representing that the property was clear of encumbrances.

3. **False Pretense § 3— land free of encumbrance — no promise to do something in future by seller**

Provision in a deed from defendant to buyer that the property conveyed was free and clear of encumbrances did not amount to a promise to do something in the future, that is, to pay off a prior mortgage on the land after the sale was closed, thereby constituting a defense to a charge of false pretense.

APPEAL by defendant from *Smith, Judge.* Judgment entered 18 June 1974. Heard in the Court of Appeals 19 November 1974.

Criminal prosecution for obtaining money by false pretenses, a violation of G.S. 14-100.

Defendant was tried on his plea of not guilty to an indictment which charged that he feloniously, knowingly and designedly, and with intent to cheat and defraud, obtained from Donald B. Harris, the sum of $5,067.53, in that defendant, as president of Talley-Rand Construction Company, Inc., received that sum from Harris for a portion of the sale price of a house and lot upon the representation made to Harris by the defendant that the lot was free and clear of all liens, when in fact defendant knew that there was an outstanding indebtedness of more than $28,000.00 secured by a recorded deed of trust on the property.

The State's evidence showed: On 23 May 1973 Talley-Rand Construction Company, Inc., acting through defendant, who was its president, executed a written contract with Harris by which the Construction Company, as seller, agreed to sell to Harris a certain house and lot, "conditional upon the Seller being able to convey a good and marketable title free and clear of en-

cumbrances except ad valorem taxes." The agreed contract price was $38,000.00, of which Harris paid at the time of signing the contract the sum of $32,932.47, "to be held in escrow by Seller as agent" until the sale should be closed or the agreement otherwise terminated. The contract provided that the balance of $5,067.53 was to be paid in cash upon delivery of the deed.

The sale was closed on 13 July 1973, at which time Harris gave the defendant his check for $5,067.53 payable to the Construction Company and defendant delivered to Harris the deed of the Construction Company, executed in its name by defendant as its president, conveying to Harris the house and lot in question. The check bore the notation, "For Balance on House & Lot 421 S. Brookgreen," was marked on the back, "For Deposit Only," and was subsequently cleared through Harris's bank account. The deed contained the usual covenants of warranty, including the covenant that the property conveyed was free from any and all encumbrances. In fact the lot was subject to the lien of a recorded deed of trust dated 6 June 1972 which defendant, as president of the Construction Company, had executed in its name to secure an indebtedness to Stockton, White & Company for a construction loan in the original principal amount of $56,600.00. This deed of trust originally covered two lots, including the lot subsequently conveyed to Harris, but the other lot was later released. At the time of defendant's trial, the lot conveyed to Harris was still subject to the deed of trust and the balance of the indebtedness to Stockton, White & Company was in excess of $28,000.00.

After the sale to Harris was closed, defendant, as president of the Construction Company, executed an agreement dated 27 August 1973 with Stockton, White & Company, by which the maturity date of the note secured by the deed of trust was extended to 27 February 1974. On 20 February 1974 defendant went to Harris and told him of the deed of trust, saying he had been trying to get the money to pay it off and did not want Harris to lose.

Other evidence for the State will be referred to in the opinion. Defendant offered no evidence but moved for a directed verdict at the close of the State's evidence. The motion was denied, and the jury found defendant guilty as charged. Judgment was entered imposing a prison sentence, execution of the sentence being suspended and the defendant being placed on probation on the condition, to which defendant assented, that

he pay to the Clerk of Court in stated installments the sum of $29,278.77 with interest, being the sum required to make restitution to Harris for cancellation of the deed of trust. From this judgment defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles R. Hassell, Jr. for the State.

Kenneth W. Parsons for defendant appellant.

PARKER, Judge.

By the only assignment of error brought forward in his brief, defendant challenges the sufficiency of the evidence to take the case to the jury. In this connection we treat defendant's motion for a directed verdict as though it had been a motion to dismiss the action or a motion as in case of nonsuit, *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973), and apply the same well established rules in testing the sufficiency of the evidence. So doing, we find the evidence sufficient and that defendant's motion was properly denied.

[1] The elements of the offense of obtaining property by false pretense are (1) a false representation by the defendant, by conduct, word or writing, of a subsisting fact, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which defendant obtains something of value from another without compensation. *State v. Houston,* 4 N.C. App. 484, 166 S.E. 2d 881 (1969). The false representation that land is free from encumbrances, when knowingly made in order to effect a sale, as in *State v. Munday,* 78 N.C. 460 (1878), or to obtain a loan, as in *State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705 (1941), may be the subject matter of the offense, and conviction therefor will be sustained where the evidence is sufficient to support a jury finding that all of the elements of the crime exist.

[2] In the present case the evidence is uncontradicted that the representation was made that the land was free from any and all encumbrances. The warranty in the deed expressly so stated. The evidence that this representation was false was also uncontradicted. Defendant contends that nevertheless the case should not have been submitted to the jury because, so he argues, the evidence was insufficient to support a jury finding either (1) that Harris relied upon the representation and was

thereby induced to part with his money, or (2) that defendant knowingly made the representation.

On the first point, defendant stresses that there was no evidence that defendant made any oral or written representations to Harris as to the status of the title to the land excepting the covenants contained in the deed, and he points to the testimony of Harris, brought out on cross-examination, to the effect that, while he read the deed on the morning the sale was closed, he could not remember whether he read it before or after he gave his check for it and that he could not say whether he read it while he was still in the lawyer's office where the sale was closed or while he was on his way to the office of the Register of Deeds, where he filed the deed for recording at 10:20 a.m. on 13 July 1973. We do not view this uncertainty in Harris's testimony such as to preclude the jury from finding that in parting with his money he relied upon defendant's representation that the property was free from encumbrances. Harris held a real estate license and had dealt in real estate over a period of years. In his opinion the property was worth $38,000.00, the amount he had agreed to pay for it, when he delivered his check to defendant for the full balance of the contract price on 13 July 1973 and received in return the deed from the defendant. He testified that he knew that "a warranty deed normally states that it is free and clear of all encumbrances, debts or liens," and he held a contract, signed by defenant, entitling him to purchase the property "conditional upon the Seller being able to convey a good and marketable title free and clear of encumbrances." In view of this contractual provision, defendant's mere action in handing the deed to Harris and accepting the check in return from him constituted an implied representation that the land was free from encumbrances. Viewing all of the evidence in the light most favorable to the State, resolving any uncertainties and discrepancies in Harris's testimony in its favor, and giving the State the benefit of all legitimate inferences which might reasonably be drawn from the evidence, we find it sufficient to support a jury finding that Harris did rely upon defendant's representation when he parted with his money.

We also find the evidence sufficient to support a jury finding that in signing and delivering the deed and accepting Harris's check, defendant knew he was representing that the property was clear of encumbrances. There was evidence that defendant had previously worked in a bank, where Harris had

first known him, and that when the sale was closed he had for some time been the chief corporate officer in a company engaged in the construction business. The covenant against encumbrances was expressed in plain and unambiguous English language. Defendant signed the deed containing the covenant and had previously signed the sale contract, which was also expressed in clear language, by which his company agreed to sell only conditional upon being able to convey the property free and clear of encumbrances. The jury could find from this evidence that defendant well knew and understood the nature of the representation which he made by signing and delivering the deed and that by those actions he intended to deceive Harris and to induce him to part with his money.

[3] Finally, citing *State v. Phifer,* 65 N.C. 321 (1871) and *State v. Knott,* 124 N.C. 814, 32 S.E. 798 (1899), for the well-established proposition that a promise to do something in the future, however false, is not a false pretense within G.S. 14-100, defendant contends that under the evidence in this case the representation that the lot was free from encumbrances must be construed to have been no more than a promise by the seller that the prior mortgage would be paid after the sale was closed. Again we do not agree. Defendant's argument appears to be that, because of the language in the sale contract that the seller would hold the initial payment of $32,932.47 in escrow until the sale should be closed, it would have been unlawful for the seller to use these funds to pay off the prior mortgage at any time prior to the final closing, from which defendant derives the conclusion that the practical effect of the warranty against encumbrances under the factual setting of this case is that it could only amount to a promise to do something in the future. Defendant's argument ignores the fact that at all times the seller was legally free to use other funds to pay off the prior mortgage indebtedness which it admittedly owed and that not one word is said in the sale contract about using any portion of the sale price for this purpose. It is, of course, true that in closing real estate sales it is not at all unusual that portions of the purchase price will be applied to pay off existing encumbrances, but this is done as an essential part of the closing itself, and it would be an unusual transaction indeed in which the buyer parted with his cash in exchange for no more than the seller's unsupported promise to pay off then existing liens at some future time. Certainly nothing in the evidence in the present case suggests that Harris agreed to any such arrange-

ment or that at the time he paid the balance of the purchase price in full he even had any reason to believe that any prior lien existed. The covenant against encumbrances in the deed given to Harris is expressed in the present tense, and we see no circumstance in the present case to support defendant's contention that the representation contained in the clear language employed meant something other than what it plainly said.

In the trial and judgment appealed from we find

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JAMES NORFLEET JARRELL AND MONTE MUNOZ ZEPEDA

No. 7426SC811

(Filed 19 February 1975)

1. **Crime Against Nature § 2; Criminal Law § 33— reason for police surveillance — relevancy — harmless error**

In a prosecution for crime against nature, testimony that officers were maintaining surveillance of the public restroom where the crime allegedly occurred because of numerous complaints concerning "acts being committed in the men's bathroom" was relevant to explain the surveillance of the restroom, although it was irrelevant to prove defendants committed any crime; even if such testimony should have been excluded, its admission was harmless error in the light of the overwhelming evidence of defendants' guilt.

2. **Criminal Law § 84; Searches and Seizures § 1— activities in public area of restroom— photographs and testimony — no illegal search**

In a crime against nature case, photographs of defendants in a public restroom, taken through a preexisting hole in the restroom ceiling by an officer concealed in the attic of the restroom, and testimony by the officer concerning what he saw while he observed defendants from his concealed position, did not result from an illegal search in violation of defendants' Fourth Amendment rights where defendants were in the open, public area of the room at all times while the officer observed and photographed them, since defendants had no reasonable expectation of privacy in using such a public place for their activities.

3. **Crime Against Nature § 2— acts in public place — constitutionality of statute**

A state is not prohibited on constitutional grounds from punishing individuals who commit a crime against nature in a public restroom even though the acts are between consenting adults. G.S. 14-177.

4. Criminal Law § 128; Crime Against Nature § 2— motion for mistrial — remark of prospective juror — improper question by solicitor

In this prosecution for crime against nature, the trial court did not err in the denial of defendants' motion for mistrial made when a prospective juror replied during questioning that he could not give anyone a fair trial as long as one defendant's counsel was involved where the prospective juror was excused by the court; nor did the court err in the denial of a motion for mistrial made when the prosecutor, in cross-examining one defendant's former Sunday School teacher who testified as to that defendant's good character, asked whether he taught defendant "about Sodom and Gomorrah," where the court sustained an objection to the question and directed the jury not to consider it.

APPEAL by defendants from *Falls, Judge.* Judgments entered 3 April 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 November 1974.

Defendants were tried on their pleas of not guilty to separate indictments which charged that each committed the crime against nature with the other, the two cases being consolidated for trial without objection. The State's evidence showed: After receiving complaints concerning activities at a public restroom in Freedom Park, a public park in Charlotte, N. C., Officer Cobb of the Charlotte Police Department secreted himself in the attic of the restroom. From this position he could see into the restroom through a hole in the ceiling. At approximately 11:30 a.m. on 8 May 1973 he observed and photographed defendants while they performed an act of oral copulation. The act occurred near a window in the public area of the restroom, with defendant Zepeda standing and looking out the window and defendant Jarrell kneeling on the floor and out of sight from outside the building. No person other than defendants was in the restroom at the time. Officer Cobb, via a prearranged radio signal, summoned other nearby officers, who entered the restroom and arrested the defendants.

Defendant Zepeda testified that the act occurred but that he submitted to it only because he was petrified with fear. Jarrell did not testify but presented witnesses who testified to his good character.

The jury found each defendant guilty, and from judgments imposing prison sentences, each defendant appealed.

Attorney General Carson by Assistant Attorney General Edwin M. Speas, Jr. for the State.

Craighill, Rendleman & Clarkson by Hugh B. Campbell, Jr. for defendant appellant Jarrell.

Casey & Daly, P.A., by G.S. Daly, and William G. Jones for defendant appellant Zepeda.

PARKER, Judge.

[1] Defendants first contend that the trial court erred in overruling their objections to testimony of Officer Cobb as to the reasons the police were maintaining surveillance of the restroom. Cobb testified that he and other officers had received numerous complaints concerning "acts being committed in the men's bathroom." Defendants contend that this testimony, admitted over objection, was irrelevant on the issue of their guilt and had the sole effect of creating prejudice against them in the minds of the jurors. In this connection we note initially that in the testimony complained of Officer Cobb did not further characterize or explain to the jury what he meant by the phrase, "acts being committed in the men's bathroom," and only by intimation could the jury guess that the acts referred to involved sexual misconduct. Furthermore, the challenged testimony did serve to explain the surveillance of the restroom and was relevant for that purpose. It may be granted that it was irrelevant to prove that defendants committed any crime, but even so, and even if it be further granted that the challenged testimony should have been excluded, nevertheless in this case the properly admitted evidence of guilt was so overwhelming and the prejudicial effect of the challenged evidence was so insignificant by comparison, that it is clear that error in admitting the evidence was harmless beyond any reasonable doubt. Where that is the case, reversal is not required even when the error complained of involves allowing introduction of evidence in violation of a defendant's constitutional rights. *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970). Still less is a reversal and new trial required where, as in the case now before us, the error complained of involves only the allowance of testimony of questionable relevancy. The assignment of error which is the basis of defendants' first contention, being assignment of error No. 8, is overruled.

[2] Defendants next contend it was error to deny their motions to suppress and to allow into evidence the photographs taken of them by Officer Cobb and his testimony concerning what he saw while he observed them from his position concealed in the restroom attic. They contend that this evidence should have been suppressed as being the product of an illegal search violative of their Fourth Amendment rights. We do not agree. At all times while Officer Cobb observed the defendants and when he photographed them through a preexisting hole in the restroom ceiling, defendants were in the open, public area of the room. At no time did he observe or photograph either of them in an enclosed toilet stall, a place which might ordinarily be understood to afford some degree of personal privacy to an individual occupant. Therefore, decisions holding an illegal search occurs when the police surreptitiously observe persons in an enclosed toilet stall, *Bielicki v. Superior Court,* 57 Cal. 2d 602, 371 P. 2d 288, 21 Cal. Rptr. 552 (1962); *Britt v. Superior Court,* 58 Cal. 2d 469, 374 P. 2d 817, 24 Cal. Rptr. 849 (1962); *Brown v. State,* 3 Md. App. 90, 238 A. 2d 147 (1968); *State v. Bryant,* 287 Minn. 205, 177 N.W. 2d 800 (1970); *contra, Smayda v. United States,* 352 F. 2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981 (1966), are not here applicable. Defendants cite and rely upon *People v. Triggs,* 8 Cal. 3d 884, 506 P. 2d 232, 106 Cal. Rptr. 408 (1973), for the proposition that it is also illegal to maintain surveillance over the open areas of a public toilet room. In that case the activities observed took place in a doorless toilet stall and could have been seen by anyone who walked into the public area of the restroom. In holding the surveillance in that case to be illegal, the California Supreme Court relied in part upon the public policy as declared in an act adopted by the California Legislature. In their brief defendants also rely heavily upon *Katz v. United States,* 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967) to sustain their position that an unconstitutional search occurred in the present case. We do not so broadly read the holding in *Katz.* It is true that the majority opinion in *Katz* contains the statement that "the Fourth Amendment protects people, not places," 389 U.S. at 351, but that broad statement furnishes little assistance in determining what human activities occurring in what places and under what circumstances are entitled to be constitutionally protected from unreasonable governmental intrusion. The sentence appears in the portion of the majority opinion in which the Court was seeking to shift emphasis away from the concept of "constitutionally

protected areas" as a "talismanic solution to every Fourth Amendment problem," and to focus attention more upon what a person might be doing in a particular area and his reasonable expectation of privacy for his activity. 389 U.S. at 351, n. 9. Obviously, all human activities must occur in some "area," and as Justice Harlan pointed out in his concurring opinion in *Katz,* the answer to the question of what protection the Fourth Amendment affords to people, generally requires reference to a "place." We find some decisional assistance from Justice Harlan's further statement:

> "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. 347, 361, 19 L.Ed. 2d 576, 587-88, 88 S.Ct. 507, 516.

In our opinion the reasonable expectation of privacy of one who enters and places a phone call from a public pay telephone booth and the societal interests involved in protecting that expectation from surreptitious invasion by the police are of such vastly different order from the expectation of privacy and the interests involved of one who is in the open public area of a public restroom, that the actual holding in *Katz* has little relevance to the present case. Here, the police officer, from a position where he had a right to be, was observing activities taking place in the open, public area of a public building, which it was his duty to protect. By using such a public place for their activities, defendants had no such expectation of privacy as society, or at least as this Court, is prepared to recognize as "reasonable." On the contrary, they risked observation, and we find here no constitutional right in defendants to demand that such observation be made only by some person of whose presence they were aware. In our opinion defendants here did not acquire the right to insulate their activities with Fourth Amendment protection merely by attempting to maintain a lookout for persons who might enter the restroom. We find no error in admitting into evidence the photographs and the testimony of Officer Cobb. Support for this result is furnished by *State v. Coyle,* 181 So. 2d 671 (Fla. Dist. Ct. App. 1966) and *Poore v. State of Ohio,* 243 F. Supp. 777 (N.D. Ohio 1965).

[3] Defendants next contend that the trial court erred and infringed their constitutional rights by failing to limit G.S.

14-177 "so that it would not punish private sexual acts between consenting adults which did not disturb others." No authority cited by defendants and none of which we are aware prohibits a state on constitutional grounds from punishing under a statute such as G.S. 14-177 individuals who commit the proscribed act in a public restroom.

[4] Finally, defendants contend that the court abused its discretion in denying their motions for mistrial. The first of these motions was made on the grounds that a prospective juror replied during questioning that he could not give anyone a fair trial as long as Zepeda's counsel was involved. The record shows that this prospective juror was then excused by the court and that jury selection was thereafter completed and the jury impaneled. In their brief defendants' counsel candidly admit that the incident to which their first motion for mistrial was directed "standing alone would not merit reversal," and that it was "not beyond the expectable rough-and-tumble of a criminal trial." The second motion for mistrial was made when the prosecuting attorney, in cross-examining Zepeda's former Sunday School teacher who testified to Zepeda's good charatcer, asked, "Teach him Genesis, about Sodom and Gomorrah?" The court promptly sustained defendants' objection and instructed the jury not to consider the question, but denied defendants' motion for mistrial. As a general rule, a motion for mistrial is addressed to the discretion of the trial judge, and his ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion. *State v. Daye,* 13 N.C. App. 435, 185 S.E. 2d 595 (1972), *aff'd,* 281 N.C. 592, 189 S.E. 2d 481 (1972). The record in the present case shows no abuse of the trial court's discretion.

In defendants' trial and in the judgments appealed from we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

J. M. THOMPSON AND WIFE FRANCES THOMPSON; JOHN H. SIMPSON AND WIFE RUTH SIMPSON; GARY R. BURLESON AND WIFE ANNETTE BURLESON; JAMES M. SMITH AND WIFE MARIAN SMITH; JIM R. BOST AND WIFE BETTY BOST; WILLIAM G. SHAW AND WIFE MONA B. SHAW; CHARLIE G. RITCHIE; GEARNIE F. SCHENK AND WIFE NELLIE L. SCHENK; W. E. OVERCASH AND WIFE DAISY S. OVERCASH; JACK M. BROWN AND WIFE ELSIE W. BROWN; JAMES R. HILL AND WIFE VICKI S. HILL; MRS. S. H. BERNHARDT; JOHN JUNIOR SMITH AND WIFE ROBERTA L. SMITH; S. RAY BERNHARDT AND WIFE SUE BERNHARDT; MELVIN L. BARRINGER AND WIFE SARA D. BARRINGER; A. G. SNIDER AND WIFE VIVIAN P. SNIDER; DONALD R. BASINGER AND WIFE BILLIE JEAN BASINGER; JERRY P. SINK AND WIFE TRICIA A. SINK; GLEN PEELER AND WIFE JEAN R. PEELER; JAMES E. BELL AND WIFE QUEEN W. BELL; R. G. PICKERAL AND WIFE DORA M. PICKERAL; J. A. GENTSCH AND WIFE IRENE C. GENTSCH; CLYDE S. MILLER AND WIFE NELL J. MILLER; J. B. GOBBLE AND WIFE MOLLIE M. GOBBLE; LARRY D. CORL AND WIFE CAROLYN B. CORL; GORDON L. PEACOCK AND WIFE REBECCA PEACOCK; MRS. GRACE Y. KLINE; INDIVIDUALLY AND FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER PROPERTY OWNERS LOCATED IN ANNEXATION AREA I, PETITIONERS v. THE CITY OF SALISBURY, RESPONDENT

No. 7419SC944

(Filed 19 February 1975)

1. **Municipal Corporations § 2— appeal from annexation ordinance — burden of proof**

When, on the face of the record, a city has substantially complied with statutory requirements for annexation, the burden is on petitioners who appealed from the annexation ordinance to show by competent evidence that the city failed to meet these requirements.

2. **Municipal Corporations § 2— annexation — 60% "use" and "subdivision" tests — golf course as one commercial tract**

A municipality properly classified 140 lots and tracts comprising 205.65 acres in use as a privately-owned golf course as one commercial tract in determining whether an area to be annexed met the 60% "use" and "subdivision" tests provided in G.S. 160-453.16(c)(3) [now G.S. 160A-36].

3. **Municipal Corporations § 2— annexation — residential use — vacant lots in common ownership with lots with houses**

A municipality properly classified as in residential use 225 vacant lots and tracts which are part of a platted subdivision and are in common ownership with lots and tracts upon which dwellings have been constructed.

4. **Municipal Corporations § 2— annexation — 60% "use" and "subdivision" tests — smallest unit on tax maps**

A municipality did not act arbitrarily and capriciously in using the smallest unit of land subdivision appearing on the county tax maps in determining whether an area to be annexed met the 60% "use" and "subdivision" tests of G.S. 160-453.16(c)(3) [now G.S. 160A-36]. G.S. 160-453.22 [now G.S. 160A-42].

5. **Municipal Corporations § 2— annexation report — extension of services**

Annexation report met the requirements of G.S. 160-453.15 [now G.S. 160A-35] that it set forth plans for the extension of municipal services to the annexed area.

APPEAL by petitioners from *Exum, Judge.* Judgment entered 26 May 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 23 January 1975.

Petitioners are residents of a 2,125.60-acre tract of land located in Rowan County. On 3 April 1973, the City of Salisbury, a city with a population in excess of 5,000, passed an ordinance calling for the annexation of this tract, referred to as Area I in the Official Annexation Report. Pursuant to G.S. 160-453.18 [now G.S. 160A-50], petitioners appealed to Superior Court for review. From judgment affirming the ordinance, petitioners appealed to this Court.

Carlton, Rhodes & Thurston, by Gary C. Rhodes, for petitioner appellants.

James A. Hudson and Larry Ford for respondent appelle.

ARNOLD, Judge.

[1] When, on the face of the record, the City has substantially complied with the statutory requirements for annexation, the burden is on petitioners to show by competent evidence a failure to meet these requirements. *Dunn v. City of Charlotte,* 284 N.C. 542, 201 S.E. 2d 873 (1974); *In re Annexation Ordinance,* 278 N.C. 641, 180 S.E. 2d 851 (1971). Upon a careful review of the record and the arguments of counsel, we have concluded that this burden has not been met.

[2] Petitioners first contend that Area I does not meet the requirements of G.S. 160-453.16(c) [now G.S. 160A-36] that part of the area to be annexed be developed for urban purposes. Such an area is defined as one that:

> "(3) Is so developed that at least sixty per cent (60%) of the total number of lots and tracts in the area at the

time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty per cent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

These criteria are known as the "use" test and the "subdivision" test. *Lithium Corp. v. Bessemer City,* 261 N.C. 532, 135 S.E. 2d 574 (1964); *Adams-Millis Corp. v. Town of Kernersville,* 6 N.C. App. 78, 169 S.E. 2d 496, *cert. denied* 275 N.C. 681 (1969). Both tests must be met.

The Official Annexation Report contains the following description of Area I:

"Total number of lots and tracts	3,955
Number of lots and tracts used for residential, commercial, industrial, institutional, and governmental purposes	2,587
[2587 ÷ 3955]	65.4%
Total acreage, not used for commercial, industrial, governmental, or institutional purposes	1,486.09
Acreage, not used for commercial, industrial, governmental or institutional purposes, consisting of lots and tracts five acres or less in size	957.96
[957.96 ÷ 1,486.09]	64.5%"

Petitioners contend that the above figures are erroneous. They argue that 140 lots and tracts, comprising 205.65 acres, are presently in use as a privately-owned golf course and therefore are improperly classified as being in commercial use. Corrected "use" figures allegedly would result in a failure to meet the "subdivision" test.

The trial court found that these 140 lots and tracts are "presently in 'commercial' use within the intents and purposes of G.S. 160-453.16(c) (3)," and that the acreage is "in present

use as one (1) integral commercial tract." These findings of fact, to which petitioners have not excepted, will not be disturbed on appeal.

Moreover, we agree with the trial court that a golf course, open to the public and operated for profit, is used for a commercial purpose. Petitioners concede that the clubhouse area is being put to a commercial use but contend that the course itself is used for recreation. This argument is not persuasive. The clubhouse and fairways are a single entity. A commercial venture may involve recreation, for example, a football stadium, a race track, or a bowling alley. The fact that the acreage in question is zoned residential is not determinative of its use under the statute, particularly in light of petitioners' argument that none of it can be classified "residential" because no habitable dwelling is on it. We hold that this acreage is properly classified as being used for a commercial purpose.

[3] Petitioners also argue that the City improperly classified 225 vacant lots and tracts as being in residential use. These 225 lots or tracts are part of a platted subdivision and are in common ownership with lots and tracts upon which dwellings have been constructed. Petitioners contend however that, because they are vacant and have their own frontage, they are not in residential use. In *Adams-Millis Corp. v. Town of Kernersville, supra* at 84, 169 S.E. 2d at 501, holding that a lot need not contain a habitable dwelling in order to be classified as in residential use, this Court said, "If A owned two lots, each having a 75-foot frontage, and he constructed his residence on one lot and landscaped the other with a pond, shrubbery, etc., surely it would be less than reasonable to classify the lot containing the dwelling as in residential use and the other lot as not in residential use." Following this rationale, we now hold that the lots in question were properly classified.

[4] Petitioners further contend that it was arbitrary and capricious for the City to determine whether the area met the standards of G.S. 160-453.16(c)(3) because it used the smallest unit of land subdivision appearing on the Rowan County maps. Many of the lots were 25 feet in width.

G.S. 160-453.22 [now 160A-42] provides that for the purposes of meeting the requirements of § 160-453.16(c)(3) [160A-36] "the municipality shall use methods calculated to provide reasonably accurate results," and that on appeal to

Superior Court the estimates of the municipality shall be accepted "[a]s to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps . . . unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more."

The trial court, in its findings of fact, found that the City " . . . in an effort to determine if the area qualified . . . , computed the lot and tract count and their usage based on all divisions of land within Area I as shown on Rowan County Tax Maps; that this was a proper method and calculated to provide reasonably accurate results of the land use existing in Area I as required by G.S. 160-453.22." The City's method was authorized by statute, and the trial court's findings will not be disturbed.

[5] We now turn to the question of whether the Official Annexation Report meets the requirements of G.S. 160-453.15 [now 160A-35] that it set forth plans for the extension of municipal services to the annexed area. Petitioners argue that the report contains no analysis of the needs of Area I for such services. While the extent to which the area needs municipal services is among the factors to be considered in a decision to annex, the statute requires only that the City demonstrate an ability to serve the area to be annexed. *See Lithium Corp. v. Bessemer City, supra; Williams v. Town of Grifton,* 19 N.C. App. 462, 199 S.E. 2d 288 (1973). The trial court found that petitioners had offered no evidence of any failure to comply with the statute. Petitioners have not excepted to this finding. Their argument therefore is overruled.

The record shows that in both the procedure followed and in the character of the area to be annexed, the City of Salisbury was in substantial compliance with Chapter 160 [now 160A] of the General Statutes. Petitioners have failed to rebut this *prima facie* showing of validity. The judgment of the trial court is affirmed.

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHN R. TEAT

No. 7427SC890

(Filed 19 February 1975)

1. **Criminal Law § 154— unavailability of trial transcript — failure to raise objections in case on appeal**

Defendant's contention that he is entitled to a new trial by reason of his inability to obtain effective appellate review because he could not obtain a transcript of his trial due to the death of the court reporter before she transcribed her notes is without merit where defendant furnished a complete narrative of the State's evidence and some of defendant's evidence, but no objections or exceptions appear in the record nor does defendant state what errors the court committed during the course of the evidence; furthermore, defendant does not assign error to the charge of the trial court or indicate what the charge should have been.

2. **Criminal Law § 139— failure of judgment to include minimum term — error**

The trial court's judgment sentencing defendant to imprisonment "for the term of Not to exceed 25 years in the Common Jail of Gaston County . . . " was improper since it failed to sentence defendant for a minimum term.

ON *certiorari* to review proceedings before *McLean, Judge.* Judgment entered 30 September 1972 in Superior Court, GASTON County. Heard in the Court of Appeals 16 January 1975.

Defendant was charged with first degree murder and armed robbery. The charges were consolidated for trial, and defendant entered a plea of not guilty to each offense. The jury found him not guilty of the charge of murder but guilty of armed robbery. From judgment entered on the verdict, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lester Chalmers, Jr., for the State.

Frank Patton Cooke for defendant appellant.

MORRIS, Judge.

Defendant first assigns as error the failure of the court to grant his motion for judgment as of nonsuit made at the close of the State's evidence and at the close of all the evidence, and his motion for mistrial made at the close of all the evidence. He concedes that, taking the evidence in the light most favor-

able to the State, there was sufficient evidence to take both charges to the jury. We commend counsel for his candor. The evidence for the State reveals a brutal beating, robbery, and subsequent murder. The evidence is conflicting with respect to whether defendant or his companion actually did the killing after the completion of the robbery in which both participated, but there is no question but that the evidence is plenary to withstand motion for judgment as of nonsuit.

With respect to his motion for mistrial at the close of all the evidence, the defendant contends that several improper and prejudicial rulings were made by the trial court during the course of defendant's evidence and during the course of the State's rebuttal evidence. He says, however, that because of the untimely death of the court reporter and the subsequent inability to reconstruct the transcript, "this evidence cannot now be brought before the court for review." For that reason defendant says he must now waive this assignment of error except as it may be considered in light of his second assignment of error. We will treat this assignment of error with the second assignment of error, but we note at this point that despite the fact that trial counsel also represents defendant on appeal and has been able from his trial notes to reconstruct portions of the evidence, and despite the fact that the State's evidence, consisting of the testimony of 13 witnesses, comprises 61 pages of the record and defendant's testimony comprises 17½ pages of the record, there nowhere appears an objection or exception to any ruling of the court.

[1] By his second assignment of error defendant contends that he is entitled to a new trial by reason of his inability to obtain effective appellate review because of the fact that he has been unable to obtain a complete transcript of the evidence and the court's charge to the jury.

It appears from the record that defendant gave notice of appeal in open court and appeal entries were signed granting him 65 days within which to serve his case on appeal. In open court the reporter advised that she could not furnish the transcript in the time allotted and the court indicated that if she could not, a proper motion for enlargement of time would be considered. Such a motion was filed and granted. Shortly thereafter the court reporter became ill. Her illness was terminal and she died on 16 January 1973. Prior to her illness she had transcribed a portion of the State's evidence. The court ap-

pointed another reporter, Mrs. Opal Blair, to complete the transcription of the evidence. Although Mrs. Blair was diligent in her efforts, she was able to locate only a portion of the stenographic notes and record of the deceased reporter. As a result, only a portion of the defendant's testimony was transcribed by Mrs. Blair, no part of the testimony of witnesses for the defendant, and only a portion of the charge of the court.

Because of these circumstances, defendant moved for a new trial. The trial court entered an order in which he found facts substantially as above with the addition of the finding that "numerous rulings were made by this Court, some of which to the Court's knowledge raise serious questions of law, which in the Court's opinion were meritorious objections taken by the defendant." The court found that none of the rulings appeared in the transcript prepared by Mrs. Blair and that only a portion of the court's charge was transcribed. The court further found that from his own notes he was unable to determine the objections and exceptions taken by defendant. The trial court's order purported to set aside the verdict, judgment, and commitment and direct a new trial. The State sought review by certiorari, and this Court issued the writ of certiorari to review the trial court's order. In an opinion written by Chief Judge Brock, this Court reversed the trial court and vacated the order purporting to grant a new trial. *State v. Teat,* 22 N.C. App. 484, 206 S.E. 2d 732 (1974), cert. denied 285 N.C. 667 (1974). In the opinion of the Court, Judge Brock quoted with approval the following statement from *State v. Neely,* 21 N.C. App. 439, 440-441, 204 S.E. 2d 531 (1974):

> "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." (Emphasis added.) *State v. Teat, supra,* at p. 486.

Defendant has not complied with the directive of this Court. He has furnished a complete narrative of the State's evidence, but there appears therein not a single objection or exception nor does defendant contend that any error was committed during the introduction of evidence for the State. The record contains some 17½ pages of testimony by the defendant including direct and cross-examination, but no objection or exception appears in the record nor does defendant state what errors he contends the court committed, if any, during the course of defendant's testimony. The record then lists the names of witnesses who testified for defendant but no indication is given as to whether they were character witnesses or alibi witnesses or witnesses to the occurrence. Nor does defendant set out any error or errors he contends the court committed during the course of this evidence. The record contains a portion of the court's charge. The trial court has stated in its order that the charge is incomplete. Neither the court nor counsel assigns any error to the portion of the charge before us. Neither does counsel give us by way of assigned error any indication of what the charge should have contained but didn't and whether there was any prejudicial omission. Both defendant's counsel and the trial court say there was error in the trial. The record before us contains no indication of what the error, if any, was. It is inconceivable that counsel, who can recall so much of the evidence from his trial notes and the available evidence, cannot, as suggested by this Court "set out 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." *State v. Teat, supra.*

Nor does counsel contend that he and the State were unable to agree on alleged facts on which the appeal is based, or defects on the face of the record, or errors defendant contends were made at the trial.

For the reasons set out herein, we are of the opinion that this is not a situation justifying an assignment of error that defendant is unable to obtain an effective appellate review of errors committed during the trial proceeding because of the inability of the court reporter to prepare a transcript. See *State v. Allen,* 4 N.C. App. 612, 167 S.E. 2d 505 (1969). Defendant's assignments of error are, therefore, overruled.

[2] Although defendant does not raise the question, we note that the trial court's judgment sentenced the defendant to imprisonment "for the term of Not to exceed 25 years in the Common Jail of Gaston County to be assigned to work under the supervision of the State Department of Correction as provided by law." In *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973), the Court, on its own motion in reviewing the face of the record, remanded the case for entry of a proper judgment on the verdict. There the court had entered judgment sentencing defendant to "be confined in the common jail of Gaston County *not to exceed seven years.* . . . " The court called attention to G.S. 148-42 authorizing superior court judges, in their discretion, to sentence convicted defendants for "a minimum and maximum term". The statute further provides for discharge, under conditons, "[a]t any time after the prisoner has served the minimum term . . . " The Court quoted with approval 21 Am. Jur. 2d, Criminal Law, § 540, p. 519, as follows:

> "[U]nder an indeterminate sentence law, a sentence cannot be for a definite term of imprisonment. It must be for not less than a specified minimum period and not more than a specified maximum period. There must be a difference between the periods, and a sentence fixing identical minimum and maximum terms of imprisonment is invalid."

Although we find no error in the trial, the case must be remanded to the Superior Court, Gaston County, for the entry of a proper judgment.

Remanded for judgment.

Judges PARKER and HEDRICK concur.

EDDIE HARDY, JR. v. CHARLES L. TOLER AND PAMLICO MOTOR COMPANY, A CORPORATION

No. 743SC913

(Filed 19 February 1975)

Damages § 15; Fraud § 12; Unfair Competition— representations by automobile salesman — punitive damages — unfair and deceptive trade practices

In an action to recover damages for fraud in the sale of an automobile, the evidence was insufficient to be submitted to the jury on

the issue of punitive damages where it tended to show that defendant salesman represented the automobile as a one-owner vehicle when he knew the vehicle had had two previous owners, the salesman represented the automobile to have only 21,000 miles of use when he knew it had been used in excess of 79,000 miles, the salesman falsely represented that the warranty could be transferred to plaintiff for a $25.00 fee, and the salesman knew that the vehicle had been damaged in a collision but represented to plaintiff that it was in excellent condition; however, such evidence was sufficient to require submission to the jury of an issue as to whether the false representations constituted unfair or deceptive acts or practices in the conduct of trade or commerce within the purview of G.S. 75-1.1 for which plaintiff would be entitled to recover treble damages.

