NORTH CAROLINA COURT OF APPEALS REPORTS

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[2] Resigned 31 July 1975. Succeeded by Frank T. Grady, Elizabethtown, 18 August 1975.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. WILLIE HUDSON McNAIR

No. 7420SC963

(Filed 5 March 1975)

1. Searches and Seizures § 3— warrant to search for marijuana — sufficiency of affidavit

An affidavit was sufficient to support issuance of a warrant to search defendant's premises for marijuana where the affidavit stated that a confidential informer had told affiant within the past seventy-two hours that he had seen marijuana in an area of the premises closed to the public, and the affidavit stated that the affiant had given reliable information on two previous occasions.

2. Searches and Seizures § 4— warrant to search for marijuana — seizure of other items proper

Officers' search of defendant's restaurant did not exceed the scope of the warrant to search for marijuana where officers seized marijuana but also found in plain view and seized evidence consisting of scales, papers, envelopes and plastic bags.

3. Criminal Law § 34— possession of marijuana on other occasions — cross-examination of defendant proper

The trial court in a prosecution for possession of marijuana did not err in allowing the State to cross-examine defendant concerning other instances of possession of marijuana where the district attorney did not ask whether defendant had ever been accused of possession of marijuana but instead asked whether defendant had possessed marijuana on other occasions.

4. Criminal Law § 102— district attorney's jury argument — no prejudice

Though counsel is allowed wide latitude in making its argument to the jury, counsel may not travel outside the record and argue facts not in evidence; argument of the district attorney in this case was not prejudicial.

APPEAL by defendant from *Winner, Judge.* Judgment entered June 1974 in Superior Court, RICHMOND County. Heard in the Court of Appeals 10 February 1975.

Defendant was charged in an indictment with possession of more than one ounce of marijuana. He pleaded not guilty and was tried before a jury. The State offered evidence which showed that on 15 February 1974 law enforcement officers obtained a warrant and conducted a search of premises occupied by Jabbar's Restaurant, an establishment operated by defendant. In an office area they found a box containing 25.3 grams of green vegetable material later identified as marijuana. In a trash can in the dining area they found seven grams of marijuana. The total amount of marijuana seized and introduced into evidence was 32.3 grams. (There are 31.103 grams in one ounce.) Also seized and introduced into evidence were cigarette papers, plastic bags, manilla envelopes and a set of Hanson scales.

Defendant testified that he had no knowledge of the marijuana in question and denied possessing it. The jury found him guilty as charged, and the court sentenced him to eight months imprisonment. From judgment entered, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, for the State.

Chambers, Stein & Ferguson, by James E. Ferguson II, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the search warrant was not based upon a showing of probable cause. When the affidavit supporting a warrant is based on hearsay information, the magistrate must be "informed of underlying circumstances upon which the informant bases his conclusion as to the whereabouts of the articles and the underlying circumstances upon which the officer concluded that the informant was credible. *Jones v. U. S.*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725." *State v. Spillars,*

280 N.C. 341, 349-50, 185 S.E. 2d 881, 887 (1971); *accord, State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Altman.* 15 N.C. App. 257, 189 S.E. 2d 793, *cert. denied* 281 N.C. 759, 191 S.E. 2d 362 (1972). *See also Spinelli v. United States,* 393 U.S. 410 (1969); *Aguilar v. Texas,* 378 U.S. 108 (1964).

In the instant case, the affidavit attached to the warrant reads in part as follows:

> "D. V. Parker, Special Agent, State Bureau of Investigation, being duly sworn and examined under oath, says under oath that he has probable cause to believe that Willie Hudson McNair has on his premises certain property, to wit: Marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act the possession of which is a crime, to wit: possession of marijuana.
>
> The property described above is located on the premises described as follows: The premises, known as Jabbar's Restaurant, is a one (1) story cement block structure; green, black, and red in color. Same premises is located on Hwy. 381, Richmond County, approx. 5/10 mile south of the intersection of Hwy. 74 and Hwy. 381, and the same premises is located on the East side of Hwy. 381. The facts which establish probable cause for the issuance of a search warrant are as follows:
>
> . . . Within the past seventy-two (72) hours a confidential sourse [sic] of information contacted affiant concerning his observation of marijuana on the premises of Jabbar's Restaurant. Informant advised affiant that within the past seventy-two (72) hours from the issuance of this search warrant, that he was on the premises of Jabbar's Restaurant and there observed marijuana, informer noted that the marijuana was contained in a box located in a room at the east end of the building, which is not open to the public. Informant has provided affiant with information in the past which has proven accurate and reliable. On June 8, 1973 informant advised affiant the location of a item which had been stolen and as the result of same information, the item was recovered. On or about July 6, 1973 same informant advised affiant that he had observed marijuana on the premises of Jabbar's Restaurant. As the result of same information a search warrant was issued to search

the premises for marijuana. On July 6, 1973 a search of Jabbar's Restaurant was conducted, during which less than five (5) grams of marijuana was found on the premises."

Measuring this affidavit against the above standards, we are of the opinion that it is more than sufficient to support the warrant.

[2] Defendant further contends that the search exceeded the scope of the warrant. We disagree. In *State v. Zimmerman,* 23 N.C. App. 396, 402, 209 S.E. 2d 350, 355 (1974), we held that "it is permissible to seize an item constituting 'mere evidence' while *properly* executing a search warrant for another item when (1) there exists a nexus between the item to be seized and criminal behavior, and (2) the item is in plain view, and (3) the discovery of that item is inadvertent, that is, the police did not know its location beforehand and intend to seize it."

The warrant in question, based on probable cause, authorized the search of defendant's premises for the property in question. The premises were described in the affidavit as "Jabbar's Restaurant . . . a one (1) story cement block structure. . . ." The property was described as marijuana. Clearly, this was not a general search warrant. *See State v. Foye,* 14 N.C. App. 200, 188 S.E. 2d 67 (1972). Pursuant to the warrant, officers searched the office, kitchen and dining room of Jabbar's Restaurant and seized marijuana, which was admissible in evidence. They also found in plain view and seized mere evidence consisting of scales, papers, envelopes and plastic bags, which were admissible as well.

[3] Defendant next contends that the trial court erred in allowing the State to cross-examine him concerning other instances of possession of marijuana. When a defendant takes the stand he is as subject to impeachment as any other witness, and may be questioned about specific acts of misconduct. *State v. Foster,* 284 N.C. 259, 200 S.E. 2d 782 (1973); 1 Stansbury, N. C. Evidence (Brandis rev.), §§ 111-12. But he may not be cross-examined as to prior indictments or accusations. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). The district attorney asked defendant questions such as "Do you possess marijuana at that restaurant?" and "How many times have you bought marijuana?" He did not ask whether defendant had ever been accused of possession of marijuana but instead asked whether defendant had possessed marijuana on other occasions.

Our North Carolina Supreme Court has recognized a distinction between these two forms of questioning. *State v. Williams, supra* at 671, 185 S.E. 2d at 179. We hold that in the instant case the cross-examination was permissible.

[4] Finally, defendant contends that the trial court erred in permitting the district attorney to argue improper, irrelevant and prejudicial matters in his summation to the jury. It is well settled in this jurisdiction that counsel is allowed wide latitude in arguing hotly contested issues. 2 Strong, N. C. Index 2d, Criminal Law § 102, p. 641. Counsel may not "travel outside the record" and argue facts not in evidence. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962). "But what is an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge, and we 'will not review his discretion unless the impropriety of counsel was gross and well calculated to prejudice the jury,' *State v. Baker,* 69 N.C. 147. (Citations omitted.)" *State v. Bowen,* 230 N.C. 710, 711, 55 S.E. 2d 466, 467 (1949); *accord State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *vacated on other grounds* 408 U.S. 939 (1972). In light of the charge against defendant and the evidence adduced at trial, we hold that the remarks of the district attorney were not so gross or prejudicial as to require a new trial.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. DWIGHT EVERETTE PHILLIPS AND BOBBY MILES

No. 7415SC991

(Filed 5 March 1975)

1. **Robbery § 2— indictments — ownership of property**

Armed robbery indictments clearly negated the idea that defendants took their own property and were sufficient as to ownership.

2. **Robbery § 4— accomplice testimony — sufficiency of evidence for jury**

Testimony of an accomplice was sufficient for submission to the jury on the issue of defendants' guilt of armed robbery.

3. **Criminal Law § 67— dialect of robbers**

Robbery victim was properly permitted to testify that the men who robbed him "sounded like black people talking, that was as much identification as I could tell."

4. **Searches and Seizures § 3— confidential informant — insufficiency of affidavit for warrant**

Officer's affidavit based on information received from a confidential informant was insufficient to support issuance of a warrant to search defendant's car for a pistol taken in a robbery where it contained no circumstances underlying the informant's belief that the stolen pistol would be found in defendant's car.

5. **Searches and Seizures § 2— consent to search — acquiescence in search**

Defendant did not consent to a search of his car but only acquiesced in the search where officers told defendant after they arrested him that they had a warrant to search his car and he told them to go ahead.

6. **Criminal Law § 84— illegally seized weapons — prejudice to codefendant**

Although a codefendant in an armed robbery case had no standing to object to an illegal search of defendant's car, the codefendant was prejudiced by the State's references to weapons seized during the illegal search, and is entitled to a new trial, where there was no evidence that the weapons were used to commit the robbery and the court did not instruct the jury that weapons taken from defendant's car were not to be considered with respect to the codefendant.