APPEAL by plaintiff from *James, Judge,* 7 May 1974 Session of Superior Court held in CRAVEN County. Argued in the Court of Appeals on 21 January 1975.

In this action plaintiff seeks to recover damages allegedly due him as the result of false representations made by the individual defendant, as the agent of the corporate defendant, with respect to an automobile purchased by plaintiff from defendants. Pertinent allegations of the complaint, filed 27 November 1972, and amendments thereto, are summarized as follows:

On or about 11 November 1971, plaintiff purchased from defendants a 1970 Dodge Super Bee automobile for a total purchase price of $2,350. The odometer of the automobile registered approximately 21,000 miles and defendants represented the vehicle as having had only one previous owner. Defendants further told plaintiff that the manufacturer's warranty could be transferred to plaintiff upon the payment of an additional $25 as a transfer fee; this representation was made part of the bargain for the purchase of the automobile and plaintiff paid the additional fee.

On 30 May 1972, plaintiff was advised by defendants that the warranty could not be transferred to plaintiff and defendants attempted to refund the $25 transfer fee. Plaintiff then learned for the first time that the automobile was not in conformity with the representations made at the time of the sale.

Plaintiff discovered that the automobile at the time of purchase had in excess of 79,000 miles on it and in fact had been sold twice prior to the date of the purchase, both times by the defendants. Defendants knew at the time of the sale to plaintiff that the warranty for the automobile could not be transferred

to plaintiff, that the vehicle had been driven in excess of 79,000 miles and that it had been damaged in a collision while previously owned, which adversely affected its performance and reduced its value; that defendants knew of this collision, the damage to the vehicle, and the diminution in value but represented to plaintiff with intent to deceive that the automobile was in excellent condition.

The representations concerning the automobile made by the defendants were false, and were known by them to be false at the time they were made. The false representations were made by defendants with the intent to deceive plaintiff, to induce plaintiff to purchase the automobile, and they did in fact deceive plaintiff; and in reliance upon them, plaintiff purchased the automobile from defendants. Defendants' actions in representing that the warranty could be transferred, that the automobile had been driven only 21,000 miles, and their failure to tell plaintiff that the automobile had been damaged constituted unfair and deceptive acts and practices within the meaning of General Statute § 75-1.1.

The fair market value of the automobile as represented and warranted was $2,350, its actual value was $1,450; and plaintiff has been damaged in the amount of $900.

In June and July of 1972, plaintiff notified defendants of the revocation of his acceptance of the automobile and demanded a refund of the purchase price in full. Plaintiff continued possession of the vehicle under the reasonable belief that defendants would seasonably cure the nonconformity of the automobile but defendants have refused to cure the nonconformance.

Plaintiff prayed that he recover $900 as damages for fraud, treble damages for the unfair and deceptive acts of the defendants as provided for by G.S. 75-16, punitive damages in the amount of $50,000, and for the costs of this action. He requested a jury trial.

In their answer defendants admitted that the representations as to the warranty being transferable and that the car was a one-owner car were erroneous but that they were made through an honest mistake. They alleged that one of the owners only kept the car overnight and returned it the next day and that the sale had been voided on their books; that they did not find out about the nontransferability of the warranty until they heard from

Chrysler Corporation; that as soon as they found out they offered to return the plaintiff's $25 and to make the warranty good themselves, which offer was refused by plaintiff.

At a pretrial conference defendants stipulated to the following:

> 3. That the said automobile sold to the plaintiff, was represented by the defendant, Charles L. Toler, as the agent, servant and employee of Pamlico Motor Company, as being a one-owner vehicle, and that if the plaintiff purchased the same, the remaining portion of the original new car warranty could be transferred to him upon his payment of the additional sum of $25.00 for a transfer fee, and this representation was made part of the bargain for the purchase of the Dodge automobile, and that the said sum was in fact paid, along with the purchase price. That the said automobile in fact, had been sold twice prior to this time, by the defendant corporation, and this was known by the individual defendant, Charles L. Toler, for the vehicle had been previously sold to Jasper Willis Fleming and then subsequently to Guy L. Satterthwaite. That during the period the car was owned by Guy L. Satterthwaite, it was involved in a collision and was wrecked, and this information was known by the defendant at the time of the sale to the plaintiff, as well as that this was the third sale of the said vehicle.

At trial the parties presented evidence substantially in conformity with their pleadings.

At the close of all the evidence defendants made a motion under Rule 50 for a directed verdict on the issue of punitive damages. The motion was allowed and plaintiffs excepted. Plaintiffs made a motion for a directed verdict as to the issue of whether defendants had breached any express warranties made to plaintiff. This motion was allowed. Plaintiff then tendered the following issues for submission to the jury:

(a) Did the false representations of the defendant to the plaintiff in connection with the sale of said vehicle, as alleged in the complaint, constitute unfair or deceptive acts or practices in the conduct of trade or commerce?

(b) Were the false representations of the defendants to the plaintiff done with the intent to defraud the plaintiff,

and with willful, wanton or reckless disregard of the plaintiff's rights?

(c) If so, in what amount is the plaintiff entitled to recover punitive damages of the defendants?

The court refused to submit the issues tendered by plaintiff but submitted the following issue: "What amount is the plaintiff, Eddie Hardy, Jr., entitled to recover of the defendants, Charles L. Toler and the Pamlico Motor Company?" The jury answered the issue $600. After the jury returned the verdict, plaintiff asked the court to treble the amount of the verdict as provided by G.S. 75-16. The court denied the motion. From judgment entered on the verdict, plaintiff appealed, assigning numerous errors.

Ward and Ward, by Jerry F. Waddell and Kennedy W. Ward, for plaintiff appellant.

Wilkinson and Vosburgh, by John A. Wilkinson, for defendant appellees.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Donald A. Davis, as amicus curiae, for the State.

BRITT, Judge.

Plaintiff contends the trial court erred in allowing defendants' motion for a directed verdict under Rule 50(b) as to the issue of punitive damages. We find no merit in this contention. Due to the similarity of the facts in this case to those presented in *Clouse v. Motors, Inc.*, 17 N.C. App. 669, 195 S.E. 2d 327 (1973), we think the principle of law applied in the plaintiff's appeal in that case is applicable here. Appropriate here are the following words from the opinion in *Clouse* by Judge Morris (p. 671): "We hold that, taking all of the plaintiff's evidence as true, the record is void of evidence of insult, indignity, malice, oppression, or bad motive, and that the facts upon which the plaintiff seeks to recover punitive damages are the same facts on which he bases his cause of action for fraud. (Citations)" *See also Nunn v. Smith*, 270 N.C. 374, 154 S.E. 2d 497 (1967).

Plaintiff contends the trial court erred in not submitting the following issue to the jury: "Did the false representations of the defendant[s] to the plaintiff in connection with the sale

of said vehicle, as alleged in the complaint, constitute unfair or deceptive acts or practices in the conduct of trade or commerce?" This contention has merit and we hold that the court erred in not submitting the issue.

G.S. 75-1.1 provides in pertinent part as follows:

> Methods of competition, acts and practices regulated; legislative policy.—(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

— — — —

G.S. 75-16 provides: "Civil action by person injured; treble damages.—If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict."

All of G.S. 75-1.1 above quoted, and the first portion of G.S. 75-16 reading "[i]f any person shall be injured" are parts of Chapter 833 of the 1969 Session Laws. The title of that act is AN ACT TO AMEND CHAPTER 75 OF THE GENERAL STATUTES TO PROVIDE CIVIL REMEDIES AGAINST UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN TRADE OR COMMERCE.

We think it was the clear intention of the 1969 General Assembly in enacting Ch. 833, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged

in business and the consuming public within this State, and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer. We also think that the admissions and evidence presented in this case were sufficient to raise a jury question as to whether the false representations allegedly made by defendants constituted unfair or deceptive acts or practices in the conduct of trade or commerce. Had the jury determined that the false representations of defendants constituted unfair or deceptive acts or practices in the conduct of trade or commerce, then the court should have rendered judgment in favor of plaintiff for treble the amount of damages assessed by the jury.

For the reasons stated, the judgment is vacated and this cause is remanded to the superior court for a new trial consistent with this opinion.

New trial.

Judges PARKER and HEDRICK concur.

W. L. ARRINGTON v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA

No. 749SC859

(Filed 19 February 1975)

Master and Servant § 112— Fair Labor Standards Act — time spent "on call"

An employee of a natural gas company who was required to be available at certain times after regular working hours to respond to emergency service calls and to have his phone attended during such times was "waiting to be engaged," not "engaged to wait," and was thus not entitled to compensation under the Fair Labor Standards Act for such time spent "on call" while not actually performing a service.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 29 April 1974, in Superior Court, GRANVILLE County. Heard in the Court of Appeals 14 January 1975.

Plaintiff is suing the defendant under the provisions of the Fair Labor Standards Act of 1938, alleging that the defendant owed him $46,724.00, as compensation for overtime work dur-

ing the period from 17 July 1967, to 9 April 1971, the work consisting of "on-call" duty which he performed for the purpose of responding to emergency service calls from customers of the defendant.

Defendant's denial of the claim raised the following issue: Was the plaintiff, during those weeks when he held himself available and subject to call to work in the event of trouble or emergency, entitled to compensation for hours spent "on call" after regular working hours on the theory that even though he was not called to actually perform a service, he was nevertheless standing by prepared to go to work?

Jury trial having been waived by the parties, the trial court, after hearing evidence offered by plaintiff and defendant, entered Judgment as follows:

"JUDGMENT (Filed April 29, 1974)

THIS CAUSE coming on to be heard before the undersigned Judge Presiding without a Jury, and the Court, after having heard the evidence of the parties, and having examined the exhibits and legal memoranda submitted by the parties, finds the following facts:

1. It was stipulated between the parties that the Court has jurisdiction of this case and that Public Service Company of North Carolina is an employer subject to the terms and provisions of the Fair Labor Standards Act upon which this action was based.

2. Public Service Company as a company policy required a qualified repairman to be available for emergency calls at all hours during which the Company office was not open for business. This includes nights, Saturdays, Sundays, and holidays.

3. W. L. Arrington was, prior to April 9, 1971, an employee of Public Service subject to said company policy.

4. At all times during the period relevant to this action and not barred by the statute of limitations, Public Service Company had four employees in the Oxford-Henderson District subject to said policy of which Plaintiff was one.

5. The four employees rotated the duty week beginning on Fridays at 5:00 P.M. and continuing on call until

the opening of business the succeeding Friday morning, so that one week out of four each employee had 'on-call' duty.

6. When an employee was on call the employer required that the employee's phone be tended and that the employee be available to perform service required by emergency calls.

7. For each call actually resulting in the performance of service the employee was paid double time for each hour of time involved, but was paid for not less than one hour for each separate call resulting in work performed.

8. The Defendant paid the base telephone bill for the employee's home phone and paid all long distance charges billed to employee for company business.

9. The Company maintained at its Henderson Office a telephone answering device which gave to callers the phone number of the on-duty employee.

10. The number programmed into this machine could be changed at will by any of the four on-call employees, the Area Manager, and the Office Manager.

11. The Company caused to be listed in the telephone directory both the alphabetical section and the yellow pages emergency numbers to be called in addition to the numbers recorded on the answering machine. None of these numbers was the Plaintiff's number.

12. The on-call employees could list an alternate number in addition to their home phone on the answering machine, and the Plaintiff did, in fact, on occasions list his mother's number.

13. The Company did not require the on-call employee to remain constantly at home, but he could visit friends and relatives, play golf, coach baseball, and attend social functions so long as either his phone was attended or the number of his location was programmed into the answering machine.

14. The Company permitted the on-call employees to swap and shift and arrange on-call hours to suit themselves. In effect, the Company did not care which employee answered the call so long as the customer was served with reasonable promptness. The Plaintiff has, in fact, worked

on-call duty for other employees and has had other employees work 'on-call' duty for him.

15. The Plaintiff's base pay was as follows:

July 17, 1967 thru December 30, 1967	$2.60 per hour
December 30, 1967 thru October 1, 1968	$2.73 per hour
October 2, 1968 thru December 8, 1968	$3.04 per hour
December 9, 1968 thru December 7, 1969	$3.18 per hour
December 8, 1969 thru December 6, 1970	$3.47 per hour
December 7, 1970 thru April 9, 1971	$3.78 per hour

16. The employee on call was furnished a company vehicle in which to answer calls and was permitted to use the vehicle to visit Elks Clubs, golf courses, Junior League baseball games, and to run personal errands as well as to go to and from work.

Based upon the foregoing Findings of Fact, the Court reaches the following Conclusions of Law:

The time spent by employee while on call was time waiting to be engaged and not time for which the employee was engaged to wait. The on-call employee could run personal errands and engage in recreational activities while on call so long as he was in the District and available to respond to emergency calls. The on-call employee was free to arrange with other qualified employees to take over his duties by any arrangement mutually satisfactory to the employees making the arrangement. The time spent on 'on-call' duty was not compensable except for time actually spent in performing service, which time was properly compensated.

THEREFORE, the Court holds and determines, adjudges and decrees that the Plaintiff recover nothing of the De-

fendant, and that the Plaintiff pay the costs of this action as taxed by the Clerk. That this action is hereby dismissed.

This the 23rd day of April, 1974.

/s/ JAMES H. POU BAILEY
Judge Presiding"

The plaintiff appealed, citing as error the facts found in paragraphs 10, 12, 13, 14 and 16 and the conclusions of law.

Nye, Mitchell & Bugg by John E. Bugg for the plaintiff.

Bryant, Lipton, Bryant & Battle, P.A., by Victor S. Bryant, Jr., for the defendant.

CLARK, Judge.

Those facts to which plaintiff does not except are presumed supported by the evidence. They provide some of the illuminating circumstances surrounding the issue to be decided. Those findings to which plaintiff does except are conclusive on appeal if there is evidence to support them, just as would a verdict of the jury; and this is so even though the evidence might sustain findings to the contrary. *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973).

We do not deem it necessary to treat herein each contested finding of the trial court. Some of the evidence is conflicting, but summarily the evidence favorable to defendant shows, among other things, that plaintiff and other servicemen placed numbers other than their own in the answering device; that plaintiff, while "on call", did yard work around the house, cared for his horses and ran personal errands; and that the area manager instructed them to try to stay near a phone and if they left home to use back-up numbers or use alternate numbers. A careful consideration of all the evidence reveals that all of the findings of fact by the trial court are supported.

Turning now to the paintiff's contention that the findings of fact do not support the conclusions of law, whether "on call" time is time *waiting to be engaged* or is time wherein the employee is *engaged to wait* is a question which must be resolved upon appropriate findings by the trial court. "This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of

the service and its relation to the waiting time, and all of the surrounding circumstances." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S.Ct. 161, 163, 89 L.Ed. 124, 128 (1944).

The administrator under the Fair Labor Standards Act has ruled that "[a]n employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." 29 C.F.R. 785.17 (1971). For an application of the above principle, see *Barker v. Georgia Power and Light Company*, 5 C.C.H., Labor Cases, Par. 61,095 (M.D. Ga. 1942). In that case, the facts as found were very similar to those in the present case and the district court held that the public utility linemen, after regular working hours, were standing by waiting to go to work and were not on duty performing actual work for the utility.

We find that the trial court carefully considered all of the pertinent circumstances and correctly concluded on findings of fact supported by the evidence that the plaintiff was waiting to be engaged and, therefore, was not entitled to compensation. Consequently, in the trial below, we find

No error.

Chief Judge BROCK and Judge BRITT concur.

DAYS INN OF AMERICA, INC., PETITIONER v. BOARD OF TRANSPORTATION AND THE DEPARTMENT OF TRANSPORTATION & HIGHWAY SAFETY, RESPONDENTS

No. 7410SC917

(Filed 19 February 1975)

1. Highways and Cartways § 2; Statutes § 1— effectiveness of statute contingent upon future event — necessity of notice to public that event occurred

The Outdoor Advertising Control Act, G.S. 136-126 *et seq.*, which provided that it was to become effective when federal funds became available to the State for the purpose of controlling outdoor advertising did not become effective on 17 July 1972, the date of a letter from an employee of an agency of the federal government to an agency of the State stating that federal funds had become available, since the happening of the statutory contingency could not have been

determined by the general public, including petitioner, by the exercise of reasonable diligence; therefore, the trial court properly enjoined respondents from enforcing their order declaring that the Act became effective on 17 July 1972, that certain billboards, including those purchased by petitioner, were erected after this date in violation of the provisions of the Act, that all permits for these billboards were void *ab initio*, and that the signs must be removed within 30 days.

2. **Appeal and Error § 7— injunction against respondents — petitioner not aggrieved party — appeal dismissed**

Where the superior court permanently enjoined the respondents from enforcing an order challenged by petitioner, petitioner was not an aggrieved party under G.S. 1-271, and its appeal from the trial court's judgment is dismissed.

APPEAL by respondents and petitioner from *Collier, Judge.* Judgment entered 19 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 21 January 1975.

Petitioner, Days Inn of America, Inc., instituted this proceeding pursuant to Article 33 of Chapter 143 of the General Statutes seeking judicial review of an ordinance adopted 4 October 1973 by the respondents, declaring null and void and revoking all permits issued by respondents for the erection and maintenance of certain roadside advertising signs erected between 17 July 1972 and 15 October 1972. Petitioner also sought to have the respondents permanently enjoined from enforcing its order to have such outdoor advertising signs removed within thirty days after receipt of notice of the order.

The matter was heard in the superior court upon an agreed statement of facts which is summarized as follows: On 6 July 1967 the legislature enacted the Outdoor Advertising Control Act, G.S. 136-126 et seq., giving the Board of Transportation authority to control outdoor advertising by requiring a permit for the erection and maintenance of advertising signs within 660 feet of the nearest edge of the right-of-way of an interstate or primary highway in North Carolina. The Act provided (G.S. 136-140) that it would not take effect until (1) the Board of Transportation had entered into an agreement with the U. S. Secretary of Transportation concerning the control of outdoor advertising and (2) federal funds had been "made available to the State" for controlling such advertising.

The necessary agreement with the U. S. Secretary of Transportation was entered into on 31 January 1972; and on 17 July 1972 George S. Willoughby, State Highway Administrator for

North Carolina, received a letter from T. J. Morawski, Division Engineer for the Federal Highway Administration, stating: "You are advised that $500,000 in Title I highway beautification funds 649 has been allocated to the State for control of outdoor advertising. You have also been granted obligational authority in this amount for use in fiscal year 1973."

Between 17 July 1972 and 15 October 1972 the Ever-Glo Sign Company erected five advertising billboards within 660 feet of the right-of-way of Interstate Highway 85. On 5 October 1972 the N. C. Highway Commission (hereinafter referred to as Board of Transportation, created 1 July 1973) promulgated an ordinance declaring 15 October 1972 the effective date for enforcement of the Outdoor Advertising Control Act. Ever-Glo and other advertisers were therefore notified that they had to obtain permits in order to maintain their signs erected within the controlled area. Ever-Glo applied for and on 27 November 1972 and 15 December 1972 was granted permits for the five signs it had erected between 17 July and 15 October 1972. On 7 December 1972 the Board of Transportation adopted an ordinance providing that a "notice of full compliance" with the conditions for putting the Outdoor Advertising Control Act in full force and effect be published in the major newspapers of the State.

On 3 August 1973, relying upon the fact that the Board of Transportation had issued permits for the above-mentioned billboards erected by Ever-Glo Sign Company, petitioner purchased said billboards. Thereafter, on 4 October 1973, the Board of Transportation adopted an ordinance declaring that the Outdoor Advertising Control Act became effective on 17 July 1972, that certain billboards, including those purchased by petitioner, were erected after this date in violation of the provisions of the Act, and that all permits for these billboards were null and void *ab initio*. It ordered the removal of the signs within thirty days after receipt of notice of the order.

At the trial before Judge Collier, T. J. Morawski testified for respondents that federal funds for outdoor advertising control became available to the State on 17 July 1972, the date of his letter to George Willoughby. After that date the State could spend money for outdoor advertising control purposes and obtain reimbursement from federal funds.

Judge Collier made detailed findings of fact and concluded, among other things, that the Outdoor Advertising Control Act,

G.S. 136-126 et seq., did not become effective on 17 July 1972 as declared in the respondents' order dated 4 October 1973. From an order permanently enjoining respondents "from enforcing its order of October 4, 1973 in respect to the petitioner", both parties appealed.

Attorney General Edmisten by Associate Attorney C. Diederich Heidgerd for respondent appellants-appellees.

McLean, Stacy, Henry & McLean by William S. McLean for petitioner appellee-appellant.

Bailey, Dixon, Wooten, McDonald & Fountain by Kenneth Wooten, Jr., amicus curiae.

HEDRICK, Judge.

Respondents' Appeal

[1] Respondents' appeal presents the question of whether the Outdoor Advertising Control Act, G.S. 136-126 et seq., became effective on 17 July 1972.

By its terms, the Act provides that it is not to "have any force and effect until federal funds . . . [have been] made available to the State for the purpose" of controlling outdoor advertising "and the Board of Transportation has entered into an agreement with the Secretary of Transportation" with respect to the control of outdoor advertising along the interstate and primary highway systems in North Carolina. G.S. 136-140.

Respondents argue that all persons are charged with notice of public laws and the provisions thereof, 58 Am. Jur. 2d, Notice § 21, and therefore petitioner is charged with notice that the Act became effective on 17 July 1972, when T. J. Morawski notified the State Highway Administrator that federal funds had been "made available" as required by G.S. 136-140.

While it may not be an unlawful delegation of authority for the legislature to enact a statute complete in all respects which is to become operative under the happening of a certain contingency or future event, 16 Am. Jur. 2d, Constitutional Law, § 258, we think it would be absurd to hold that the statute in question took effect, and the general public, including the petitioner, was charged with notice of such statute simply because an employee of an agency of the federal government wrote a letter to an agency of the State stating that federal funds had

become available for the purpose of carrying out the provisions of the Act. We are of the opinion that the law does not charge a party with knowledge of the happening of a statutory contingency which cannot be determined by the exercise of reasonable diligence. See *McClure v. Township of Oxford,* 94 U.S. 429 (1877).

It is very doubtful whether petitioner could have determined the existence of Morawski's letter at or prior to the time it purchased the billboards from Ever-Glo. Indeed, by contending that the petitioner in this case was charged with notice of the Outdoor Advertising Control Act and the provisions thereof as of the date of Morawski's letter, the respondents are arguing that the petitioner ought to have had notice of a fact of which the Board of Transportation itself was obviously unaware. It would have been a relatively simple matter for the Board of Transportation, the administrative agency charged with the responsibility of enforcing the Outdoor Advertising Control Act, upon receipt of notice from the agency of the federal government that federal funds were available, to have adopted a resolution or ordinance declaring that the contingency referred to in G.S. 136-140 had occurred and that the Act was in effect.

We, therefore, hold that G.S. 136-126, et seq., did not become effective on 17 July 1972 and that the trial court did not err in enjoining the Board of Transportation from enforcing its order of 4 October 1973 as to the petitioner.

Petitioner's Appeal

[2] On 22 November 1974 respondents filed a motion in this court to dismiss petitioner's appeal on the ground that petitioner was not an aggrieved party under G.S. 1-271. We agree. Since the superior court permanently enjoined the respondents from enforcing the order dated 4 October 1973 challenged by petitioner, we fail to perceive how petitioner could be considered an aggrieved party. Therefore, petitioner's appeal is dismissed.

The result is: as to respondents' appeal, the judgment permanently enjoining respondents from enforcing the order dated 4 October 1973 is affirmed; petitioner's appeal is dismissed.

Respondents' appeal—Affirmed.

Petitioner's appeal—Dismissed.

Judges BRITT and PARKER concur.

MARION GILBERT FRAZIER v. RAEFORD GLASGOW AND HOWARD RICHARDSON

No. 7419SC893

(Filed 19 February 1975)

1. **Damages § 11— punitive and compensatory damages — separate issues required**

Since the approved practice in N. C. is to submit to the jury separate issues of punitive and compensatory damages, the trial court did not err in denying plaintiff's request to charge the jury "on the element of punitive damages in considering" the issue of compensatory damages; furthermore, had plaintiff's evidence warranted submission of an issue of punitive damages, plaintiff waived his right to have the issue submitted when he tendered to the court the three issues which were submitted and failed to request the submission of an issue of punitive damages.

2. **Assault and Battery § 2— provocation — no defense in assault case — mitigation of damages**

Although provocation is not a defense to an action for civil assault, provocation can be considered in mitigation of plaintiff's damages, and the trial court did not err in giving such an instruction in this case.

3. **Trial § 9— motion for recess during jury deliberation — denial within discretion of court**

Where after deliberations had begun a juror stated that she had two small children at home and she had to see about her family, plaintiff moved for a recess, the trial court denied the motion but immediately thereafter summoned the jury to return to the courtroom, and the judge was informed that the jury was making progress toward a verdict and wanted to continue to deliberate that night, plaintiff failed to show that the trial court abused his discretion in denying the motion for a recess.

4. **Trial § 36— instructions on parties' contentions — no expression of opinion**

Trial court's statements in his charge to the jury as to the contentions of the parties did not amount to expressions of opinions by the court.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 30 May 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 16 January 1975.

This is a civil action wherein the plaintiff, Marion Gilbert Frazier, seeks to recover actual and punitive damages from the defendants, Raeford Glasgow and Howard Richardson, allegedly caused by a "wilful and malicious assault . . . upon the plaintiff" on 18 June 1972.

At the trial, plaintiff offered evidence tending to show that on Sunday, 18 June 1972, plaintiff was advised by his son that defendant Glasgow wanted to talk with him. En route to Glasgow's house, plaintiff came upon several cars blocking the road. Glasgow's car was parked in the middle of the road and several people, including Glasgow, the defendant Richardson, and Glasgow's son, were present. Glasgow told the plaintiff to "[g]et out of the truck". He then accused the plaintiff of having pointed a shotgun at his son and Richardson on the previous night. Plaintiff called Glasgow a "liar", and Glasgow hit the plaintiff in the eye with his first. He backed the plaintiff against the pickup truck and hit the plaintiff several more times. The plaintiff testified that he did not hit Glasgow first and that, in fact, he did not strike either Glasgow or Richardson at any time.

Both defendants testified that they argued with the plaintiff about the incident which occurred the night before. Both defendants testified that the altercation was provoked by the plaintiff and that they acted only in self-defense.

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

"1. Was the plaintiff, Marion Gilbert Frazier, assaulted by the defendant, Raeford Glasgow, as alleged in the complaint?

ANSWER: Yes.

2. Was the plaintiff, Marion Gilbert Frazier, assaulted by the defendant, Howard Richardson, as alleged in the complaint?

ANSWER: No.

3. What amount, if any, is the plaintiff entitled to recover for his injuries?

ANSWER: $1,500.00."

From judgment entered on the verdict, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Smith & Casper by Archie L. Smith for defendant appellee, Glasgow.

HEDRICK, Judge.

[1] Plaintiff contends the trial court erred in "refusing to charge the jury in regard to punitive damages." The record reveals that the plaintiff formulated and tendered to the trial judge the three issues which were submitted to the jury. The third issue clearly refers solely to actual damages. After the judge had completed his instructions to the jury, plaintiff's counsel requested the court to charge the jury "on the element of punitive damages in *considering the Third Issue.*" [Emphasis ours.]

The plaintiff never asked the trial court, either orally or in writing, to submit the issue of punitive damages. Rather, he requested the judge to instruct the jury to consider punitive damages along with the issue of actual damages. Since the approved practice in North Carolina is to submit to the jury *separate* issues of punitive and compensatory damages, *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393 (1956); *Cottle v. Johnson,* 179 N.C. 426, 102 S.E. 769 (1920), we are of the opinion that the trial judge properly refused plaintiff's request. Assuming, arguendo, the plaintiff's evidence warranted the submission of an issue of punitive damages in this case, we are of the opinion that plaintiff waived his right to have this issue submitted when he tendered to the court the three issues which were submitted and failed to request the submission of an issue of punitive damages. *Baker v. Construction Corp.,* 255 N.C. 302, 121 S.E. 2d 731 (1961); *Benson v. Insurance Co.,* 23 N.C. App. 481, 209 S.E. 2d 362 (1974); *Yandle v. Yandle,* 17 N.C. App. 294, 193 S.E. 2d 768 (1973); *Brant v. Compton,* 16 N.C. App. 184, 191 S.E. 2d 383 (1972). See also, G.S. 1A-1, Rule 49(b) and (c), Rules of Civil Procedure.

[2] Plaintiff also contends the trial court erred in instructing the jury that provocation by the plaintiff could be considered in mitigation of damages. It has long been held that although provocation is not a defense to an action for civil assault, provocation can be considered in mitigation of plaintiff's damages. *Lewis v. Fountain,* 168 N.C. 277, 84 S.E. 278 (1915). We are bound by this well-settled rule.

[3] At 7:15 p.m. one of the jurors, Mrs. Dorothy K. Dills, came to the door of the jury room and stated "that she had a three year old and two year old and she just had to see about her family; and that they were all crossed up". Plaintiff's counsel

thereupon made a motion "that we recess and let the jury come back here because I don't think they can deliberate properly at this time." The denial of this motion is the basis of plaintiff's seventeenth exception and fifth assignment of error.

In the absence of a controlling statutory provision or recognized rule of procedure, the conduct of a trial rests in the discretion of the trial court. *Shute v. Fisher,* 270 N.C. 247, 154 S.E. 2d 75 (1967); 7 Strong, N. C. Index 2d, Trial, § 5. Immediately after the statement by the juror and the denial of plaintiff's motion, the trial judge asked the jury to return to the courtroom. The judge was informed that the jury was making progress toward a verdict and that it wanted to continue to deliberate that night. The trial judge then ordered a forty-minute dinner recess. Plaintiff has failed to show by these circumstances that the trial judge abused his discretion.

[4] Finally, based on four exceptions duly noted in the record, plaintiff contends the trial judge "express[ed] his opinion as to the sufficiency of proof in the plaintiff's evidence", in violation of G.S. 1A-1, Rule 51(a), Rules of Civil Procedure. Each of these exceptions relates to a statement by the judge in his charge as to the contentions of the parties. In our opinion, the charge of the court is free from prejudicial error.

In the trial we find no prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ELVIN CLAUDE POPE

No. 7420SC879

(Filed 19 February 1975)

Criminal Law §§ 90, 162— impeachment of own witness — general objection to testimony — part of testimony competent

The trial court did not err in the admission of a sheriff's testimony, including prior inconsistent statements made by a State's witness which constituted impeachment by the State of its own witness, where defendant objected to the sheriff's entire testimony and part of the testimony was competent.

Judge CLARK dissenting.

APPEAL by defendant from *Winner, Judge.* Judgment entered 31 May 1974 in Superior Court, MOORE County. Heard in the Court of Appeals 17 January 1975.

Defendant was indicted and tried for the felonious larceny of one Lennox heat pump. A plea of not guilty was entered, and a verdict of guilty was returned.

The State offered evidence which tended to prove that defendant, his nineteen year old son Richie Nelson Pope, and Larry Martin removed a Lennox heat pump from the construction site of the O. J. Garrison house in Southern Pines. The three hauled the pump to another location in Southern Pines and later moved it to defendant's home east of Aberdeen. On 18 January 1974 defendant received a call from Don Tripp, a police officer with the Chapel Hill Police Department, who talked to defendant about purchasing the heating unit. Following the conversation, Tripp drove to defendant's home where defendant helped load the unit onto Tripp's truck. Tripp then paid defendant $450.00 for the unit. These negotiations were witnessed by an officer of the Moore County Sheriff's Department, who was parked on the side of the road some distance from defendant's house. After defendant had been paid, Tripp hauled the heat pump to the Moore County Sheriff's Department where it was examined. The serial number had been removed. However, the seller of the pump was able to identify the pump, by virtue of peculiar work he had performed on it, as being the same pump that had been sold to the Garrisons.

Defendant denied ever having had a telephone conversation with Tripp, but admitted helping Tripp load the unit onto the truck. Defendant further denied ever having discussed the sale of the unit with Tripp or ever having received any money from Tripp. He maintained that Larry Martin left the heat pump in his yard, where it remained three or four days before Tripp picked it up. Sheriff C. G. Wimberly of the Moore County Sheriff's Department, who had testified earlier for the State, was apparently called as a witness by defendant. Wimberly testified that defendant had told him that he discovered the heat pump in a field while hunting rabbits. The unit was camouflaged by pine straw.

After the jury returned its verdict of guilty, a sentence of ten years was imposed. Defendant appeals.

Seawell, Pollock, Fullenwider, Van Camp & Robbins, by Bruce T. Cunningham, Jr., for the defendant-appellant.

Attorney General Edmisten, by Assistant Attorney General Keith L. Jarvis, for the State.

BROCK, Chief Judge.

In his sole assignment of error, defendant asserts that the trial court committed reversible error when it allowed the State to impeach its own witness, Richie Nelson Pope, by introducing evidence of prior inconsistent statements made by him.

In *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473 (1954), Justice Ervin acknowledged that the rule prohibiting a party from impeaching his own witness was roundly condemned by commentators on the law of evidence, but upheld the rule as being sound in this State and as having received legislative recognition. In its latest pronouncement on this doctrine, the Supreme Court, in *State v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561 (1973), stated: "This rule, unchanged as to criminal cases, still precludes the solicitor from discrediting a State's witness by evidence that his general character is bad or that the witness had made prior statements inconsistent with or contradictory of his testimony." 283 N.C. at 224. Defendant contends that this doctrine controls the disposition of his appeal.

As acknowledged by the Supreme Court, *State v. Anderson, supra,* the rule that one may not impeach his own witness was modified in respect of civil cases by the adoption of G.S. 1A-1, Rule 43(b) of the North Carolina Rules of Civil Procedure. *See generally* 1 Stansbury, N. C. Evidence, § 40 (Brandis rev. 1973). Although the modification of the rule in the civil area has not been carried over by legislative enactment to the criminal area, Dean Brandis notes that "[t]he change on the civil side seems to offer the Court an admirable opportunity to apply the basic principle of the Civil Rules to criminal cases." 1 Stansbury, N. C. Evidence, § 40 (Brandis rev. 1973).

The rule that defendant contends is dispositive of this appeal is grounded on three bases: a party is bound by his witness' statements; a party guarantees his witness' credibility; a party ought not to have the means to coerce his witness. 3A Wigmore, Evidence §§ 897-899 (Chadbourne rev. 1970). The first basis is no longer defended, *State v. Tilley, supra* at 251; the second is "merely the last remnant of the broad primitive notion that a

party must stand or fall by the utterances of his witness," 3A Wigmore, Evidence § 898 (Chadbourne rev. 1970); the third "cannot appreciably affect an honest and reputable witness," and consequently is said to be "of trifling practical weight." 3A Wigmore, Evidence § 899 (Chadbourne rev. 1970). While we will not undertake an in-depth discussion of the rule, we acknowledge the copious literature by eminent commentators who refute the utility of this rule. *See generally* 3A Wigmore, Evidence §§ 896-918 (Chadbourne rev. 1970); McCormick on Evidence, § 38 (1972); Ladd, *Impeachment of One's Own Witness—New Developments,* 4 U. Chi. L. Rev. 69 (1936); Hauser, *Impeaching One's Own Witness,* 11 Oh. St. L. J. 364 (1950); Comment, 49 Va. L. Rev. 996 (1963); Note, 9 N. C. L. Rev. 41 (1931).

In this case defendant argues that the State attempted to impeach Richie Pope, the defendant's son, by introducing evidence of certain prior inconsistent statements. When Richie Pope took the stand, he immediately disavowed any knowledge of his father's involvement in the theft of the heat pump. He did admit, however, that he had talked to Sheriff Wimberly about the theft of the heat pump. The solicitor then propounded questions to Richie Pope based on what Pope had told Wimberly. Richie Pope responded only by stating that he could not recall or could not remember. Immediately after Richie Pope stepped down, Sheriff Wimberly took the stand and testified as to certain prior inconsistent statements made by Pope. Although impeachment of one's own witnesses through the use of prior inconsistent statements is the most important type of impeachment, McCormick on Evidence, § 38 (1972), it is not recognized in this jurisdiction. *See State v. Norris,* 2 N.C. 429 (1796); *Sawrey v. Murrell,* 3 N.C. 397 (1806); *Neil v. Childs,* 32 N.C. 195 (1849); *Hice v. Cox,* 34 N.C. 315 (1851); *State v. Taylor,* 88 N.C. 694 (1883) *(disapproving State v. Norris, supra); State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298 (1949); *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473 (1954); *Moore v. Moore,* 268 N.C. 110, 150 S.E. 2d 75 (1968); *State v. Anderson, supra.*

At the conclusion of Wimberly's direct examination, defendant objected generally and moved to strike his entire testimony. The trial court denied this motion. Although part of Wimberly's testimony concerned prior inconsistent statements made by Richie Pope, the remainder of his testimony was not

objectionable, but was competent and admissible. We believe that the trial court's ruling was correct.

When objections are general, "the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence." *State v. Ledford,* 133 N.C. 714, 722, 45 S.E. 944, 947 (1903). The Supreme Court, in *Nance v. Telegraph Co.,* 177 N.C. 313, 98 S.E. 838 (1919), furthermore stated:

> "[I]t will be observed that at least some of [the testimony] was clearly admissible, and the objection must fail, for where a part of testimony is competent, although the other part of it may not be, and exception is taken to all of it, it will not be sustained. Defendant should have separated 'the good from the bad,' and objected only to the latter, as the objection must be valid as to the whole of the testimony. We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part. He must do that for himself. This is the firmly established rule." 177 N.C. at 315.

Defendant, in this case, failed to confine his objections to the parts of Wimberly's testimony that he considered both inadmissible and as constituting impeachment of the State's own witness. Upon proper objection and request, the defendant was entitled to have Wimberly's testimony limited and restricted. *See generally State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. McCray,* 15 N.C. App. 373, 190 S.E. 2d 267 (1972); *State v. Hill,* 6 N.C. App. 365, 170 S.E. 2d 99 (1969); *Brown v. Green,* 3 N.C. App. 506, 165 S.E. 2d 534 (1969). In the absence of a proper objection, however, the admission of Wimberly's entire testimony was not error.

No error.

Judge BRITT concurs.

Judge CLARK dissenting:

Other than his name, his office, and his time spent in law enforcement work, the testimony of Sheriff Wimberly related

to the impeachment of defendant's son. Under the circumstances, I think that the "en masse" motion to strike was adequate without request for limitation and restriction. However, the majority makes such a convincing argument for judicial modification of the judicially created rule prohibiting a party from impeaching his own witness that I favor the modification of the criminal rule to conform to the rule in civil cases, G.S. 1A-1, Rule 43(b), and I would prefer to apply the rule as so modified to this case.

MAMIE PAULINE PEGRAM TUCKER v. MELVIN CLARENCE TUCKER, JR.

No. 7418DC946

(Filed 19 February 1975)

1. **Divorce and Alimony § 24— child custody taken from mother and given to brother — sufficiency of evidence**

Evidence was sufficient to support the findings and conclusions of the trial judge that plaintiff was unfit to have custody of her thirteen year old son and that the best interests of the minor would be served by awarding his custody to his older brother where such evidence tended to show that plaintiff was unable to discipline or control her son, that he would not remain in her home, that he had developed complete disrespect for her love and authority, that the older brother was willing and able to supply a stable homelife for the minor, and that the minor exhibited love and respect for his older brother and expressed a desire to live with him.

2. **Divorce and Alimony § 24— child custody — visitation rights to be determined by court**

The trial court erred in vesting the determination of visitation rights in the parties to whom custody of the minor was awarded, since visitation rights, if any, should be determined and controlled by the court.

3. **Divorce and Alimony § 24— custody awarded to persons not parties to action**

Cause is remanded with directions that the trial court issue the necessary notices and orders to make persons to whom custody of a minor was awarded parties to the action to the end that the court have effective jurisdiction over their persons.

Judge CLARK dissenting.

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 7 August 1974 in District Court, GUILFORD County. Heard in the Court of Appeals 23 January 1975.

This action was instituted on 9 March 1973 seeking alimony without divorce, custody and support, and counsel fees. The parties were married 21 November 1943, and five children were born of the marriage. The parties have been living separate and apart since 9 March 1973. Of the five children born of the marriage, only Timmy Joe Tucker, born 8 December 1961, is subject to the custody jurisdiction of the court.

By order dated 20 August 1973 plaintiff was awarded exclusive custody of Timmy Joe Tucker, and defendant was required to make certain support payments. The controversy has been the subject of several hearings in District Court since entry of the original order. At the conclusion of each of the intervening hearings, an order was entered continuing custody of Timmy Joe Tucker in plaintiff. The matter was heard before Judge Alexander on 30 July 1974. At the conclusion of the 30 July 1974 hearing, Judge Alexander found that neither party "is presently fit to have the care and custody of the minor child." Judge Alexander also found that Clarence Michael Tucker (a married son of the parties) and his wife "are the most fit and capable persons to have the care and custody of Timmy Joe Tucker," and that it was "for the best interest of said minor to grant custody to Clarence Michael Tucker and wife." Thereafter, exclusive custody of Timmy Joe Tucker was vested in Clarence Michael Tucker and his wife.

Plaintiff appealed.

Younce, Wall and Suggs, by Adam Younce and Peter F. Chastain, for plaintiff.

No appearance contra.

BROCK, Chief Judge.

[1] Plaintiff assigns as error that there is not sufficient evidence to support the findings and conclusions of the trial judge that plaintiff is presently unfit to have custody of Timmy Joe Tucker and that the best interests of said minor will be served by awarding his custody to his older brother. We disagree. We think in this case the evidence supports the findings and the findings support the action taken by the trial judge.

"As a general rule at common law and under our own decisions, parents have the legal right to the custody of their children. (Citation omitted.) 'This right is not absolute, and it

may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it.' (Citations omitted.)" *Thomas v. Pickard,* 18 N.C. App. 1, 4, 195 S.E. 2d 339, 342 (1973).

At the time of entry of the original order in August 1973 awarding custody of the minor to plaintiff, there was nothing before the court to indicate that it would not be for best interest and welfare of the minor for plaintiff to have custody. At the present time there is nothing before the court to suggest that plaintiff is morally unfit to have custody of her son. But moral fitness is not the only consideration, and a finding of moral unfitness of a parent is not always a prerequisite to the court's denying custody to the parent.

Since the original custody order in August 1973, the circumstances and relationships of all the interested parties have deteriorated to the point that the facts now portray an unfortunate and pathetic situation. The father has continually disregarded the orders of the court and has been adjudged in contempt several times. The mother, admittedly, is unable to discipline or control her son. He will not remain in her home and has developed complete disrespect for her love and authority. Although it may be, as the mother contends, that the father has taught their son to disrespect, to disobey, and to do as he pleases, nevertheless the fact is clear that the mother is presently unable to exercise effective supervision and control over the actions and conduct of her son. These circumstances present to the court substantial and sufficient reasons for the court to take action, and present a situation where the best interests and welfare of the child clearly require removing custody of the child from his mother.

The older married brother of the minor, to whom custody was awarded by the order appealed from, has, along with his wife, exhibited admirable concern for the welfare of the minor, and is able and willing to supply a stable homelife for him. The minor has exhibited love and respect for his older brother and has expressed his desire and willingness to live with him. It appears to us that Judge Alexander exercised sound judicial discretion in resolving this difficult custody controversy.

[2, 3] Although we affirm the basic resolution of the custody problem, we find error in two respects. First, the order leaves the question of visitation rights to be determined in the dis-

cretion of Clarence Michael Tucker and his wife, the persons to whom custody of the minor was awarded. The visitation rights, if any, should be determined and controlled by the court. *See In re Custody of Stancil,* 10 N.C. App. 545, 179 S.E. 2d 844 (1971). That portion of the order appealed from which vests the determination of visitation rights in the parties to whom custody of the minor was awarded is vacated, and the cause will be remanded for a determination by the court of such visitation rights as are appropriate. Second, the trial court awarded custody of the minor to persons who are not parties to this action. *See In re Custody of Branch,* 16 N.C. App. 413, 192 S.E. 2d 43 (1972). The cause will be remanded with directions that the trial court issue the necessary notices and orders to make Clarence Michael Tucker and his wife parties to this action to the end that the court has effective jurisdiction over their persons.

Affirmed in part.

Remanded with instructions.

Judge BRITT concurs.

Judge CLARK dissenting:

The trial court has taken a son, age 13, from the custody of his mother. Her legal right to custody of the son, though not absolute, may be denied only upon convincing proof that she is an unfit person or for some other substantial and sufficient reason. *James v. Pretlow,* 242 N.C. 102, 86 S.E. 2d 759 (1955); *Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973); *In re Jones,* 14 N.C. App. 334, 188 S.E. 2d 580 (1972).

The order of the trial court is based on findings (1) that the plaintiff is an unfit person and (2) that Melvin Clarence Tucker, Jr., and wife are both fit and proper persons, and it is for his best interests to grant custody to them. These findings are based primarily on the written reports of two case workers for the Departments of Social Services, one in Guilford County and one in Rockingham County.

These reports were requested by and considered by the trial court. Assuming that the reports were received in evidence without objection and therefore admissible, I do not find the evidence contained therein either convincing or substantial. Since the evidence is not legally sufficient to support the order, I favor vacating and remanding the cause.

REGINALD G. PILAND v. JAMES R. PILAND AND WIFE, MARGARET L. PILAND; CALVIN R. PILAND, WIDOWER; JOHN E. PILAND AND WIFE, MAE W. PILAND; MARY LOU PILAND GRIFFIN AND HUSBAND, DAVID S. GRIFFIN; A. C. PILAND AND WIFE, ESTHER GRIFFIN PILAND

No. 746SC925

(Filed 19 February 1975)

1. **Partition § 1— land subject to life estate — partition sale of timber**

Under G.S. 46-25 the court has the discretion to order a partition sale of timber growing on land owned by tenants in common subject to a life estate upon petition by the life tenant without making findings as to the necessity and advisability of such a sale.

2. **Partition § 9; Estates § 4— land subject to life estate — partition sale of timber — portion of life tenant**

Where the court ordered a partition sale of timber growing on land owned by tenants in common subject to a life estate, the life tenant is entitled to receive his portion of the net proceeds as ascertained under the mortuary tables. G.S. 46-25.

APPEAL by respondents from *Martin (Perry), Judge.* Judgment entered 22 July 1974 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 23 January 1975.

Petitioner, owner of a life estate in a wooded tract of land, brought this special proceeding under G.S. 46-25 to have timber on the land sold for partition. Respondents are owners as tenants in common of the remainder. The cause came on for hearing before the Clerk of Superior Court, who made findings of fact and entered judgment that the timber not to be sold. Petitioner appealed to Superior Court.

After hearing arguments in the cause, Judge Martin made the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. Respondents James R. Piland, Calvin R. Piland, John E. Piland, Mary Lou Piland Griffin, and A. C. Piland are the owners of a 1/5 undivided interest each as tenants in common of the land described in the petition, subject to the life estate of petitioner, Reginald G. Piland, in said land.

2. There is standing timber upon said land and the petitioner desires a sale of that timber separate from the land for partition among the owners thereof, including the

life tenant, Reginald G. Piland, petitioner herein, upon such terms as the court may direct in accordance with the provisions of G.S. 46-25.

3. Petitioner is 67 years old.

4. The land is part of what is commonly known as the Diamond Grove Farm lying in the fork of SR 1333 and SR 1341. The parcel of land is rectangular in shape and approximately 55 acres of it is woodland.

5. 80% of the timber on the land is pine; the remaining 20% of the timber on the land is hardwood.

6. An average of 25% of all the timber on the land has reached full growth. Of the fully-grown timber 20% is pine and 80% is hardwood. There are approximately 250,000 board feet in the fully-grown timber.

7. The remaining approximately 75% of all the timber on the land is small to medium young timber, is not diseased, and is growing well. This growing timber should be fully mature in approximately 10 to 12 years. When the tract is fully grown, it will contain at least an estimated 500,000 board feet.

8. The timber growing and standing upon said tract of land can be presently harvested.

CONCLUSIONS OF LAW

1. The petitioner R. G. Piland, life tenant, is entitled to the relief defended in his petition, to wit, sale of the timber described in the petition by commissioners appointed herein.

2. The said petitioner is entitled to receive annually the interest on his pro rata share of the proceeds of sale of said timber."

From judgment ordering sale of the timber, petitioner and all respondents except A. C. Piland and Esther Griffin Piland appealed to this Court. Petitioner later abandoned his appeal.

No brief filed for petitioner.

Revelle, Burleson and Lee, by L. Frank Burleson, Jr., for respondent appellants.

ARNOLD, Judge.

Respondent appellants contend that since the court did not make findings of the necessity and advisibility of a sale there are insufficient findings of fact to support the order of sale. We cannot agree. The statute does not require any such findings.

G.S. 46-25 provides, "When two or more persons own, as tenants in common . . . a tract of land . . . subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, *or the life tenant,* for partition among the owners thereof, including the life tenant. . . . " (Emphasis added.) The North Carolina Supreme Court has said this statute is permissive rather than mandatory. *Chandler v. Cameron,* 229 N.C. 62, 67, 47 S.E. 2d 528, 531 (1948). The use of the word "may" obviously makes the statute permissive. 7 Strong, N. C. Index 2d, Statutes, § 5, p. 75.

This statute changes the common law and permits a sale of timber for profit, by a life tenant, with the remaindermen receiving their share of the proceeds. At common law the life tenant was not permitted to sell standing timber, nor to receive benefit from it except for ordinary purposes in using the land. *Dorsey v. Moore,* 100 N.C. 41, 6 S.E. 270 (1888). When the life tenant cut timber it constituted waste unless he "acted as a prudent owner of the fee would have done." *Thomas v. Thomas,* 166 N.C. 627, 630, 82 S.E. 1032, 1033 (1914).

G.S. 46-25 gives the life tenant an advantage in timber that he does not enjoy in land. Life tenants may not maintain partition proceedings against tenants in common in the remainder. *Richardson v. Barnes,* 238 N.C. 398, 77 S.E. 2d 925 (1953) ; *Ray v. Poole,* 187 N.C. 749, 123 S.E. 5 (1924).

[1] Under G.S. 46-25 the court has the power in its discretion to order the sale of timber upon the life tenant's petition. A statute must be construed as it is written unless a literal interpretation leads to an absurd result. *See* 7 Strong, N.C. Index, *supra* at pp. 76, 77. When the language is clear and unambiguous the courts must give the statute its plain and definite meaning. We are powerless to interpolate, or superimpose, provisions or limitations not contained therein. *State v. Camp,* 286 N.C. 148, 152, 209 S.E. 2d 754, 756 (1974).

While we might think the statute should be changed to allow the life tenants to sell timber only upon a finding that good husbandry requires the cutting, and that no substantial injury will be done to the remainder, what we might think is not controlling. The wisdom of the enactment, and the power to change or alter, is exclusively the concern of the legislature.

[2] Although petitioner has not perfected his appeal we note a mistake on the face of the judgment. The court apparently confused G.S. 46-25 with G.S. 46-24 when it provided that the petitioner was to "receive annually the interest on his pro rata share of the proceeds of sale of said timber." In accordance with G.S. 46-25 the judgment is corrected as follows: "The petitioner is entitled to receive his portion of the net proceeds of the sale of the timber as ascertained under the mortuary tables established by law."

The judgment is

Modified and affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. HARLEY CHAPPELL

No. 7418SC960

(Filed 19 February 1975)

Criminal Law § 75— statements at crime scene — no custodial interrogation — absence of Miranda warnings

Statements made by defendant in response to questions by an officer making an on-the-scene investigation of a death by shooting were not the result of custodial interrogation and were properly admitted in evidence although defendant had not been given the *Miranda* warnings before he made the statements.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 14 June 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 January 1975.

Defendant was charged with murder, but the State elected to arraign the defendant on the charge of murder in the second degree or such lesser offense as the evidence might warrant. Upon a plea of not guilty, the jury returned a verdict of guilty

of voluntary manslaughter in violation of G.S. 14-18. From judgment sentencing him to be imprisoned for a term of eight years, with a recommendation for work release, defendant appealed.

State's evidence tended to show that at approximately 5:00 a.m. on 20 January 1974, a police officer investigated a call reporting a shooting at 803 Worth Street in High Point, North Carolina; that defendant admitted the officer at that address and in response to the officer's question, "Who got shot?", defendant pointed out the deceased's body; that when the officer asked "where was the gun", the defendant directed him to a bedroom dresser drawer where the officer found a .38 caliber pistol; that when the officer asked what had happened, defendant looked at the officer and said, "I shot the son of a bitch and he deserved what he got and I would do it again." It was stipulated that a .38 caliber bullet in each lung of the deceased was the cause of his death, but the State offered expert medical testimony concerning the death wounds. The doctor also testified that in his examination, he found spermatozoa present at the penis of the deceased.

The defendant testified that the deceased came to his house on 19 January 1974 at approximately 9:00 p.m. and the two of them sat and drank for some period of time; that deceased went to the bathroom several times that evening and that the last time deceased went to the bathroom, defendant heard his wife holler "get out of here". Defendant further testified that he went to the bedroom and discovered that his wife was across the bed wearing a bra with her panties down around her knees; that defendant's wife told him that the deceased had pulled her clothes off; that deceased then reentered the bedroom and put his hand on defendant's wife's private parts, whereupon defendant went for his pistol and shot the deceased in the hand; that deceased then came at the defendant and defendant again fired at him two or three times. Defendant testified that his wife "is a paralytic" and introduced a letter explaining that his wife has a right hemiparesis with weakness involving the arm and the leg.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Rufus L. Edmisten, by Associate Attorney Thomas M. Ringer, Jr., for the State.

Bob Scott for defendant appellant.

MORRIS, Judge.

Because defendant has failed to argue assignments of error Nos. 2, 5, 6, 7, 8 and 9, they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In his first assignment of error defendant challenges the admissibility of the testimony of the investigating officer concerning statements made to him by the defendant prior to the time defendant was advised of his rights. Defendant maintains that at the time these statements were made, defendant was in custody and being subjected to interrogation without having been given the warning required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). We do not agree. The Supreme Court of this State has consistently held that the *Miranda* warnings are *only* required when the defendant is being subjected to "custodial interrogation". E.g., *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971), and cases cited therein. We find nothing in the record to indicate that the defendant was in custody at the time he made the incriminating statements. Questions asked by the investigating officer were not accusatory in nature, nor is there any evidence the officer even suspected the defendant of having committed a crime at that time. On these facts we feel the case of *State v. Gladden,* 279 N.C. 566, 570, 184 S.E. 2d 249 (1971), is instructive. There, Chief Justice Bobbitt, quoting extensively from *Miranda* said:

> "*Miranda* involved custodial interrogations. The majority opinion, delivered by Chief Justice Warren, states: 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citations omitted.] The opinion states further: 'Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interroga-

tion is not necessarily present.' [Citations omitted.] The opinion also states: 'Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' [Citations omitted.]"

Here, defendant obviously was not in custody at the time he made the incriminating statements, and the statements were clearly admissbile. Defendant's first assignment of error is therefore overruled.

Defendant next contends the trial court erred in overruling his objection to questions asked by the Assistant District Attorney on cross-examination of the defendant concerning statements made by his wife following the shooting. A review of the record reveals that this same evidence was received by stipulation and without objection, as part of a statement made by the defendant to the police. Defendant was not prejudiced by the admission of this testimony in any way, and his assignment of error is therefore overruled.

We have carefully reviewed the defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

Gold v. Price

DAVID JACK GOLD, EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDNA P. GOLD, DECEASED, PLAINTIFF v. ELMER PRICE AND WIFE, FLOY B. PRICE, IRENE P. WHITWORTH AND HUSBAND, J. A. WHITWORTH, RUTH P. PALMER AND HUSBAND, BEN C. PALMER, AGNES W. PEARSON AND HUSBAND, FOLKE PEARSON, CECIL C. WEAVER AND WIFE, ROSA C. WEAVER, HERBERT K. WEAVER AND WIFE, BESSIE S. WEAVER, MAUDE W. MARGADONNA AND HUSBAND, THOMAS A. MARGADONNA, CHARLES D. WEAVER, JR., AND WIFE, MAXINE H. WEAVER, RONALD LEE WEAVER AND WIFE, GLADYS B. WEAVER, SHEILA W. HAWKINS AND HUSBAND, JOLLY C. H. HAWKINS, GEORGE B. WEAVER AND WIFE, ELIZABETH WEAVER, NORENE P. HUNT, AND HUSBAND, GRIER HUNT, AND MATHEW PAT MAUNEY, BILLY J. JONES AND E. B. PACKARD, TRUSTEES OF SANDY PLAINS BAPTIST CHURCH, DEFENDANTS

No. 7427SC933

(Filed 19 February 1975)

1. **Trusts § 1— provision of will — failure to provide funds — trust not created — honorary trust**

Provision of a will directing the executor to "see that Tom Gold and Edna P. Golds graves are kept decent" did not create a trust for maintenance of the graves since testatrix did not provide any funds to maintain the graves; even if a trust were created, it would be an honorary trust which is unenforceable.

2. **Wills § 55— gift of "moneys" — real estate not included**

Provision of a holographic will stating, "If any moneys left it will go to Sandy Plains Church" did not dispose of testatrix' real property, since testatrix used the word "moneys" in its ordinary sense in a previous portion of the will.

APPEAL by defendants Elmer Price and wife, Floy B. Price from *Falls, Judge.* Judgment entered 25 September 1974, in Superior Court, CLEVELAND County. Heard in the Court of Appeals 22 January 1975.

This action was brought under the Declaratory Judgment Act by David Jack Gold, Executor of the will of Edna P. Gold, against Elmer Price, the only surviving brother of the deceased, and his wife; the heirs at law and next of kin of decedent; and Sandy Plains Baptist Church, requesting the court to interpret the will of Edna P. Gold and to determine the rights of the parties with respect to ownership of decedent's property. When

testatrix died, she owned some money, some furniture and the home where she lived. Her holographic will provided as follows:

"4-15 1970

"I Edna P. Gold being of sound mind and memory do make and declare this my last will and testament that my Executor hereinafter named shall give my body a decent burial and pay all my Funeral expenses with vault, and pay my just debts out of the First moneys also see that Tom Gold and Edna P. Golds graves are kept decent. If any moneys left it will go to Sandy Plains Church. Also my Furniture be sold to the high bidder.

Executor s/ DAVID JACK GOLD
Witness s/ MARSHALL O. CLINE
Witness s/ RAY BRIDGES"

From judgment holding that the "title to real estate owned by the testatrix at the date of her death, together with the cash, after the payment of debts and funeral expenses, passes to Sandy Plains Baptist Church, Cleveland County, North Carolina," and that testatrix created no trust for the maintenance of her grave and Tom Gold's grave since she provided no funds to carry out such trust, defendants appealed. Additional facts necessary for decision are set forth in the opinion.

Joseph M. Wright for plaintiff appellee, Executor of the Estate of Edna P. Gold, deceased.

Reuben L. Elam for defendant appellant, Elmer Price.

Hamrick, Mauney & Flowers, by Joe Mauney, for defendant appellee, Trustees of Sandy Plains Baptist Church.

MORRIS, Judge.

[1] In their first assignment of error defendants contend the trial court erred in holding that testatrix did not create a trust for the maintenance of her grave and Tom Gold's grave. We find this assignment of error without merit for several reasons. First, as we pointed out in *Starling v. Taylor,* 1 N.C. App. 287, 290-291, 161 S.E. 2d 204 (1968), "[i]t is well settled in this State that three circumstances must concur in order to constitute a valid trust: (1) sufficient words to raise a trust, (2) a definite subject or trust *res,* and (3) an ascertained object. [Citations omitted.]" Here, testatrix did not provide any funds to

maintain the graves. Consequently, the second element necessary to create a trust, a definite subject or res, is missing. Second, even if a trust had been created, which we do not concede, it would be an honorary trust, rather than a charitable trust, since it would not benefit the public as a whole. Such a trust is not enforceable. It may be put into effect or ignored at the option of the person named trustee since he "has only a power and not a duty to apply the property." Restatement of Trusts 2d, § 124, p. 264 (1959).

[2] Defendants next contend that the trial court erred in concluding "that the Sandy Plains Baptist Church is the sole beneficiary under the terms of the will" and that it was "the intent of the testatrix that the word 'moneys' is synonymous with the word 'funds' and is construed in its broadest sense and includes not only cash but real property as well." They maintain that in using the language "[i]f any *moneys* left it will go to Sandy Plains Church", testatrix was not attempting to and did not dispose of her real property; that the real estate, therefore, passes to them, her heirs, under the rules of intestate succession. (Emphasis supplied.) We find defendants' argument persuasive.

It is well settled in this State that in construing wills "[g]enerally, ordinary words are to be given their usual and ordinary meaning. . . . " *Clark v. Connor,* 253 N.C. 515, 521, 117 S.E. 2d 465 (1960). Moreover, there is a presumption that "if words are used in one part of the will in a certain sense, the same meaning is to be given to them when repeated in other parts of the will, unless a contrary intent appears." *Taylor v. Taylor,* 174 N.C. 537, 539, 94 S.E. 7 (1917), cited in *Anders v. Anderson,* 246 N.C. 53, 57, 97 S.E. 2d 415 (1957).

Here, testatrix possessed no special skills in drafting wills. She executed her holographic will using everyday words of conversation. Especially where, as here, testatrix earlier used the word "moneys" in its ordinary sense, we are of the opinion that the word cannot be construed to include her real property. We find additional support for our holding in 173 A.L.R. 656, 662 (1950) where it is stated that "[w]hile the word 'money' may be broad enough to include real estate, it will not be deemed to do so, unless the intention so to use it is clearly manifest on the face of the will and put beyond all reasonable doubt. [Citation omitted.]" In the case at bar we do not find language clearly manifesting an intention on the part of the testatrix to use the word "moneys" to include her real property.

Finally, we note that there is a long standing presumption against disinheritance. An "heir should not be disinherited except by express devise or by one arising from necessary implication, by which the property is given to another, . . . " *Dunn v. Hines,* 164 N.C. 113, 117, 80 S.E. 410 (1913). For the foregoing reasons, defendants' assignment of error is sustained and the decision of the trial court is hereby reversed.

Reversed.

Judges PARKER and HEDRICK concur.

HERBERT G. BRADY v. YVONNE T. BRADY

No. 7418DC910

(Filed 19 February 1975)

1. **Divorce and Alimony § 23— child support — inability of plaintiff to pay**

Evidence was insufficient to show plaintiff's ability to comply with a child support order and his deliberate and intentional failure to do so where it tended to show that plaintiff lost his job with Duke Power Company because he could not climb poles as his job required, plaintiff supported his family until his money ran out, he had no job or money and lived with his sister, and he was sick and unable to work, having spent ten months in a hospital.

2. **Divorce and Alimony § 23— arrears in child support — lien on real property — failure to give owner "day in court"**

The trial court erred in declaring sums due from plaintiff as child support a lien on real property conveyed by plaintiff to his sister where the order purporting to make the sister a party defendant required her to appear in court on 9 September 1974 and show cause why the deed should not be set aside, while the order appealed from was entered on 30 August 1974, thereby denying the sister her day in court.

APPEAL by plaintiff from *Alexander, Judge.* Order entered 30 August 1974 in District Court, GUILFORD County. Heard in the Court of Appeals 20 January 1975.

The pleadings and proceedings in this cause pertinent to this appeal are summarized as follows:

(1) On 13 March 1970, plaintiff filed his complaint asking for absolute divorce on ground of one-year separation. The divorce was granted on 4 May 1970.

(2) On 17 September 1970, pursuant to motions by defendant in this cause and a prior cause between the parties, and by consent, Judge Haworth entered an order awarding custody of two children to defendant, requiring plaintiff to pay $150 per month support for the children, ordering plaintiff to convey his interest in a residence to defendant and defendant to convey her interest in certain real estate to plaintiff, and ordering plaintiff to pay attorney fees.

(3) On 21 December 1973 and 7 June 1974, defendant filed motions in the cause alleging that plaintiff had made no child support payments since May 1973. She asked that plaintiff be adjudged in contempt and that he be required to convey his interest in certain real estate to defendant for the use and benefit of the children, or that the sums in arrears be declared a lien on the real estate. On 7 June 1974, defendant also filed a notice of *lis pendens* in the office of the Clerk of Superior Court of Guilford County.

(4) On 27 August 1974, a hearing on defendant's motions was conducted by Judge Alexander.

(5) On 29 August 1974, defendant filed a motion alleging that on 19 June 1974 plaintiff executed a deed to his sister, Myrtle B. Putnam (hereinafter referred to as Mrs. Putnam), purporting to convey to her all of his interest in certain real estate; that the deed had been recorded in Guilford County Registry; and that said conveyance was without lawful consideration and was for the purpose of avoiding the support claims of plaintiff's children. Defendant asked that Mrs. Putnam be made a party to this action and ordered to show cause why the conveyance should not be set aside.

(6) On 29 August 1974, Judge Alexander entered an order making Mrs. Putnam a party defendant to this action and ordering her to appear on 9 September 1974 " . . . and at such later times as may be designated by the Court . . . " and show cause why the deed from plaintiff to her should not be set aside.

(7) On 30 August 1974, Judge Alexander entered an order containing detailed findings of fact and conclusions of law and providing the following: Declaring plaintiff delinquent in making child support payments; adjudging plaintiff in contempt of court in failing to make support payments since February 1974; declaring the amount of all payments in arrears, together with certain taxes and lien payments made by defend-

ant and attorney fees, a lien on the real estate conveyed by plaintiff to Mrs. Putnam; and ordering plaintiff " . . . placed in the custody of the Sheriff of Guilford County, North Carolina, until he shall have been purged of contempt, by the payment of the sum of $540.00 . . . . "

Plaintiff appealed from the order.

Cahoon & Swisher, by Robert S. Cahoon, for plaintiff appellant.

Turner, Rollins and Rollins, by Clyde T. Rollins, for defendant appellee.

BRITT, Judge.

[1] Plaintiff contends that the court's determination that he is in willful contempt of the orders of the court is not supported by the evidence and the record. The contention has merit.

G.S. 50-13.4(f) (9) provides that the *willful* disobedience of an order for the payment of child support shall be punishable as for contempt. Our Supreme Court has interpreted "willful disobedience" as disobedience " . . . which imports knowledge and a stubborn resistance." *Mauney v. Mauney,* 268 N.C. 254, 257, 150 S.E. 2d 391, 393 (1966). "To constitute wilful disobedience there must be an ability to comply with the court order and a deliberate and intentional failure to do so." *Bennett v. Bennett,* 21 N.C. App. 390, 393, 204 S.E. 2d 554 (1974).

At the hearing on 27 August 1974, defendant called plaintiff as a witness and she also testified. Plaintiff's testimony is summarized in pertinent part as follows: He has not paid any money for the children's support since June of 1973. Prior to December of 1972 he worked for Duke Power Company as a supervisor for 26 years. In December of 1972 Duke required " . . . all of us to go back to climbing poles. I could not do that and was separated from my job for that reason." At the time his employment terminated, he had some $300 or $400 in savings bonds and $2,100 in Duke stock. He supported his family until his money ran out. Since May 1973 he has had no job nor money and has lived with his sister. Since that date he has been sick and unable to work, having spent ten months in the Veterans' Hospital in Salisbury. He has tried to find work but without success. He has been promised a job at a Naval Base in Cuba, doing

the same kind of work he did for Duke, and is waiting to be sent there; that is the only kind of work he knows how to do.

Defendant testified that plaintiff drank too much but that he supported his family and made his payments as long as he had money. Defendant also introduced into evidence the clinical record of treatment of plaintiff at the Veterans' Hospital. This record described plaintiff's medical problems and extensive treatment for several months following 30 July 1973 and indicated plaintiff's physical disability along with alcoholism.

We hold that the evidence was not sufficient to show plaintiff's ability to comply with the support order and his deliberate and intentional failure to do so.

[2] Plaintiff contends the court erred in declaring any sums a lien on the real estate as against Mrs. Putnam. This contention has merit. We do not reach the question of whether a deed can be set aside pursuant to a motion in the cause in a divorce action that has been "tried." It suffices to say that Mrs. Putnam's rights were adversely affected by the order appealed from without her having any "day in court." The order of 29 August 1974 purported to make her a party defendant and required her to appear on *9 September 1974* and show cause why the deed should not be set aside. The order appealed from was entered on 30 August 1974, some ten days before Mrs. Putnam was required to appear and show cause. Clearly, the court erred.

For the reasons stated, the order appealed from is vacated and this cause is remanded for further proceedings not inconsistent with this opinion.

Order vacated and cause remanded.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. FREDDIE LEE

No. 741SC952

(Filed 19 February 1975)

1. Criminal Law § 66— description of robber by victim — testimony that description "fit" defendant

The trial court in a common law robbery case did not err in permitting two police officers to testify on cross-examination that the descrip-

tion of the alleged robber which the victim gave them "fit" the defendant.

2. **Criminal Law § 46— flight of defendant — sufficiency of evidence to support instruction**

The trial court did not err in giving an instruction on the flight of defendant where the evidence tended to show that defendant was not seen for five or six days in an area where he would normally be found, that the sheriff who had a warrant for defendant's arrest searched the area for five or six days, but the sheriff made no inquiries whatsoever as to defendant's whereabouts.

APPEAL by defendant from *James, Judge.* Judgment entered 29 May 1974 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 23 January 1975.

By indictment, proper in form, defendant was charged with the common law robbery of one Aubrey Jordan on 25 August 1973. He was tried first at the 29 October 1973 Session of Superior Court held in Perquimans County, was found guilty as charged, and from judgment imposing prison sentence of not less than eight nor more than ten years, he appealed to the Court of Appeals. This court, in an opinion reported in 21 N.C. App. 337, 204 S.E. 2d 192 (1974), ordered a new trial for the reason that defendant was not provided an attorney at his trial.

At his retrial, defendant was represented by court appointed counsel, pleaded not guilty, was found guilty as charged, and from judgment imposing prison sentence of not less than eight nor more than ten years, with credit to be given for time spent in custody awaiting trial, he appealed.

Attorney General Rufus L. Edmisten, by Noel Lee Allen, Associate Attorney, for the State.

W. T. Culpepper III for defendant appellant.

BRITT, Judge.

[1] By the first assignment of error argued in his brief, defendant contends the trial judge committed prejudicial error in permitting two police officers to testify on cross-examination that the description of the alleged robber which the victim gave them "fit" the defendant. We find no merit in the assignment.

Conceding, *arguendo,* that the testimony was improper in that it invaded the province of the jury, we perceive no prej-

udice to the defendant in this case. The question propounded to the first officer was, "[d]id the description of the short light-skinned individual that Mr. Jordan gave you fit the Defendant, Freddie Lee?" The witness answered, "[i]t does." The question propounded to the second witness was, "I ask you whether or not the description he gave you fits Freddie Lee?" The answer was, "[w]ell, it could. He is bushy-headed and light-complexioned." With the defendant being in full view of the jury at trial, we think the jurors were in position to see for themselves if defendant was "short," "light-skinned" or "bushy-headed," and that the answers given by police had little or no effect on the jurors' judgment.

[2] By the second assignment of error argued in his brief, defendant contends the trial judge committed prejudicial error in instructing the jury on the question of flight. Although this assignment presents a close question, considering the facts in this case and the wording of the instruction, we do not think the court erred to the prejudice of defendant.

It appears that the instruction with respect to flight was predicated on the testimony of Sheriff J. H. Broughton who was presented as a rebuttal witness by the State and whose testimony is summarized in pertinent part as follows: He was serving as sheriff in August of 1973 and had been personally acquainted with defendant practically all of his (defendant's) life. On Saturday afternoon (25 August 1973), he received an arrest warrant for defendant and for the next six days attempted to find defendant for purpose of serving the warrant. He located defendant and served the warrant on Friday, 31 August 1973. During those six days he looked for defendant mostly on King Street (in the Town of Hertford where other testimony showed defendant resided). In trying to locate defendant, he did not make any inquiry as to defendant's whereabouts but tried to find defendant " . . . just by riding and looking for him . . . . " He had a particular reason for not making any inquiry as to where defendant might be.

The instruction challenged by this assignment was as follows:

> Now it is contended by the State, whether the evidence shows it is for you and you alone to say, that the defendant disappeared, and was not seen for five or six days, the officer's testimony being that he had a warrant for him

and drove around through the area which he knew the defendant would normally be in, but did not see him, but made no inquiries as to where the defendant was, did not ask any person where he might be found, made no oral inquiry whatsoever and did not see him for five or six days, the State saying and contending that that was evidence of flight, or secluding himself.

I instruct you that evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show perhaps a consciousness of guilt. However, I instruct you that proof of circumstances, that is proof of flight, in and of itself is not sufficient to establish the defendant's guilt.

On the question of flight, our Supreme Court in *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E. 2d 697, 698 (1973), said:

> Some jurisdictions hold that flight before arrest raises a legal presumption of guilt. Annot., 25 A.L.R. 886, at 890; 29 Am. Jur. 2d Evidence § 280.
>
> The rule in North Carolina is that flight of an accused may be admitted as some evidence of guilt. However, such evidence does not create a presumption of guilt, but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt. Proof of flight, standing alone, is not sufficient to amount to an admission of guilt. An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure. (Numerous citations.)