APPEAL by defendants from *Brewer, Judge.* Judgments entered 16 August 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 February 1975.

Defendants were charged in bills of indictment with armed robbery. Both men pleaded not guilty, and the cases were consolidated for trial. Clifton Snyder testified that on the night of 21 March 1974 John Virgil Hodgins, a former employee, came to his house and told him he had two friends outside waiting to talk to Snyder about renting a pool table and a music machine. Snyder and Hodgins went downstairs to Snyder's basement, and Hodgins stepped outside to summon his friends. He returned and was followed by two men with stockings over their heads and guns in their hands. Snyder was ordered to open the safe but was unable to do so. He left his wallet on the desk and was taken into a back room and tied up. When he got loose the men were gone, along with a .38 caliber pistol from the desk and money from the wallet.

John Virgil Hodgins testified that on the night of 21 March 1974 he was drinking beer and shooting pool with Dwight Phil-

lips. They went to Phillips' house to see his mother's new car and returned to the poolroom where they met Bobby Miles. Miles talked about opening a business of his own, and Phillips mentioned renting equipment from Snyder. The three men left in Miles's car for Snyder's house. Hodgins went in first and later motioned to the others to come into the basement. The robbery thereafter took place as Snyder described it. Defendants then drove away, put Hodgins out on Interstate 85, and handed him some money. Hodgins was arrested in Durham two days later.

On 25 March 1974 law enforcement officers obtained warrants for the arrest of Phillips and the search of his car. In the car they found two pistols, neither of which matched the description of the gun taken from Mr. Snyder. After a *voir dire* hearing, the trial court found that the search warrant was valid and that Phillips consented to the search after the warrant was read to him. Miles was not arrested until 9 May 1974.

Both Phillips and Miles testified to being elsewhere at the time of the robbery. Each defendant offered witnesses with corroborative testimony concerning his whereabouts. The court instructed on the elements of robbery with a firearm, the defense of alibi, and the jury's duty to scrutinize closely the testimony of Hodgins, who was under indictment as an accomplice to the robbery. The jury found both defendants guilty as charged. From judgments imposing sentences of 20 to 30 years' imprisonment, defendants appealed to this Court.

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

Ross, Wood & Dodge, by B. F. Wood, for defendant appellant Dwight Everette Phillips.

Fred Darlington III for defendant appellant Bobby Miles.

ARNOLD, Judge.

In order to preserve all objections on appeal, both defendants have assigned error to the wording of the indictments, the denial of their motions for nonsuit, and the court's instructions to the jury. We have examined the record and conclude that these assignments are without merit.

[1, 2] The indictments clearly negate the idea that defendants took their own property and therefore are sufficient as to owner-

ship. *See State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972); *State v. Mason,* 279 N.C. 435, 183 S.E. 2d 661 (1971); *State v. Fountain,* 14 N.C. App. 82, 187 S.E. 2d 493 (1972). Viewed in the light most favorable to the State, the testimony of John Virgil Hodgins constituted a sufficient basis for finding that a crime was committed and that defendants committed it. *See State v. Mason, supra; State v. Terry,* 278 N.C. 284, 179 S.E. 2d 368 (1971). *See generally* 6 Strong, N. C. Index 2d, Robbery § 4, pp. 682-83. The trial court did not err in overruling their motions for nonsuit. In instructing the jury, the court properly recapitulated Hodgins' corroborative testimony. The court is not required to instruct on lesser included offenses when there is no evidence to support the charge. *State v. McLeod,* 17 N.C. App. 577, 194 S.E. 2d 861 (1973); *State v. Hailstock,* 15 N.C. App. 556, 190 S.E. 2d 376, *cert. denied* 281 N.C. 760, 191 S.E. 2d 363 (1972).

[3] Defendant Phillips further contends that the trial court erred in permitting Clifton Snyder to testify that the men who robbed him "sounded like black people talking, that was as much identification as I could tell." We disagree. Mr. Snyder did not purport to identify his assailants by race. He merely testified as to the dialect he heard. Moreover, he later stated that he did not know whether they were black or white. Defendant's objection to his testimony was properly overruled.

[4] Turning now to Phillips' objection to the State's evidence concerning handguns found in his automobile, we hold that the search was illegal and the testimony was inadmissible against him. The trial court's finding of fact that the search warrant was valid is not supported by the evidence. A warrant based on hearsay information must disclose the basis for the informant's beliefs as well as the basis for the officer's reliance on the informant. *Jones v. United States,* 362 U.S. 257 (1960); *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1971). *See also Spinelli v. United States,* 393 U.S. 410 (1969); *Aguilar v. Texas,* 378 U.S. 108 (1964). In the instant case, the affidavit attached to the warrant reads in part as follows: "The facts which established probable cause for the issuance of the search warrant are as follows: Received information from a reliable informer that Dwight Phillips took the thirty-eight caliber pistol, Serial No. D-230342 during the armed robbery of Cliff Snyder. 2920 Maple Avenue, Burlington, N. C. on March 21, 1974. The informer has

given information in the past which has proven to be correct and has resulted in conviction." This warrant is totally devoid of any information as to the circumstances underlying the informant's belief that Clifton Snyder's .38 caliber pistol would be found in Phillips' car. It is insufficient as a matter of law to support an issuing magistrate's independent finding of probable cause. *See State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974).

[5] The State contends, however, that Phillips consented to the search and the trial court so found. Again, this finding is not supported by the evidence. The burden is on the State to show by clear and convincing evidence that consent to search was given freely and voluntarily. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied* 414 U.S. 874 (1973). Testimony on *voir dire* hearing tended to show that, after they arrested him at the Annedeen Hosiery Mill, the officers told Phillips they had a warrant to search his car. He then told them to go ahead. The United States Supreme Court has held that under such circumstances there is no consent but only acquiescence. *Bumper v. North Carolina,* 391 U.S. 543 (1968). Nor was the search valid as being incident to an arrest. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). The State having failed to show otherwise, we hold that Phillips did not freely and voluntarily consent to the search of his automobile. The search therefore was invalid, and testimony concerning items thereby obtained was inadmissible against this defendant. He is entitled to a new trial.

[6] Defendant Miles, conceding that he lacks standing to object to the search of Phillips' vehicle, nevertheless contends that he was prejudiced by the State's repeated references to the illegally obtained evidence and also is entitled to a new trial. The exclusionary rule has not been extended to codefendants. *Alderman v. United States,* 394 U.S. 165 (1969). Unlike the victim of the illegal search this defendant has the burden of showing prejudicial effect.

While defendant has failed to point this out in his brief, we believe the record speaks for itself. The State offered no evidence to indicate that the weapons found in Phillips' car were used to commit the robbery. The stolen weapon was never found. Moreover, the trial court did not instruct the jury that the weapons taken from Phillips were not to be considered with

respect to Miles. The cumulative effect was so potentially prejudicial as to require that this defendant also be given a new trial.

As to both defendants, new trial.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. SIDNEY RICHARD BROWN

No. 7425SC989

(Filed 5 March 1975)

1. **Burglary and Unlawful Breakings § 5— break-in of drug store — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for felonious breaking and entering and possession of burglary tools where it tended to show that an officer apprehended defendant inside a drug store, a stack of drugs was on a counter within arm's reach of defendant when he was apprehended, and two crowbars and other tools were found near defendant at the crime scene.

2. **Burglary and Unlawful Breakings § 10— possession of burglary tools — tools not in defendant's actual possession — admission proper**

In a prosecution for breaking and entering and possession of burglary tools, the trial court properly admitted into evidence burglary tools found at the scene, though they were not found in defendant's actual possession, where the State's evidence placed defendant in close proximity to the tools and evidence tended to show that entry had been gained to the building and to the narcotics cabinet by use of the tools found.

3. **Criminal Law § 168—jury charge — one improper statement — charge as a whole correct**

Though at least one statement of the trial court's charge, read out of context and as an isolated statement, might be said to present an erroneous statement of the law, that statement was harmless error since the charge as a whole was proper.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 12 July 1974 in Superior Court, CALDWELL County. Heard in the Court of Appeals 13 February 1975.

Defendant was charged with and convicted of feloniously breaking and entering a building with intent to commit larceny therein and feloniously and without lawful excuse having burglary tools in his possession.

The State's evidence tended to show: Officer Brown was, on 25 March 1974, patrolling on the Wilkesboro Road in Lenoir. He received a radio call that the alarm had gone off at Sav-Mor Drug, Inc. He immediately responded to the call as did Lt. Harless, who was on the same shift. Harless went to the rear of the building and Brown went to the front. Brown found the front door pried open and observed the "defendant and two other subjects inside." They saw him and ducked behind a counter. He entered and followed them into a back room which was dark. He could hear them trying to remove the bar across the back door. One removed the bar, opened the door, and ran out. From the light from the outside, Brown could see the defendant and another at the back door. Harless called for the fleeing one to stop, and Brown heard two shots—while he was attempting to locate the two still in the store. He found the defendant hiding in a corner and the other subject under a counter. The other subject was Raymond Gibson. On the counter under which Gibson was hiding was "a rather long list of drugs," and these were within "arms reach of the defendant on the counter stacked up." Brown also found two crowbars and other tools used to gain entry. These were found near the defendant. Both defendant and Gibson were arrested. Gibson died prior to trial.