The testimony of Sheriff Broughton summarized above was not objected to, therefore, the question of competency of the evidence is not presented. We think the evidence was sufficient to raise an inference that defendant had departed the community or was secluding himself, therefore, the court was justified in providing the instructions that he did. In fact, the evidence having been admitted, (and, no doubt the question of flight was argued by the attorneys to the jury), defendant might have been prejudiced if the court had not given the instructions

and thus clarified the weight that the evidence should be given. The assignment of error is overruled.

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

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. DARRELL KENNY KELLY

No. 7419SC937

(Filed 19 February 1975)

1. **Homicide § 28— self-defense in own home — instructions**

Where defendant's evidence in a homicide case tended to show that the victim refused to leave defendant's home after being requested to do so several times, that defendant was assaulted by the victim, and that defendant shot when the victim started to grab him, the trial court was required to instruct the jury on defendant's right to evict a trespasser from his home and to defend himself and his home from attack.

2. **Trespass § 12— remaining in home after request to leave**

One who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser even though the original entry was peaceful and authorized, and a householder may use such force as is reasonably necessary to eject him. G.S. 14-126.

3. **Assault and Battery § 8; Homicide § 9— self-defense in own home**

A person in his own home and in defense of himself and his habitat is not required to retreat in the face of a threatened assault, regardless of its character, but is entitled to stand his ground and to repel force with force so as not only to resist but also to overcome the assault.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 26 June 1974, in Superior Court, ROWAN County. Heard in the Court of Appeals 22 January 1975.

Defendant pled not guilty to the charge of first-degree murder of Master Grant, Jr.

According to the State's evidence, on 29 May 1974, defendant and his friend, Billy Wayne Moose, after working the 3:00

p.m. to 11:00 p.m. shift at Cannon Mills in Kannapolis, went to a nearby beer parlor and drank beer for two hours, both taking a six-pack with them as they left the establishment. While walking away, they accepted the offer for an automobile ride from Master Grant, Jr., whom they had not previously known. They rode around for about an hour, all drinking beer, and then they let Moose out of the car at his home in Concord.

Defendant, after being warned of his rights against self-incrimination and signing a written acknowledgment and waiver of counsel, made a statement to law officers on the same morning at about 9:00 a.m. In substance he stated that Grant drove around for another two hours after taking Moose home and then stopped the car and made homosexual advances; the defendant resisted and asked Grant to take him home. They arrived at defendant's home in north Kannapolis about 5:00 a.m. Grant followed defendant into the house, saying he wanted to drink a beer. Defendant's wife was in the home with their small baby but walked out of the house when defendant and Grant came in. Defendant asked Grant two or three times to leave his home, but Grant refused to do so. When Grant went to the bathroom, defendant got a shotgun and shot him as he was coming out of the bathroom. Grant fell to the floor and then got back to his feet; defendant reloaded and shot him again. Defendant ran from the house, sticking his arm through the glass front door and cutting his right forearm. He ran to a nearby store and called the Rowan County Sheriff's Department.

Officers went to the store immediately and found the defent bleeding badly from his right arm. Defendant told the officers the man had broken into his house and he had shot him.

Officers went to the home of the defendant where they found Grant lying on the floor in a pool of blood near the bathroom door. He died from gun wounds of the chest and neck.

Defendant's testimony was different from the statement that he made to officers on the morning of the shooting in that he testified that when he told Grant to leave the house they had an argument and Grant pushed him through the glass door cutting his arm; that he again told Grant to leave the house and Grant refused; that he got the shotgun thinking that Grant would leave if he saw the gun; that when Grant came out of the bathroom, he again asked him to leave and Grant said

"he wasn't going no damn where", and that he shot when Grant, who was unarmed, started to grab him.

The jury returned a verdict of second-degree murder, and the defendant appealed from the judgment imposing imprisonment.

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

Davis, Ford & Weinhold by Donald L. Weinhold, Jr., and Robert M. Davis for defendant appellant.

CLARK, Judge.

Though defendant presents several assignments of error, the only one warranting express consideration is the exception to that portion of the charge relating to self-defense.

It is apparent that the charge of the trial court is from "Pattern Jury Instructions", (N.C.P.I. - Crim. 206.10), in which the right of self-defense is made available to the defendant upon the jury finding that a murderous assault, or assault with felonious intent, was made upon him.

[1] It may be conceded that the charge as given would be applicable to a different, and probably usual, factual situation; but in this case the evidence for the defendant tended to show that at the time of the assault, defendant was in his own home; that he was assaulted by the victim; that the victim refused to leave after being requested to do so several times; and that he shot when the victim started to grab him. Under these circumstances, the trial court was required under G.S. 1-180 to declare and explain the law arising from the evidence as it related to the rights of the defendant to evict a trespasser from his home and to defend himself and his home from attack.

[2] One who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser, even though the original entry was peaceful and authorized, and a householder may use such force as is reasonably necessary to eject him. G.S. 14-126; *State v. Clyburn,* 247 N.C. 455, 101 S.E. 2d 295 (1958); *State v. Chaney,* 9 N.C. App. 731, 177 S.E. 2d 309 (1970); and 40 Am. Jur. 2d, Homicide, § 179 (1968).

[3] A person in his own home and in defense of himself and his habitat is not required to retreat in the face of a threatened

assault, *regardless of its character,* but is entitled to stand his ground, to repel force with force, so as not only to resist, but also to overcome the assault. *State v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142 (1945); *State v. Walker,* 236 N.C. 742, 73 S.E. 2d 868 (1953); *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279 (1966). Of course, this would not excuse the defendant if he used excessive force in repelling the assault. *State v. Jernigan,* 231 N.C. 338, 56 S.E. 2d 599 (1949); *State v. Pettiford,* 239 N.C. 301, 79 S.E. 2d 517 (1954).

For error noted, defendant is entitled to a

New trial.

Chief Judge BROCK and Judge BRITT concur.

MARGARET SHUTT POTTS v. BILLY JOE POTTS

No. 7421DC931

(Filed 19 February 1975)

Husband and Wife § 12— consent judgment waiving alimony — effect of reconciliation

Portions of a consent judgment providing for a division of property and the mutual waiver of alimony were not abrogated by the subsequent reconciliation of the parties and prevented the wife from thereafter obtaining alimony *pendente lite* from the husband.

APPEAL by defendant from *Henderson, Judge.* Judgment entered 22 July 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 22 January 1975.

This appeal arose out of a civil action for alimony and alimony pendente lite filed 3 April 1974. At the pendente lite hearing on 25 April 1974, the defendant appeared without counsel, and the court ordered him, among other things, to pay alimony pendente lite. On 14 June 1974, the plaintiff filed a motion that the defendant be punished as for contempt, alleging that the defendant had failed to comply with the above order.

At the contempt hearing, the defendant introduced, without objection, two exhibits, one being a separation agreement dated 15 March 1972, and the other a consent judgment entered

in the District Court, Forsyth County, on 17 April 1973. Both the separation agreement and the consent judgment contained property settlement provisions and a waiver on the part of the wife to alimony. The trial judge found the defendant to be in willful contempt.

It appears that the parties were married in 1969, but separated in 1971. During this separation, the agreement was duly executed and the consent judgment was entered. The parties were reconciled and resumed cohabitation in January, 1974, but again separated two months later. This last separation gave rise to the present cause of action and the contempt decree, from which the defendant has appealed.

D. Blake Yokley for the plaintiff.

William E. Hall for the defendant.

CLARK, Judge.

Defendant contends that the consent judgment dated 17 April 1973 is *res judicata,* and that the alimony pendente lite judgment dated 30 April 1974, finding the defendant to be in willful contempt and ordering him to comply with the terms of the alimony order is barred as a matter of law. To determine the propriety of the action of the trial court in the contempt order, the effect of the parties' January, 1974, reconciliation on the consent judgment must be resolved.

It is established in this jurisdiction that if a separation agreement or a consent judgment is executory as to support and maintenance, a reconciliation and resumption of cohabitation may terminate those provisions, but it would have no effect on executed provisions. See, generally, *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547 (1955). In the normal situation, a separation agreement or a consent judgment incorporates provisions for periodic alimony payments and child support, which by their very nature remain executory from period to period and may be abrogated upon reconciliation. *Hester v. Hester,* 239 N.C. 97, 79 S.E. 2d 248 (1953). A provision for support is sometimes fully executed before the reconciliation, as where the husband pays money in a lump sum for support and maintenance in return for the wife's release of all future claims. In these circumstances, since the agreement is fully executed prior to the reconciliation, it cuts off any rights the wife may thereafter have to alimony. See 35 A.L.R. 2d 707, § 6. In the circumstances

of the case at bar, we can discern no valid distinction between the case where a wife agrees to release her claims to future support by accepting a lump sum amount in consideration thereof and the case as here where the parties have mutually agreed in a consent judgment to release future support claims. The judgment to which both parties consented was entered 17 April 1973. The provision in that judgment calling for the division of property and the mutual waiver of alimony was executed and was a definite settlement of a property right within the meaning of the law of this State. See *Wilson v. Wilson,* 261 N.C. 40, 134 S.E. 2d 240 (1964); *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963); and *Brown v. Brown,* 205 N.C. 64, 169 S.E. 818 (1933).

Consequently, the subsequent reconciliation by the parties did not abrogate those portions of the consent judgment relating to property settlement and waiver of alimony, and that judgment precludes the recovery of alimony as provided by the 25 April 1974 judgment. Therefore, the judgment of the trial court finding the defendant to be in willful contempt for failure to pay said alimony is in error and is vacated and the cause remanded for such further proceedings as may be appropriate.

Vacated and remanded.

Chief Judge BROCK and Judge BRITT concur.

MARGIE ECKLIN MOORE, SOLE BENEFICIARY OF THE "MARITAL TRUST," UNDER WILL OF K. E. MOORE, DECEASED v. WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, UNDER WILL OF K. E. MOORE; AND OPAL MOORE RAKOWSKI, ET AL.

No. 742SC908

(Filed 19 February 1975)

Trusts § 10— termination of trust — conditions and emergencies not contemplated by testator

The condition or emergency asserted in an action to terminate a trust must be one not contemplated by the testator which, had it been anticipated, would undoubtedly have been provided for; plaintiff's dissatisfaction with the consideration, benefits, and administration of a marital trust were not conditions or emergencies which were not contemplated by the testator, and the trial court properly dismissed the action.

APPEAL by plaintiff from *James, Judge.* Judgment entered 13 August 1974 in the Superior Court, BEAUFORT County. Heard in the Court of Appeals 20 January 1975.

K. E. Moore died testate on 30 May 1969, leaving an estate valued at approximately $400,000.00. The will was probated on 6 June 1969, and Wachovia Bank and Trust Company, N.A., was appointed trustee pursuant to the terms of the will on 18 May 1971. Item III of the will created a marital trust of one-half the adjusted gross estate. The net income was to be paid over to the settlor's widow, the plaintiff in this action, together with as much of the principal as the trustee, in its discretion, deemed needful and desirable. The plaintiff was given the power to appoint the remaining principal and income of the trust by will. Failing the exercise of this power of appointment, the marital trust assets are to be combined with the residuary trust, which is also created by the will and whose beneficiaries include the settlor's daughter and grandchildren.

The plaintiff, being dissatisfied with the consideration and benefits of the trust, and with the administration of the trust, commenced this action to terminate the marital trust. After defendant-trustee answered, the trial judge ordered that all living and unborn heirs of the settlor be joined in the action. These new defendants answered, and the matter was heard without a jury. The trial judge allowed defendant's Rule 41(b) motion, made pursuant to the North Carolina Rules of Civil Procedure, dismissing the action on the ground that upon the facts and the law plaintiff showed no right to relief.

Frazier T. Woolard, for the plaintiff-appellant.

Mayo & Mayo, by William P. Mayo, and Gaylord and Singleton, by L. W. Gaylord, Jr., and Danny McNally, for defendant-appellee Wachovia Bank and Trust Company, N.A.

Fred Holscher, for the defendants-appellee, beneficiaries of the residuary estate.

BROCK, Chief Judge.

Plaintiff's sole assignment of error challenges the entry of the judgment. Plaintiff contends that the trust was created for her benefit, that she possesses the only beneficial interest, and that the trust is therefore terminable at her will. We do not believe that the facts support this contention.

"A court of equity may have the power to terminate a trust and distribute the trust property prior to the happening of the contingency prescribed by the trustor, but only when such action is necessary or expedient." 7 Strong, N. C. Index 2d, Trusts, § 10 (1968); *Wachovia Bank & Trust Co. v. Laws,* 217 N.C. 171, 7 S.E. 2d 470; *Davison v. Duke University,* 282 N.C. 676, 194 S.E. 2d 761. "[T]he condition or emergency asserted must be one not contemplated by the testator and which, had it been anticipated, would undoubtedly have been provided for; . . . " *Carter v. Kempton,* 233 N.C. 1, 6, 62 S.E. 2d 713. Although plaintiff's challenge stems from her dissatisfaction with the consideration and benefits of the trust, and with the administration of the trust, we cannot say that these are conditions or emergencies which were not contemplated by the testator. Trusts will not be modified on technical objections merely because interested parties' welfare will be served thereby. *Carter v. Kempton, supra.* Furthermore, the grandchildren of the testor have, under the terms of the will, an expectancy in the marital trust. As interested parties, the trust cannot be terminated without their consent. *Solon Lodge v. Ionic Lodge,* 247 N.C. 310, 101 S.E. 2d 8. "It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator. The controlling objective is to preserve the trust and effectuate the primary purpose of the testator." *Carter v. Kempton, supra* at 6. The trial court's entry of judgment dismissing the action was correct.

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. RODERICK LEE JORDAN

No. 7410SC911

(Filed 19 February 1975)

Criminal Law § 92— refusal to sever trials against two defendants

In this prosecution for armed robbery, the interests of defendant and a codefendant were not so antagonistic as to require the trial court to sever their trials where the State's evidence tended to show that defendant was one of two persons who entered and robbed a Kwik-Pik store and that the codefendant remained in the getaway car, and

defendant contended he was an innocent hitchhiker in the getaway car and the codefendant offered no evidence.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 22 May 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 21 January 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of robbery with a dangerous weapon. The charge against defendant was consolidated, over objection, for trial with the same charge against one James Allen.

The State's evidence tended to show the following: At about 1:30 to 2:00 a.m. on 29 November 1973, two Negro males went into and robbed the Kwik-Pik Store on Western Boulevard in Raleigh. They were identified by a customer as defendant Jordan and one Jerryle Martin. Martin was described as the man with the .38 caliber pistol, and defendant Jordan was described as the man who tied the witness' hands behind him. Martin and defendant Jordan were also identified by a taxicab driver who saw them as they ran from the store. The taxicab driver alerted the police by radio. Another witness observed a car, black over gold Plymouth or Dodge, parked near the Kwik-Pik with three people in it. Two got out of the car and went to the Kwik-Pik. Later the two ran back to the car where the third was waiting, and the car drove away. The police intercepted a black over gold Plymouth automobile about three miles from the Kwik-Pik Store. The black over gold Plymouth slowed, and the three occupants jumped from it before it stopped rolling. Jerryle Martin jumped from the driver's side and ran. Defendant Jordan and his co-defendant Allen jumped from the passenger's side and ran. All three were caught. Items stolen from the Kwik-Pik were found in the car from which they jumped, as was the .38 caliber pistol and a 12-gauge shotgun. The arresting officer found in the pockets of defendant Jordan's coat the following items: (1) $6.26 in pennies in rolls; (2) a checkbook in the name of George Wayne Davis, the employee on duty in the Kwik-Pik at the time of the robbery; (3) one 12-gauge shotgun shell; and (4) one .38 caliber bullet.

Defendant Jordan offered evidence which tended to show he had been visiting various people and was on his way home when he caught a ride in a black over gold Plymouth. He did not know anything about a robbery, but was implicated only

because the two people who may have committed the robbery picked him up to carry him home.

From a verdict of guilty and judgment of imprisonment, defendant Jordan appealed.

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

Manning, Fulton & Skinner, by James E. Davis, Jr., for the defendant.

BROCK, Chief Judge.

When the charge against this defendant was called for trial with the like charge against James Allen, defendant moved for a severance. Defendant argued that his and Allen's interests were mutually antagonistic. The trial judge denied the motion for severance. However, he suggested to counsel that if, during the trial, the interests of the defendants appeared so antagonistic as to constitute a real hazard, he would consider a request for a mistrial. This consideration by the trial judge was eminently fair to both the State and the defendant. The evidence presented by the State unequivocally tended to identify defendant as one of the two men who entered and robbed the Kwik-Pik Store. The State's evidence also unequivocally tended to show that when arrested, the defendant had in his jacket pocket a large quantity of pennies in rolls as are usually maintained in a store for change and the personal checkbook of the Kwik-Pik storekeeper. Defendant's jacket also contained ammunition for both the pistol and shotgun which were found in the car from which defendant fled.

Defendant's evidence that he was an innocent hitchhiker was in no way antagonistic to Allen, who offered no evidence. Therefore, Allen's defense was in no way antagonistic to defendant. We find no denial of a fair trial in the consolidation of the cases for trial.

We have examined defendant's remaining assignments of error and find them to be without merit. In our opinion defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

BUNN BENNETT v. ANNIE MAE BENNETT

No. 748DC886

(Filed 19 February 1975)

Divorce and Alimony § 16— dependent and supporting spouses — determination by court

The determination of who is a "dependent spouse" and who is is a "supporting spouse" within the meaning of G.S. 50-16.1(3), (4) should be made by the trial judge and not by the jury.

APPEAL by plaintiff from *Nowell, Judge.* Judgment entered 6 June 1974 in District Court, LENOIR County. Heard in the Court of Appeals 16 January 1975.

This action for absolute divorce based on one year's separation was instituted by plaintiff-husband on 6 September 1973. Defendant-wife answered, alleging abandonment in bar and counter-claiming for temporary alimony, permanent alimony, child custody and support, and attorney fees.

The case was tried before a jury. Plaintiff offered evidence that he had been separated from defendant since 4 September 1972. Defendant offered evidence that plaintiff had abandoned her on 4 September 1972, and that prior to that time he had beaten her and whipped her with a belt. Plaintiff admitted striking defendant but denied beating her. Defendant also testified concerning her financial condition and by cross-examination of plaintiff adduced the fact that plaintiff earned over $11,000 per year but only paid her $50 per month.

The trial court submitted the issue of abandonment to the jury, and the jury found that plaintiff had abandoned the defendant as alleged in her answer. The trial court refused to submit issues to the jury relating to whether defendant was a "dependent spouse" and whether plaintiff was a "supporting spouse" within the meaning of G.S. 50-16.1(3) and (4), as requested by plaintiff. After the verdict, the court made findings of fact concerning the parties' financial condition and concluded that defendant was a "dependent spouse" and plaintiff was a "supporting spouse". Plaintiff was ordered to pay defendant $25 per week for alimony, $25 per week for child support, and to pay one-half of all house payments, taxes, insurance and major repairs exceeding $100, until the child of the marriage attained the age of 18 years.

Wallace, Langley, Barwick & Llewellyn, by P. C. Barwick, Jr., and Richard F. Landis II, for plaintiff appellant.

White, Allen, Hooten & Hines, P.A., by Thomas J. White, for defendant appellee.

MORRIS, Judge.

Plaintiff has abandoned his first 30 assignments of error for failure to argue them in his brief. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

By his thirty-first assignment of error he purports to except to the failure of the trial court to submit the following issues:

1. Did the plaintiff abandon the defendant without justification?
2. Is the defendant a dependent spouse?
3. Is the plaintiff the supporting spouse?

We note that the first issue was actually submitted to the jury. With respect to the second and third issues, the record shows plaintiff did not properly object and except to the refusal of the trial court *to submit* the issues tendered.

> "Where there are no objections or exceptions in the lower court to the issues submitted, or to the court's refusal to submit issues tendered, appellant may not challenge the issues for the first time on appeal in his assignments of error." 1 Strong, N. C. Index 2d, Appeal and Error, § 32, p. 170, and cases cited therein.

Plaintiff's only exception was to the court's failure *to instruct* on the above three requested issues. However, the charge of the trial judge is not included in the record on appeal in this case. Therefore, it is not properly before us for review.

Even if the question were properly before us, we do not agree with plaintiff that the issues of who is a "dependent spouse" and who is a "supporting spouse" within the meaning of G.S. 50-16.1 (3) and (4) should be decided by the jury rather than the trial judge. Although the courts of North Carolina apparently have never decided whether the issues of who is the "dependent spouse" and who is the "supporting spouse" should be decided by the judge or by the jury, we are of the

opinion, and so hold, that these questions should be determined by the trial judge. As we noted in *Peoples v. Peoples,* 10 N.C. App. 402, 410, 179 S.E. 2d 138 (1971) :

> "The determination of what constitutes a 'dependent spouse' and what constitutes a 'supporting spouse' requires an application of principles of statutory law to facts and are therefore mixed questions of law and fact . . . . "

Moreover, as noted by Dr. Robert E. Lee in his work entitled North Carolina Family Law:

> " . . . It should be unnecessary, it seems to this writer, to submit to the jury the determination of which is the dependent and which is the supporting spouse. These are complicated questions of fact, often involving accounting and other financial records, and these questions can best be determined by the judge when he sets the amount of the permanent alimony. . . . The facts necessary to prove which spouse is dependent and which supporting are identical with those required to be considered by the judge in determining the amount of the permanent alimony at the final hearing. It would be futile to produce this evidence twice." 2 Lee, N. C. Family Law, § 137, at p. 50 (Supp. 1974).

For the foregoing reasons, defendant's assignment of error is hereby overruled.

Judge Nowell found sufficient facts to establish defendant as the dependent spouse and plaintiff as the supporting spouse and the need of the defendant for support and the ability of the plaintiff to provide support. His findings were supported by competent evidence as well as the ability of the defendant to make the payments awarded.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. LAWRENCE DAVIS

No. 7415SC940

(Filed 19 February 1975)

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

In a prosecution for assault and battery, the trial court did not express an opinion in asking witnesses questions concerning the incident and a later confrontation between the prosecuting witness and defendant where the questions were objective and innocuous and related to matters of minor importance.

2. **Assault and Battery § 14— sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for assault and battery where it tended to show that the victim and his sister-in-law went to defendant's home to discuss an incident involving defendant and the sister-in-law, that an argument ensued and defendant told the victim and his sister-in-law to leave the premises, that as they were leaving the victim asked defendant for his name, saying the sheriff might want to know it, and that defendant then punched the victim in the mouth with his fist.

APPEAL by defendant from *Clark, Judge.* Judgment entered 26 June 1974 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 January 1975.

This is a criminal action in which the defendant was charged with assault and battery in violation of G.S. 14-33. Upon a plea of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing defendant to be imprisoned for a term of 30 days in the county jail, sentence suspended upon the condition defendant pay the costs and medical expenses incurred by the prosecuting witness, defendant appealed.

State's evidence tended to show that Vicky Lorbacher lived with her brother-in-law, Herman Long, and her sister, Jane Long; that on 12 February 1974 while Vicky was riding her sister's motorcycle, the defendant approached her in his truck and ran her off the road into a ditch; that Vicky complained to her sister and brother-in-law about the incident and they all went to defendant's house to talk with him; that there was a confrontation between defendant and Vicky and her brother-in-law, Herman; that defendant and Vicky cursed each other and defendant told Vicky and her brother-in-law to leave the premises; that as they were leaving Herman asked defendant his name, saying that the sheriff might want to know it, where-

upon the defendant came up to Herman and punched him in the mouth. Other evidence offered by the State tended to show that as a result of defendant's having punched him in the mouth, Herman lost a tooth, suffered a broken upper jaw, and had to have 11 stitches taken in his lip at the hospital. Defendant also had to go to the hospital to have his finger sutured.

Defendant offered evidence tending to show that after he told Vicky and Herman to leave his premises, Herman said he would not leave until defendant told him his name. Defendant then punched Herman and said, "That's my name."

Additional facts necessary for decision are set forth in the opinion.

Attorney General Rufus L. Edmisten, by Associate Attorney David S. Crump, for the State.

B. Frank Bullock for defendant appellant.

MORRIS, Judge.

[1] In his first assignment of error defendant maintains the trial judge violated G.S. 1-180 by asking witnesses certain questions concerning the incident and a later confrontation between the prosecuting witness, Herman Long, and defendant. Defendant asserts that by asking these questions, the trial judge took on the role of advocate in the trial, which was highly prejudicial to the defendant. We find defendant's argument unpersuasive. A careful examination of the questions asked by the court indicates that they were entirely objective and innocuous. Clearly, the trial judge did not become an advocate in favor of the State. Furthermore, the questions related to matters of minor importance, having little relation to the principal issue in this case. Finally, defendant has failed to show how he was prejudiced by these questions. It must appear with ordinary certainty that the rights of a defendant have in some way been prejudiced by the conduct of the trial judge, before such conduct can be treated as reversible error. *State v. Blue,* 17 N.C. App. 526, 195 S.E. 2d 104 (1973), and cases cited therein.

[2] Defendant's second and fourth assignments of error relate to the denial of his motions for nonsuit at the close of the State's evidence and at the close of all the evidence. "By introducing testimony at the trial, defendant waived his right to except on appeal to the denial of his motion for nonsuit

at the close of the State's evidence. His later exception to the denial of his motion for nonsuit made at the close of *all* the evidence, however, draws into question the sufficiency of all the evidence to go to the jury." *State v. Mull,* 24 N.C. App. 502, 211 S.E. 2d 515 (1975), citing *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971). Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, and nonsuit should be denied when there is sufficient evidence, direct, circumstantial or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases cited therein. The record contains plenary evidence that the prosecuting witness was peacefully leaving defendant's premises when defendant approached him and suddenly struck him in the mouth. For the purpose of nonsuit, it is immaterial that the State's evidence was controverted by defendant's assertion that he merely was using reasonable force to remove a trespasser from his premises. The credibility of the evidence was for the jury. As there was substantial evidence of each of the elements of the offenses charged, defendant's motion for nonsuit was properly denied.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit. Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

ASSOCIATES FINANCIAL SERVICES CORPORATION v. EARL WELBORN, t/a *HILLSIDE POULTRY FARM*

No. 7423DC847

(Filed 19 February 1975)

Appeal and Error § 39— expiration of time for docketing record — subsequent extension by trial court

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing.

APPEAL by defendant from *Davis, Judge.* Judgment entered 22 May 1974 in District Court, WILKES County. Heard in the Court of Appeals 19 November 1974.

This civil action was commenced 14 May 1965 to recover a deficiency judgment for the balance due on the purchase price of personal property sold under a conditional sales agreement. In 1967 this case was before the North Carolina Supreme Court upon the question presented by a demurrer to the complaint, *Financial Services Corp. v. Welborn,* 269 N.C. 563, 153 S.E. 2d 7 (1967), and on that appeal the Supreme Court reversed the ruling of the trial court which had sustained the demurrer. The present appeal is from a summary judgment entered in favor of the plaintiff.

Fairley, Hamrick, Montieth & Cobb by Laurence A. Cobb for plaintiff appellee.

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

PARKER, Judge.

The judgment appealed from was dated and entered on 22 May 1974. The record on appeal was not docketed in the Court of Appeals and no order extending the time for docketing was entered within 90 days after the date of the judgment. After the expiration of the 90-day period, the trial judge signed an order dated 29 August 1974 purporting to extend the time for docketing.

After the time for docketing the record on appeal in the Court of Appeals has expired, the trial tribunal is without authority to enter a valid order extending the time for docketing. *Lambert v. Patterson,* 17 N.C. App. 148, 193 S.E. 2d 380 (1972); *Simmons v. Textile Workers Union,* 15 N.C. App. 220, 189 S.E. 2d 556 (1972), *cert. denied,* 281 N.C. 759, 191 S.E. 2d 356 (1972). Since there was a failure to comply with Rule 5 of the Rules of Practice in the Court of Appeals, this appeal is subject to dismissal.

Appeal dismissed.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. BENNIE HOPKINS AND ROOSEVELT MORRISON KELLUM

No. 749SC862

(Filed 19 February 1975)

1. **Criminal Law § 155.5— failure to docket record in apt time**

Appeal is dismissed for failure to docket the record on appeal within 90 days from the date of the judgment appealed from where the record on appeal contains no order extending the time for docketing. Court of Appeals Rule 5.

2. **Criminal Law § 155.5— extension of time to serve case on appeal — no extension of time to docket**

An order extending the time within which to serve the case on appeal does not have the effect of extending the time to docket the appeal.

APPEAL by defendants from *Bailey, Judge.* Judgments entered 2 May 1974 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 14 January 1975.

Each defendant was charged in separate bills of indictment, proper in form, with the felony of armed robbery. On motion of the District Attorney and without objection by the defendants, the cases were consolidated for trial, and each defendant pled not guilty. The jury found each defendant guilty, and from judgments entered on the verdicts, each defendant gave notice of appeal.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey for the State.

Hubert H. Senter for defendant appellant Bennie Hopkins.

Charles M. Davis for defendant appellant Roosevelt Morrison Kellum.

PARKER, Judge.

[1] The judgments appealed from are dated 2 May 1974. The record on appeal was docketed in this Court on 23 September 1974, which was more than 90 days after the date of the judgments. The record on appeal contains no order extending the time for docketing. Rule 5, Rules of Practice in the Court of Appeals, requires that a record on appeal, absent an order ex-

tending the time to docket, be docketed within 90 days after the date of the judgment or order appealed from.

[2] The record does show that orders were entered extending the time for serving the case on appeal. However, an order extending the time within which to serve the case on appeal does not have the effect of extending the time to docket the appeal. *State v. Peek,* 22 N.C. App. 350, 206 S.E. 2d 386 (1974) ; *State v. Scott,* 16 N.C. App. 424, 192 S.E. 2d 54 (1972), *cert. denied,* 282 N.C. 429, 192 S.E. 2d 839 (1972) ; *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388 (1968). In accordance with the practice of this Court, defendants' appeal is dismissed for failure to docket within the time allowed by the Rules. *State v. Hunt,* 14 N.C. App. 626, 188 S.E. 2d 546 (1972).

Nevertheless, we have reviewed the record before us with respect to the assignments of error brought forward for review, and we find no prejudicial error.

Appeal dismissed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. DONNIE E. CARTER

No. 7422SC951

(Filed 19 February 1975)

1. **Criminal Law § 169— receiving stolen panty hose — evidence of value — admission not prejudicial**

In a prosecution for feloniously receiving stolen goods, any error of the trial court in allowing a witness who allegedly stole the goods to testify concerning their value was cured by the court's allowance of defendant's motion to strike the testimony and by the court's emphatic instruction to the jury not to consider it in any way.

2. **Criminal Law § 87; Witnesses § 1— list of State's witnesses — testimony from witness not listed**

Defendant was not legally prejudiced merely because the State offered a witness not found on the list previously furnished by the district attorney to the defendant.

State v. Carter

APPEAL by defendant from *Winner, Judge.* Judgment entered 7 August 1974 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 23 January 1975.

Defendant was charged with feloniously receiving stolen goods. He was found guilty as charged, judgment of imprisonment for a term of eight months was entered, and work release was recommended.

The State's evidence tended to show that one Charles W. Perrell, Jr., stole four cartons (five boxes of one dozen panty hose each to the carton) of panty hose. Perrell delivered the four cartons to defendant's home and asked defendant if he wanted some panty hose. Perrell told defendant to sell them and to give Perrell half of whatever defendant could get for them. A couple of days later defendant gave Perrell $40.00 or $50.00. The defendant turned over to the investigating officer two boxes of one dozen each which he had remaining at the time of the investigation. Testimony for the State tended to establish the total wholesale value of the four cartons of panty hose at $370.90.

Defendant offered no evidence.

Attorney General Edmisten, by Assistant Attorneys General William F. Briley and Thomas B. Wood, for the State.

Barnes & Grimes, by Jerry B. Grimes, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error that the court permitted the witness Perrell to testify concerning the value of the four cartons of panty hose. The court allowed defendant's motion to strike the testimony complained of and emphatically instructed the jury not to consider it in any way. If there were error in the admission of the testimony, it was cured by the court's ruling on the motion to strike and by the instructions to the jury.

[2] Defendant assigns as error that the State was permitted to offer the testimony of the witness Prevette, who was not included on the list of the State's witnesses furnished by the district attorney to defendant. There is no statute in this State which requires the State to furnish a defendant in a criminal case with a list of prospective witnesses for the State. Absent a statute, an order to furnish such a list is within the discretion

of the trial court. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Chavis,* 24 N.C. App. 148, 196, 210 S.E. 2d 555, 584 (1974). Defendant does not suggest the violation of an order of the court to supply him with a list of witnesses. The defendant was not legally prejudiced merely because the State offered a witness not found on the list previously furnished by the district attorney to the defendant. "Prejudicial surprise results from events 'not reasonably to be anticipated or perhaps testimony contrary to a prior understanding between the parties or something resulting from fraud or deception.'" *State v. Hoffman, supra* at 735. Defendant has failed to show such prejudicial surprise. We note that the testimony of the witness Prevette was directed only to the value of the four cartons of panty hose. Defendant made no objection to the competency or relevancy of the testimony. This assignment of error is overruled.

Defendant has brought forward additional assignments of error. Some are directed to the admission or exclusion of evidence, some are directed to the court's instructions to the jury, and some are directed to the rendering and taking of the verdict. We do not view any of these as requiring a discussion. They are overruled.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and CLARK concur.

THOMAS GORDON OATES, ADMINISTRATOR OF THE ESTATE OF TOMMY GENE OATES, DECEASED v. NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES AND TRAVELERS INSURANCE COMPANY

No. 748IC927

(Filed 19 February 1975)

State § 8— tort claim — contributory negligence in taking and operation of patrol car

In this tort claim action, conclusion by the Industrial Commission that the contributory negligence of plaintiff's intestate was a proxi-

mate cause of his death was supported by findings that the intestate and another were arrested by a State trooper, that the trooper left the two arrestees in the patrol car with the motor running in front of a magistrate's office, that the intestate drove away in the patrol car, at times exceeding 100 mph, and that the patrol car was wrecked and the intestate was killed in the accident.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 15 July 1974. Heard in the Court of Appeals 22 January 1975.

The findings of fact by the Industrial Commission disclose the following events: Highway Patrol Trooper Gales arrested and took into his custody Tommy Gene Oates and Donald Wayne Stallings. He placed them in the front seat of his patrol car. Oates was seated in the middle, and Stallings was seated next to the right-hand door. Trooper Gales parked his patrol car in front of the magistrate's office in the Town of Fremont and went into the magistrate's office to secure arrest warrants for Oates and Stallings. Trooper Gales left Oates and Stallings sitting in the patrol car and left the key in the ignition switch with the motor running. Oates drove away in the patrol car, at times exceeding 100 miles per hour. After arriving at Goldsboro, the patrol car was wrecked, and both Oates and Stallings were killed in the accident. Oates was found pinned in the patrol car on the driver's side. Stallings was found on the ground on the right side of the patrol car.

This action for damages was brought by the administrator of Oates under the State Tort Claims Act, alleging negligence of Trooper Gales in leaving the patrol car keys in the ignition and his prisoners unguarded. The Industrial Commission found Trooper Gales negligent, found Oates contributorily negligent, and denied recovery by plaintiff.

Kornegay & Bruce, by Robert T. Rice, for the plaintiff.

Attorney General Edmisten, by Associate Attorneys John R. Morgan and Elisha H. Bunting, Jr., for the State.

BROCK, Chief Judge.

Findings of fact by the Industrial Commission are conclusive if supported by competent evidence. *Tanner v. Dept. of Correction*, 19 N.C. App. 689, 200 S.E. 2d 350 (1973). It is the function of the finder of the facts to resolve inconsistencies and conflicts in the evidence.

There is a serious question whether the findings of fact support a conclusion that the negligence of Trooper Gales was a proximate cause of the accident and the resulting death of Oates. However, that question is not presented to us by this appeal, and we do not pass upon it. Nevertheless, it is clear that the facts found support the conclusion that plaintiff's intestate (Tommy Gene Oates) was negligent in the taking and the operation of the trooper's patrol car and that the negligence of plaintiff's intestate was a proximate cause of the accident and the resulting death of plaintiff's intestate. Contributory negligence on the part of the claimant bars his recovery under the State Tort Claims Act. G.S. 143-299.1; *Crawford v. Board of Education,* 275 N.C. 354, 168 S.E. 2d 33 (1969).

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES ALLEN

No. 7410SC909

(Filed 19 February 1975)

1. **Criminal Law § 92— consolidated trial of two defendants**

The trial court did not err in consolidating for trial charges against two defendants for the same offense of armed robbery.

2. **Robbery § 4— armed robbery — person remaining in getaway car**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of armed robbery where it tended to show that defendant and two companions went near a Kwik-Pik store in an automobile, that defendant stayed in the car while his companions entered the store and with the use of a firearm robbed the operator, that defendant turned on the car lights when his companions ran from the store and blew the horn when they ran past the car, and that when the car was stopped several minutes later, defendant and his two companions ran.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 22 May 1974, in Superior Court, WAKE County. Heard in the Court of Appeals 20 January 1975.

Defendant pled not guilty to a charge of armed robbery, and the case was consolidated, over objection, for trial with the

same charge against Roderick Lee Jordan. See *State v. Roderick Lee Jordan* filed this date.

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

Attorney General Edmisten by Associate Attorney Sam T. Currin for the State.

H. Spencer Barrow for defendant.

CLARK, Judge.

[1] Defendant and Roderick Lee Jordan were indicted for the same criminal offense. Consolidation for trial, rather than multiple individual trials, was appropriate in the absence of a showing that defendant was deprived of a fair trial. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972). Here the motion to consolidate was addressed to the sound discretion of the trial court; and no abuse having been shown, we find no error in the consolidation for trial.

[2] Defendant's other assignment of error is addressed to the refusal of the trial court to allow his motion for judgment as of nonsuit. We see no need to repeat the statement of facts set out in the case of *State v. Roderick Lee Jordan,* filed on the same date as this opinion.

We add that it may reasonably be inferred from the State's evidence that defendant, with Jordan and another, went to the scene in an automobile; that defendant stayed in the car while his two companions entered the nearby Kwik-Pik store and with the use of a firearm robbed the operator; that when they ran from the store, defendant turned on the car lights, then blew the horn when they ran past the car; and that several minutes later when the car was stopped, defendant and his two companions ran.

Taking the evidence in the light most favorable to the State, we find the evidence sufficient to warrant submitting the case to the jury.

Presence at the scene, assistance to the perpetrators, flight and guilty knowledge may be reasonably inferred from the evidence. This case is clearly distinguishable from *State v. Aycoth,*

272 N.C. 48, 157 S.E. 2d 655 (1967), where the State's evidence showed nothing more than presence.

We find

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. CURTIS SIMPSON, JR.

No. 7429SC930

(Filed 19 February 1975)

APPEAL by defendant from *Winner, Judge.* Judgment entered 19 August 1974 in Superior Court, POLK County. Heard in the Court of Appeals 22 January 1975.

Defendant was charged in a bill of indictment with the felony of robbery with a dangerous weapon. He was found guilty of attempted robbery with a dangerous weapon, and judgment of imprisonment was entered.

The State's evidence tended to show that defendant went into McGinnis' store, pointed a pistol at Mr. McGinnis, and demanded his wallet. McGinnis did not have a wallet; therefore, defendant pointed the pistol at McGinnis' head and ordered him to lie down on the floor. After defendant left the store, $21.00 was missing from the cash drawer.

Attorney General Edmisten, by Associate Attorney Robert P. Gruber, for the State.

Robert W. Wolf, for the defendant.

BROCK, Chief Judge.

Defendant's motions for judgment as of nonsuit were properly overruled.

We have carefully considered defendant's assignments of error to the judge's instructions to the jury. In our opinion the

instructions, considered as a whole, fairly presented the case to the jury under applicable principles of law.

No error.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. MARION RAY CARVER

No. 7427SC916

(Filed 19 February 1975)

APPEAL by defendant from *Tillery, Judge.* Judgment entered 22 July 1974 in Superior Court, GASTON County. Heard in the Court of Appeals 21 January 1975.

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

R. R. Friday for defendant appellant.

BROCK, Chief Judge, PARKER and HEDRICK, Judges.

No error.

STATE OF NORTH CAROLINA v. EDWARD PEASLEE

No. 743SC959

(Filed 19 February 1975)

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 13 June 1974 in Superior Court, CARTERET County. Heard in the Court of Appeals 11 February 1975.

Attorney General Edmisten by Assistant Attorney General Charles M. Hensey for the State.

McCotter & Mayo by Charles K. McCotter, Jr., for defendant appellant.

MORRIS, PARKER, and HEDRICK, Judges.

No error.

STERLING COTTON MILLS, INC. AND ARCHER W. PHELPS AND WIFE JANICE W. PHELPS v. LINWOOD H. VAUGHAN AND WIFE SARAH J. VAUGHAN; AND THOMAS EMMITT DEBNAM AND CHARLES WILLIAM LYLES

No. 749DC939

(Filed 5 March 1975)

1. **Deeds § 20— restrictive covenants — nonconforming uses of lots — no change in character of community**

The use of four of sixty-two lots subject to residential restrictive covenants for a snack bar, automobile repair shop, used car lot and fabric shop did not constitute such a radical or fundamental change in the character of the community as to warrant removal of the residential restrictions.

2. **Deeds § 20— restrictive covenants — failure to object to nonconforming uses of lots**

Failure of plaintiffs or other residents of a subdivision to object to the use of four lots in the subdivision for non-residential purposes did not constitute waiver, acquiescence or estoppel so as to deprive them of the protection of a covenant restricting use of the lots in the subdivision to residential purposes.

APPEAL by defendants from *Banzet, Judge.* Judgment entered 20 August 1974 in District Court, FRANKLIN County. Heard in the Court of Appeals on 23 January 1975.

The facts underlying this controversy are set out in a Stipulation of Facts agreed upon by the counsel for the plaintiffs and the counsel for the defendants and were incorporated by reference in the judgment of the trial court.

"STIPULATIONS OF FACTS

The parties hereto, through their respective attorneys of record, do hereby agree to the following stipulated facts:

(1) This action was instituted in the District Court of Franklin County on July 16, 1973, and thereafter the defendants filed an Answer to the Complaint on September 21, 1973.

(2) That the plaintiff, Sterling Cotton Mills, Inc. is a North Carolina corporation with its principal office and place of business in Franklinton, Franklin County, North Carolina, and the plaintiffs, Archer W. Phelps and wife, Janice W. Phelps, are natural persons residing in Franklinton, Franklin County, North Carolina.

(3) That the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan, and Thomas Emmitt Debnam and Charles William Lyles, are natural persons residing in Franklinton, Franklin County, North Carolina.

(4) That this civil action is being brought under the North Carolina Rules of Civil Procedure, Chapter 26 (sic), known as the Uniform Declaratory Judgment Act (G.S. 1-253-267, both inclusive), for that this action is based upon matters of law arising from certain facts the material parts of which are not in material controversy.

(5) That prior to 1955 and for many years, the plaintiff, Sterling Cotton Mills, Inc. owned a number of parcels of land in and around its mills in Franklinton, North Carolina, upon which it had constructed numerous residences which it rented to its employees and former employees.

(6) That during the year 1955, the said plaintiff, Sterling Cotton Mills, Inc. employed the services of William F. Freeman, Engineers to survey and plat a considerable number of lots upon which the aforesaid residences were constructed, and the said William F. Freeman prepared a plat of said lots or parcels of land, and said plat is duly of record in Plat Book 4 at Pages 8 and 9 of the office of the Register of Deeds of Franklin County.

(7) That the said plaintiff, Sterling Cotton Mills, Inc., caused the said survey to be made and plat of said survey prepared and recorded as aforesaid under a general plan which it had to sell said lots of land upon which said residences were constructed to the then occupants of said residences who were or had been employees of said plaintiff, and in the carrying out of said plan, executed and delivered approximately 62 deeds by reference to said plat and the various numbers on said plat which designated said lots and the residences thereon. That all of said deeds are of record in the office of the Register of Deeds of Franklin County in Deed Book 516 at Pages 645 to 700 both inclusive, Deed Book 224 at Pages 21 and 23 and Deed Book 625 at Pages 29 and 30 and all of said Deeds contain the following proviso: 'This conveyance is made subject to the express conditions that the above described lot or parcel of land shall be used for residential purposes exclusively.'

(8) That among the various deeds executed and delivered by the said plaintiff, Sterling Cotton Mills, Inc., was a deed to the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan, for a lot of land designated as Lot 62 on said plat lying on the corner of Bullock and Wilson Street in the Town of Franklinton, North Carolina, known as No. 201 Wilson Street; that this Deed is dated January 27th, 1956, and appears of record in the office of the Register of Deeds of Franklin County, and said deed conveying said lot or land to said defendants contain the above referred to condition and set forth in said deed in the identical language, to wit: 'This conveyance is made subject to the express condition that the above described lot or parcel of land shall be used for residential purposes exclusively'; that the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan, accepted delivery of said deed and paid the purchase price therefor with the full knowledge of the above referred to condition.

(9) That in the spring of 1973, the defendants Linwood H. Vaughan and wife, Sarah J. Vaughan, leased said premises to the defendants, Thomas Emmitt Debnam and Charles William Lyles who intend to use and are presently using said premises for the operation of a place of business known as 'Tar Heel Lounge'; that the defendants, Thomas Emmitt Debnam and Charles William Lyles have repainted the dwelling on said premises to a red color with black trim and have painted over the glass windows in black; that in furtherance of their intention to operate the said 'Tar Heel Lounge', the defendants, Thomas Emmitt Debnam and Charles William Lyles, have applied for a license to operate said Tar Heel Lounge in the Town of Franklinton and have applied to the North Carolina Board of Alcoholic Control for a beer license for the sale of beer on said premises, both of which licenses have been granted by the Town of Franklinton and the North Carolina Board of Alcoholic Control, respectively.

(10) That on February 10, 1956, the plaintiff, Sterling Cotton Mills, Inc., executed and delivered to the plaintiffs, Archer W. Phelps and wife, Janice W. Phelps, who were at the time and are now employees of said Sterling Cotton Mills, Inc., a deed for Lot 45 on said plat is of record in Plat Book 4 at Pages 8 and 9 of the office of the Register

of Deeds of Franklin County, and known as 204 Wilson Street, and by later conveyance, the said plaintiffs, Archer W. Phelps and wife, Janice W. Phelps, acquired Lot No. 44 on said plat known as 202 Wilson Street; that the said plaintiffs, Archer W. Phelps and wife, Janice W. Phelps, continued to occupy said lot No. 45 known as 204 Wilson Street as their residence and rent said Lot No. 44 known as 202 Wilson Street for residential purposes; that both lots Nos. 44 and 45 and known as 202 and 204 Wilson Street are directly across the street from No. 201 Wilson Street, the premises of the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan.

(11) That said Sterling Cotton Mills, Inc. in addition to the lots sold to its employees and former employees as hereinabove stated owned certain other lots or parcels of land in the same area which it retained for the use of its supervisory personnel and Sterling Cotton Mills, Inc. is still the owner of said lots or parcels of land; that one of said lots or parcels of land lying on the corner of North Carolina Highway No. 56 on Wilson Street in the Town of Franklinton is now occupied by the Superintendent of said Sterling Cotton Mills, Inc., operation in the Town of Franklinton; that said residence is within 200 feet from 201 Wilson Street owned as aforesaid by the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan.

(12) That the town of Franklinton owned the right of way along Wilson and Bullock Street upon the corner of which is located Lot 201 and owned by Linwood H. Vaughan and wife, Sarah J. Vaughan and in which the defendants, Thomas Emmitt Debnam and Charles William Lyles, operate the Tar Heel Lounge; that the right of way for the Town of Franklinton is 40 feet wide and the paved portion of said streets is 16-1/2 and 17 feet wide; that the building located on the lot known as 201 Wilson Street is located 28 feet from the paved portion of Bullock Street and 26 feet from the paved portion of Wilson Street; that the lot known as 201 Wilson Street has a frontage of 81.4 feet on Wilson Street and a frontage of 79.6 feet on Bullock Street.

(13) That prior to 1956, the mother of the defendant, Linwood H. Vaughan, operated a snack bar in the house located on the lot known as 201 Wilson Street; that said snack bar was operated for several years prior to 1956, and

up until January 13, 1960; that on January 13, 1960, the defendant, Linwood H. Vaughan, obtained a license from the State of North Carolina to operate 'Vaughan's Snack Bar' at 201 Wilson Street in the Town of Franklinton; that the defendant, Linwood H. Vaughan, operated Vaughan's Snack Bar from the 13th day of January, 1960, until the 31st day of May, 1973; that said snack bar was operated continuously during said period of time and the defendant sold sandwiches, soft drinks, and tobacco products and operated a 'slot music machine' within said snack bar during said period of time; that in 1966, the defendant applied for and obtained from the State of North Carolina and the Town of Franklinton, a permit to sell beer and wine from Vaughan's Snack Bar at 201 Wilson Street, Franklinton, North Carolina, and the defendant, Linwood H. Vaughan, sold beer and wine from said premises from May 31, 1966, to May 31, 1973; that the defendant, Linwood H. Vaughan, operated said snack bar 7 days a week from approximately 8:00 o'clock a.m. to approximately 9:30 to 10:00 o'clock p.m. each day.

(14) That in 1956, at the time the defendant, Linwood H. Vaughan and wife, Sarah J. Vaughan acquired title to the property known as 201 Wilson Street, the building located on said lot was constructed for use as a dwelling house; that in 1960, the defendant, Vaughan, changed the appearance of said dwelling house adding a front portion to said building and a porch and canopy around the West and North side of said building and painted signs on said building advertising food, soft drinks, and other items sold from a snack bar; that a picture of Vaughan's Snack Bar as it appeared after said renovation is attached hereto marked 'Exhibit A'; that the only difference made in the appearance of the premises known as 201 Wilson Street by the defendants, Debnam and Lyles, is that the defendants, Debnam and Lyles, painted the building a dark red with black trim, that a picture of said building as the same presently exists is attached hereto and marked 'Exhibit B'.

(15) That at the time of the filing of this action, James Perry operated an automobile garage and repair shop on one of the lots sold by the plaintiff, Sterling Cotton Mills, Inc., and which deed carries the same restriction as the deed conveying Lot 201 Wilson Street to the defendants,

Vaughan; that said automobile garage has been operated by the said James Perry for several years prior to the institution of this action; that at the time this action was filed in the District Court of Franklin County, Tom Allen sold used cars from a lot which he owns on Wilson Street and located three lots South of the defendants Vaughan property; that the deed conveying the said lot to the said Tom Allen from Sterling Cotton Mills, Inc. contains the same restriction concerning residential property as the deed to the defendant Vaughan; that Pete Kearney operated a fabric shop on a lot conveyed to the said Pete Kearney contained the same restrictions with respect to residential property as the deed conveying 201 Wilson Street to the Vaughans; that since the institution of this action, the said fabric shop operated by Pete Kearney has been closed and since the institution of this action, the cars have been moved off of the lot now owned by the said Tom Allen.

(16) That since 1960, the defendant, Linwood H. Vaughan, has applied for and obtained numerous licenses from the State of North Carolina and from the Town of Franklinton authorizing him to operate a snack bar and sell sandwiches, short food orders, soft drinks, beer, wine, tobacco and other items from his premises known as 201 Wilson Street.

(17) That prior to closing Vaughan's Snack Bar on May 31, 1973, the defendant, Vaughan, sold groceries, hamburgers, hot dogs, beer and kerosene from the premises known as 201 Wilson Street; that the defendants, Debnam and Lyles, leased the premises known as 201 Wilson Street from the defendant, Vaughan, effective June 1, 1973, and thereafter, applied for a license to sell beer; that the State of North Carolina granted the defendants, Debnam and Lyles, a beer license in July of 1973, 7 days after the Complaint in this action was filed; that with the exception of groceries and kerosene, the defendants, Debnam and Lyles, are selling basically the same items as was previously sold by the defendant, Vaughan; that the defendant, Vaughan, operated Vaughan's Snack Bar between the hours of eight o'clock a.m. and ten o'clock p.m. and the defendants, Debnam and Lyles, operate the 'Tar Heel Lounge' from around seven o'clock p.m. to eleven to eleven-thirty p.m. five days a week and until approximately one o'clock a.m. on Friday and Saturday.

(18) It is further agreed between the parties hereto that the defendants may introduce into evidence without objection a color photograph of Vaughan's Snack Bar as the same appeared while being operated by the defendant, Vaughan, together with various and sundry licenses issued by the Town of Franklinton, the County of Franklin and the State of North Carolina to Vaughan's Snack Bar covering such items as beer, tobacco products, etc.

The foregoing Stipulation of Facts is agreed upon by each of the parties hereto.

This the 15th day of February, 1974.

ROYSTER AND ROYSTER
By: s/ T. S. Royster
Attorneys for Plaintiff

DAVIS, STURGES & TOMLINSON
By: s/ Charles M. Davis
Attorneys for the Defendants"

The trial court entered the following judgment:

"JUDGMENT (Filed August 26, 1974)

THIS CAUSE coming on to be heard before the undersigned, Chief District Judge of the Ninth Judicial District of North Carolina upon the Stipulation of Facts agreed upon by Attorneys representing the Plaintiffs and the Defendants, which Stipulation of Facts has been duly filed and forms a part of the Court Record in this action, and incorporated herein by reference, a copy of which is hereto attached and made a part of this judgment, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. That this action was properly brought under the North Carolina Rules of Civil Procedure, Chapter 26 (sic), known as the Uniform Declaratory Judgment Act (G.S. 1-253-367 both inclusive).

2. That all of the parties to this action are properly before the Court and are all represented herein by counsel.

3. That the restricted covenants for residential use only contained in all of the sixty-two deeds from Sterling

Cotton Mills (Stipulation of Facts # (7) and (8)) are reasonable in character and duration and not contrary to public policy.

4. That the character of the neighborhood or the subdivision as a whole has not changed so substantially as to render its use exclusively for residential purposes impractical.

5. That the plaintiffs, Archer W. Phelps and wife, Janice W. Phelps, the owners of two lots in said subdivision, (Lots #44 & 45, 202 & 204, Wilson Street) may enforce the covenant restricting the neighborhood and the subdivision to residential use exclusively.

6. That the plaintiff, Sterling Cotton Mills, Inc., the owner of certain parcels of land retained by it in the area of the subdivision may enforce the covenant restricting the neighborhood and the subdivision to residential use exclusively.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the defendants, Linwood H. Vaughan and wife, Sarah J. Vaughan and anyone claiming by, through or under them are hereby ordered to make no use of the lot they own in the Sterling Cotton Mills, Inc. subdivision and known as Lot #62, 201 Wilson Street, Franklinton, N. C., shown as Lot #62 on the map of the lots of Sterling Cotton Mill of record in Plat Book #4, at pages 8 and 9 in the office of the Register of Deeds of Franklin County, for other than residential purpose.

2. That plaintiff recover of the defendants their costs of this action to be taxed.

This Aug. 20, 1974.

s/ JULIUS BANZET
Chief District Judge of the
Ninth Judicial District"

Royster & Royster, by T. S. Royster, for plaintiff appellees.

Aubrey S. Tomlinson, Jr., for defendant appellants.

MARTIN, Judge.

The defendants' only exception is to the signing of the judgment for that the conclusions of law are not supported by the facts.

Defendants first contend that conditions within the area have been materially altered so as to change the character and environment of the neighborhood.

"When persons desiring to become home owners purchase property in a subdivision protected by certain desirable restrictive covenants, the security of such covenants ought not to be destroyed by slight departures from the original plan, and valid restrictions appearing in all the deeds for lots in such subdivision should not be eliminated and wiped out because of immaterial violations of such restrictions . . . . 'However, it is equally true that if the character of the community has been changed by . . . causes resulting in a substantial subversion or fundamental change in the essential character of the property, then, in such cases, equity will not rigidly enforce the restriction.' " *McLeskey v. Heinlein,* 200 N.C. 290, 156 S.E. 489 (1931).

"It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place within the covenanted area." *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 120 S.E. 2d 817 (1961) (quoting *Brenizer v. Stephens,* 220 N.C. 395, 17 S.E. 2d 471).

Doubtless, the use of such dwellings for the purposes described were violative of the restrictions imposed thereon. However, not every violation of a restrictive agreement entitles an aggrieved party to equitable relief. Each case depends on its own circumstances. "The Court said in *Rombauer v. Compton Heights Christian Church,* 328 Mo. 1, 40 S.W. 2d 545, 553: 'No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement.' " *Tull v. Doctors Building, Inc., supra.*

[1] We are of the opinion, and so hold, that the evidence does not show that the aforementioned use of the four lots is such a radical or fundamental change or substantial subversion as practically to destroy the essential objects and purposes of the

restrictive agreement as to warrant the removal of the residential restrictions.

Defendants next argue that the plaintiffs have acquiesced in the operation of the business operated by the defendant Vaughan and are now estopped to complain.

"Nor should a property owner be held to have waived his rights and to have abandoned the protection conferred upon him by such covenants by reason of disconnected and immaterial violations of the restrictions in the conveyances. This idea is expressed in *Ward v. Prospect Manor Corp.*, 188 Wis., 534, 206 N.W., 856: 'It is now generally recognized by the overwhelming weight of authority in this country that an individual lot owner is not under penalty of waiving his right to the enforcement of a restrictive covenant by his failure to take notice of such violations as do not affect him.'" *Starkey v. Gardner*, 194 N.C. 74, 138 S.E. 408 (1927).

[2] The fact that four residences were used for nonresidential purposes and not objected to by plaintiffs or other residents of the subdivision should not, in equity, be held to have estopped plaintiffs from asserting their rights against the subsequent substantial violation by the defendants. In consideration of all the evidence, we hold that the failure of the plaintiffs or other residents of the subdivision to object to the aforementioned uses for non-residential purposes does not constitute waiver or acquiescence or estoppel so as to deprive them of protection of said restrictive covenant.

We have taken into account the hardship to defendants resulting from enforcement of the restrictive covenant, nevertheless, it is our opinion that the trial court's conclusions of law were supported by the facts as stipulated.

Affirmed.

Judges VAUGHN and ARNOLD concur.

COMMERCIAL FINANCE CORPORATION v. JESSIE W. LANGSTON, ANTHONY KEITH LANGSTON, AND AARON WILLARD LANGSTON

No. 7413SC27

(Filed 5 March 1975)

1. **Dedication § 1— sale of subdivision lot by reference to plat — right of buyer to have streets on plat open**

When an owner of land has it subdivided and platted into streets and lots and thereafter sells a lot by reference to the plat, nothing else appearing, the purchaser acquires the right to have the streets shown on the plat kept open for his reasonable use.

2. **Dedication § 1— sale of lots by reference to plat — easements created in streets on plat**

Where separate owners of separate but contiguous tracts, by placing on record a plat showing the subdivision of both tracts into lots served by streets running across both tracts, and by each owner thereafter selling lots by reference to the recorded plat, effectively represented to purchasers of lots from either tract that the streets as shown on the entire plat would be available and would remain open for reasonable use, each of the separate owners in effect thereby created a joint and reciprocal easement which was both a burden and a benefit to his separate tract, and a purchaser of a lot or lots from either owner by such purchase acquired the benefit of the appurtenant easement over all of the streets shown on the plat and not merely over those portions of the streets which were located on the tract owned separately by his immediate grantor.

3. **Appeal and Error § 26— exception to signing of judgment — no review of finding of fact**

Appellant's sole exception which was directed to the signing of the judgment did not present for review the trial court's finding of fact with respect to the subdivision of the land in question.

4. **Easements § 8— easement of way for use of pedestrians and vehicles — nonexclusive easement**

Where plaintiff's predecessor in title was granted "an easement of way for the use of pedestrians and vehicles" in the 24 foot wide strip of land in controversy, and the grantors expressly reserved unto themselves and their heirs and assigns generally "a like easement in thereto the same," there was nothing in the grant of the nonexclusive easement which prevented the grantors from thereafter granting similar easements to others.

APPEAL by plaintiff from *Clark, Judge.* Judgment entered 8 June 1973. Heard in the Court of Appeals 13 February 1974.

Action for a declaratory judgment to determine the rights of the parties in a strip of land 24-feet wide by approximately

95-feet long which is a portion of the area shown on a recorded plat as a "street."

After pleadings were filed the plaintiff moved for summary judgment. The parties stipulated that there were no issues of fact to be determined and that the matters raised by the pleadings constituted questions of law. They further stipulated that if plaintiff's motion for summary judgment should be denied, the court should then find the facts, determine the questions of law presented by the pleadings, and render judgment thereon.

The pleadings and exhibits filed show the following: In 1948 Edna Smathers Cox (later Mrs. Edna Smathers Drye), plaintiff's predecessor in title, owned a tract of land on the southeastern shore of White Lake in Bladen County known as lots 1 and 2 of the Harry L. Melvin subdivision. W. R. Watkins and wife owned the adjoining property known as lots 3 and 4 of the Melvin subdivision. The common line between the Cox and the Watkins properties, being the common line between lots 2 and 3 of the Melvin subdivision, was a straight line approximately 574-feet long which extended in a northwesterly direction from the northwest margin of the public highway which circles White Lake to the water's edge on the southeastern shore of the lake. By instrument dated 24 May 1948 and recorded on 16 June 1948, Edna Smathers Cox and W. R. Watkins and wife created a "joint street" from the highway to the lake having a width of 24 feet and having as its center line the common property line dividing the properties of the parties. No question is raised in this action as to this joint boundary line street which connects the public road with the shoreline of the lake.

In the same day on which the instrument creating the joint boundary line street was recorded, 16 June 1948, there was also recorded a plat which showed the Cox and the Watkins properties and the joint boundary line street established by the agreement. This plat, which appears of record in Plat Book 4 at page 114, shows the Cox property still simply as lots 1 and 2 of the Harry L. Melvin subdivision, but shows the Watkins property, which was formerly lots 3 and 4 of the Melvin subdivision, subdivided into nine smaller lots. This plat also shows an additional 24-foot-wide street running across the Watkins property in a northeast-southwest direction on a course approximately parallel with and 150 feet from the shoreline of the lake. This additional street intersects at an approximate right angle into

the southwestern margin of the joint boundary line street created by the recorded agreement.

On 23 May 1951 a second plat was recorded. This plat, which appears of record in Plat Book 4 at page 169, shows the streets and subdivision of the Watkins property as in the previous plat, but shows the Cox (now Drye) property subdivided into smaller lots in substantially the same manner as the Watkins property had been previously subdivided. This plat also shows the additional cross street, which is marked "street" on this as well as on the previous plat, extended straight across and at an approximate right angle to the joint boundary line street. It is the land covered by this additional street as so extended across the Cox property, a tract 24-feet wide by approximately 95-feet long, which is the subject of this action.

After the recording of the first plat, which appears of record in Plat Book 4 at page 114, but before the recording of the second plat, which appears of record in Plat Book 4 at page 169, Edna Smathers (Cox) Drye and her husband conveyed to one C. C. Disher, one of plaintiff's predecessors in title, the waterfront portion of lots 1 and 2 of the Harry L. Melvin subdivision extending back from the lake shore a distance of 150 feet. The property conveyed by this deed, which was dated 19 May 1949 and recorded in Book 120 at page 561, is described therein by metes and bounds and the southeastern line of the property conveyed is identical with the northwestern boundary line of the additional cross street which was subsequently shown on the plat in Book 4, page 169, as extended across the Cox property. After the description of the waterfront property conveyed by this deed, there appears the following:

> "And the said parties of the first part do hereby convey unto the said parties [sic] of the second part, his heirs and assigns, an easement of way for the use of pedestrians and vehicles over and upon a parcel of land [there then follows a description by metes and bounds of a tract 24-feet wide which is coterminous with the area subsequently shown as a "street" on the plat in Book 4, page 169, as this "street" is extended across the Cox property, the same being the property which is the subject matter of this litigation], and the said parties of the first part, their heirs and assigns, reserving a like easement in thereto the same [sic]."

Both W. R. Watkins and Edna Cox Drye "made numerous conveyances of lots contained in said subdivision and their conveyances were made by lot numbers with reference to the subdivision of the G. T. Watkins and Edna Cox Drye property as recorded in Map Book 4, at page 114, and Map Book 4, at page 169." The defendant, J. W. Langston, is the owner of six of the nine lots which resulted from the subdivision of the Watkins property, and operates a motel business on this property. The remaining defendants are his sons and own and operate a motel business on property adjoining but not included within the boundaries of the property shown on the recorded plats above-referred to, their property abutting the northeastern end of the 24-foot-wide cross "street" shown on the plat in Plat Book 4, page 169, the status of which is here in controversy. All of the defendants and their guests have been using the cross "street" in going to and from the motel and business operated by J. W. Langston and the motel and business operated by his sons.

Prior to instituting this action, plaintiff acquired from Edna Smathers Drye and her husband, and from the other owners of all of the lots which resulted from the subdivision of the Edna Smathers Cox Drye property, quitclaim deeds conveying to plaintiff all such right, title and interest as these grantors had in the 24-foot-wide tract here in controversy.

After hearing the parties, the court entered judgment denying plaintiff's motion for summary judgment and, pursuant to the stipulation of the parties, making findings of fact. On the basis of the facts found the court made conclusions of law as follows:

> "(1) That W. R. Watkins and Edna Cox Drye by placing the Maps of recorded [sic] which are recorded in Map Book 4 at pages 114 and 169, jointly and mutually dedicated all the streets, including the street described as an easement in the deed from Edna Cox Drye, et vir to Disher, to all the lot owners of lots shown on the plats recorded in Map Book 4 at pages 114 and 169 and their successors in title.
>
> "(2) That the easement described in the deed from Edna Cox Drye et vir to C. C. Disher which is recorded in Book 120, at page 561 did not convey an exclusive easement to C. C. Disher so as to prevent a joint and mutual dedication by Edna Cox Drye and W. R. Watkins.

"(3) That the purported deeds referred to as Exhibits 6, 7, 8, 9, and 10 in the complaint [being the quitclaim deeds to plaintiff from Edna Smathers Drye and the other owners of all of the lots which resulted from subdivision of the Edna Smathers Cox Drye property] are null and void to the extent that they purport to destroy or nullify the easement created in all owners of lots within the subdivision shown on the plats recorded in Map Book 4, at pages 114 and 169 which was created by the dedication."

The court accordingly adjudged that "the streets shown on the plats recorded in Map Book 4 at pages 114 and 169, Bladen County Registry are dedicated streets, including the street in controversy, and all the lots [sic] owners of the lots within the subdivision shown on the plats recorded in Map Book 4, at pages 114 and 169 are entitled to an easement by dedication for the free and unobstructed use of said streets, including the street in controversy."

From this judgment, plaintiff appealed.

Moore & Melvin by James R. Melvin for plaintiff appellant.

Frank T. Grady and John T. McDougald for defendant appellees.

PARKER, Judge.

Separate owners of adjoining tracts record a plat showing subdivision of both tracts into lots served by streets crossing both tracts. Each owner then sells lots from his tract to third parties, in so doing making reference to the recorded plat. Do purchasers of lots from one tract thereby acquire the right to have the streets across the other tract remain open? We hold that they do.

[1] It is well settled in this State that when an owner of land has it subdivided and platted into streets and lots and thereafter sells a lot by reference to the plat, nothing else appearing the purchaser acquires the right to have the streets shown on the plat kept open for his reasonable use. *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E. 2d 30 (1964); *Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E. 2d 13 (1940); *Collins v. Land Co.*, 128 N.C. 563, 39 S.E. 21 (1901); Annot., 7 A.L.R. 2d 607.

"In a strict sense it is not a dedication, for a dedication must be made to the public and not to part of the public.

> It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots." *Land Corp. v. Styron,* 7 N.C. App. 25, 27-28, 171 S.E. 2d 215, 217 (1969).

[2] Here, the separate owners of the separate but contiguous tracts, Watkins and Cox (later Drye), by placing on record the plat recorded in Plat Book 4, page 169, showing the subdivision of both tracts into lots served by streets running across both tracts, and by each owner thereafter selling lots by reference to the recorded plat, effectively represented to purchasers of lots from either tract that the streets as shown on the entire plat would be available and would remain open for reasonable use. In effect, each of the separate owners thereby created a joint and reciprocal easement which was both a burden and a benefit to his separate tract, and a purchaser of a lot or lots from either owner by such purchase acquired the benefit of the appurtenant easement over all of the streets shown on the plat and not merely over those portions of the streets which were located on the tract owned separately by his immediate grantor.

[3] In its brief on this appeal plaintiff appellant contends that the court erred in making Finding of Fact No. 3 which states that "Edna Cox Drye subdivided Lots one (1) and two (2) of the Harry L. Melvin Subdivision and placed of record a plat of said subdivision as recorded in Map Book 4, at page 169, Bladen County Registry." In support of this contention, appellant argues in its brief that "[t]he defendant [sic] introduced no evidence whatsoever to prove that Edna Cox Drye ever recorded, authorized, or caused to be recorded" the map in question. Appellant's contention must fail, first, because there is but one exception in the entire record, and that is directed to the signing of the judgment, and "[a]n exception to the judgment does not present for review the findings of fact or the evidence on which they are based," 1 Strong, N. C. Index 2d, Appeal and Error, § 28, p. 157, and, second, because it was unnecessary in this case for defendants to introduce any evidence to prove the finding of fact which plaintiff now attempts to challenge. That finding is fully supported by the pleadings. In paragraph 3 of defendants' further answer it was expressly

alleged that Edna Smathers Cox Drye subdivided her property "and placed of record in Map Book 4, at page 169, a map of said property." This allegation was admitted in plaintiff's reply.

[4] Finally, plaintiff contends that because its predecessor in title acquired title to its waterfront lot and an appurtenant easement over the 24-foot-wide strip of land here in controversy prior to the time the plat showing the street over that strip of land was recorded, Edna Smathers Cox Drye had no right to grant rights in the street to anyone excepting only to purchasers of lots subdivided from her separate property. We find this contention without merit. All that was granted to plaintiff's predecessor in title in the 24-foot-wide strip of land here in controversy was "an easement of way for the use of pedestrians and vehicles." In the deed by which this grant was made the grantors expressly reserved unto themselves and their heirs and assigns generally "a like easement in thereto the same," and nothing in this reservation indicates that it was to be solely for the benefit of the grantors' then remaining land. Since the grantors at that time also retained the fee title to the 24-foot-wide strip, the only significance which can logically attach to their expressed reservation of "a like easement in thereto the same" must be to make clear that the grant of the "easement of way for the use of pedestrians and vehicles" did not exclude the possibility of similar use of the property by others. We see nothing in the grant of the nonexclusive "easement of way for the use of pedestrians and vehicles" which prevented the grantors from thereafter granting similar easements to others, including even unto the public generally had they chosen to do so.

The judgment appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

JACK DUNN, AND HIS WIFE, JOANN SMITH DUNN v. DAVID E. DUNN, JR., AND HIS WIFE, GERTRUDE M. DUNN

No. 7416SC912

(Filed 5 March 1975)

Frauds, Statute of § 4— conveyance of land — oral agreement to reconvey — fraud — specific performance

The evidence was sufficient to support a jury finding that plaintiff conveyed property to defendant for $7,000 upon defendant's fraudulent representation that he would execute an option to plaintiff to repurchase the property within five years for $10,000; therefore, defendant is equitably estopped to plead the statute of frauds and plaintiff is entitled to specific performance of the contract to reconvey.

APPEAL by defendants from *Webb, Judge.* Judgment entered 24 July 1974 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 20 January 1975.

Plaintiffs allege that Jack Dunn, hereafter referred to as plaintiff, and his brother David E. Dunn, Jr., hereafter referred to as defendant, entered into an agreement for plaintiff to convey to defendant his one-half undivided interest in a tract of land in Laurinburg, which they owned as tenants in common, for the sum of $7,000.00, and that defendants would execute simultaneously an option to plaintiff to repurchase the one-half interest within five years for $10,000.00; that pursuant to the agreement plaintiffs delivered the deed, but that defendant, though the option to repurchase was prepared by his attorney, fraudulently refused to execute and deliver the same to plaintiff and now fraudulently refuses to acknowledge any such right of the plaintiff to repurchase.

Defendants answer that an option was prepared by their attorney at the request of plaintiff but that they refused to execute it because they never agreed to give such option to repurchase to plaintiff, and they pled the statute of frauds.

Plaintiffs reply that defendant represented that he and his wife had executed the option and put it in their safe, which was false, and that defendants are estopped from pleading the statute of frauds because of fraud.

At trial plaintiff's evidence tended to show the facts as alleged in his pleadings, and he explained that he needed $7,000 for his used car business but his bank would not accept a one-

half undivided interest in the tract as security; so he proposed to the defendant the deed with option to repurchase agreement which was accepted by defendant, who advised plaintiff that he would have his attorney prepare both the deed and option. On 12 February 1968, when defendant informed plaintiff that the papers were ready, he and his wife went to the attorney's office, executed the deed, and plaintiff read the unsigned option to repurchase and found it acceptable. Later the same day plaintiff went to defendant's office, got the $7,000, and asked for the executed option, but defendant told him that he did not need it then and that it was in his safe. Plaintiff thereafter made several demands for the option but defendant refused. He did not know the option was not executed until after he brought this action.

Plaintiff also offered the testimony of their mother to the effect that defendant told her on 12 February 1968 that he had agreed to give plaintiff an option to repurchase within five years for $10,000; and the testimony of his sister that shortly thereafter defendant told her that plaintiff thought he was going to get the property back but he was not.

Plaintiff testified that the fair market value of his one-half interest in the tract on 12 February 1968 was at least $22,500. The owner of a nearby tract testified that the one-half interest was worth $25,000 to $30,000 at that time.

Defendant testified that no option was ever discussed and the deed was an outright conveyance; that plaintiff mentioned a repurchase for $10,000 more than two years after the deed was made. His wife testified that after she signed the deed of trust to receive the bank loan on 16 February 1968, a bank officer gave her a paper that she took home and put away, but she did not know that it was an option until she found and read it after this action was brought.