Defendant testified in his own behalf. His testimony was that on the night in question he was hitchhiking, having come from California to North Carolina, had gotten a ride to Lenoir, and was walking down Highway 321-A to Lincolnton trying to get a ride when he came to Sav-Mor Drugs. He saw someone in the store, thought it was open, and went in to buy a pack of cigarettes. When he "got about half-way in the door, Officer Brown came in with his pistol and told me to get up against the wall." Brown told defendant that he was under arrest and when defendant asked him what the charge was he was told "public drunkenness right now."

The jury found the defendant guilty as charged on both counts. The court consolidated the cases for the purpose of judgment and ordered imprisonment for the term of 10 years. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General John R. B. Matthis, for the State.

L. H. Wall for defendant appellant.

CLARK, Judge.

Prior to trial defendant made several written motions. He moved that the charges be dismissed because his request to be put in a cell with Gibson had been denied, because the prison authorities had not prevented Gibson from committing suicide, and because he had been denied his request to have a court reporter record the testimony at his preliminary hearing. The record discloses that defendant was placed in jail on 25 March 1974 and called District Court Judge Dale requesting the appointment of counsel and a hearing on bond reduction. Judge Dale appointed counsel and had a hearing on defendant's request for a court reporter to record the testimony at his preliminary hearing. The court denied the request stating that the recording system used in Juvenile and Domestic Relations Court would be made available and directed that the preliminary hearing be set at the earliest practicable time. These entries were made 28 March 1974, only three days after defendant's arrest. Subsequently, defendant wrote the judge expressing dissatisfaction with his appointed counsel and requesting that he be released and that the court appoint another lawyer. The court complied with the request as to appointment of another lawyer. On 22 April 1974, defendant wrote the judge requesting that he be confined in a cell with Gibson so they could prepare their joint defense. On 13 May 1974, defendant waived preliminary hearing and the judge bound him over for trial. On 28 May 1974, defendant filed a written motion requesting dismissal of the charge. In this motion, he recites that on 6 May 1974 Gibson committed suicide in the Caldwell County jail. He abandons his contention that he should have been confined with Gibson to prepare their joint defense, and for the first time contends that Gibson would have testified that defendant was innocent and Gibson would have accepted the full blame for the breaking and entering and larceny and would have testified that the burglary tools were his. In this motion defendant says that the sheriff and jailers should have and could have prevented Gibson's death and their failure to do so deprived defendant of his right to secure the attendance of a witness who possessed evidence favorable to defendant's defense and that Gibson was the only person who could have exonerated defendant.

When defendant's cases were called for trial, and after arraignment and plea, the court directed that the reporter let the record reflect that the court had thoroughly reviewed and

considered defendant's pretrial motions, those of counsel and counsel's brief. The court denied all the motions. The record lists 11 exceptions to the court's action, among them being exceptions to the court's failure to hear the defendant and to make findings of fact. We do not think it necessary to consider each exception separately. Suffice it to say that in our opinion the lack of prejudicial error is too obvious to require discussion.

[1] At the close of the State's evidence and again at the close of all the evidence, defendant moved for dismissal as of nonsuit and brings forward his exceptions to the court's denial of his motions. The evidence is plenary to survive the motions. These assignments of error are overruled.

[2] Defendant also assigns as error the introduction into evidence of the burglary tools found in the drug store contending that they were not tied to defendant's use of them to gain entry to the building. The evidence for the State placed defendant in close proximity to the tools. According to the State's evidence, he ran and attempted to flee from the rear of the building and hid when this was not successful. The evidence was that entry had been gained to the building and to the narcotics cabinet by use of the tools found. It is difficult to see how the court could have failed to deny defendant's objection to the introduction of these tools in evidence. It was not necessary that the State show that the tools were found in defendant's actual possession. *State v. Lovelace,* 272 N.C. 496, 158 S.E. 2d 624 (1968). They were certainly relevant and admissible. The weight to be given the evidence was for the jury.

[3] Finally, defendant contends the court committed prejudicial error in its charge to the jury. Even though defendant has failed to except properly to any portion of the charge, we have considered the charge and are of the opinion that the charge taken contextually and read as a whole fairly and clearly presents the law to the jury. We concede that at least one statement, read out of context and as an isolated statement, might be said to present an erroneous statement of the law. However, when considered in the context of the charge as a whole, it had no prejudicial effect and was, therefore, harmless error.

> " 'The charge of the court must be read as a whole . . ., in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . .' *State v. Wilson,* 176 N.C. 751, 97 S.E. 496 (1918). It will

be construed contextually, and isolated portions will not be held prejudicial when the charge as whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1963); *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169 (1962). If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966)." *State v. Lee,* 277 N.C. 205, 214, 176 S.E. 2d 765 (1970).

These assignments of error are overruled.

Defendant's remaining assignments of error are formal and have been discussed previously. They are overruled.

Defendant has had a fair trial, free from prejudicial error and wherein all rights guaranteed by the Constitution of this State and of the United States were protected.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. DANA ALDERMAN, EDDIE WHITAKER, CHARLES LEAK, AND ERNEST MARKHAM

No. 748SC955

(Filed 5 March 1975)

1. Constitutional Law § 32— right to counsel — allowance of reasonable time to prepare defense

The right to assistance of counsel and the right to face one's accusers are guaranteed by the Sixth Amendment of the U. S. Constitution, which is made applicable to the states by the Fourteenth Amendment, and by Article I, §§ 19 and 23 of the N. C. Constitution; and the right to assistance of counsel includes the right of counsel to have a reasonable opportunity in the light of all the attendant circumstances to investigate, prepare, and present a defense.

2. Criminal Law § 91— motion for continuance — failure to file supporting affidavits — excuse

Where counsel were notified of their appointment to represent four indigent defendants, each charged with two felony crimes on different dates, on the first day of the session, and on the same day, before the appointed counsel had had an opportunity to confer with

their clients, the trial court, over the objection of the appointed counsel, granted the motion of the State for a speedy trial of all defendants, ordered the consolidation of all charges for trial, and called the cases for trial on the following day, the appointed counsel were relieved of the burden of filing affidavits showing sufficient grounds for continuance resisting the State's motion for a speedy trial, particularly since counsel had no opportunity to file affidavits and the grounds for delay in trial were obvious and known to the court.

3. Constitutional Law § 32— trial one day after appointment of counsel — right to counsel abridged

Indigent defendants were denied their constitutional guarantee of the right to counsel where their attorneys were notified of appointment on the first day of the session and trial was scheduled for the next day.

APPEAL by defendants from *Browning, Judge.* Judgments entered 7 June 1974, in Superior Court, GREENE County. Heard in the Court of Appeals 23 January 1975.

Each of the four defendants was charged in separate bills of indictment with the same two criminal offenses as follows: (1) crime against nature with Raymond Thaxton on 16 May 1974, and (2) crime against nature with Harold Clark on 19 May 1974. All defendants and the alleged victims on the alleged dates of the offenses were confined to the Greene County Unit of the Department of Corrections, which is a minimum custody reception center where inmates are committed for diagnostic processing and then assigned to various units of the department. After the alleged dates, all of the defendants left the Greene County Unit and were transferred and assigned to the Goldsboro Youth Center in Wayne County, where they were served with warrants charging the two criminal offenses as aforesaid on Friday, 31 May 1974.

On Friday, 31 May 1974, defendants Whitaker, age 22, Leak, age 20, and Markham, age 19, appeared in the District Court, Greene County, and made affidavits of indigency; and the court appointed counsel for them. The defendant Alderman, age 19, made his affidavit of indigency the following Monday, 3 June 1974, in the Superior Court, and the court appointed counsel for him.

It appears that counsel who were appointed in the district court on 31 May 1974, were not advised of the appointment until the following Monday, 3 June 1974, the first day of the session of the Superior Court of Greene County; and counsel did not see their respective clients until that day.

On the opening day of the session, bills of indictment charging each of the four defendants with the two offenses were presented to the Grand Jury, and a true bill was returned on each charge. On this opening day after the indictments were returned by the Grand Jury, the State moved for a speedy trial of the two charges against each of the four defendants. Counsel for the defendants objected and excepted to the order of the trial court allowing speedy trial, all contending that they had not had an opportunity to confer with their clients and to prepare a defense.

All cases were called for trial after the noon recess on the following day, Tuesday, 4 June 1974, at which time, in the absence of a jury, counsel for all defendants made motions for severance, for continuance, for bill of particulars, and to quash the bills of indictment. All motions were denied. All defendants excepted.

The defendants were arraigned on the two stated charges and all entered pleas of not guilty. The jury was selected and empaneled by that afternoon, and thereupon the court ordered a recess. The trial was resumed the following morning.

The State's evidence consisted of the testimony of the alleged victims, Raymond Thaxton and Harold Clark, and the two other youthful offenders who were present in the barracks of the Greene County Unit at the times of the alleged offenses.

The defendants, Markham, Leak and Alderman each testified in their own behalf, and another inmate testified for the defendant Alderman. The defendant Whitaker did not offer evidence.

The jury returned verdicts of guilty on all charges, and from judgments imposing consecutive prison terms, all defendants appealed.

Attorney General Edmisten by Associate Attorney Robert P. Gruber for the State.

Farris, Thomas & Farris by Robert A. Farris for defendant Dana Alderman.