The case was tried before a jury. The issues submitted to the jury at the close of the evidence and their verdict thereon were as follows:

> "1. Did the defendant, David E. Dunn, Jr., agree to grant to the plaintiffs a five (5) year option to repurchase the land described in Paragraph III of the complaint for $10,000.00 in consideration of the plaintiff, Jack Dunn,

conveying to the defendant for $7,000.00 his one-half interest in the land described in Paragraph III of the complaint?

ANSWER: Yes.

2. Was the plaintiff, Jack Dunn, induced to execute the deed dated February 12, 1968, by the fraud of the defendant, David E. Dunn, Jr.?

ANSWER: Yes.

3. Was the defendant, David E. Dunn, Jr., acting as agent for his wife, Gertrude M. Dunn, in the transaction with Jack Dunn?

ANSWER: Yes."

The trial judge entered Judgment ordering the defendants, upon payment of $10,000 into the office of the Clerk of Superior Court, to execute and deliver to the plaintiffs a good and sufficient deed to the lands described in the complaint. From this judgment, defendants appealed.

William A. Vaden for the plaintiff.

Jennings G. King for the defendant.

CLARK, Judge.

The evidence is ample to support the jury finding that the plaintiff executed the deed for his one-half undivided interest in the lands to the defendant with the understanding and agreement that the plaintiff would have the option to repurchase the said one-half interest as alleged. There was evidence that the oral agreement had been reduced to writing in the form of an option to repurchase, which was prepared by the defendants' attorney and that defendant falsely represented that he and his wife had executed the option, had put it in a safe place and would deliver it to plaintiff later. The fact that the value of the property conveyed was much greater than the consideration for the deed is a factor tending to support the agreement. *McKinley v. Hinnant,* 242 N.C. 245, 87 S.E. 2d 568 (1955).

The evidence is also sufficient to support the jury finding that defendant fraudulently induced the plaintiff to execute the deed. The evidence that defendant made statements to his sister that he did not intend to reconvey the lands to the plaintiff, while made after the delivery of the deed, were nevertheless

probative of his original intent and purpose. *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919 (1956).

It is clear that an oral agreement to acquire legal title to land and thereafter reconvey to the grantor upon specified terms and conditions is within the statute of frauds, (G.S. 22-2), and is unenforceable in the absence of fraud, mistake or undue influence. A parol trust in favor of a grantor cannot be engrafted upon such a deed. *Conner v. Ridley,* 248 N.C. 714, 104 S.E. 2d 845 (1958).

But in proper cases an equitable estoppel based upon grounds of fraud may override the statute of frauds. *McKinley v. Hinnant, supra.* In *McNinch v. Trust Co.,* 183 N.C. 33, 38, 110 S.E. 663, 666 (1922), an action based on breach of a constructive trust to hold land and obtain the best price therefor, the Court said, "[i]t is not necessary that actual fraud be shown, but the establishment of such conduct and bad faith . . . as would shock the conscience of a chancellor will suffice to invoke the aid of a court of equity." See also 73 Am. Jur. 2d, Statute of Frauds, § 567 (1974).

We do not find a case in this State where the relief sought is the specific performance of a contract to reconvey lands based on equitable estoppel because of fraud. There are numerous cases where the grantor sought to have a transaction of this nature declared a mortgage. *Ferguson v. Blanchard,* 220 N.C. 1, 16 S.E. 2d 414 (1941); *Ricks v. Batchelor,* 225 N.C. 8, 33 S.E. 2d 68 (1945); *McKinley v. Hinnant, supra; Hardy v. Neville,* 261 N.C. 454, 135 S.E. 2d 48 (1964). Our Supreme Court has recognized the doctrine of equitable estoppel and there is some indication in *McNinch v. Trust Co., supra,* that in an appropriate case of estoppel based on fraud, it would uphold the specific performance of such a contract to reconvey.

In other jurisdictions it has been held that the conveyance of land by the plaintiff to the defendant, under an oral agreement by the latter to reconvey to the plaintiff, has been held to constitute a sufficient part performance to entitle the plaintiff to a specific performance of the contract to reconvey. See Annot. 101 A.L.R. 923 at 1108 (1936). In *Cloniger v. Cloniger,* 261 S.C. 603, 193 S.E. 2d 647 (1973), the court upheld the right of the plaintiff to the specific performance of defendant's oral promise to reconvey land to the plaintiff when he was able to repay costs incurred by defendant, together with interest.

There is no evidence that the plaintiff made a tender to the defendant of the sum of $10,000, the agreed consideration for repurchase; but here the evidence is clear that the defendant disavowed the contract, and this relieved the plaintiff of any necessity of thereafter tendering repayment. *Bateman v. Hopkins*, 157 N.C. 470, 73 S.E. 133 (1911); 7 Strong, N. C. Index 2d, Tender (1968).

The defendant assigns as error the three issues submitted to the jury. Upon our review we find that the issues of contract, fraud and agency were sufficient as to all determinative facts. Since the charge of the court was omitted from the record on appeal, it is presumed that the jury was properly instructed on the law of equitable estoppel based on fraud. We also find that the issues submitted support the judgment.

Under the circumstances in this case, we believe that the defendants are equitably estopped to plead the statute of frauds in defense of the plaintiffs' action and that the verdict of the jury was fully supported by the evidence.

Defendants' other assignments of error relate to questions of evidence, and upon review we find no prejudicial error.

It is noted that the judgment provides that defendants execute a fee simple deed to the lands described. Obviously, the judgment should be corrected to provide that the defendants execute a deed to the plaintiffs conveying a one-half undivided interest in the lands described upon tender of the option price of $10,000. And, except as remanded for this correction in the judgment, we find

No error.

Chief Judge BROCK and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LARRY EUGENE CASSELL

No. 7418SC878

(Filed 5 March 1975)

1. Homicide § 21— second degree murder — aider and abettor

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of second degree murder as an aider

and abettor where it tended to show that defendant and the actual perpetrator argued with deceased in a bar, defendant and the perpetrator obtained shotguns from defendant's car, defendant threatened to "blow the door down" when the bartender prevented them from reentering the bar with the shotguns, defendant threatened to kill deceased if he followed defendant and the perpetrator from the lounge, deceased followed them in a car when they left the lounge, defendant was driving and the perpetrator reached across in front of defendant with a shotgun and fired into the car operated by deceased, and defendant fled from the scene of the crime.

2. **Criminal Law § 9— trial for aiding and abetting second degree murder — manslaughter guilty plea by perpetrator**

Defendant could properly be tried for second degree murder as an aider and abettor although the State had previously allowed the actual perpetrator to plead guilty to voluntary manslaughter.

3. **Criminal Law §§ 9, 113— aiding and abetting — statement to victim — communication to perpetrator — manner of driving car**

In a prosecution of defendant for second degree murder as an aider and abettor, the trial court did not err in instructing the jury that it could convict defendant if it found that defendant was present and knowingly aided the perpetrator by telling deceased that if he followed them they would kill him without also instructing the jury that the State must prove defendant's statement was communicated to the perpetrator where the evidence showed that defendant and the perpetrator were together when defendant made the statement to the deceased; nor did the court err in instructing the jury that it could convict defendant if it found defendant was present and aided and abetted the perpetrator by driving his automobile in such a manner as to permit the perpetrator to fire the fatal shot.

4. **Criminal Law § 78— stipulation as to cause of death — relevancy of medical testimony and X-rays**

Stipulation that decedent died as a result of a gunshot wound inflicted by a third person did not render irrelevant a physician's testimony as to the injuries sustained by decedent and the treatment of those injuries and X-rays showing shotgun pellets in decedent's head where the State contended defendant aided and abetted in the commission of the crime by driving his automobile in such manner as to permit the actual perpetrator to shoot decedent while decedent was operating an automobile, since evidence of the nature and location of the wounds would aid the jury in determining the relative positions of the two automobiles at the time the fatal shot was fired and would not serve only to inflame the jury.

APPEAL by defendant from *Long, Judge.* Judgment entered 16 May 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 January 1975.

This is a criminal prosecution wherein the defendant, Larry Eugene Cassell, was charged in a bill of indictment, proper in

form, with first degree murder. Immediately prior to arraignment, however, the State announced that it would not prosecute the defendant for first degree murder but that it had elected to prosecute him for "the lesser included offense of murder in the second degree, and for such other lesser included offenses as the evidence may show."

Defendant entered a plea of not guilty and the State offered evidence tending to show the following. At about 6:00 p.m. on 1 November 1973, the deceased, Bruce Garner, accompanied by several friends, went to the Flamingo Bar and Grill on Summit Avenue in Greensboro to drink beer. The defendant and a friend, Jimmy Dale Hundley, were at the Flamingo when Garner and his friends arrived. Sometime thereafter, Garner accused Hundley and the defendant of staring at him. A short conversation ensued, after which the defendant and Hundley walked out of the Flamingo, crossed the street, and obtained two shotguns from the defendant's car. With the defendant in the lead, the two men returned to the bar and grill. When the bartender prevented them from going inside, the defendant said: "Listen I don't have a beef with you but I do with a boy inside. If you don't move, I'm going to blow the door down." The bartender nevertheless refused to allow the defendant and Hundley to enter the Flamingo with the shotguns. At this point the defendant told Garner, who was standing inside the door: "If you follow me, I'm going to kill you." Defendant and Hundley returned to their car and, with the defendant driving, headed north on Summit Avenue. Immediately thereafter, Garner borrowed a friend's car and drove away in the same direction.

Officer J. D. Shelton, Jr., of the Greensboro Police Department, testified that shortly after 9:30 p.m. he received a call to investigate an accident on Summit Avenue. When he arrived at the scene, he discovered that a 1965 Thunderbird had wrecked in the front yard of the Proximity School. He observed a hole "approximately the size of a silver dollar" in the front window on the passenger side of the car and extensive injury to the face of the driver, who he later learned was Bruce Garner.

Defendant stipulated that Bruce Garner died from a shotgun blast to the face inflicted by Jimmy Dale Hundley while a passenger in the defendant's car and did not object to the introduction into evidence of a statement made by the defendant on 2 November 1973.

R. C. Booth of the Greensboro Police Department, who took the defendant's statement, testified that the defendant was advised of his constitutional rights and that the defendant signed a "Waiver of Rights" form.

The defendant told Booth that on the previous evening Hundley and another man, who was a stranger to him, became involved in an argument at the Flamingo Bar and Grill. When the defendant and Hundley decided to leave, this same person, along with approximately four other males, followed them outside of the Flamingo and "hollered something to them". The defendant and Hundley each took a shotgun from the defendant's car and told the group that they did not want any trouble.

Booth further testified as follows:

> "He [the defendant] said they got in the car and that he put the automatic shotgun on the back seat and folded the back part of the seat down; said that Jimmy laid his gun in the front seat, and they started the car up and hit Summit Avenue, headed north out of town. He said along about the Northeast Shopping Center we noticed this T-Bird right up on our bumper and said that they kept on going, and that the T-Bird started weaving in and out. He said that that went on from the Northeast Shopping Center all the way up to Proximity School. He said that he motioned for him—the guy in the T-Bird to go on two or three times. He said that he hollered and told him to go on. He said that he was on the outside lane and the guy in the T-Bird was on the inside lane. He said at that point Jimmy pointed the gun out my window across in front of me and shot; said after he shot, I kept going. The T-Bird went to the left, crossed the other side of the road onto the Proximity School yard. He said that he went on home to Joyce Street . . . . "

Booth also testified that Proximity School is approximately four or five blocks from the Northeast Shopping Center and that Summit Avenue is a two lane road.

Defendant did not testify or offer any evidence. The jury found the defendant guilty of second degree murder, and the court sentenced him to a prison term of not less than eight (8) nor more than fifteen (15) years. Defendant appealed.

Attorney General Edmisten by Asst. Attorney General Walter E. Ricks III and Assoc. Attorney Robert W. Kaylor for the State.

Smith, Carrington, Patterson, Follin & Curtis by Kenneth M. Carrington and Michael K. Curtis for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit.

In the case at bar, defendant was prosecuted on the theory that he aided and abetted Jimmy Dale Hundley in the commission of second degree murder. An aider and abettor is one who advises, procures, encourages, or assists another in the commission of a crime. *State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973).

> " 'A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.' *State v. Holland,* 234 N.C. 354, 358, 67 S.E. 2d 272; *State v. Johnson,* 220 N.C. 773, 776, 18 S.E. 2d 358. ' . . . Mere presence, even with the intention of assisting in the commission of a crime cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to him (the perpetrator) . . . . ' *State v. Hoffman,* 199 N.C. 328, 333, 154 S.E. 314. However, there is an exception. ' . . . when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting.' *State v. Holland, supra.*" *State v. Hargett,* 255 N.C. 412, 415, 121 S.E. 2d 589, 592 (1961).

Circumstances to be considered in determining whether a defendant aided and abetted the actual perpetrator of a crime include the following: (1) the relationship of the defendant to the actual perpetrator; (2) the motive tempting the defendant to assist in the crime; (3) presence of the defendant at the time

and place of the crime; and (4) conduct of the defendant both before and after commission of the crime. *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5 (1952).

[1] In the instant case, the State offered evidence tending to show (1) that the defendant and Hundley were friends; (2) that the defendant was angry with the deceased; (3) that the defendant and Hundley obtained two shotguns from the defendant's car; (4) that the defendant threatened to "blow the door down" when the bartender prevented them from entering the Flamingo Bar and Grill with the shotguns; (5) that the defendant threatened to kill the deceased if he followed them; (6) that when he and Jimmy Dale Hundley left the Flamingo, Hundley put his shotgun in the front seat of the car; (7) that the defendant was driving the car from which Hundley shot the deceased; (8) that Hundley fired the shotgun from out of the defendant's window; and (9) that the defendant left the scene of the crime. We conclude that when taken in the light most favorable to the State, there was sufficient evidence to allow the jury to find that the defendant aided and abetted Hundley in the commission of second degree murder.

[2] Defendant next contends that the trial court erred in placing him on trial for second degree murder because Jimmy Dale Hundley, the actual perpetrator of the crime, had previously pleaded guilty to voluntary manslaughter.

One who aids and abets in the commission of a felony is a principal in the second degree and is equally liable with the actual perpetrator of the crime. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971).

> "It is not necessary that the person who actually perpetrated the deed be tried and convicted before the one who aided and abetted in the crime can be tried and convicted. *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127. Indeed, this Court has held that where one principal has been acquitted at a former trial it was no bar to the trial of the others who were indicted as principals. *State v. Whitt,* 113 N.C. 716, 18 S.E. 715. See Annot., 24 A.L.R. 603; 21 Am. Jur. 2d Criminal Law § 101. Obviously there must be proof that the offense has in fact been committed before one may be convicted of aiding and abetting in its commission. *Cf. State v. Gainey,* 273 N.C. 620, 160 S.E. 2d 685; *State v. Spruill,* 214 N.C. 123, 198 S.E. 611." *State v. Beach, supra* at 269.

Although the State allowed Hundley to plead guilty to voluntary manslaughter prior to defendant's trial, Hundley's guilty plea did not, as contended by the defendant, determine that the crime of second degree murder had not been committed. This assignment of error is, therefore, overruled.

[3] Based on exceptions duly noted in the record, the defendant contends the court erred in instructing the jury that it could convict the defendant if it found beyond a reasonable doubt that the defendant was present when Hundley committed the crime and that the defendant knowingly encouraged and aided Jimmy Hundley by telling the deceased if he followed them they would kill him or by driving the car in such a way as to permit the shooting.

Defendant argues that where the State relies on words of encouragement as a basis for the jury's finding that the defendant aided and abetted in the perpetration of the crime, the State must prove not only that the words were uttered but that they were actually communicated to the perpetrator. Ordinarily, where the State relies on words of encouragement or incitement to show that the defendant aided and abetted the actual perpetrator of the crime, the State must also prove that the words were communicated to the perpetrator, 22 C.J.S. Criminal Law, § 88(2); but in the present case, the State was not relying solely on the defendant's statement to the deceased that if he followed them he would be killed. This statement was merely one incident in a series of events linking the defendant and Hundley to the commission of the crime.

The evidence discloses that Hundley had been present all evening and left the Flamingo with the defendant and that each man got a shotgun and returned to the bar and were together when the defendant made the statement to the deceased. Under the circumstances, it was not necessary for the State to prove that the statement made by the defendant to the deceased was communicated to Hundley. Nor do we find any error in the court's instructing the jury that it could convict the defendant if it found beyond a reasonable doubt that the defendant was present when Hundley committed the crime and aided and abetted him by driving the automobile in such a manner as to permit the shooting. Driving the automobile in such a manner as to permit Hundley to fire the fatal shot was simply the final incident in the series of events linking the defendant and Hundley to the crime. When the charge is considered contextually as

a whole, we think it is fair, complete and free from prejudicial error.

[4] By assignment of error number six, defendant next contends that the trial court committed prejudicial error in allowing Dr. Phillips, after the defendant had stipulated that Garner died as a result of a gunshot wound inflicted by Hundley, to testify as to the injuries sustained by Garner and the treatment he gave for these injuries and in allowing into evidence an X-ray photograph showing shotgun pellets in the deceased's head. Citing *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969) and *State v. Wall,* 243 N.C. 238, 90 S.E. 2d 383 (1955), defendant argues that this evidence was rendered irrelevant by the stipulation and had no probative value with respect to any issue to be determined by the jury and that its admission was prejudicial because it served only to inflame the jury and incite prejudice against the defendant. Relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy; however, if the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. *State v. Wall, supra.*

Under the circumstances of this case, we cannot say that the evidence challenged by these exceptions was irrelevant and that its only effect or purpose was to inflame the jury against the defendant. Here, the State not only had the burden of proving that Garner died as a result of gunshot wounds inflicted by Hundley, it had to introduce evidence from which the jury could find beyond a reasonable doubt that the defendant aided and abetted Hundley in the commission of the crime; and, in order to do so, the State had to offer evidence that the defendant drove the automobile in such a manner as to permit Hundley to fire the fatal shot. The nature and extent of the wounds, and their precise location on Garner's body, would be of considerable aid to the jury in determining the relative position of the two automobiles when the fatal shot was fired. This in turn would assist the jury in deciding whether the defendant aided and abetted Hundley by driving the automobile in such a manner as to permit him to reach across in front of the defendant with his shotgun and fire with deadly accuracy into the automobile operated by Garner. While the stipulation relieved the State of the burden of proving the cause of Garner's death, it did not, in our opinion, render irrelevant any evidence which tended to shed any light on the defendant's connection with that death.

In any event, it is our opinion that the defendant has failed to show that he was prejudiced by the admission of the physician's testimony, since Officer Shelton testified without objection immediately before Dr. Phillips in considerable detail as to the injuries sustained by Garner. This assignment of error is not sustained.

Defendant has other assignments of error which we have carefully considered and find to be without merit. We find that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

JAMES CARL WALL v. SARAH KING WALL

No. 7410SC905

(Filed 5 March 1975)

1. **Husband and Wife § 17— estate by entireties — termination — charge against wife's share from partition sale — insufficient evidence**

In a proceeding instituted by plaintiff who was the divorced husband of defendant for a partition sale of certain real property owned by them as tenants in common, the trial court erred in entering summary judgment for plaintiff charging defendant's share of the proceeds from the partition sale with the amount of a judgment declared by a judge in a prior action between the same parties, since plaintiff alleged that the property was subject to the judgment described in the petition, that allegation was denied by defendant, and the question thereby raised could not be determined from the record presented to the trial court.

2. **Rules of Civil Procedure § 56— summary judgment — findings of fact by trial court unnecessary**

It is not necessary for the trial judge in passing on motions for summary judgment to make findings of fact.

3. **Husband and Wife § 17— estate by the entireties — termination by absolute divorce — no reimbursement for sums spent for property prior to termination**

Upon divorce the two former spouses become equal cotenants of property owned by the entireties even though one of the former spouses paid the entire purchase price, and each spouse is entitled to an undivided one-half interest in the property and is entitled to partition the property; however, expenditures for the property after

the final decree of absolute divorce are treated as they normally would be in a tenancy in common.

4. **Husband and Wife § 17— termination of estate by entireties — no reimbursement for sums spent on property prior to termination**

The trial court correctly concluded that the defendant was not entitled to be reimbursed for sums paid on an indebtedness encumbering an estate by the entireties during her marriage to plaintiff, but she was entitled to credit for all sums paid by her on the indebtedness after the judgment of absolute divorce.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 12 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 24 January 1975.

In this proceeding the plaintiff, James Carl Wall, divorced husband of the defendant, Sarah King Wall, filed a petition on 7 February 1974 for a partition sale of certain real property owned by them as tenants in common. In his petition plaintiff alleged that the property was subject to a deed of trust dated 9 October 1963 and recorded in Book 1571, Page 199, Wake County Registry, and subject "to a judgment dated November 26, 1973 and recorded in judgment Docket Book 27, Page 76."

The defendant filed answer admitting that the property was subject to a deed of trust but denied that it was subject to the judgment described in the petition. Defendant also filed a counterclaim seeking reimbursement of sums allegedly paid by her from 1 July 1958 to 4 November 1963 toward the reduction of the outstanding indebtedness on a note and deed of trust executed by the parties on 19 July 1950 and reimbursement of sums paid by her from 1963 until the date of filing the counterclaim on a note and deed of trust executed by the parties on 9 October 1963.

Plaintiff filed a reply denying the material allegations of the counterclaim.

Pursuant to G.S. 1-399, and upon motion of plaintiff, the proceeding was transferred from the clerk to the superior court for trial upon all issues raised by the pleadings.

On 5 March 1974, plaintiff filed a motion for summary judgment. On 8 July 1974, defendant filed an affidavit in opposition to the motion for summary judgment wherein she alleged the following:

"2. That from July 1, 1958, to December 1, 1963, I paid from personal funds all monthly payments of principal,

interest, taxes and insurance as they became due on outstanding mortgages on the house and lot located at 1201 Mitchell Street, Raleigh, North Carolina.

3. That from December 1, 1963, until January 1, 1973, in lieu of paying myself $20.00 per week under order of the Court, I paid all monthly payments of principal, interest, taxes and insurance on 1201 Mitchell Street, Raleigh, North Carolina, from the guardianship account of James Carl Wall as his guardian.

4. That from January 1, 1973, to date, I have paid from personal funds all monthly payments of principal, interest, taxes and insurance on 1201 Mitchell Street, Raleigh, North Carolina."

When the matter came on for hearing on plaintiff's motion for summary judgment, Judge Bailey made the following pertinent recital:

"It was stipulated between the parties that the parties were divorced on February 6, 1974, the property in question being owned as tenants by the entirety; and plaintiff stipulated that defendant was entitled to an accounting from any proceeds of the sale of the property to be reimbursed for any payments made by the defendant for the benefit of the property as payments on the mortgage since the date of divorce, February 6, 1974."

Judge Bailey made the following findings of fact:

"1. Plaintiff and defendant were married and owned the property in question as tenants by the entirety for all times relevant up to the date of February 6, 1974, when ownership in the property was converted to a tenancy in common by the divorce of the parties.

2. Judge Hamilton H. Hobgood in Civil Action 72 CVS 9198 between the same parties entered a judgment on November 26, 1973, copy of which is attached to this judgment, which judgment entered by Hobgood, J., considered all of the equities of the various payments between the parties, including the payments by the defendant on the mortgage for the home in question here, as well as other payments by and between the parties."

The trial judge made the following conclusions of law:

"1. As a matter of law, neither the plaintiff nor the defendant owning property as a tenancy by the entirety prior to their divorce are entitled to any reimbursement for payments on the mortgage or for other benefits to the property during their marriage.

2. The judgment of Hobgood, J., entered November 26, 1973, in Civil Action 72 CVS 9198, attached hereto, specifically deals with and resolves the equitable issues raised in defendant's answer and counterclaim.

3. The defendant is entitled to reimbursement prior to division of the proceeds of the sale for any amount paid by her for the benefit of the property in payment of mortgages on the property since the divorce on February 6, 1974.

4. The plaintiff is entitled to have the property sold pursuant to its petition to partition.

5. The plaintiff is entitled to have defendant make a payment of Seven Hundred Twenty-Eight and 63/100 Dollars ($728.63) toward a reduction of the balance due on the note and deed of trust prior to the sale at partition, or a credit in that sum from the proceeds of the sale pursuant to the judgment herein referred to by Hobgood, J. in 72 CVS 9198."

Based upon his findings of fact and conclusions of law, Judge Bailey entered summary judgment for plaintiff. Defendant appealed.

Kimzey, Mackie & Smith by Stephen T. Smith for plaintiff appellee.

Thomas S. Erwin for defendant appellant.

HEDRICK, Judge.

[1] The pleadings raise only the question of how the proceeds of the partition sale of the property shall be divided between the tenants in common. In his petition the plaintiff alleged that the property was subject to a judgment dated 26 November 1973, recorded in Docket Book 27, page 76. The defendant denied this allegation. Nothing further appears in the record regarding the judgment described in the petition. However, the trial judge

incorporated by reference in his findings of fact a judgment entered by Judge Hobgood dated 26 November 1973 in Case No. 72 CVS 9198 between the same parties and concluded that:

> "The plaintiff is entitled to have defendant make a payment of Seven Hundred Twenty-Eight and 63/100 Dollars ($728.63) toward a reduction of the balance due on the note and deed of trust prior to the sale at partition, or a credit in that sum from the proceeds of the sale pursuant to the judgment herein referred to by Hobgood, J. in 72 CVS 9198."

The effect of this conclusion was to declare that the judgment described in the findings of fact was a lien on defendant's interest in the property. It may be that the judgment referred to in the findings of fact is a lien against the property in question, but there is simply nothing in the record to support such a conclusion. Moreover, it may be that the property in question is subject to a judgment described in the petition (Docket Book 27, page 76), but this allegation was denied by defendant and the question thereby raised has not been determined and could not be determined from the record presented to Judge Bailey. Therefore, summary judgment for plaintiff charging defendant's share of the proceeds from the partition sale of the property, $728.63, pursuant to the judgment of Hobgood described in the findings of fact, was not appropriate; and that portion of the order must be vacated and the proceeding remanded to the superior court for a determination of to what extent, if any, the property in question is subject to a judgment as described in the petition.

[2] We note the error discussed above might have been avoided if the trial judge, rather than undertaking to find facts to support his conclusions of law, had determined the plaintiff's motion for summary judgment on the record presented to him. We point out again that it is not necessary for the trial judge in passing on motions for summary judgment to make findings of fact. The following, from *General Teamsters, Chauffeurs & Helpers U. v. Blue Cab Co.*, 353 F. 2d 687, 689 (7th Cir. 1965), may be instructive:

> "The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented."

With respect to defendant's counterclaim for reimbursement of sums paid on notes secured by deeds of trust encumbering the property in question, the defendant assigns as error the court's conclusion that:

> "As a matter of law, neither the plaintiff nor the defendant owning property as a tenancy by the entirety prior to their divorce are entitled to any reimbursement for payments on the mortgage or for other benefits to the property during their marriage."

Citing *Roberts v. Barlowe,* 260 N.C. 239, 132 S.E. 2d 483 (1963) and *Henson v. Henson,* 236 N.C. 429, 72 S.E. 2d 873 (1952), defendant contends she is entitled to a hearing on her equitable counterclaim for reimbursement of sums paid by her out of her personal funds during her marriage to the plaintiff on the indebtedness secured by deeds of trust on the property owned by them as tenants by the entirety.

The cases cited by the defendant stand for the proposition that once an estate by the entirety has been dissolved by decree of absolute divorce and the husband and wife become owners of the property as tenants in common, either party in answer to a petition for partition is entitled to a hearing on his or her equitable claim for reimbursement for funds expended as a tenant in common toward the reduction of an encumbrance on the common property.

[3] The general rule is that upon divorce the two former spouses become equal cotenants even though one of the former spouses paid the entire purchase price. Each spouse is entitled to an undivided one-half interest in the property and is entitled to partition the property. However, expenditures for the property after the final decree of absolute divorce are treated as they normally would be in a tenancy in common. 2 Lee, North Carolina Family Law § 120 (1963); 4A Powell, Law of Real Property § 624 (1974); 27A C.J.S. Divorce § 180 (1959).

[4] In the present case, defendant's counterclaim for reimbursement includes sums allegedly paid by her on the indebtedness while she and the plaintiff owned the property as tenants by the entirety and while they owned the property as tenants in common. The stipulation between the parties supports the decree that the defendant must be given credit for all sums paid by her on the indebtedness after the judgment of absolute divorce. An estate by the entirety is a form of co-ownership of real

property by a husband and wife in which each is deemed to be seized of the entire estate, with neither spouse having a separate or undivided interest therein. *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566 (1924); 2 Lee, North Carolina Family Law § 112 (1963). Thus, because of the nature of the estate by the entirety, we are of the opinion that the trial court correctly concluded that the defendant was not entitled to be reimbursed for sums paid on the indebtedness encumbering such an estate during her marriage to the plaintiff. This decision makes it unnecessary for us to discuss whether the judgment referred to in the findings of fact is res judicata as to this portion of the defendant's alleged counterclaim.

Therefore, summary judgment for plaintiff, in effect an order allowing plaintiff's motion to dismiss defendant's counterclaim for reimbursement of sums paid on the indebtedness during the marriage, pursuant to Rule 12(b) (6) for failure to state a claim for which relief could be had, must be affirmed.

The result is: that portion of the judgment ordering the sale of the property for partition and dismissing defendant's counterclaim to be reimbursed money paid by her during her marriage to the plaintiff is affirmed; that portion of the judgment decreeing that credit be given to defendant for any sums paid on the deeds of trust encumbering the property since 6 February 1974 (date of judgment of final divorce) is affirmed; that portion of the judgment decreeing that plaintiff is entitled to $728.63 credit pursuant to the judgment of Hobgood entered in 72 CVS 9198 is vacated.

The proceeding is remanded to the superior court to determine to what extent, if any, the property in question is subject to a judgment as described in the petition. Upon remand, the trial court will also determine the exact amount of money paid by the defendant upon the indebtedness encumbering the property after she and the plaintiff were divorced.

Affirmed in part; vacated and remanded in part.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JACK CONRAD GLEASON

No. 7418SC1004

(Filed 5 March 1975)

1. **Narcotics § 4.5— possession and sale of MDA — instructions — guilty knowledge**

In a prosecution for possession and sale of the controlled substance MDA, the evidence did not require the court to give instructions on guilty knowledge of either the fact of possession or of the fact of the narcotic character of the substance.

2. **Criminal Law § 169— exclusion of evidence — similar evidence admitted**

The exclusion of evidence was not prejudicial where evidence of the same import had already been admitted and the subject had been amply covered by other testimony.

3. **Criminal Law § 51; Narcotics § 3— qualification of expert — testimony that substance contained MDA**

State's witness was properly qualified as an expert in forensic chemistry to permit him to express his opinion, based on his chemical analysis of a substance allegedly purchased from defendant, that the substance contained MDA.

4. **Criminal Law § 42; Narcotics § 3— MDA — chain of custody**

Chain of custody of the controlled substance MDA purchased from defendant was sufficiently shown to permit its admission in evidence.

5. **Criminal Law § 97— reopening of State's case**

The trial court did not abuse its discretion in permitting the State to reopen its case after the State had rested but before defendant put on any evidence.

6. **Criminal Law § 26; Narcotics § 5— double jeopardy — possession and sale of same narcotics**

Defendant was not subjected to double jeopardy by his convictions for both the possession and sale of the same controlled substance.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 9 July 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 February 1975.

Defendant was charged in a two-count bill of indictment with (1) possession and (2) the sale and delivery of 3, 4-methylenedioxy amphetamine (MDA), a controlled substance under Schedule I of the North Carolina Controlled Substances Act. At arraignment, the defendant pled not guilty to both counts.

The evidence for the State tended to show that an undercover vice squad officer, Detective Cobbler, went to the defend-

ant's residence on 1 March 1974; that he was invited inside where several other people were present; that the defendant came into the room, speaking to Cobbler asking him if he wanted the stuff; that they retired to a back room of the house; that on a table in the room was a large clear bag containing several small bags, each of which contained a white powder substance; and that the defendant, representing the powder to be real good MDA, sold a gram to Detective Cobbler for $30.00. Cobbler thereafter took the plastic bag to the office of the Greensboro Vice Division where he had it checked and packaged. He eventually locked it up in his own individual lockbox. Later, on 19 March, he turned the package over to a Detective Roy Riggs who in turn took it to the SBI chemical laboratory in Raleigh. There, Riggs personally handed the package to Dr. Charles McDonald, a chemist, who placed his file number and initials on the package and locked it up in his evidence locker until he eventually analyzed the package's contents on 28 March. As a result of his analysis, McDonald found 3, 4-methylenedioxy amphetamine to be present. After the analysis, he replaced the package in his evidence locker and Detective Riggs picked it up the next day. Riggs thereupon returned it to Detective Cobbler, and on 8 April, Cobbler checked the package in at the evidence room of the Greensboro Police Department where it remained until trial.

The defendant's evidence was to the effect that Cobbler came to the house on the day in question, but that he never retired to a back room with the defendant. There was also testimony that no table of any kind was present in the back room to which the defendant and Cobbler allegedly retired. None of the witnesses for the defendant saw any controlled substance in the house and testified that Cobbler left only ten minutes after he had arrived.

The defendant's motions for judgment as of nonsuit at the close of the State's case and his own were denied. The case was submitted to the jury which found him guilty on both counts.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Attorney General Edmisten by Assistant Attorney General Edwin M. Speas, Jr., for the State.

Smith, Carrington, Patterson, Follin and Curtis by Kenneth M. Carrington for the defendant.

CLARK, Judge.

[1] The defendant contends that the trial court erred in failing to properly define and instruct the jury that the defendant's possession of a controlled substance must be a "knowing" possession and in failing to instruct that in order for the defendant to "knowingly" possess a controlled substance, he must know of its narcotic character. Since a similar argument was made with regard to the count charging sale and delivery, both counts will be treated together.

In the present case it it noted that the trial court apparently followed Patterned Jury Instructions (N.C.P.I. — Crim. 260.10) wherein the word "knowingly" is used in explaining what the State must prove but is omitted in the "final charge".

It is uniformly held throughout the United States that knowledge of the presence of the contraband drug is an essential element of the offense of possession in violation of Sec. 2 of the Uniform Narcotic Drug Act. A majority of the states also require knowledge of the character of the substance as an essential element. For a compilation of cases, see Annot., 91 A.L.R. 2d 810 (1963).

The question of guilty knowledge was raised in *State v. Stacy,* 19 N.C. App. 35, 197 S.E. 2d 881 (1973) where there was evidence that the defendant was a mere messenger boy in carrying a package to someone and had no knowledge of its contents. A new trial was ordered for failure of the trial court to instruct the jury that the defendant was guilty only in the event he *knew* the package contained heroin.

Clearly, the evidence in *State v. Stacy, supra,* raised the issue of guilty knowledge, which made it necessary for the trial court to give specific instructions. A similar conclusion was reached by our Supreme Court in *State v. Elliott,* 232 N.C. 377, 61 S.E. 2d 93 (1950), wherein defendant, charged with transporting intoxicating liquor, pled and offered evidence of lack of knowledge of the presence of liquor in his automobile. See also *State v. Welch,* 232 N.C. 77, 59 S.E. 2d 199 (1950).

But in *State v. Elliott, supra,* at 378, 61 S.E. 2d at 95, it is stated:

> "A person is presumed to intend the natural consequences of his act [citations omitted]. Hence, ordinarily,

where a specific intent is not an element of the crime, proof of the commission of the unlawful act is sufficient to support a verdict. [citations omitted] . . .

Nothing else appearing, it would not be necessary for the court, in the absence of a prayer, to make reference in its charge to guilty knowledge or intent. *Scienter* is presumed. . . . "

In the present case, the issue of guilty knowledge is not presented by the evidence, and there was no prayer for instructions. Under these circumstances we do not find error in the failure of the trial court to give instructions on guilty knowledge, either of the fact of "possession" or of the fact of "narcotic character".

[2] Next, the defendant contends that the trial court committed prejudicial error in sustaining the State's objections to several questions asked of witnesses by the defendant and by refusing to allow the answers to questions which were relevant to the establishment of a defense by the defendant. The defendant was seeking to discredit on cross-examination the chain of custody established by the State with regard to the MDA purchased at the defendant's house. Each officer who handled the MDA testified extensively as to their individual systems for marking the package for future use. Detective Cobbler was on the stand at the time and had previously testified that he had placed his initials and the date on the package, which, together with the character of the package, is how he could identify it as the same he had purchased from the defendant. He also testified that he always used the same kind of tape to secure the envelopes into which he placed evidence and initialed that tape. Defense counsel then asked:

"Do you initial them the same way?

MR. JOHN: Objection.

COURT: Sustained.

A. (By the witness) Yes, I do.

COURT: Don't answer that question. I SUSTAINED the objection."