Turner & Harrison by Fred W. Harrison for defendant Eddie Whitaker.

I. Joseph Horton for defendant Charles Leak.

William R. Jenkins for defendant Ernest Markham.

CLARK, Judge.

[1] The right to assistance of counsel and the right to face one's accusers and witnesses and other testimony are guaranteed by the Sixth Amendment of the Federal Constitution, which is made applicable to the states by the Fourteenth Amendment and by Article I, Sections 19 and 23 of the Constitution of North Carolina. *White v. Ragen,* 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948).

The right to be represented by an attorney necessarily includes a reasonable time for counsel to prepare defendants' cases. Ordinarily, a motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal, except in a case of manifest abuse. However, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and the order of the court is reviewable. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964).

The right to the assistance of counsel includes the right of counsel to have a reasonable opportunity in the light of all the attendant circumstances to investigate, prepare and present his defense. *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294 (1949).

[2] Ordinarily, continuances should not be granted unless the reasons therefore are fully established and the motion is supported by an affidavit showing sufficient ground. *State v. Gibson, supra.* However, in this case, counsel were notified of their appointment to represent four indigent defendants, each charged with two felony crimes on different dates, on the first day of the session. On that same day, before the appointed counsel had had an opportunity to confer with their clients, the trial court, over the objection of the appointed counsel, granted the motion of the State for a speedy trial of all defendants, ordering the consolidation of all charges for trial, and calling the cases for trial on the following day. In these circumstances, the appointed counsel were relieved of the burden of filing affidavits showing sufficient grounds for continuance resisting the State's motion for a speedy trial, particularly since counsel had no opportunity to file affidavits and the grounds for delay in trial were obvious and known to the court. See, *Edgerton v. State of North Carolina,* 315 F. 2d 676 (1963); and *Fields v. Peyton,* 375 F. 2d 624 (1967).

The evidence for the State tends to show that the defendants forced the victims, one on the night of 16 May 1974, and the other on the night of 19 May 1974, to submit to intercourse per anus in the reception center dormitory where more than fifty inmates occupied double-decked bunks in rows about one and one-half feet apart. There was a dim ceiling light in the dormitory and a guard sat at a desk just outside the door, which was constructed of iron bars spaced about six inches apart.

Defendants testified that they had not committed any sexual acts with Thaxton, Clark or any other males.

[3] It is not *ipso facto* a denial of effective assistance because counsel were notified of their appointment and on the same day learned that the cases would be called for trial the following day. However, taking into consideration the ages of the defendants, the multiple charges on different dates, the probable transfer of possible witnesses from the reception center to other correctional units, and all the other circumstances, we find that the appointed counsel did not have a reasonable opportunity to investigate, prepare and present their defenses which is a violation of the constitutional guarantee of the right to counsel.

The convictions and sentences of all defendants are vacated and the actions are remanded for

New trial.

Chief Judge BROCK and Judge BRITT concur.

NYTCO LEASING, INC., PLAINTIFF v. DAN-CLEVE CORPORATION, F. ROLAND DANIELSON, AND BILL CLEVE, DEFENDANTS-APPELLANTS v. SOUTHEASTERN MOTEL CORPORATION, THIRD PARTY DEFENDANT

No. 7410SC874

(Filed 5 March 1975)

Rules of Civil Procedure § 54— adjudication of rights of fewer than all the parties — judgment interlocutory and not appealable

Where the judgment from which the original defendants purported to appeal adjudicated "the rights and liabilities of fewer than all the parties" and contained no determination by the trial judge that "there is no just reason for delay," the judgment was interlocutory within the

meaning of N. C. Rules of Civil Procedure, Rule 54(b), and the judgment was not appealable.

APPEAL by defendants from *McKinnon, Judge.* Judgment entered 28 June 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 17 January 1975.

The Southeastern Motel Corporation, third party defendant, is not involved in this appeal.

On 27 November 1972 plaintiff Nytco Leasing, Inc., entered into a lease agreement with defendant Dan-Cleve Corporation for the lease of furniture, fixtures, and equipment for a period of eighty-four months at a monthly rental of $5,130.00. Defendants F. Roland Danielson and Bill Cleve each contemporaneously executed and delivered to plaintiff a personal guaranty of defendant Dan-Cleve's performance. In consideration of the execution of the lease and the personal guaranties, Nytco purchased and delivered the furniture, fixtures, and equipment selected by Dan-Cleve to a Sheraton Inn leased and operated by defendants. Because the amount and rental value of the items purchased by Nytco was less than that contemplated under the lease, the schedule of rates and charges was amended to provide for monthly rental payments of $3,594.04, payable for eighty-four months, commencing 1 March 1973.

Beginning 1 March 1973, Dan-Cleve made three monthly payments of rent to plaintiff but made no further monthly payments. By reason of Dan-Cleve's failure to make the scheduled payments, plaintiff requested that the guarantors remedy the default. The guarantors have refused to do so. As a result, and pursuant to the terms of the agreement, Nytco declared due and payable all the unpaid rentals for the entire term of the agreement.

At the time they entered into the lease, defendants also agreed to accept and pay for certain expendable items agreed upon by both plaintiff and defendants. Plaintiff Nytco purchased these items at a cost of $4,396.83 and delivered them to defendants, who had previously agreed to accept delivery. Plaintiff alleges that defendants have failed to pay for these expendables despite repeated demands for payment. As a consequence of these events, plaintiff Nytco, in its complaint, prayed for the rent due under the agreement, sales tax payable on the rent,

the value of the expendables and the sales tax thereon, and reasonable attorney fees.

Defendants filed a joint answer denying the prayers of the complaint generally but admitting defendant Dan-Cleve's liability for the expendables purchased by Nytco. Defendants also filed, at the filing of their answer, a pleading against Southeastern Motel Corporation (hereinafter referred to as Southeastern). Defendants complained that Southeastern, which leased the Sheraton Inn to Dan-Cleve, had taken possession of the inn and the furniture, fixtures, and equipment. Defendants prayed that in the event plaintiff got a judgment against them, the judgment would be made a lien on the furniture, fixtures, and equipment held by Southeastern. Defendants also prayed that these items be sold at public auction.

Southeastern subsequently cross-claimed against defendants. Under a lease agreement for rental of the inn owned by Southeastern, defendants agreed that all furniture, fixtures, and equipment would be purchased, not leased, and that a chattel mortgage would be given to secure the rental payments for the inn. For breaching this agreement, Southeastern complained that it was damaged in the amount of $210,220.26. Southeastern also charged that because defendants were in default of their rent on the inn, it had been damaged in the amount of $66,930.50 and, furthermore, that defendants had misappropriated some $17,737.00. Southeastern's cross-claim acknowledged the existence of a separate action which was filed in Johnston County against it by plaintiff. The record on appeal does not disclose what disposition, if any, has been made of the claims of the respective defendants against each other and the claim of plaintiff against Southeastern.

After the pleadings were filed, plaintiff moved for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure. Pursuant to the action filed in Johnston County by plaintiff against Southeastern, part of the furniture, fixtures, and equipment were recovered by plaintiff at a cost of $14,926.21. Part of these items were also sold to Southeastern for $33,500.00. Defendants disputed plaintiff's allegation in respect of the amount spent to recover part of the goods, and the trial court found that there was a genuine issue as to this material fact. On the other issues pending between plaintiff and original defendants, the court granted summary judgment for plaintiff in the amount prayed for by plaintiff, less a credit of

$33,500.00 by reason of plaintiff's sale of the goods to Southeastern.

Sanford, Cannon, Adams & McCullough, by John Q. Beard, E. D. Gaskins, Jr., H. Hugh Stevens, Jr., and Daniel T. Blue, Jr., for plaintiff-appellee.

Vaughan S. Winborne and Ellis Nassif, for defendants-appellant.

BROCK, Chief Judge.

Although neither party has raised the question, it is clear that the judgment from which the original defendants purport to appeal 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" within the language of Rule 54(b) of the North Carolina Rules of Civil Procedure. Rule 54(b) provides:

> "(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, cross-claim, 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.)

In the recent case of *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974), we pointed out the purpose of and need

for Rule 54(b). In that case plaintiff sued the original defendants for money due on a promissory note. The defendants answered, setting out, in addition to certain defenses, a third-party claim for contribution against a third-party defendant. After the pleadings were filed, the third-party defendant moved for summary judgment on the original defendants' claim against him. The trial court found no genuine issue as to any material fact, granted the motion, and dismissed the original defendants' claim for contribution against the third-party defendant. The original defendants appealed. Because the judgment from which they attempted to appeal adjudicated "the rights and liabilities of fewer than all the parties" and furthermore contained no determination by the trial judge that there was "no just reason for delay," the judgment was interlocutory and not appealable. The opinion of the Court in *Arnold v. Howard, supra,* states:

> "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)." 24 N.C. App. at 258.

In the case at bar, 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." Although the claims of the respective defendants against each other do not seem to affect the plaintiff's rights, it is clear

that under Rule 54(b) the judgment is interlocutory and not presently appealable.

Appeal dismissed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. PRESTON MAYNARD CARLISLE

No. 748SC980

(Filed 5 March 1975)

1. **Automobiles § 127— driving under the influence — discrepancies in evidence — motion for nonsuit properly denied**

The trial court did not err in denying defendant's motions for nonsuit on the charge of a sixth offense of driving under the influence, though there were contradictions in the testimony of a State's witness, since mere contradictions and discrepancies in the State's evidence are not enough to warrant the granting of a motion for nonsuit.

2. **Criminal Law § 92; Indictment and Warrant § 12— warrant on one charge improperly drawn — amendment allowed — consolidation of two charges proper**

Defendant's contention that it was improper to consolidate for trial a charge of a sixth offense of driving while intoxicated with a charge of driving while his license was permanently revoked because the warrant for the former was improperly drawn was without merit where the trial court allowed the State to amend the warrant to reflect the correct chronological order of defendant's five prior convictions, and such amendment did not impair any substantial right of defendant.

3. **Criminal Law § 74— statements by defendant to trooper — no custodial interrogation — admissibility of statements**

The trial court did not err in admitting statements made by defendant to a state trooper who stopped him on the highway since defendant made the statements to the trooper after he had been stopped but before he was placed under arrest, and therefore the statements were not the fruits of an in-custodial interrogation.

APPEAL by defendant from *Wells, Judge.* Judgment entered 22 August 1974 in Superior Court, Lenoir County. Heard in the Court of Appeals 12 February 1975.

Defendant was charged in two warrants with (1) operating a motor vehicle while his license was permanently revoked, and (2) a sixth offense of driving a motor vehicle while under

the influence of intoxicating beverages. He entered a plea of not guilty in district court, but was found guilty and sentence was imposed. Defendant then appealed to the superior court. There his motion for nonsuit on the charge of driving while his license was permanently revoked was allowed, but defendant was found guilty of the sixth offense of driving under the influence of intoxicating beverages. He was sentenced to serve a term of not less than sixteen nor more than twenty-four months.

Two witnesses testified for the State at the trial in superior court. William Perkins, a member of the State Highway Patrol assigned to Lenoir County, observed defendant operating his car on U.S. 70 at approximately 1:45 a.m. on 12 May 1973. Trooper Perkins followed the defendant for some distance. Defendant's car weaved four times from the right side of the road to the centerline, and Perkins stopped it. Defendant stumbled as he got out of his car. His eyes were red and glassy, and he staggered as he walked. He was taken to the Kinston Police Department where coordination tests were administered. Defendant fell during the balance test, hesitated before turning during the walking test, and was unable to touch the forefinger of either hand to his nose. Defendant refused to take a breathalizer test. Both Perkins and the breathalyzer operator, one Geldon Harper, testified that they detected an odor of alcohol about defendant.

Andrew Wallace testified for defendant. He stated that he and defendant had been together on the evening of 11 May 1973, and, as of midnight, the defendant was not under the influence of intoxicating beverages.

Attorney General Edmisten, by Assistant Attorney General Zoro J. Guice, Jr., for the State.

Duke and Brown, by John E. Duke, for defendant-appellant.

BROCK, Chief Judge.

Defendant has brought forward eighty-four exceptions and five assignments of error for our consideration.

[1] In his first argument defendant asserts that the trial court erred when it denied his motions for nonsuit on the charge of a sixth offense of driving under the influence. In support of his argument defendant cites statements made by Trooper Perkins to the effect that defendant's faculties were not impaired when

he was stopped. Of course, mere contradictions and discrepancies in the State's evidence are not enough to warrant the granting of a motion for nonsuit. The evidence must be considered in the light most favorable to the State in ruling upon the motion. Contradictions and discrepancies are to be resolved by the jury. *See* 2 Strong, N. C. Index 2d, Criminal Law, § 104 (1967). This assignment of error is overruled.

[2] In his second assignment of error, defendant advances two arguments: that it was error to consolidate the charge of a sixth offense of driving while intoxicated with the charge of driving while his license was permanently revoked because the warrant for the former was improperly drawn, and that it was error to deny the motion to quash the warrant for the former. The warrant for the sixth offense of driving while intoxicated, as it was drawn before defendant's trial in district court, improperly reflected the chronological order of defendant's five prior convictions for that offense. After defendant made a motion to quash the warrant and objected to consolidation, the court allowed the State to amend the warrant to reflect the correct chronological order of the convictions. The crux of defendant's argument is that it was improper to consolidate for trial an offense for which a warrant is improperly drawn with an offense for which a warrant is properly drawn. No authority is cited by defendant for this proposition, and we think it is unsupportable on these facts. In *State v. Thompson,* 2 N.C. App. 508, 512, 163 S.E. 2d 410 (1968), we held that "[a]s a general proposition the superior court, on an appeal from an inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged." The fact that the warrant charging the offense of driving while intoxicated, sixth offense, was amended to reflect correctly the chronological order of the prior five convictions could not have impaired any substantial right of defendant. Because of the amendment, the offenses which were consolidated were supported by warrants, both of which were properly drawn. We furthermore fail to see how defendant was prejudiced by consolidation of two charges of the same class, "not so separate in time or place and not so distinct in circumstances as to render a consolidation unjust and prejudicial." *State v. Anderson,* 281 N.C. 261, 265, 188 S.E. 2d 336 (1972). This assignment of error is without merit.

By way of his third assignment of error, defendant argues that comments made by the district attorney require the reversal of this case. Exception 73 is, however, the only exception taken to these comments. Although other exceptions in support of this argument are noted, none are taken to things actually said by the district attorney, and we are left only with inferences on which to draw. "Generally, it is not improper for the prosecuting attorney to comment on, and make references from, the conduct of the accused, where the purported facts referred to are supported by competent evidence and the inferences sought to be made are within the bounds of proper argument; such comments may be couched in denunciatory or opprobrious terms appropriate to the evidence adduced." 23A C.J.S. Criminal Law § 1102, *quoted in State v. Westbrook*, 279 N.C. 18, 38, 181 S.E. 2d 572 (1971). In our opinion the comments made by the district attorney were not improper and certainly do not require reversal.

[3] Defendant has grouped some sixty exceptions to the admission of evidence under his fourth assignment of error. Among these exceptions are those that have been taken to statements made by defendant to Trooper Perkins after he stopped defendant's car. Defendant argues, on the authority of *State v. Lawson*, 285 N.C. 320, 204 S.E. 2d 843 (1974), that these were improperly admitted because they were the fruits of an in-custodial interrogation for which *Miranda* warnings were required but not given. We do not disagree with defendant's reading of *Lawson;* however, we believe that the argument is based on a faulty major premise, i.e., that an in-custodial interrogation took place. In *Lawson* an accused made statements after he had been arrested, advised of his rights, and asked if he understood his rights. Here defendant freely made statements to Perkins after he had been stopped but before he was placed under arrest. Although there is admittedly a fine distinction between an in-custodial interrogation and an on-the-scene investigation,

> "[t]he questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a 'police dominated' situation or as 'incommunicado' in nature. * * * This general on the scene questioning is a well accepted police practice; it is difficult to imagine the police warning every person they encounter of his *Miranda* rights. This is why the opinion in *Miranda* expressly excluded 'on-the-scene questioning' from the warn-

ing requirements." *Lowe v. United States,* 407 F. 2d 1391 (9th Cir. 1969), *quoted in State v. Sykes,* 285 N.C. 202, 206, 203 S.E. 2d 849 (1974). *Cf. State v. Beasley,* 10 N.C. App. 663, 179 S.E. 2d 820 (1971); *State v. Tyndall,* 18 N.C. App. 669, 197 S.E. 2d 598 (1973).

We do not agree, therefore, with the defendant that the statements made to Perkins were the fruits of an in-custodial interrogation. As to the other exceptions taken to the admission of certain evidence, we find no error harmful to defendant.

This leaves for our resolution defendant's final argument that the trial court erred in instructing the jury. Suffice to say, we have reviewed the charge and find no error prejudicial to defendant. In our opinion he had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

ALLIED PERSONNEL OF RALEIGH, INC. v. ROBERT F. ALFORD

No. 7410DC923

(Filed 5 March 1975)

1. **Contracts § 4— employment agency agreement — consideration**

Paper-writing in which defendant authorized plaintiff to act as agent in seeking employment for him and promised to pay for such services as provided by the terms of the writing amounted to a contract since plaintiff impliedly promised to seek an employer for defendant.

2. **Cancellation and Rescission of Instruments § 10— employment agency contract — responsibility for fee — absence of fraud**

Defendant's contention that he signed a contract with an employment agency because he was told by an employment counselor that the fee payment provision would not apply to him because he wanted a "fee-paid" sales job is insufficient to set aside the contract on the ground of fraud where the contract provided that defendant would be obligated to pay the fee if the employer agreed and then failed to pay it, the contract provided that employment counselors were not authorized to enter into any agreement contrary to the written contract, and there was no evidence that defendant was incapable of understanding the contract or was prevented from reading it.

3. **Contracts § 19— novation**

A novation is the substitution of a new contract for an existing valid contract by agreement of the parties, and ordinarily the parties must have intended that the new agreement should be in substitution for and extinguishment of the old.

4. **Contracts § 19— employment agency contract — employer's agreement to pay fee — no novation**

Where an employment agency contract provided that if the employer agreed to pay the agency's service fee but failed to do so, defendant would be obligated to pay it, a subsequent oral agreement by defendant's employer to pay one-half of the agency's fee was consistent with the agency contract and did not replace it, and defendant is liable for the fee upon the employer's refusal to pay any portion of it after defendant quit his job.