To this the defendant excepted. While this evidence may have been relevant to certain of the issues relating to the witness's system of identification, its exclusion in the circumstances of this case was not prejudicial in that evidence of the same import

had already been admitted and the fact amply covered by other testimony. See, 3 Strong, N. C. Index 2d, Criminal Law, § 169 at 137 (1967).

With reference to the second exception that the defendant makes to the sustaining of an objection by the State, the defendant has not placed the witness's answer in the record. Consequently, it is impossible to determine whether the trial court committed prejudicial error in excluding the questions, and we accordingly do not consider this exception. *State v. Forehand,* 17 N.C. App. 287, 194 S.E. 2d 157 (1973).

[3, 4] The remaining exceptions under this assignment of error relate to the identification by Dr. McDonald of the contents of the package as 3, 4-methylenedioxy amphetamine and the subsequent admission of that package into evidence. Suffice it to say that Dr. McDonald's credentials more than adequately supported him as an expert in the field of forensic chemistry, thereby enabling him to express a qualified opinion, following his chemical analysis, as to the contents of the package. Furthermore, upon a careful review of the evidence on chain of custody, there was a sufficient foundation to permit the admission of the MDA into evidence. *State v. Bell,* 24 N.C. App. 430, 210 S.E. 2d 905 (1975).

[5] A collateral matter raised with reference to the introduction of the MDA was that the State was allowed, over defendant's objection, to reopen its case after it had rested, but before the defendant had put on any evidence. It is well established that it is within the discretion of the trial judge to reopen the case and to allow the State to present additional evidence. We find there was no abuse of discretion in reopening the case. See *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206 (1971).

[6] The defendant's next contention is that the conviction of the defendant for both possession and sale of the same controlled substance places him in double jeopardy, contrary to the Fifth Amendment to the Constitution of the United States and Article I, Section 19 of the North Carolina Constitution. Under facts identical with those in the present case our Supreme Court has held that the crimes of possession and sale are separate and distinct offenses and a conviction on both such offenses does not constitute double jeopardy. For a complete discussion of this proposition, see *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973).

The defendant's last assignment of error is that the trial court erred in refusing to grant defendant's motions for judgment as of nonsuit. Having carefully reviewed the evidence in the light most favorable to the State, we find no error in this ruling. Consequently, in the trial below, we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. AMOS LOCKLEAR

No. 7412SC954

(Filed 5 March 1975)

1. **Criminal Law § 76— voluntariness of defendant's statements — determination by trial judge**

Although remarks of the trial judge indicated that there was some question in his mind as to the credibility of the arresting officer who testified on voir dire concerning a statement made by defendant, there was sufficient competent evidence to support the trial court's finding that the statement was voluntary.

2. **Criminal Law § 76— statements made by defendant — sufficiency of evidence of voluntariness**

The trial court in a prosecution for murder and assault with a deadly weapon did not err in admitting statements signed by defendant waiving his rights and admitting that he committed the offenses charged where officers testified on voir dire that defendant was verbally advised of his constitutional rights, that defendant was given a written copy of his rights and asked to read them which he did, that defendant signed the statement in the officers' presence, that defendant gave no indication that he did not understand what was going on, that defendant did not indicate any difficulty in reading, and that defendant responded intelligently to questions.

3. **Criminal Law § 75— statement by defendant to detective — admissibility**

In a prosecution for murder and assault with a deadly weapon, the trial court did not err in allowing a detective to testify that he asked defendant "did you do something like that?" and defendant responded "Yes, and if I got the chance, I would do it again."

4. **Criminal Law § 135; Jury § 5— first degree murder — exclusion of juror opposed to death penalty — death penalty not imposed**

Defendant's contention that the jury was selected only after persons who had general misgivings about the death penalty were ex-

cluded, thereby depriving him of a juror who was not initially preconditioned in favor of the death penalty, is without merit since the death penalty was not imposed in this case.

5. **Criminal Law §§ 34, 162— motion to strike — time of making**

Trial court's refusal to allow defendant's motion to strike his earlier testimony that he was "convicted" of prior crimes and the court's failure to give instructions to the jury distinguishing between a conviction and a plea of nolo contendere did not prejudice defendant, particularly where defendant failed to object or move to strike at the time the testimony as to defendant's "conviction" was elicited.

APPEAL by defendant from *Smith, Judge.* Judgment entered 6 June 1974 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 February 1975.

Defendant was charged with first-degree murder and assault with a deadly weapon with intent to kill, inflicting serious injury. Upon his pleas of not guilty to both charges, the jury returned verdicts of guilty of second-degree murder and guilty of assault with a deadly weapon, with intent to kill, inflicting serious injury. From judgments sentencing him to imprisonment for a term of 30 years for second-degree murder and imprisonment for a consecutive term of 10 years for assault with a deadly weapon with intent to kill, inflicting serious injury, defendant appealed.

State's evidence tended to show that on 3 February 1974 Robert Beal was driving an automobile and had as a passenger one Prudence Locklear, defendant's estranged wife, when defendant drove up behind them and blew his horn; that both Beal and the defendant stopped their automobiles and Beal waited while defendant walked up to the driver's side of his automobile; that defendant suddenly reached in his pocket and then Beal felt five blows from a sharp object and fell over in the seat; and that Beal saw a cut on Prudence's arm and blood on her stomach before he passed out.

Several witnesses testified for the State. Two witnesses testified they heard a woman scream, then observed a man standing on the passenger side of the Beal automobile with a long instrument in his hand. They both saw the man wipe the instrument on his pants leg as he was leaving. One of the witnesses testified that when he arrived at the scene of the crime, he found Beal slumped over in the seat and Prudence "kind of sitting on the floorboard on the passenger side with her head up against the dash". He also testified there was a shotgun on the ground

beside the Beal automobile. A third witness testified that he also heard a woman scream, and saw her standing beside the Beal automobile with a shotgun in her hand. He then observed an "Indian man" take the gun away from the woman and stab her in the chest with a knife. The witness summoned the police and then went to the scene of the crime and discovered the woman was dead. The cause of death was stipulated to be a six-inch stab wound in the chest which penetrated the victim's heart.

A Cumberland County deputy sheriff testified that he went from the scene of the crime to a location where he found the defendant and that he read defendant his rights. On voir dire, the deputy sheriff stated that the defendant asked if they were dead and that he was told his wife appeared to be but Beal was not. The defendant then said, "Well, I am sorry; I meant to get both of them."

A Cumberland County detective testified that when the defendant was brought into his presence at the police station he asked the defendant if he would do something like that and the defendant answered, "Yes, and if I got the chance, I would do it again."

Defendant's evidence tended to show that defendant and his wife had been separated; that defendant stopped the automobile driven by Beal to talk to his wife about their children; that when he began talking to them, Beal suddenly reached into his pocket as if he were going for a weapon and attempted to open the door of his automobile; that defendant thought Beal was going to harm him and therefore pulled a knife from his pocket and stabbed him; that his wife, Prudence, then attempted to get a shotgun from the back seat of the automobile and that in an effort to get the gun away from her and to protect himself, defendant stabbed her. Defendant denied understanding any of the questions asked of him at the time of his arrest or making a statement that he "meant to get both of them." Defendant also denied signing a statement waiving his rights and confessing to having committed the crime charged.

Two witnesses for the defendant, who were present at the time of defendant's arrest, testified they did not hear the defendant state he meant to kill both victims. A cell mate of defendant corroborated defendant's testimony by stating defendant related the same version of the incident to him several times while they were in jail.

Additional facts necessary for decision are set forth in the opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ralf F. Haskell and Associate Attorney Elijah Bunting, for the State.

James D. Little, Public Defender, Twelfth Judicial District, for defendant appellant.

MORRIS, Judge.

[1] In his first assignment of error defendant maintains the trial court erred in allowing one of the arresting officers to testify over objection as to statements made by the defendant, in denying the defendant's subsequent motion to strike that portion of the officer's testimony, in instructing the jury to remember statements made by the defendant to arresting officers, and finally in failing to grant a new trial. Defendant maintains the greater weight of the evidence fails to show he made a statement that he "meant to get both of them" to the arresting officers. In support of his contention defendant points to testimony of two witnesses present at the arrest scene that they did not hear him make any such statement and to statements allegedly made to the trial court by Deputy Sheriff Brown, one of the arresting officers, who was not available to testify on voir dire during the trial. At the close of all of the evidence and before argument to the jury the trial judge made the following statement to the assistant solicitor:

> "The thing is, Mr. Grannis, if Deputy Sheriff Brown had testified on voir dire, which he didn't, I would have excluded the statement. I would have found the facts to be other than I did and I would have excluded the statement that Locklear allegedly made, 'I meant to kill them both;' because the greater weight of the evidence is just to the contrary. *I don't think I made any error in my ruling on voir dire* but I have worried about it. I simply say for the record, on the merits of same, I am simply telling you I would have found the facts to be otherwise now. I want in the record right now, what I think, so if it goes up the court will know exactly how I felt.
>
> It is not in evidence, but I do not think, from what you have told me and from what Mr. Brown told me, and what

Mr. and Mrs. Thomas testified to, that goes without saying, that what Officer Kitchen says, he may be correct, but my findings would have been different and I would have excluded it." (Emphasis supplied.)

Although the trial judge's remarks indicate there was some question in his mind as to the credibility of the arresting officer who did testify, we find it significant that it was not sufficient to cause him to reverse his earlier ruling permitting the officer to testify that the defendant made such a statement. Moreover, the judge's uneasiness apparently was based largely upon statements made by Deputy Sheriff Brown well after the judge ruled on the admissibility of the defendant's statements. Since these statements are not in the record, they, of course, are not before us for consideration on appeal. All that exists here is conflicting testimony between one of the arresting officers and two of the defense witnesses as to whether defendant actually made such a statement. Determination with respect to the credibility of the witnesses in that regard is, of course, for the jury. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966). The court's findings of fact with respect to the voluntariness of the statement is supported by competent evidence and is binding on appeal. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

[2] Defendant next assigns error to the admissibility of statements signed by him waiving his rights and admitting that he committed the offenses charged. Defendant premises his argument in part on the fact that he could not read the statements before signing them because he did not have his glasses. He notes that law enforcement officers made no inquiry as to his educational level or whether he could read and asked him to sign the waiver before he received medical attention for a cut on his hand. Defendant also maintains officers did not fully advise, and apprise him of, his rights during interrogation and he did not understand his constitutional rights or the seriousness of the charges against him.

On voir dire officers testified defendant was verbally advised of his constitutional rights, that defendant was given a written copy of his rights and asked to read them which he did, and that defendant signed the statement in their presence. Officers further testified that defendant "did not exhibit any indication that he did not understand what was going on"; that "[h]e did not indicate any difficulty in reading or [that he] could not read." To the questions asked of him he responded in-

telligently and would "clarify things" when questioned further. A review of the above testimony shows that "[t]he 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. (Citations omitted.)" *State v. Howard,* 21 N.C. App. 75, 77, 203 S.E. 2d 393 (1974). This assignment of error is overruled.

[3] In his third assignment of error defendant contends the trial court erred in allowing Detective Levee to testify over objection that he asked defendant "did you do something like that?" and defendant responded "Yes, and if I got the chance, I would do it again." Our review of the record leads us to conclude that this testimony was properly admitted into evidence. We also find it significant that testimony of similar import made to Officer Kitchen was admitted into evidence after an extensive voir dire. Consequently, even assuming arguendo, that the trial court erred in admitting this testimony, it was harmless error and did not prejudice defendant in any way. *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972).

[4] Defendant next asserts that the trial court should not have allowed the State to challenge a juror for cause on the basis of her statement that she would find it difficult to find the defendant guilty of first-degree murder knowing the death penalty would be imposed. Although the death penalty was not imposed in this case, defendant maintains the jury was selected only after persons who had general misgivings about the death penalty were excluded, thereby depriving him of a juror who was not initially preconditioned in favor of the death penalty. Defendant cites the United States Supreme Court case of *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), in support of his argument. We find defendant's contention without merit. This same argument was advanced to and rejected by the United States Supreme Court in *Bumper v. North Carolina,* 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968). There the Court stated:

> In *Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscienti-

ous scruples against imposing the death penalty. *Our decision in Witherspoon does not govern the present case, because here the jury recommended a sentence of life imprisonment.* The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444; *Turner v. Louisiana,* 379 U.S. 466, 471-473, 13 L.Ed. 2d 424, 428, 429, 85 S.Ct. 546; *Irvin v. Dowd,* 366 U.S. 717, 722-723, 6 L.Ed. 2d 751, 755, 756, 81 S.Ct. 1639. We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone,' and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon.* Accordingly, we decline to reverse the judgment of conviction upon this basis." (Emphasis supplied.) *Bumper v. North Carolina, supra,* at p. 545.

Defendant's fourth assignment of error is overruled.

[5] Defendant's final assignment of error relates to the denial of his motion to strike certain testimony elicited from the defendant by the Assistant District Attorney concerning his "convictions" in 1945 for breaking and entering and attempted rape. On redirect examination of the defendant if was pointed out by defense counsel that defendant actually plead nolo contendere to these charges. Defendant argues that by refusing to allow the motion to strike his prior testimony that he was "convicted" of these crimes, and by the court's failure to give instructions to the jury distinguishing between a conviction and a plea of nolo contendere, the trial judge committed error to his prejudice. We disagree. We note that defense counsel interposed no objection nor did he move to strike at the time the testimony as to defendant's "conviction" was elicited. His objection comes too late, even if he had shown that the result would have been different had the evidence been excluded. In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

APPEAL AND ERROR — Continued

§ 44. Time of Filing Brief and Effect of Failure to File

Where appellant failed to file brief within 20 days after appeal was docketed, he is deemed to have abandoned all assignments of error except those appearing on the face of the record proper. *Fitch v. Fitch,* 112.

§ 50. Harmless and Prejudicial Error in Instructions

Any defect in the charge in respect to plaintiff's intoxication was immaterial since the jury did not reach the issue of contributory negligence. *Williams v. Gray,* 305.

Any error in the court's failure to instruct the jury on Uniform Commercial Code provisions pertaining to plaintiff's remedies or damages upon breach of contract was not prejudicial where the jury found defendant had not breached its contract with plaintiff. *Foods, Inc. v. Super Markets,* 447.

ASSAULT AND BATTERY

§ 2. Defenses in Civil Actions

Trial court in an assault case did not err in giving instructions on the consideration to be given provocation in mitigation of plaintiff's damages. *Frazier v. Glasgow,* 641.

§ 5. Assault with Deadly Weapon

Acquittal of defendant for assault with a deadly weapon inflicting serious injury would not bar conviction on an attempted armed robbery charge. *S. v. Teel,* 385.

§ 8. Defense of Self, Home, or Property

A person in his own home is not required to retreat in the face of a threatened assault. *S. v. Kelly,* 670.

§ 14. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to support verdict finding defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Burns,* 392.

State's evidence was sufficient for the jury in a prosecution for assault and battery. *S. v. Davis,* 683.

§ 15. Instructions

In a prosecution for assault upon a public officer while he was attempting to discharge a duty of his office, trial court properly instructed the jury they must find the officer was performing a duty of his office when the alleged assault occurred. *S. v. Keziah,* 298.

In a prosecution for feloniously discharging a firearm into an occupied dwelling, trial court did not err in failing to relate the defense of intoxication to "wanton" conduct where the court related the defense to intent. *S. v. Gunn,* 561.

Trial court in a felonious assault prosecution did not shift the burden of proof to defendant by instructing on self-defense without reiterating the presumption of innocence. *S. v. Cantrell,* 575.

Trial court sufficiently instructed on apparent necessity. *Ibid.*

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Trial court did not err in finding that there was an unwarranted refusal by defendant insurance company to pay a claim under the theft and vandalism provision of an automobile policy and in allowing plaintiff to recover attorney's fee of $200 under G.S. 6-21.1. *Hubbard v. Casualty Co.*, 493.

AUTOMOBILES

§ 3. Driving After Revocation

In a prosecution for driving while license was permanently revoked, trial court erred in failing to charge the jury on what would constitute permanent revocation. *S. v. Parks*, 314.

§ 56. Following too Closely

Plaintiff's evidence was sufficient to be submitted to the jury in an action growing out of a rear-end collision wherein defendant alleged she was struck from the rear by a third party's vehicle and knocked into the rear of plaintiff's vehicle. *Griffeth v. Watts*, 440.

§ 90. Instructions in Accident Cases

In an action to recover damages incurred by plaintiff in an automobile accident, trial court's instructions occasionally using the term "servient highway or street" instead of "private road or drive" did not confuse the jury. *Penland v. Greene*, 240.

Any error in the court's failure to instruct in the initial charge that a pedestrian has the right of way when crossing a highway at an unmarked crosswalk was cured when the instruction was thereafter given upon request of plaintiff's counsel. *Williams v. Gray*, 305.

§ 113. Sufficiency of Evidence of Homicide

Evidence was sufficient to support the jury's finding that defendant violated either the drunk driving statute or the reckless driving statute or both, and that such violation was the proximate cause of the death of a child. *S. v. Griffith*, 250.

§ 126. Competency of Evidence in Prosecution for Drunken Driving

Failure of the State to establish that defendant was advised he had the right to an additional test administered by a qualified person of his own choosing rendered the results of the breathalyzer test administered by a law enforcement officer inadmissible. *S. v. Fuller*, 38.

§ 127. Sufficiency of Evidence in Prosecution for Drunken Driving

Evidence was sufficient to be submitted to the jury in a prosecution for driving under the influence. *S. v. Fuller*, 38.

§ 131. Hit and Run Driving

Evidence was sufficient to be submitted to the jury in a prosecution for hit and run driving. *S. v. Hood*, 139.

BASTARDS

§ 10.5. Action to Establish Paternity

A reputed father of an illegitimate child can bring an action to establish paternity. *Conley v. Johnson*, 122.

BASTARDS — Continued

§ 11. Right to Custody of Illegitimate Children

A father of an illegitimate child is a parent within the meaning of G.S. 50-13.1, and the district court was authorized to grant the father visitation privileges. *Conley v. Johnson,* 122.

BOATING

Plaintiff's evidence was insufficient to make out a case of actionable negligence in the operation of an outboard motorboat. *Barefoot v. Trask,* 301.

BROKERS AND FACTORS

§ 4. Duties and Liabilities of Broker to Principal

In an action to recover for loss of money allegedly resulting from the purchase and attempted sale of 600 shares of corporate stock, the trial court erred in entering summary judgment where there were issues of fact as to the broker's failure to follow instructions. *Meyer v. McCarley and Co.,* 418.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for breaking and entering a courthouse. *S. v. Ritzel,* 88.

Evidence was sufficient to be submitted to the jury in a prosecution for the break-in of a store. *S. v. Burch,* 514.

State's evidence was sufficient for the jury in a prosecution for breaking and entering and larceny under the doctrine of possession of recently stolen property. *S. v. Solomon,* 527.

§ 10. Prosecutions for Possession of Housebreaking Tools

Evidence that tools were found under the hood of the automobile defendant was driving but did not own was sufficient to carry the case to the jury in a prosecution for possession of burglary tools. *S. v. Glaze,* 60.

In a prosecution for possession of burglary tools, testimony by an officer that defendant's employment did not require the use of tools found in his car did not constitute prejudicial error. *Ibid.*

Nonsuit was proper in a prosecution for possession of burglary tools where the State failed to show that defendants were in constructive possession of tools found under the hood of an automobile in which they were passengers. *S. v. Ledford,* 542.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. For Mutual Mistake

Plaintiff was entitled to rescind a contract for the purchase of a lot which he bought for residential purposes where the buyer and seller subsequently learned there was no sewage disposal system available. *Hinson v. Jefferson,* 231.

CONSTITUTIONAL LAW — Continued

§ 22. Religious Liberty

Trial court could properly enter an order providing for the use of church property by factions involved in a church dispute. *Trotter v. Debnam,* 356.

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial where there was a 7½ months lapse between the award of a new trial and a new trial. *S. v. Jackson,* 394.

§ 31. Right of Confrontation; Access to Evidence

Defendants' rights were not violated by denial of their request to inspect a typewritten copy of a statement made by a State's witness containing handwritten notes added to the margin by the solicitor during a conversation with the witness. *S. v. Chavis,* 148.

Defendant was not entitled to disclosure of the identity of a confidential informant. *S. v. Jones,* 280.

Defendant's motion to compel disclosure of an informant's identity was properly denied. *S. v. Jackson,* 394.

Defendant's assignment of error to the admission into evidence of the arrest complaint and warrant on the ground that such evidence constituted double hearsay is overruled. *Ibid.*

§ 32. Right to Counsel

Trial of indigent defendant could proceed without counsel where defendant refused to accept appointed counsel chosen by the court and refused to sign a written waiver of counsel. *S. v. Smith,* 498.

CONTEMPT OF COURT

§ 6. Findings and Judgment

Where a spectator at a criminal trial was present in the courtroom when the court instructed the jury not to discuss the case with anyone, the court's order was binding upon her as well as the jurors, and the court properly found the spectator guilty of contempt for disobedience of the order by making a telephone call to a juror in which she stated that defendant was not guilty and did not live in the house where heroin was found. *In re Hogan,* 51.

Defendant was not entitled to a jury trial for contempt of court for attempting to influence a juror. *Ibid.*

CONTRACTS

§ 7. In Restraint of Trade

Covenant not to compete in defendant's initial contract of employment with plaintiff was founded upon valuable consideration. *Wilmar, Inc. v. Corsillo,* 271.

An injunction prohibiting defendant from competing with plaintiff properly included all territory in which defendant sold and not just his original territory assigned in his initial contract of employment. *Ibid.*

CONTRACTS — Continued

§ 27. Sufficiency of Evidence and Nonsuit

Trial court erred in failing to make sufficient findings of fact in an action to recover balance due for construction of a house. *Campbell v. Blount*, 368.

Summary judgment was improperly entered in an action to recover an amount allegedly due under a contract and purported subsequent settlement agreement providing for the completion of four houses and payment for building materials furnished by plaintiff. *Builders Supply Co. v. Eastern Associates*, 533.

§ 28. Instructions

Trial court sufficiently instructed the jury on law relating to notice to be given upon termination of a contract of indefinite duration. *Foods, Inc. v. Super Markets*, 447.

CORPORATIONS

§ 28. Dissolution

Order for liquidation of a corporation was proper where evidence was sufficient to support trial court's conclusion that the business of the corporation could no longer be conducted to the advantage of all the shareholders. *Ellis v. Civic Improvement, Inc.*, 42.

COSTS

§ 3. Taxing of Costs in Discretion of Court

Trial court did not err in finding that there was an unwarranted refusal by defendant insurance company to pay claim under the theft and vandalism provision of an automobile policy and in allowing plaintiff to recover attorney's fee of $200 under G.S. 6-21.1. *Hubbard v. Casualty Co.*, 493.

COURTS

§ 2. Jurisdiction in General

Jurisdiction over subject matter cannot be conferred upon a court by consent, waiver or estoppel. *S. v. Earley*, 387.

§ 7. Appeals from Inferior Court to Superior Court

Defendant was not entitled to have a court reporter take down the proceedings at his trial in district court nor was he entitled to a free transcript of the proceedings. *S. v. Brooks*, 338.

§ 15. Criminal Jurisdiction of Juvenile Courts

Statute requiring the district court to determine whether the case of a 14 year old charged with felony should be transferred to superior court is constitutional and does not require the district court to conduct a separate evidentiary hearing upon the cause for transfer. *In re Smith*, 321.

Order stating that a juvenile charged with rape was transferred to superior court for trial because the Board of Youth Development could not render appropriate custodial rehabilitative services if the juvenile should be found guilty of rape contained sufficient reason under G.S. 7A-280. *Ibid.*

CRIME AGAINST NATURE

§ 2. Prosecutions

A state may punish individuals who commit a crime against nature in a public restroom even though the acts are between consenting adults. *S. v. Jarrell,* 610.

Trial court did not err in denial of motion for mistrial made when the solicitor asked defendant's former Sunday School teacher whether he taught defendant about Sodom and Gomorrah. *Ibid.*

CRIMINAL LAW

§ 7. Entrapment

Evidence was insufficient to support the defense of entrapment in a prosecution for sale of cocaine. *S. v. Salame,* 1.

§ 9. Aiders and Abettors

Trial court's instructions on aiders and abettors were proper. *S. v. Burch,* 514.

Trial court properly instructed the jury it could convict defendant of second degree murder if it found defendant was present and knowingly aided the perpetrator by telling deceased if he followed them they would kill him or by driving his car in such a manner as to permit the perpetrator to fire the fatal shot. *S. v. Cassell,* 717.

§ 13. Jurisdiction in General

Controversy over ownership of stolen property between the purported owner and a person found not guilty of illegally receiving the property cannot be determined in the criminal action but must be determined in a civil action. *S. v. Earley,* 387.

§ 22. Arraignment and Pleas

Defendant is entitled to a new trial where the record was silent concerning the entry of a formal arraignment and plea. *S. v. McCotter,* 76.

§ 26. Plea of Former Jeopardy

Where trial was continued during jury selection because of illness of the assistant solicitor, defendants were not placed in double jeopardy by their trial at a subsequent session. *S. v. Chavis,* 148.

Defendant was not subjected to double jeopardy by his conviction for both the possession and sale of the same controlled substance. *S. v. Gleason,* 732.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court properly allowed testimony concerning defendant's commission of drug related offenses committed subsequent to the offenses for which defendant was being tried. *S. v. Salame,* 1.

Trial court in an armed robbery case properly allowed an eyewitness to testify that defendant had committed a similar crime several days before since that testimony tended to identify defendant. *S. v. Garnett,* 489.

Defendant was not prejudiced when an officer testified that defendant gave a false name while he was being booked but it was later determined that defendant's fingerprints matched those of an escapee from another county. *S. v. Williams,* 554.

CRIMINAL LAW — Continued

Evidence tending to connect defendant with the shooting of defendant's husband was competent in a prosecution for conspiracy to murder the wife of defendant's lover. *S. v. Graham*, 591.

§ 40. Evidence and Record at Former Proceeding

Trial court did not err in denying defendant's motion for a copy of the judge's memorandum of the preliminary hearing held in district court. S. *v. Jones*, 280.

Defendant's assignment of error to the denial of his motion for a transcript of the testimony before the grand jury was without merit. *Ibid.*

§ 42. Articles Connected With the Crime

Chain of custody of MDA purchased from defendant was sufficiently shown to permit its admission in evidence. *S. v. Gleason*, 732.

§ 43. Photographs

Trial court in an armed robbery case properly allowed photographs of the robbery into evidence. *S. v. Garnett*, 489.

§ 46. Flight of Defendant as Implied Admission

Evidence was sufficient to support trial court's instructions on flight of defendant. *S. v. Lee*, 666.

§ 50. Expert and Opinion Testimony in General

Trial court properly allowed the arresting officer to give his opinion that bags found in defendant's car contained marijuana. *S. v. Bagnard*, 54.

§ 51. Qualification of Experts

Trial court's statement in the presence of the jury that a medical doctor was an expert witness was not prejudicial error. *S. v. Edwards*, 303.

Where a witness was accepted as an expert in clinical psychology, it was still within the discretion of the trial judge to determine whether he was qualified as an expert to testify as to defendant's state of consciousness at the time of the crime. *S. v. Peterson*, 404.

§ 57. Evidence in Regard to Firearms

In a second degree murder prosecution where death resulted from a shooting, trial court properly admitted results of tests made with defendant's rifle and deceased's pistol. *S. v. Goins*, 468.

§ 62. Lie Detector Tests

Polygraph evidence is not admissible in evidence in the trial of criminal cases. *S. v. Pope*, 217; *S. v. Jackson*, 394.

§ 64. Evidence as to Intoxication

The jury was properly allowed to consider opinion evidence of an officer that defendant was under the influence of intoxicating liquor. *S. v. Griffith*, 250.

§ 66. Evidence of Identity by Sight

In-court identification of defendant was of independent origin based on what the prosecuting witness saw at the time of the crime. *S. v. Jones*, 280.

CRIMINAL LAW — Continued

defendant "did you do something like that?" and defendant responded "Yes, and if I got the chance, I would do it again." *S. v. Locklear*, 737.

§ 76. Determination and Effect of Admissibility of Confession

Trial court properly admitted defendant's in-custody statement made to the arresting officer. *S. v. Sanders*, 33.

Trial court did not show partiality during a voir dire examination to determine admissibility of defendant's confession. *S. v. Berry*, 312.

Evidence supported trial court's finding that defendant was not under the influence of drugs when he confessed to police. *S. v. Travatello*, 511.

Although the remarks of the trial judge indicated that he had some question as to the credibility of the arresting officer who testified on voir dire concerning a statement made by defendant, there was sufficient competent evidence to support trial court's finding that the statement was voluntary. *S. v. Locklear*, 737.

Trial court properly admitted statement signed by defendant waiving his rights and admitting that he committed the offense charged. *Ibid.*

§ 77. Admissions and Declarations

Exculpatory statement made by defendant to an officer at the police station was not admissible as part of the res gestae. *S. v. Pearson*, 410.

§ 78. Stipulations

Stipulation that decedent died as a result of a gunshot wound inflicted by a third person did not render irrelevant a physician's testimony as to the injuries sustained by decedent and the treatment of those injuries and x-rays showing shotgun pellets in decedent's head. *S. v. Cassell*, 717.

§ 80. Records and Private Writings

Trial court did not err in permitting a witness to use a card as a memorandum to refresh his memory. *S. v. Berry*, 312.

§ 84. Evidence Obtained by Unlawful Means

Trial court's findings were adequate to show defendant's voluntary consent to a search of his automobile although they did not refer specifically to the voluntariness of the consent. *S. v. Glaze*, 60.

Although the record in a homicide case was insufficient to show the arrest of defendant without a warrant was lawful and that a search of defendant at the time of the arrest was therefore lawful, admission of a butcher knife and shotgun shells found in defendant's coat pocket during the search was harmless error. *S. v. Sanders*, 33.

Defendants had no standing to object to the warrantless search of a church and parsonage where they were not members of the church and were trespassers on the church property. *S. v. Chavis*, 148.

Trial court properly allowed into evidence a bag of heroin where the State established a chain of custody from the time the heroin was seized from defendant's home until it appeared in court. *S. v. Chapman*, 462.

In a crime against nature case, photographs of defendants in the open, public area of a public restroom taken by an officer concealed in the

attic of the restroom, and testimony by the officer concerning what he saw while so concealed, did not result from an illegal search in violation of defendants' Fourth Amendment rights. *S. v. Jarrell,* 610.

§ 85. Character Evidence Relating to Defendant

Defendant was not prejudiced by the trial court's allowance of a question concerning his character and reputation for dealing in drugs. *S. v. Salame,* 1.

§ 86. Credibility of Defendant and Parties Interested

Trial court in a homicide case properly permitted the State to ask defendant on cross-examination whether he hadn't pulled a gun on another person earlier the same night of the crime. *S. v. Roberts,* 125.

Defendant who testified in his own behalf may be questioned with respect to specific acts of criminal and degrading conduct for the purpose of impeachment. *S. v. Adcock,* 102.

Trial court did not abuse its discretion in refusing to allow defense counsel to ask the prosecuting witness whether he had been putting out feelers to see if defendant would pay him some money. *S. v. Gunn,* 561.

§ 87. Direct Examination of Witnesses

Trial court did not abuse its discretion in permitting the State to offer the testimony of witnesses not named on the list furnished by the solicitor. *S. v. Chavis,* 148; *S. v. Carter,* 688.

§ 88. Cross-examination

Trial court properly denied defendant's motion to cross-examine an informant called as a defense witness where the evidence did not establish that at the time of defendant's trial the informant's interests were opposed to defendant's. *S. v. Salame,* 1.

§ 89. Credibility of Witnesses; Impeachment

Trial court properly refused to permit defense counsel to question two State's witnesses as to where they were being housed during the trial. *S. v. Chavis,* 148.

Trial court properly excluded evidence showing bias of a witness who had not yet testified. *S. v. Pearson,* 410.

§ 90. Rule Party is Bound by and May Not Discredit Own Witness

Testimony of a sheriff, including prior inconsistent statements made by a State's witness which constituted impeachment by the State of its own witness, was properly admitted where defendant objected to the sheriff's entire testimony and part of the testimony was competent. *S. v. Pope,* 644.

§ 91. Time of Trial and Continuance

Trial court properly denied defendant's motion made during trial for continuance to secure attendance of a witness whose whereabouts was unknown. *S. v. Roberts,* 125.

Trial court did not err in denial of defendant's motion for continuance based on remarks made by the trial court in passing sentence in a previous case involving marijuana. *S. v. Carriker,* 91.

CRIMINAL LAW — Continued

Trial court did not err in denial of defendant's motion for continuance made on the ground that jurors who had just tried another defendant represented by the same attorney and convicted him of the same crime would be called to sit in the trial of defendant's case. *S. v. Moore*, 582.

Trial court did not err in denying defendant's motion for continuance where the only reason given for such motion was that the bill of indictment was returned at the same session of court at which defendant was tried. *S. v. Owen*, 598.

§ 92. Consolidation and Severance of Counts

Trial court properly consolidated charges against defendant for four offenses of felonious breaking and entering and four offenses of felonious larceny which allegedly occurred on two separate dates. *S. v. George*, 581.

The interests of defendant and a codefendant in an armed robbery case were not so antagonistic as to require the trial court to sever their trials. *S. v. Jordan*, 677.

Trial court properly consolidated for trial charges against two defendants for the same offense of armed robbery. *S. v. Allen*, 692.

§ 95. Admission of Evidence Competent for Restricted Purpose

Limiting instructions given after a witness's corroborating testimony only were sufficient. *S. v. Spinks*, 548.

§ 97. Introduction of Additional Evidence

Where evidence was offered by only one defendant, trial court did not err in permitting rebuttal witnesses for the State to give testimony adverse to all ten defendants. *S. v. Chavis*, 148.

Trial court properly permitted the State to reopen its case after the State had rested. *S. v. Gleason*, 732.

§ 99. Conduct of Court and Expression of Opinion on Evidence During Trial

Trial court's instruction to a witness testifying as to breathalyzer test results to "Tell him the reading. Loud and clear." was not an expression of opinion by the court. *S. v. Smith*, 97.

Trial court's questions put to two witnesses for the purpose of clarifying their testimony did not prejudice defendant. *S. v. Spinks*, 548.

Trial court in assault case did not express an opinion in asking witnesses questions concerning the incident and a later confrontation between the prosecuting witness and defendant. *S. v. Davis*, 683.

§ 101. Custody and Conduct of Jury

Trial court did not err in refusing to prohibit the jurors from using notes they had made during the trial. *S. v. Pearson*, 410.

§ 111. Form and Sufficiency of Instructions

Trial court's instruction as to unanimity of the jury was proper. *S. v. Carter*, 292.

CRIMINAL LAW — Continued

§ 112. Instructions on Burden of Proof and Presumptions

Failure of trial court to include a definition of "reasonable doubt" was not error where defendant made no request for such charge. *S. v. Berry,* 312.

Trial court did not err in failing to instruct that reasonable doubt must be one growing out of the evidence or the insufficiency of the evidence. *S. v. Pope,* 217.

Trial court in a felonious assault prosecution did not shift the burden of proof to defendant by instructing on self-defense without reiterating the presumption of innocence. *S. v. Cantrell,* 575.

§ 113. Statement of Evidence and Application of Law Thereto

Defendant was not entitled to an alibi instruction where he failed to make a specific request therefor. *S. v. Carter,* 292.

Trial court erred in applying the law of "acting in concert" to charge of armed robbery where evidence showed defendant did none of the acts necessary to constitute the crime of armed robbery. *S. v. Mitchell,* 484.

Defendant was not prejudiced by the trial court's inaccurate recapitulation of the evidence. *S. v. Brandon,* 558.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court's instruction which included the words, "the court instructs you that the fact that . . . " was prejudicial to defendant. *S. v. Cates,* 65.

In a prosecution for rape and crime against nature, trial court expressed an opinion in instructing the jury there was "considerable evidence" defendant committed the crimes. *S. v. Head,* 564.

§ 116. Charge on Failure of Defendant to Testify

Trial court did not err in failing to instruct on the effect of defendant's failure to testify absent request for such instruction. *S. v. Smith,* 498.

§ 117. Charge on Credibility of Witnesses

To require an instruction to scrutinize interested prosecution witnesses would improperly and prejudicially discredit the testimony of the prosecuting witnesses. *S. v. Pope,* 217.

§ 118. Charge on Contentions of the Parties

Trial court did not err in devoting more time to the State's contentions in his jury instructions. *S. v. Brandon,* 558.

§ 124. Sufficiency and Effect of Verdict in General

Trial court did not err in allowing an inconsistent jury verdict finding a codefendant guilty of possession of marijuana and defendant guilty of possession with intent to distribute. *S. v. Bagnard,* 54.

§ 128. Discretionary Power of Court to Set Aside Verdict and Order Mistrial

Trial court did not err in denial of motion for mistrial made when a witness left the witness stand and attempted to reach the defense table. *S. v. Chavis,* 148.