ON writ of *certiorari* to review order entered by *Barnette, Judge*. Order entered 7 August 1974 in District Court, WAKE County. Heard in the Court of Appeals 21 January 1975.

Civil action to recover an agency fee along with attorney fees and costs pursuant to a contract calling for plaintiff to act as defendant's agent in securing employment for defendant. In its verified complaint plaintiff alleges that defendant accepted employment provided by plaintiff and that defendant refused to comply with plaintiff's demand for its agency fee.

In a responsive pleading labeled "ANSWER AND THIRD PARTY COMPLAINT", defendant denies that the paper-writing is a contract or promissory note. He alleges that any obligation to plaintiff has been satisfied by his payment of one-half of the fee because plaintiff told him the other half would be paid by Lanier Business Products Company, defendant's prospective employer procured by plaintiff.

The agency contract between plaintiff and defendant states in part:

> "If I ACCEPT employment offered me by an employer as a result of a lead from you within twelve (12) months of such lead, even though it may not be the position originally discussed with you, I will be obligated to pay you as per the terms of this contract.
>
> If I voluntarily leave, fail to report for work with or without cause, or lose the employment through my own fault, I agree to pay the full service charge.

If the employer agrees to pay the service fee, but fails to pay the fee, I understand and agree that I am responsible and obligated to pay said service fee within thirty days following official notice from the agency that the service fee is due and payable.

* * *

I understand that Employment counselors are not authorized to enter into any agreement contrary to the terms of this contract (copy available upon request) without approval, in writing, by the Manager.

Accepted for the Agency Allied
Personnel, Inc., of Ral., N. C.
By: s Julie A Meyer
Date: 10-1-73

I have read, thoroughly understand and subscribe to the foregoing provisions. (Signed) Robert F. Alford

NOTICE

The above document constitutes the entire contract of agreement between the Agency and the job applicant whose signature appears above, and nothing below the line following this notice, or on the reverse side of this document shall be in any way construed by the parties hereto as part of, amendatory to, or supplemental to the aforesaid agreement."

Plaintiff moved for summary judgment, and the trial court, being of the opinion that there was no genuine issue of material fact and that plaintiff was entitled to judgment as a matter of law, entered summary judgment in favor of plaintiff. Defendant appealed.

Theodore A. Nodell, Jr., for plaintiff appellee.

John H. Parker, for defendant appellant.

MARTIN, Judge.

Since in the present case plaintiff's verified complaint and the written contract, standing alone, would have entitled plaintiff to summary judgment, it was encumbent upon defendant to come forward with materials showing a genuine issue for trial or to provide an excuse for not doing so. *See Pridgen v. Hughes,* 9 N.C. App. 635, 177 S.E. 2d 425 (1970).

[1] First, defendant argues that the paper-writing did not amount to a contract. We disagree. Defendant expressly authorized plaintiff to act as agent in seeking employment for him and promised to pay for such services as provided by the terms of the writing. Plaintiff impliedly promised to seek an employer for him. A contract was thereby formed, and the terms contained therein became enforceable. *See* 1, Corbin, Contracts, § 144 (1963).

[2] Even if a written contract was formed, defendant argues, then it was ineffective either due to fraud on the part of plaintiff or because a subsequent oral contract replaced it. Defendant's affidavit shows that he went to the office of plaintiff to seek aid in finding employment. A portion of the affidavit reads:

> "One Julie Heyne, an employee of 'Allied', then discussed with him the type of job he was seeking and he told her, among other things, that he wanted a 'fee paid' sales job; that is one wherein the employment agency's fee is paid by the employer. He was told by Julie Heyne that she would take all the information given to her by him and when she found for him the kind of job that he was looking for, to wit, a 'fee paid' sales job, she would contact him. At this time Robert Alford was handed by Julie Heyne a paper writing which she told him he must sign if he wanted 'Allied's' assistance and she pointed out to him specifically that according to the document he would 'not be obligated to accept any employment' that was suggested or referred to him by 'Allied' and that he was 'not obligated to pay any fees to the agency until' he was 'offered employment and accepted the same;' to which Robert Alford replied that he was seeking a 'fee paid' job and not one where he paid the fee. Julie Heyne told him that he must sign the document as it was but not to 'worry' about this provision relating to a fee because if the job 'Allied' procured for him was fee paid this provision would not apply. He then signed the alleged 'Contract of Employment' . . . . "

Defendant contends he signed the paper-writing because he was told the fee payment provision would not apply to him.

"An essential element of actionable fraud is that the party to whom the alleged false and fraudulent representation is made must reasonably rely thereon and be deceived thereby to his injury." *Products Corporation v. Chestnutt,* 252 N.C. 269, 113

S.E. 2d 587 (1960). The contract which defendant signed provides that if the employer agrees to pay the service fee and fails to do so then defendant is obligated to pay the same. In addition, it provides that employment counselors are not authorized to enter into any agreement contrary to the terms of the written contract. There is no evidence that defendant was incapable of understanding the contract, or that plaintiff's conduct was of such a type as to deceive a person of ordinary prudence, or that any device was used to prevent defendant from reading the contract. Defendant has not shown a triable issue of material fact regarding fraud.

[3, 4] Nor was it sufficiently shown than an oral agreement was formed in substitution of the earlier written contract whereby Lanier Business Products was accountable for part or all of plaintiff's fee in place of defendant. A novation is generally described as the substitution of a new contract for an existing valid contract by agreement of the parties, and ordinarily the parties must have intended that the new agreement should be in substitution for and extinguishment of the old. *Electric Co. v. Housing, Inc.*, 23 N.C. App. 510, 209 S.E. 2d 297 (1974) ; 2 Strong, N. C. Index 2d, Contracts, § 19. In the present case the written contract provides that if the employer (in this case, Lanier Business Products) agrees to pay the employment agency's service fee but fails to do so, then defendant shall be obligated to pay it. The subsequent oral agreement whereby Lanier Business Products agreed to pay all or part of plaintiff's service fee is not inconsistent with the written contract in question. On the contrary, it was provided for in the written contract. According to defendant's affidavit, defendant, believing that he had been misled regarding the terms of his employment with Lanier Business Products, informed "Lanier" on 17 October 1973 that he no longer wished to work for them. Thereafter, he received from "Allied" a letter, dated 30 October 1973, stating that Lanier Business Products was not going to pay its one-half of the employment fee to "Allied" as agreed and demanding payment of the remaining one-half from defendant. Plaintiff's letter of 30 October 1973 was made part of the record on appeal and indicated that plaintiff was looking to defendant for payment because "[a]ccording to the terms of the contract, the applicant agrees to pay our service fee in the event the company fails to do so." In our opinion no triable issue of material fact was presented concerning novation.

We find no issue of credibility presented and conclude that the trial court correctly entered summary judgment in favor of plaintiff.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. FLOYD BLEDSOE, JR.

No. 7416SC1007

(Filed 5 March 1975)

1. **Homicide § 21— death by drowning — sufficiency of evidence of homicide**

   Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where it tended to show that defendant and deceased argued beside a creek where they had gone to fish, defendant who was highly intoxicated picked up deceased and threw him over his head and down the creek embankment, defendant shouted at deceased to "come out of there or I'll kill you," and deceased died from drowning and lack of air due to aspiration of his fractured denture.

2. **Criminal Law § 99— recall of State's witness by court — no expression of opinion**

   Trial court's recalling and questioning of a State's witness after the State had rested its case did not amount to an expression of opinion by the court where the questions were obviously intended to clarify the testimony of the witness.

APPEAL by defendant from *Clark, Judge.* Judgment entered 12 September 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals on 12 February 1975.

By bill of indictment defendant was charged with the murder of Nathan Walters, Jr. The State elected to place defendant on trial for second degree murder to which defendant entered a plea of not guilty.

State's evidence tended to show that on 27 April 1974 Dovenel Locklear visited his brother Earl who lived about one-half mile from the "Brown Bridges" which carry the Clio Highway across the Shoe Heel Creek. Intending to visit a friend, the two brothers had occasion to travel across the bridges. At this time Dovenel Locklear noticed two people next to one of the

bridges on the embankment. Dovenel Locklear testified identifying one as defendant and the other as a smaller person who appeared to be fishing. He further testified that he "heard the big one call the little one a son-of-a-bitch about twice." On their return trip the two brothers had crossed the bridges again when Earl said, "Let's stop, somebody is fighting back down yonder." Dovenel was driving and did not stop.

Earl Locklear testified that he saw the "little fellow" up over defendant's head and saw defendant throw the "little fellow" down the embankment. According to this witness:

> "When he throwed the little fellow he turned a somersault like and that is the last time I saw him. Where he came to rest I don't know. When I last saw the little fellow he was tumbling over and hitting the ground. . . . After the little fellow left his hands the big fellow reached down and got a beer and turned it up to his head."

Earl Locklear further testified that the "little fellow" hit soft mud and that the water in the creek was some ten to fifteen feet from where he fell.

After receiving a radio transmission, Deputy Sheriff Stone testified that he went to the "Brown Bridges" and heard defendant say, "Nathan, where you at, Nathan, you son-of-a-bitch, you better come out of there or I'll kill you." Describing defendant as "highly intoxicated," Stone testified that defendant fell to his knees, threw his hands over his eyes and cried, and then crawled toward the water saying, "He's in the water."

Another deputy sheriff arrived at the scene and observed a rescue squad dragging the creek with grappling hook and rope. The body of Nathan Walters was recovered from the creek some fifteen feet from the bridge. There were bruises, contusions, and wounds on the body along with dark splotches over the face, blood expelling from an ear and the nose, and cuts across the chin.

By stipulation, Dr. Andrews testified as a medical expert for the State. His superficial examination of the body revealed wounds, contusions, and bruises. Pursuant to an autopsy, dentures were found in the place of natural teeth in decedent's mouth. The lower plate was broken with one-half of it located in the throat just above the voice box. Dr. Andrews opined that Walters' death was caused by a combination of drowning and

lack of air due to aspiration of the fractured denture into the larynx.

Defendant took the stand in his own behalf testifying that he and Walters had gone fishing and had purchased a case of beer to take along. During the course of the afternoon numerous unidentified people came and left the area. Defendant and Walters drank the beer until Walters got "plain drunk." Finally, defendant fell asleep or "passed out" and when he woke up Walters wasn't there. After looking for him, defendant heard a "funny sound" and spotted Walters in the water. Walters was holding onto a small tree limb and would not let go. Unable to reach him, defendant ran to a nearby house where the rescue squad was summoned. Defendant denied threatening Walters or picking him up over head and had no knowledge of the various cuts and bruises found on Walters' body. Defendant estimated his own weight at 240 pounds and that of Walters at 150 pounds.

Other witnesses for defendant testified that they did not hear defendant threaten to kill Walters if he did not "come out." One witness testified that she saw no blood on defendant's clothing.

The jury found defendant guilty of voluntary manslaughter, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten, by Associate Attorney Noel Lee Allen, for the State.

W. Earl Britt, for defendant appellant.

MARTIN, Judge.

[1] Defendant contends that the circumstantial evidence adduced at trial was insufficient to withstand his motions for judgment as of nonsuit. Since defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, we consider only the denial of his motion made at the close of all the evidence. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969).

> "The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. [Citation omitted.] '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.' [Citation omitted.]" *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

Viewing the evidence in the light most favorable to the State, we hold that the trial court properly overruled defendant's motion. The fact that State's evidence may have contained a discrepancy as to when Earl Locklear traveled back across the bridges and saw two men fighting along the river did not warrant nonsuit. Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972).

[2] In his next assignment of error defendant contends the trial court expressed an opinion on the evidence in violation of G.S. 1-180 by recalling and questioning the State's witness, Earl Locklear, after the State rested its case and defendant moved for judgment as of nonsuit. "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, and the calling of a witness on his own motion differs from this practice in degree and not in kind." *State v. Horne,* 171 N.C. 787, 88 S.E. 433 (1916). "Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error." *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). In the present case, the questions posed by the trial court were obviously intended to clarify the testimony of a witness, and they neither expressly nor impliedly amounted to a comment on the evidence by the court. Defendant's assignment of error is overruled.

We have carefully considered defendant's remaining assignments of error and conclude that they are without merit.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

In re Moore

IN THE MATTER OF THE ESTATE OF JAMES L. MOORE, DECEASED

No. 7419SC953

(Filed 5 March 1975)

1. **Courts § 6— appeal from clerk to superior court — reviewing capacity of judge — no consideration de novo**

The trial judge properly considered an appeal from the clerk in his reviewing capacity where the court's order recited that the cause came on to be heard "upon the appeal of the petitioner," it had been stipulated by both parties that "the court would base its ruling on the facts found by the clerk," and the order further stated that the court "having taken as established the facts found by the clerk . . . concludes as a matter of law that the facts found by the clerk establish a conflict of interest. . . ."

2. **Courts § 6— appeal from clerk to superior court — review of findings — substitution of court's conclusions proper**

Upon an appeal from the clerk to the superior court in a probate matter where the appellant does not challenge any of the clerk's findings of fact, the superior court judge reviews the record to determine whether there were errors of law, and where the judge decides that the findings of the clerk do not sustain his order, he has the power to overrule the clerk's conclusions and to substitute new conclusions which he believes are compelled as a matter of law.

3. **Executors and Administrators § 5— legally incompetent executor — inability to discharge duties impartially**

In construing G.S. 28-32 providing for revocation of letters of administration which have been granted to a legally incompetent person, it should be noted that the words "legally incompetent" are to be given a broad meaning and should be interpreted as meaning not only fit and qualified but also prepared to discharge impartially the duties of the office.

4. **Executors and Administrators § 5— potential conflict of interest — executor legally incompetent to serve**

Construing the language of G.S. 28-32 broadly, the court concludes that it is not necessary to show an actual conflict of interest to justify a refusal to issue letters of administration, but it is sufficient that the likelihood of a conflict is shown; therefore, the trial court did not err in declaring legally incompetent the executor named in deceased's will because he worked as a certified public accountant for a corporation whose chief executive officer might have to be sued by the estate.

APPEAL by respondent, Robert A. McClary, from *Long, Judge.* Judgment entered 12 September 1974, in Superior Court, CABARRUS County. Heard in the Court of Appeals 24 January 1974.

In re Moore

On 10 October 1965 James L. Moore executed a paper writing, purporting to be his will, leaving the majority of his estate to his wife, Eloise T. Moore, and naming Robert A. McClary as executor. In August of 1973, Moore sold certain corporate stock in Kannapolis Publishing Company to Robert G. Hayes and executed another paper writing, dated 15 August 1973, purporting to be his will, not only leaving the majority of his estate to his wife, but also naming her as executrix.

Following Moore's death, his wife, Eloise, filed an application and petition seeking to have the 1965 paper writing admitted to probate and requesting that the estate institute an action for rescission of the sale of stock on grounds her husband was not mentally competent in 1973. Mrs. Moore also sought to have Robert A. McClary disqualified as executor on grounds of a conflict of interest arising from his relationship with Robert G. Hayes. Since 1955, Robert A. McClary, a certified public accountant, has prepared the annual financial statements and tax returns of Central Distributing Company, an oil distributor in Kannapolis, North Carolina, of which Robert G. Hayes is president and chief executive officer, and has performed accounting services for Cannon Mills Company and its affiliates or subsidiary companies, which are substantially owned by the estate of Charles A. Cannon, Jr., in which Robert G. Hayes and his wife, Miriam Cannon Hayes, have an interest. In her petition Mrs. Moore alleged that by reason of the foregoing facts there existed a special and confidential relationship between Robert A. McClary and Robert G. Hayes which prevented McClary from impartially performing his fiduciary duties.

McClary denied any conflict of interest existed by reason of his relationship with Robert G. Hayes and sought qualifications as executor.

After reviewing the evidence, the Clerk of Superior Court made findings of fact and entered an order concluding that no conflict existed. Upon appeal to the Superior Court, the trial judge, taking the Clerk's findings as conclusive, concluded that a conflict did exist, and that an administrator c.t.a. should be appointed. Respondent appealed.

Jordan, Wright, Nichols, Caffrey and Hill, by Welch Jordan and G. Marlin Evans, and Walser, Brinkley, Walser and McGirt, by Gaither S. Walser, for petitioner appellee.

Williams, Willeford, Boger and Grady, by John Hugh Williams, for respondent appellant.

MORRIS, Judge.

[1] In his first and third assignments of error respondent challenges the procedural approach of the trial court in hearing the appeal from the Clerk de novo, and in failing to rule that the conclusions of law by the Clerk were supported by the facts found. Respondent maintains the Superior Court erroneously considered the appeal from the order of the Clerk, de novo, rather than in a reviewing capacity because it weighed the facts and reached a different conclusion, rather than determining whether the conclusions drawn by the Clerk were supported by his findings of fact. We disagree. The record clearly shows that the trial court was acting in its reviewing capacity. The trial judge's order recites that the cause came on to be heard "upon the appeal of the petitioner" and that it had been stipulated by counsel for both parties that "the court would base its ruling on the facts found by the clerk." The order further states that the court "having taken as established the facts found by the clerk . . . concludes as a matter of law that the facts found by the clerk establish a conflict of interest. . . ." The trial judge properly considered this matter in his reviewing capacity.

[2] Respondent's argument that the Superior Court's scope of review is limited to determining whether the facts found supported the Clerk's conclusions and does not extend to formulating new conclusions is unpersuasive. Upon an appeal from the clerk to the superior court in a probate matter, the superior court has jurisdiction to review the record to determine whether there have been errors of law and to review any findings of fact which the appellant has properly challenged by specific exceptions. *In Re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967). Where the appellant does not challenge any of the clerk's findings of fact, the superior court judge reviews the record to determine whether there were errors of law, and the appeal carries to the judge the question of whether the clerk's findings of fact sustain his order. *In Re Spinks*, 7 N. C. App. 417, 173 S.E. 2d 1 (1970). Where the superior court judge decides that the findings of the clerk do not sustain his order,

we conclude he has the power to overrule the clerk's conclusions and to substitute new conclusions which he believes are compelled as a matter of law. Defendant's first and third assignments of error, therefore, are overruled.

In his second and fourth assignments of error respondent maintains the findings of the Clerk do not support the trial judge's conclusions that there exists "a conflict of interest which legally disqualifies Robert A. McClary from qualifying and serving as Executor . . ." He argues that holding him "legally incompetent," within the meaning of G.S. 28-32, to serve as executor simply because he works as a certified public accountant for a corporation whose chief executive officer may have to be sued by the estate is a tenuous and premature conclusion. We disagree.