Trial court did not err in failing to order a mistrial when a juror stated that he knew a police officer who testified for the State. *Ibid.*

Trial court in a crime against nature case did not err in denying motion for mistrial made when a prospective juror stated he could not give

CRIMINAL LAW — Continued

anyone a fair trial as long as one defendant's counsel was involved or when the solicitor asked defendant's former Sunday School teacher whether he had taught defendant about Sodom and Gomorrah. *S. v. Jarrell*, 610.

§ 134. Form and Requisite of Sentence in General

Trial court must sentence a youthful offender as a "committed youthful offender" absent a finding that defendant would not derive benefit from treatment and supervision as a committed youthful offender. *S. v. Mitchell*, 484.

§ 135. Judgment and Sentence in Capital Case

Defendant's contention that he was deprived of jurors who were not initially preconditioned in favor of the death penalty is without merit since the death penalty was not imposed in this case. *S. v. Locklear*, 737.

§ 139. Sentence to Maximum and Minimum Terms

Trial court's judgment sentencing defendant to imprisonment "for the term of not to exceed 25 years" was improper since it failed to sentence defendant for a minimum term. *S. v. Teat*, 621.

§ 143. Revocation of Suspension of Judgment or Sentence

Evidence supported finding that defendant violated conditions of her probation by failing to report to her probation officer as directed, changing her place of residence without consent, and failing to remain in her dormitory room after 10 p.m. each night. *S. v. Stuntz*, 267.

Evidence that defendant had violated conditions of his probation was sufficient to support trial court's revocation of suspended sentence. *S. v. Blount*, 390.

§ 145.1. Probation

Defendant was not prejudiced by the violation of procedural rights in the revocation of his probation where the sentence thus placed in effect would run concurrently with a longer sentence imposed in another case. *S. v. Smith*, 498.

§ 146. Nature and Grounds of Appellate Jurisdiction

Defendant failed to show error where the question raised on appeal was not presented in the trial court. *S. v. White*, 318.

§ 154. Case on Appeal

Defendant's contention that he is entitled to a new trial by reason of his inability to obtain effective appellate review because he could not obtain a transcript of his trial due to the death of the court reporter is without merit. *S. v. Teat*, 621.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Order extending time within which to serve case on appeal does not extend the time to docket the appeal. *S. v. Hopkins*, 687.

§ 162. Assignments of Error to Evidence, and Motions to Strike

An assignment of error which states that defendants' several constitutional rights were violated "by admitting into evidence over defendants' objections testimony of witnesses for the State which was irrelevant, immaterial, incompetent, remote, prejudicial and inflammatory," and which

DIVORCE AND ALIMONY — Continued

§ 23. Child Support

Respondent was not prejudiced by trial court's failure to provide a court reporter for a hearing on petitioner's motion that he be purged of contempt for failing to make child support payments. *In re Custody of Cox*, 99.

Evidence was sufficient to support the trial court's finding that defendant had the ability to comply with a child support and alimony order. *Gibson v. Gibson*, 520.

Trial court's increase in the amount of child support defendant was required to pay was proper where the order was supported by findings of changed circumstances. *Ibid.*

Evidence was insufficient to show plaintiff's ability to comply with a child support order and his deliberate and intentional failure to do so. *Brady v. Brady*, 663.

Trial court erred in declaring sums due from plaintiff as child support a lien on real property conveyed by plaintiff to his sister where the sister was not given her day in court. *Ibid.*

§ 24. Child Custody

Evidence was sufficient to support the findings and conclusions of the trial judge that plaintiff was unfit to have custody of her son and that the best interests of the minor would be served by awarding his custody to his older brother. *Tucker v. Tucker*, 649.

Trial court erred in vesting determination of visitation rights in the parties to whom custody of the minor was awarded. *Ibid.*

Trial court improperly awarded custody of a child to persons not parties to the action. *Ibid.*

EASEMENTS

§ 8. Nature and Extent of

Where a consent judgment in a cartway proceeding granted defendant a perpetual easement over lands now owned by plaintiffs, defendant's use of the easement was not limited to uses for which a landlocked property owner may obtain a cartway. *Yount v. Lowe*, 48.

EJECTMENT

§ 1. Nature and Scope of Remedy of Summary Ejectment

It is necessary to show relationship of landlord and tenant before remedy of summary ejectment may be granted. *Chandler v. Savings and Loan Assoc.*, 455.

§ 2. Jurisdiction of Summary Ejectment

Remedy of summary ejectment may be obtained in a small claim action heard by a magistrate. *Chandler v. Savings and Loan Assoc.*, 455.

§ 5. Damages in Summary Ejectment

Since plaintiffs could not have asserted their claim in excess of $300 for wrongful foreclosure of a deed of trust in a small claim action for summary ejectment brought by defendant following foreclosure, they are

EVIDENCE — Continued

§ 46. Nonexpert Opinion Evidence as to Handwriting

A witness who states he is "well acquainted" with a decedent's handwriting is competent to testify as to such handwriting. *In re Will of Loftin*, 435.

§ 48. Competency and Qualification of Experts

Trial court did not err in ruling that a witness was an expert in the the development of real estate. *Power Co. v. Ladd*, 83.

§ 50. Medical Testimony

An expert in psychiatry was properly allowed to express an opinion that decedent could be considered a person likely to commit suicide. *Paint Co. v. Insurance Co.*, 507.

FALSE PRETENSE

§ 3. Nonsuit

In a prosecution for obtaining money under false pretense, evidence was sufficient to be submitted to the jury where it tended to show that defendant sold property which was allegedly free and clear of all liens when in fact he knew there was an outstanding indebtedness secured by a recorded deed of trust on the property. *S. v. Banks*, 604.

FRAUD

§ 12. Sufficiency of Evidence and Nonsuit

Evidence of misrepresentations made by a used car salesman was insufficient to be submitted to the jury on the issue of punitive damages but was sufficient for the jury on the issue of whether the false representations constituted unfair or deceptive trade practices for which plaintiff would be entitled to recover treble damages. *Hardy v. Toler*, 625.

FRAUDS, STATUTE OF

§ 4. Estoppel

Defendant was estopped to plead the statute of frauds where plaintiff conveyed property to defendant for $7000 upon defendant's fraudulent representation that he would execute an option to plaintiff to repurchase within five years for $10,000. *Dunn v. Dunn*, 713.

HABEAS CORPUS

§ 1. Nature of Writ, Issuance, and Return

Superior court judge could issue a writ of habeas corpus for a petitioner confined in jail pursuant to an order of the district court adjudging him in contempt for failure to make child support payments. *In re Custody of Cox*, 99.

HIGHWAYS AND CARTWAYS

§ 1. Powers and Functions of Board

Board of Transportation had authority to designate a road across defendant's property between Highway 70 and Interstate 40 a controlled-access facility. *Highway Comm. v. Manufacturing Co.*, 478.

HOMICIDE — Continued

§ 27. Instructions on Manslaughter

Trial court's definition of manslaughter properly instructed the jury in a second degree murder case. *S. v. Edwards*, 303.

Trial court properly defined proximate cause and unlawful pointing of a gun in a charge on the elements of involuntary manslaughter. *S. v. Pope*, 217.

Trial court's instruction as to heat of passion in a homicide case was proper. *Ibid.*

Defendant was not prejudiced by the court's failure to instruct the jury to consider the actions of all three of defendant's assailants in determining whether there was adequate provocation to reduce the crime to manslaughter where jury returned a verdict of manslaughter. *S. v. Pearson*, 410.

§ 28. Instructions on Defenses

Defendant in a murder prosecution is entitled to a new trial where the jury could deduce from the trial court's instruction that defendant was under a duty to retreat in his own home if deceased's assault upon him was not murderous. *S. v. Boswell*, 94.

Trial court's erroneous instruction that the burden of proving defenses of insanity and self-defense "in mitigation of murder in the second degree so as to make it voluntary manslaughter is on the defendant" did not constitute prejudicial error where the jury found defendant guilty of second degree murder. *S. v. Sanders*, 33.

Trial court's instruction on the burden of proof as to defendant's consciousness was proper. *S. v. Peterson*, 404.

Trial court in a second degree murder prosecution properly instructed the jury that self-defense was not applicable in this case. *Ibid.*

Trial court sufficiently instructed the jury to consider the acts of all three of defendant's assailants in determining whether defendant acted in self-defense in killing one of the assailants. *S. v. Pearson*, 410.

Trial court's erroneous instruction that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault by someone who does not have a deadly weapon was cured by the court's subsequent instructions. *Ibid.*

Evidence required the trial court to instruct the jury on defendant's right to evict a trespasser from his home and to defend himself and his home from attack. *S. v. Kelly*, 670.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court in a second degree murder case did not err in submitting an issue as to defendant's guilt of manslaughter. *S. v. Goins*, 468.

In a second degree murder prosecution defendant's self-serving declarations alone were insufficient to rebut the presumption of malice arising on the evidence, and the trial court properly failed to submit an issue of manslaughter. *S. v. Mull*, 502.

Trial court in a second degree murder prosecution erred in failing to instruct on involuntary manslaughter where there was some evidence that defendant was handling in a reckless manner a firearm which he thought was unloaded. *S. v. Putnam*, 570.

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreements

Wife impliedly waived her right to dissent from her husband's will when she executed a separation agreement. *Sloop v. Sloop,* 295.

Husband impliedly waived his right to seek partition of property by his execution of a separation agreement giving the wife the right to reside in their residence during the agreement. *Hepler v. Burnham,* 362.

§ 12. Revocation and Rescission of Separation Agreement

Portions of a consent judgment providing for a division of property and the mutual waiver of alimony were not abrogated by reconciliation of the parties and prevented the wife from obtaining alimony pendente lite. *Potts v. Potts,* 673.

§ 17. Termination and Survivorship of Estate by the Entireties

In an action for partition of real property owned by parties as tenants in common, trial court erred in charging defendant's share of the proceeds from the partition sale with the amount of a judgment declared by a judge in a prior action between the same parties. *Wall v. Wall,* 725.

Trial court correctly concluded that defendant was not entitled to be reimbursed for sums paid on an indebtedness encumbering an estate by the entireties during her marriage to plaintiff. *Ibid.*

INDEMNITY

§ 2. Construction and Operation of Agreement

Contract in which the operator of a stone quarry agreed to indemnify the manufacturer of blasting powder for any injury or loss resulting from the manufacturer's assistance of the quarry operator in blasting work was not against public policy. *Crushed Stone v. Powder Co.,* 285.

INDICTMENT AND WARRANT

§ 5. Finding and Return of Grand Jury

Report of the grand jury signed by the foreman in which was listed the bill against defendant as having been returned a true bill charging a non-capital felony rendered the failure to sign the bill itself amendable. *S. v. Spinks,* 548.

§ 8. Joinder of Counts

A warrant containing two separate counts and charging all the essential elements of driving under the influence and reckless driving was sufficient to charge defendant with those crimes. *S. v. Fuller,* 38.

§ 9. Charge of Crime

Indictments for escape and larceny were not rendered invalid by use of the words "with force and arms." *S. v. Coleman,* 530.

§ 10. Identification of Accused

Indictments identifying the accused as "John Doe AKA 'Varne' " were insufficient to charge a defendant named Vaughn Bagnard with any offense. *S. v. Bagnard,* 566.

INSURANCE — Continued

§ 37. Actions on Life Policies

An expert in psychiatry was properly allowed to express an opinion that decedent could be considered a person likely to commit suicide. *Paint Co. v. Insurance Co.*, 507.

In an action on a life policy, trial court erred in instructing the jury that once defendant insurer presented evidence of suicide plaintiff had the burden of proving insured's death was caused by external violence or accidental means. *Ibid.*

Trial court erred in failing to exclude testimony by a sheriff that when he saw decedent's body he stated "he has committed suicide" and testimony by two psychiatrists concerning suicides in N. C. in 1970. *Ibid.*

§ 77. Automobile Theft Policies

Plaintiff was not entitled to recover under a theft and vandalism provision of an automobile policy for damage to a police monitor radio as a "personal effect" when there was no evidence of damage by fire or lightning. *Hubbard v. Casualty Co.*, 493.

Trial court did not err in finding that plaintiff was entitled to recover $600 for damages to his automobile under the theft and vandalism provision of an automobile policy based on plaintiff's testimony as to the value. *Ibid.*

§ 79.1. Automobile Liability Insurance Rates

Comr. of Insurance exceeded his authority in eliminating classifications for motorcycle liability insurance rates and fixing a flat premium rate for all motorcycle liability insurance. *Comr. of Insurance v. Automobile Rate Office*, 223.

Order of the Comr. of Insurance decreasing automobile liability insurance rates, entered after hearings were conducted for consideration of what effect the energy crisis would have upon insurance rates, is invalid. *Comr. of Insurance v. Automobile Rate Office*, 228.

§ 90. Limitations on Use of Vehicle

Insurer failed to prove that at the time of an accident insured's spouse was operating a non-owned vehicle in a business or occupation within the meaning of an exclusion under a family automobile policy. *Insurance Group v. Parker*, 452.

§ 133. Apportionment and Contribution Between Fire Insurers

Where plaintiff and defendant both insured property against loss by fire and plaintiff paid homeowners pursuant to a policy it had issued, plaintiff was entitled to recover a pro rata share from defendant for loss to contents and additional living expenses but not for damage to the dwelling. *Insurance Co. v. Indemnity Co.*, 538.

JUDGES

§ 5. Recusation of Judges

Trial judge did not err in denial of respondent's motion that the judge disqualify himself from hearing petitioner's motion to purge himself of contempt for failure to make support payments. *In re Custody of Cox*, 99.

JUDGMENTS

§ 48. Property to Which Lien Attaches

Trial court erred in submission of issues and entry of judgment permitting recovery by defendant builder for the contract price of a house while also permitting the deed of trust which had been assigned to intervenor bank to remain a valied lien on the property. *Collins v. Combs*, 450.

JURY

§ 5. Selection Generally; Personal Disqualifications

Defendant's contention that he was deprived of jurors who were not initially preconditioned in favor of the death penalty is without merit since the death penalty was not imposed in this case. *S. v. Locklear*, 737.

§ 6. Examination of Jurors

Trial court did not err in denial of defendants' motion to sequester prospective jurors during voir dire examination because of pretrial publicity of the case. *S. v. Chavis*, 148.

Defendants were not prejudiced by solicitor's reference to race of certain persons in asking prospective jurors whether they knew such persons. *Ibid.*

Trial court properly refused to permit defense counsel to ask prospective jurors whether they belonged to any organization which excluded black people from its membership and whether they believed in racial equality. *Ibid.*

Trial court properly refused to permit defense counsel to ask a prospective juror whether he would have any hesitancy about saying defendants are not guilty if he had to decide the case without hearing any evidence. *Ibid.*

Trial court corrected its error in excluding questions by defense counsel as to whether prospective jurors would more readily convict a person charged with a crime because he was black. *Ibid.*

§ 7. Challenges

Trial court did not err in denial of defendants' challenges for cause to prospective jurors on grounds of prejudice and bias. *S. v. Chavis*, 148.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

Trial court's instruction in a kidnapping case which included the words, "the court instructs you that the fact that . . . " was prejudicial to defendant. *S. v. Cates*, 65.

Evidence was sufficient to support a verdict of guilty of kidnapping where it tended to show that defendant removed his victim to a place one-half mile from the scene of a prior crime. *S. v. Owen*, 598.

Trial court's instruction that "any carrying away is sufficient, . . ., that is the distance he is carried is immaterial," though not proper, did not constitute reversible error. *Ibid.*

LANDLORD AND TENANT

§ 19. Rent, and Actions Therefor

Rental checks not earmarked by the tenant for application to a particular month's rental were properly applied by the landlord to past due rental claims. *Luther v. Hauser*, 71.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for larceny of typewriters and calculators from a county courthouse. *S. v. Ritzel*, 88.

Circumstantial evidence was sufficient to be submitted to the jury in a prosecution for larceny of an automobile. *S. v. Poole*, 381.

Fact that an indictment alleged the serial number of a stolen vehicle and evidence failed to show the serial number did not constitute a fatal variance. *S. v. Coleman*, 530.

State's evidence was sufficient for the jury in a prosecution for breaking and entering and larceny under the doctrine of possession of recently stolen property. *S. v. Solomon*, 527.

State's evidence was sufficient for the jury in a prosecution for larceny of shirts from a department store. *S. v. Cross*, 584.

LIBEL AND SLANDER

§ 10. Applications of Qualified Privilege

A letter requesting an investigation into the fatal shooting by plaintiff deputy sheriff of a man during the commission of a burglary was not libelous. *Cline v. Brown*, 209.

MASTER AND SERVANT

§ 65. Hernia as Compensable Injury

Evidence was sufficient to support the conclusion that plaintiff sustained a hernia by accident arising out of and in the course of his employment. *McMahan v. Supermarket*, 113.

§ 79. Persons Entitled to Payment of Workmen's Compensation

Husband and wife who had a separation agreement were not living separate and apart for "justifiable cause" within the meaning of the Workmen's Compensation Act. *Sloop v. Exxon Service*, 129.

§ 89. Common-Law Right of Action Against Third-Person Tortfeasor

Amount received by employee's widow pursuant to judgment suspending a prison sentence imposed on the tortfeasor for voluntary manslaughter of the employee constituted amount obtained by the widow "by settlement with . . . or otherwise" from the tortfeasor, and the employer and its insurance carrier are entitled to credit from such amount upon the benefits they are obligated to pay. *Nivens v. Tire & Rubber Co.*, 473.

§ 112. Federal Wage and Hour Law

An employee of a natural gas company was not entitled to compensation under the Fair Labor Standards Act for time spent "on call" while not actually performing a service. *Arrington v. Public Service Co.*, 631.

MORTGAGES AND DEEDS OF TRUST

§ 20. Parties in Suits to Enjoin Foreclosure

Trustee named in a deed of trust was a necessary party in an action to enjoin foreclosure. *Bowman v. Barker*, 110.

§ 37. Election Between Suit to Set Aside Foreclosure and Action for Damages for Wrongful Foreclosure

When a mortgage or deed of trust is wrongfully foreclosed, the injured mortgagor who elects not to ratify the same may either (1) treat the sale as a nullity and sue to set it aside, or (2) permit the sale to stand and sue the mortgagee to recover damages suffered as a result of the wrongful foreclosure. *Chandler v. Savings and Loan Assoc.*, 455.

§ 39. Action for Damages for Wrongful Foreclosure

Since plaintiffs could not have asserted their claim in excess of $300 for wrongful foreclosure of a deed of trust in a small claim action for summary ejectment brought by defendant following foreclosure, they are not estopped by Rule 13 from asserting such claim in the present action. *Chandler v. Savings and Loan Assoc.*, 455.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

A municipality properly classified 140 lots and tracts in use as a privately owned golf course as one commercial tract in determining whether an area to be annexed met the 60% use and subdivision tests. *Thompson v. City of Salisbury*, 616.

A municipality properly classified as in residential use 225 vacant lots and tracts which are in common ownership with lots and tracts upon which dwellings have been constructed. *Ibid.*

A municipality did not act arbitrarily in using the smallest unit of land subdivision appearing on the county tax maps in determining whether an area to be annexed met the 60% use and subdivision tests. *Ibid.*

§ 30. Zoning Ordinances and Building Permits

Enclosure of an existing porch on a building used for a grocery store in an area zoned for residential use would not constitute an enlargement of a nonconforming use. *Clark v. Richardson*, 556.

NARCOTICS

§ 3. Competency and Relevancy of Evidence

Trial court properly allowed the arresting officer to give his opinion that bags found in defendant's car contained marijuana. *S. v. Bagnard*, 54.

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in allowing into evidence defendant's "dog tags" and cigarette papers seized without a warrant from the vehicle which defendant was operating at the time of his arrest. *Ibid.*

In a prosecution for distribution of THC, medical witness was properly allowed to give his opinion that a State's witness was under the influence of a hallucination drug on the day after the witness purchased a substance from defendant and to testify that a sufficient quantity of THC could have caused the symptoms he observed. *S. v. McKinney*, 259.

NARCOTICS — Continued

Evidence as to the chain of custody of marijuana seized from defendant's premises was sufficient to permit admission of the marijuana into evidence. *S. v. Bell*, 430.

Trial court properly allowed into evidence a bag of heroin where the State established a chain of custody from the time the heroin was seized from defendant's home until it appeared in court. *S. v. Chapman*, 462.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was insufficient to support the defense of entrapment in a prosecution for sale of cocaine. *S. v. Salame*, 1.

Evidence was sufficient for the jury to find that defendant had constructive possession of marijuana found in a car defendant was driving but did not own. *S. v. Bagnard*, 54.

State's evidence was sufficient for the jury in a prosecution upon two charges of distribution of the controlled substance THC. *S. v. McKinney*, 259.

Evidence was sufficient to permit an inference that defendant was in possession of a vehicle and marijuana found therein. *S. v. Bell*, 430.

Evidence was sufficient to show that substance in question taken from defendant's premises was marijuana from which the resin had not been extracted and that the substance was Cannabis Sativa L. *Ibid.*

§ 4.5. Instructions

Trial court properly refused to submit to the jury lesser included offenses in this prosecution for distribution of marijuana to a minor. *S. v. Carriker*, 91.

Trial court in a prosecution for possessison of L.S.D. with intent to distribute did not err in instructing the jury that it might return a verdict of guilty of simple possession of L.S.D. *S. v. Reindell*, 141; *S. v. Stanley*, 323.

Trial court did not err in charging the jury that tetrahydrocannabinol and "THC" are the same thing. *S. v. McKinney*, 259.

In a prosecution for possession and sale of MDA, evidence did not require the court to give instructions on guilty knowledge of either the fact of possession or the narcotic character of the substance. *S. v. Gleason*, 732.

§ 5. Verdict and Punishment

Defendant was not subjected to double jeopardy by his conviction for both the possession and sale of the same controlled substance. *S. v. Gleason*, 732.

NEGLIGENCE

§ 29. Sufficiency of Evidence of Negligence

Summary judgment was improperly granted in an action for personal injury and wrongful death resulting from the alleged negligence of a drug manufacturer. *Whitley v. Cubberly*, 204.

PARENT AND CHILD

§ 2. Liability of Parent for Injury to Child

In plaintiff's action against her stepmother to recover for personal injuries resulting from defendant's allegedly negligent operation of an automobile, defendant stood in loco parentis to plaintiff, and defendant was entitled to summary judgment on the ground of parental immunity. *Morgan v. Johnson*, 307.

§ 10. Uniform Reciprocal Enforcement of Support Act

Proceeding under the Uniform Reciprocal Enforcement of Support Act is remanded for a hearing on respondent's ability to provide support. *Barringer v. Barringer*, 142.

PARTITION

§ 1. Nature and Extent of Right to Partition

The court has discretion to order a partition sale of timber growing on land owned by tenants in common subject to a life estate upon petition by the life tenant without making findings as to the necessity and advisability of such a sale. *Piland v. Piland*, 653.

§ 2. Waiver of Right to Partition

Husband impliedly waived his right to seek partition of property by his execution of a separation agreement giving the wife the right to reside in their residence during the agreement. *Hepler v. Burnham*, 362.

§ 9. Proceeds of Sale and Distribution

Where the court ordered a partition sale of timber growing on land owned by tenants in common subject to a life estate, the life tenant is entitled to receive his portion of the net proceeds as ascertained by the mortuary tables. *Piland v. Piland*, 653.

PAYMENT

§ 3. Application of Payment

Rental checks not earmarked by the tenant for application to a particular month's rental were properly applied by the landord to past due rental claims. *Luther v. Hauser*, 71.

PROCESS

§ 19. Actions for Abuse of Process

In an action arising out of alleged unwarranted commitment of plaintiff to a mental hospital, trial court properly entered summary judgment in favor of two doctors who examined plaintiff prior to his commitment but erred in entering summary judgment in favor of plaintiff's wife who initiated the proceedings. *Booe v. Hall*, 276.

PROPERTY

§ 4. Criminal Prosecution for Malicious Destruction of Property

State's evidence was sufficient for the jury in a prosecution for being an accessory before the fact to the felonious burning of a store by use of fire bombs by nine other persons. *S. v. Chavis*, 148.

QUASI CONTRACTS

§ 1. Elements and Essentials of Right of Action

Where evidence supported a finding by the court that the conduct of of the parties indicated they had abandoned a provision of their contract relating to charges for extra work, trial court properly allowed recovery for the extra work on the basis of quantum meruit. *Campbell v. Blount,* 368.

RAPE

§ 6. Instructions

Trial court in rape case expressed an opinion on the evidence when he instructed the jury there was "considerable evidence" defendant committed the crime. *S. v. Head,* 564.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2. Government, Management, and Property

Trial court could properly enter an order providing for the use of church property by factions involved in a church dispute. *Trotter v. Debnam,* 356.

RIOTS AND INCITING TO RIOT

§ 2. Prosecutions

In a prosecution for inciting a riot and engaging in a riot, evidence was sufficient to be submitted to the jury where it tended to show that defendant as the leader of a group of Indians encouraged them to riot. *S. v. Brooks,* 338.

An iron pipe, revolver, shotguns, machete and two jugs containing an amber liquid found at the scene of a riot were admissible in a proceeding against defendant for inciting a riot and engaging in a riot although there was no evidence defendant owned or possessed the items. *Ibid.*

ROBBERY

§ 1. Nature and Elements of the Offense

Acquittal of defendant for assault with a deadly weapon inflicting serious injury would not bar conviction on an attempted armed robbery charge. *S. v. Teel,* 385.

§ 2. Indictment

The bill of indictment for attempted armed robbery was fatally defective for failure to allege defendant attempted to take any property or thing of value from anyone. *S. v. Teel,* 385.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery of a grocery store. *S. v. Stickney,* 117.

Evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit armed robbery. *S. v. Mason,* 568.

State's evidence was sufficient for the jury in an armed robbery prosecution where it tended to show defendant drove the getaway car. *S. v. Allen,* 692.

ROBBERY — Continued

§ 5. Instructions on Lesser Degrees of the Crime

Trial court in an armed robbery case did not err in failing to charge on lesser included offenses. *S. v. Smith*, 316.

RULES OF CIVIL PROCEDURE

§ 13. Counterclaim and Crossclaim

Since plaintiffs could not have asserted their claim in excess of $300 for wrongful foreclosure of a deed of trust in a small claim action for summary ejectment brought by defendant following foreclosure, they are not estopped by Rule 13 from asserting such claim in the present action. *Chandler v. Savings and Loan Assoc.*, 455.

§ 15. Amended Pleadings

Plaintiff's filing of an "application" for alimony four and one-half months after the filing of her complaint was in effect an attempt to amend her complaint. *McCarley v. McCarley*, 373.

§ 41. Dismissal of Actions

Where defendant in an action for absolute divorce filed answer affirmatively seeking a decree of absolute divorce, plaintiff could not thereafter defeat his rights by filing a notice of dismissal. *McCarley v. McCarley*, 373.

Trial court properly dismissed plaintiff's case with prejudice where neither plaintiff nor her counsel appeared for trial. *Thompson v. Trust Co.*, 577.

§ 43. Evidence

Oral testimony should normally be utilized in a hearing upon a motion for summary judgdment only if a small link of evidence is needed. *Chandler v. Savings and Loan Assoc.*, 455.

§ 54. Judgments

Summary judgment entered in favor of third party defendant was interlocutory and not presently appealable by original defendants where trial court did not find there was no just reason for delay. *Arnold v. Howard*, 255.

Order of summary judgment in favor of defendant on a claim for punitive damages was not immediately appealable where the trial court made no determination that there is no just reason for delay. *Raynor v. Mutual of Omaha*, 573.

§ 55. Default

Order refusing to set aside an entry of default is not a final order and is not appealable. *Trust Co. v. Construction Co.*, 131.

Determination of the existence of good cause for setting aside an entry of default rests in the sound discretion of the trial judge. *Miller v. Miller*, 319.

§ 56. Summary Judgment

Credibility of plaintiff's president, an interested witness, may itself be such an issue of fact as will defeat a motion for summary judgment and take the case to trial. *Builders Supply Co. v. Eastern Associates*, 533.

RULES OF CIVIL PROCEDURE — Continued

It is not necessary for the trial judge in passing on motions for summary judgment to make findings of fact. *Wall v. Wall*, 725.

§ 60. Relief from Judgment

Trial court erred in setting aside default judgment against both defendants based on excusable neglect. *Gregg v. Steele*, 310.

§ 65. Injunctions

Provisions of Rule 65 permitting entry of a temporary restraining order without notice to the adverse party are not unconstitutional. *Jolliff v. Winslow*, 107.

Trial court erred in adjudging appellants in contempt of injunctive order where they were not named parties to the action nor were they in active concert or participation with any parties. *Trotter v. Debnam*, 356.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Although the record in this homicide case was insufficient to show that the arrest of defendant without a warrant was lawful and that a search of defendant at the time of the arrest was therefore lawful, the admission of a butcher knife and shotgun shells found in defendant's coat pocket during the search was harmless error. *S. v. Sanders*, 33.

An administrative search without a warrant of a rented dwelling by municipal authorities to detect violations of a housing code does not violate the owner's constitutional right to be free from unreasonable search when the tenant-occupant consents to the search. *In re Dwelling of Properties*, 17.

Marijuana in plain view in defendant's automobile was properly seized by a state trooper. *S. v. Bagnard*, 54.

Defendants had no standing to object to the warrantless search of a church and parsonage where they were not members of the church and were trespassers on the church property. *S. v. Chavis*, 148.

In a crime against nature case, photographs of defendants in the open, public area of a public restroom taken by an officer concealed in the attic of the restroom, and testimony by the officer concerning what he saw while so concealed, did not result from an illegal search in violation of defendants' Fourth Amendment rights. *S. v. Jarrell*, 610.

§ 2. Consent to Search Without Warrant

Trial court's findings were adequate to show defendant's voluntary consent to a search of his automobile although they did not refer specifically to the voluntariness of the consent. *S. v. Glaze*, 60.

§ 3. Requisites and Validity of Search Warrant

An affidavit was sufficient to support a search warrant for heroin. *S. v. Chapman*, 462.

Officer's affidavit concerning a crowbar identified as a tool used in the break-in of a drug company and found in defendant's truck was sufficient to support issuance of a warrant to search defendant's vehicle and premises for property missing from the drug company. *S. v. Travatello*, 511.

SEARCHES AND SEIZURES — Continued

§ 4. Search Under Warrant

Search of a vehicle was proper where the vehicle was located on premises for which officers had a valid search warrant. *S. v. Bell,* 430.

Scope of a warrant to search defendant's premises was not exceeded by search of a tool shed as well as the house itself. *S. v. Travatello,* 511.

STATE

§ 8. Contributory Negligence in Tort Claim Action

In a tort claim action, plaintiff's intestate was contributorily negligent in taking a patrol car and operating it at more than 100 mph after the patrolman had left him in the car in front of a magistrate's office. *Oates v. Dept. of Motor Vehicles,* 690.

STATUTES

§ 1. Enactment of Statutes

The Outdoor Advertising Control Act which provided that it was to become effective when federal funds became available to the State for the purpose of controlling outdoor advertising did not become effective on the date of a letter from an employee of an agency of the federal government to an agency of the State stating that federal funds had become available. *Days Inn v. Board of Transportation,* 636.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Rates

The Commission sufficiently set forth its reasons for adopting a rate of return on fair value of 7.55% and did not err in failing to make findings as to the cost of capital to the telephone company. *Utilities Comm. v. Telegraph Co.,* 327.

The Commission did not err in adopting an adjusted figure for materials and supplies that was less than the telephone company's actual investment in materials and supplies. *Ibid.*

Error by the Commission in determining the cash component of working capital was not prejudicial. *Ibid.*

The Commission did not err in allocating to a telephone company a portion of interest expense incurred by its parent company in obtaining funds by debt issues to purchase common stock of the parent's wholly-owned subsidiaries. *Ibid.*

The Commission did not err in adopting an annualization adjustment factor of 3.61% based on total telephones in service, including extensions. *Ibid.*

The Commission properly disallowed charitable contributions as an operating expense. *Ibid.*

The Commission's order in a telephone rate case was not invalid for the reason it was entered or that the rates became effective more than 270 days after the proposed rates were suspended. *Ibid.*

§ 5. Prosecution for Obscene Calls

Statute making it unlawful to use in telephonic communications "any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation" is not unconstitutional. *In re Simmons,* 28.

TENANTS IN COMMON

§ 6. Acquisition of Title or Interest by One Tenant in Common

Where one tenant in common defaulted on a deed of trust on the common property and purchased the property at a foreclosure sale, the cotenant was entitled to a one-half undivided interest in the property. *Tilley v. Tilley*, 424.

One tenant in common who defaulted on a deed of trust on the common property did not have available to her as a defense the cotenant's failure to make payments for the support and maintenance of the children of both tenants as provided for by contract. *Ibid.*

TORTS

§ 7. Release from Liability and Covenants Not to Sue

Plaintiff's plea of a release given by defendant driver in bar of counterclaim by defendant driver and defendant owner constituted a ratification of the release and barred plaintiff's claim against both the driver and owner. *Jones v. Pettiford*, 546.

TRESPASS

§ 12. Nature and Elements of Criminal Trespass

One who remains in another's home after being directed to leave becomes a trespasser even though the original entry was authorized. *S. v. Kelly*, 670.

TRIAL

§ 9. Duties and Powers of Court in General

Trial court did not err in denying plaintiff's motion for recess made during jury deliberations. *Frazier v. Glasgow*, 641.

TRUSTS

§ 1. Creation of Written Trusts in General

Provision of a will directing the executor to "see that Tom Gold and Edna P. Golds graves are kept decent" did not create a trust for maintenance of the graves. *Gold v. Price*, 660.

§ 8. Income and Persons Entitled Thereto

Upon the death of the beneficiary accumulated undistributed trust income should be distributed in equal shares to the remaining beneficiaries. *Trust Co. v. Barnes*, 347.

§ 10. Duration and Termination of Trusts and Distribution of Corpus

Beneficiary's share of a trust upon her death without lineal descendents should not have been distributed equally to the trusts for each remaining beneficiary. *Trust Co. v. Barnes*, 347.

Plaintiff's dissatisfaction with the consideration, benefits and administration of a marital trust were not conditions or emergencies which were not contemplated by the testator, and the trial court properly dismissed the action to terminate the trust. *Moore v. Trust Co.*, 675.

UTILITIES COMMISSION

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VENUE

§ 8. Removal for Convenience of Parties and Witnesses

Motion for change of venue for the convenience of parties and witnesses is addressed to the trial judge's discretion. *Phillips v. Mills, Inc.*, 143.

WILLS

§ 10. Probate of Holographic Wills

Handwritten words "K. W. Loftin Store" on a purported holographic codicil and "Will of K. W. Loftin" on the envelope in which it was found satisfied requirement that the writing be subscribed by the testator or have his name written in or on the will. *In re Will of Loftin*, 435.

§ 20. Evidence of Due Execution of Will

A witness who swears he is "well acquainted" with a decedent's handwriting is competent to testify as to such handwriting. *In re Will of Loftin*, 435.

A bank employee who testified that he had an opportunity to observe decedent's handwriting only on checks, bonds and safety deposit entry cards was competent to express only an opinion as to the signature on a purported holographic codicil and not to identify the handwriting thereon. *Ibid.*

§ 26. Validity and Attack of Judgment in Caveat Proceedings

Upon appeal from a jury verdict in favor of propounders of a holographic codicil, the appellate court cannot direct the trial court to enter judgment holding as a matter of law that the paperwriting in question is insufficient as a holographic codicil. *In re Will of Loftin*, 435.

WILLS — Continued

§ 35. Time of Vesting of Estate

Where testatrix devised to her son a life estate and in the event of his death without children an estate to his wife during her widowhood, and remainder to heirs of testatrix, the roll should have been called as of the death of testatrix. *White v. Alexander,* 23.

§ 55. Whether Gift is Confined to Personalty or Realty

Provision of a holographic will stating, "If any moneys left it will go to Sandy Plains Church" did not dispose of testatrix's real property. *Gold v. Price,* 660.

§ 61. Dissent of Spouse and Effect Thereof

Petitioner's dissent to her husband's will was invalid where she had her dissent signed by a subscribing witness but she did not file a formally acknowledged dissent. *In re Estate of Burleson,* 136.

Wife impliedly waived her right to dissent from her husband's will when she executed a separation agreement. *Sloop v. Sloop,* 295.

WITNESSES

§ 1. Competency of Witness

Trial court did not abuse its discretion in permitting the State to offer the testimony of witnesses not named on the list furnished by the solicitor. *S. v. Chavis,* 148; *S. v. Carter,* 688.

Trial court did not err in denial of defendants' motion for a mental examination of a State's witness when the witness left the witness stand and attempted to reach the defense table. *S. v. Chavis,* 148.

Children of decedent who were eight, ten and thirteen years old were competent to testify in a murder prosecution. *S. v. Pope,* 217.

WORD AND PHRASE INDEX

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