G.S. 28-32, in pertinent part, provides as follows:

> "If, after any letters have been issued, it appears to the clerk . . . that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in due execution of his office . . . the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed . . . if the objections are found valid, the letters issued to such person must be revoked and superceded, and his authority shall thereupon cease."

It has been held that the power given the clerk to revoke letters of administration carries with it the power to refuse to grant letters for the same causes. *In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839 (1923).

[3] In construing the statute, we think it is important to note that the Supreme Court has held that the words "legally incompetent" are to be given a broad meaning and should be interpreted as meaning not only fit and qualified but also "prepared to impartially discharge the duties of the office . . ." *In Re Will of Covington,* 252 N.C. 551, 554, 114 S.E. 2d 261 (1960). Where conditions are present, which will prevent the executor from impartially performing his fiduciary duties, he should not be allowed to serve:

> "An executor acts in a fiduciary capacity. *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231. He is classified by

statute with 'guardians, trustees, and other fiduciaries.' G.S. 36-9. Both by law and the words of his oath he must faithfully execute the trust imposed in him. He must be impartial. He cannot use his office for his personal benefit. *When conditions arise which will prevent him from faithfully and impartially executing his duties which he has assumed, he should not be expected or permitted to continue to serve.*" (Emphasis supplied.) *In Re Will of Covington, supra,* at p. 553.

[4] We fail to see how respondent can act impartially as executor when, as here, one of his first duties will be to decide whether to sue the president and chief executive officer of a firm, for which he has performed services as a certified public accountant for approximately 19 years. Especially when a decision to bring suit might endanger respondent's chances of future employment by the firm, the possibility that his decision to bring suit will be influenced by his own personal interests is great. One cannot represent his own interest and at the same time represent those of another which are in conflict with his own with fairness and impartiality to either. Even if respondent actually brings suit on behalf of the estate, his position would be such as to make him amenable to suggestions of failure to prosecute the action fully because of his relationship with Hayes. Construing the language of G.S. 28-32 broadly, we conclude that it is not necessary to show an actual conflict of interest to justify a refusal to issue letters of administration; it is sufficient that the likelihood of a conflict is shown. Our holding is supported by decisions in other jurisdictions. E.g., *Davis v. Roberts,* 206 Mo. App. 125, 226 S.W. 662 (1920); *Corey v. Corey,* 120 Minn. 304, 139 N.W. 509 (1913). For the foregoing reasons, defendant's second and fourth assignments of error are overruled. The decision of the trial court is hereby affirmed.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE MOSES, JR.

No. 7426SC1040

(Filed 5 March 1975)

1. **Criminal Law § 91— motion to continue — denial proper**

Trial court did not err in denying defendant's motion for a continuance made on the ground that his counsel was involved in the trial of a murder case for several days prior to the trial of this case and did not have opportunity to make proper preparation.

2. **Criminal Law § 66— pre-trial photographic identification of defendant — failure to make findings that in-court identification was untainted**

The trial court erred in failing to make sufficient findings of fact that an in-court identification of defendant by a witness was of independent origin and not tainted by the illegality, if any, of a pretrial photographic identification of defendant by the witness.

APPEAL by defendant from *Wood, Judge.* Judgment entered 11 October 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 February 1975.

By indictment proper in form defendant was charged with armed robbery on or about 15 March 1974. The alleged victim was George Homer Morrow, the 69-year-old operator of a small grocery store. Defendant pleaded not guilty.

One Isaac Abrams was charged in a separate bill of indictment with the same offense and the cases were consolidated for trial. The victim was unable to identify either of the persons who robbed him. A 14-year-old boy, Ronnie Jett, who was working in the store at the time of the robbery, testified that defendant was one of the robbers but he could not identify Abrams as the other one. Floyd Seabrook, who was just outside the store when the robbery occurred, identified defendant and Abrams as the two persons he saw come out of the store. Neither Jett nor Seabrook knew defendant or Abrams at the time of the robbery. Jett identified defendant, and Seabrook identified defendant and Abrams, from a group of photographs which police showed them some time after the robbery.

The jury found Abrams not guilty but found defendant guilty as charged. From judgment imposing prison sentence of not less than 10 nor more than 15 years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Robert P. Gruber, for the State.

Blum and Sheely, by Michael Sheely, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to grant his motion for a postponement of the trial for the reason that his counsel was involved in the trial of a murder case for several days prior to the trial of this case and did not have opportunity to make proper preparation. We find no merit in the assignment.

While a motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion, 2 Strong, N. C. Index 2d, Criminal Law, § 91, where the motion is based on a right guaranteed by the Federal and State constitutions, a question of law is presented and the ruling is reviewable. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). Defendant has timely raised the constitutional question in this case and we have reviewed the court's ruling; nevertheless, under the facts appearing, we conclude that the court did not err in denying defendant's motion for continuance.

By his fifth assignment of error, defendant contends the court erred and abused its discretion when, over defendant's objection, it allowed the State to reopen its case and present additional testimony. We have carefully considered this assignment, particularly with respect to the statement made by the court at the time it permitted the State to reopen its case, but conclude that the court did not abuse its discretion. The assignment of error is overruled.

Defendant assigns as error the failure of the court to allow his timely made motions for nonsuit. No worthwhile purpose would be served in further summarizing the evidence presented at trial. It suffices to say that we consider the evidence sufficient to survive the motions for nonsuit and the assignment is overruled.

[2] Defendant assigns as error the failure of the court to make sufficient findings of fact that the in-court identification of defendant by witness Seabrook was of independent origin and

not tainted by the photographs shown by police. This assignment has merit.

After defendant pleaded not guilty and a jury was selected and impaneled, in the absence of the jury, defendant moved to suppress the testimony of witnesses Jett and Seabrook. The court conducted a voir dire hearing at which police officer Williams, Jett, and Seabrook testified. Thereafter, the court made findings of fact with respect to the procedure followed by police in displaying the photographs to Jett and Seabrook and then concluded:

> Upon the foregoing Findings of Fact, the Court concludes as a matter of law that the out of court identification of the defendant, Moses, by Ronnie Jett and of the defendants, Moses and Abrams, by Floyd Seabrook were lawful; and that neither Ronnie Jett's in court identification of defendant Moses nor Floyd Seabrook's in court identification of both defendant Moses and defendant Abrams were tainted by any improper police activity during the out of court photographic lineup procedure.

It is noted that defendant's exceptions and assignment of error do not relate to the testimony of the witness Jett but only to the testimony of Seabrook. That being true, the question as to admissibility of testimony given at trial by Jett is not presented.

In *State v. Ingram,* 20 N.C. App. 35, 38, 200 S.E. 2d 417 (1973), this court said:

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

In our opinion, in the case at bar the findings of fact with respect to Seabrook's testimony were not sufficient. In *State v.*

Accor and *Moore, supra,* in which case a new trial was ordered, defendants contended that their photographs were obtained illegally and that their identifications were based on an improper use of the photographs. In providing instructions for the new trial, the court, speaking through Chief Justice Bobbitt, said:

> . . . Irrespective of its determination as to whether defendants or either of them were unlawfully detained when the photographs were taken, the court must determine upon the evidence *then* before it whether "the photographic identification procedure" was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States, supra.* Whatever the indicated prior determinations may be with reference to the out-of-court photographic identifications, the court must make an additional factual determination as to whether the State has established by clear and convincing proof that the in-court identifications were of independent origin and were untainted by the illegality, if any, underlying the photographic identifications.

In *State v. Miller,* 281 N.C. 70, 77, 187 S.E. 2d 729 (1972), opinion by Chief Justice Bobbitt, the court found no error in the admission of identification testimony where the trial court, after a voir dire hearing relating to pretrial photographic procedure, made findings of fact, fully supported by evidence found by the court to be clear and convincing, that (1) the identification procedure ". . . was *not* so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," and (2) that the witness' testimony before the jury was based solely on her observation of the person at the time of the offense, completely independent of other factors.

See also State v. Tuggle, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Accor* and *Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); and *State v. Faire,* 22 N.C. App. 573, 207 S.E. 2d 284 (1974).

Although the court erred in not making sufficient findings of fact with respect to the photographic identification by Seabrook, as was true in *Ingram,* we hold that defendant is not entitled to a new trial unless the superior court, upon a remand of this cause as hereinafter ordered, fails to find that the in-court identification of defendant was of independent origin,

untainted by the illegality, if any, of the photographic identification.

Therefore, this cause is remanded to the superior court of Mecklenburg County where the presiding judge, at a session of the court authorized to hear criminal cases, will conduct a hearing, with defendant and his counsel present, to determine whether the witness Seabrook's identification of defendant at the trial of this cause was of independent origin, untainted by the illegality, if any, of the photographic identification. If the presiding judge determines that the identification was not of independent origin, he will find the facts and enter an order vacating the judgment, setting aside the verdict, and granting defendant a new trial. If the presiding judge determines that the identification was of independent origin, untainted by the illegality, if any, of the photographic identification, he will find facts consistent with the requirements hereinabove set forth and order commitment to issue in accordance with the judgment entered at the 7 October 1974 Session of Mecklenburg Superior Court.

Remanded with instructions.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. MILTON EDGERTON AND CARL ALTON ELLIOTT

No. 7429SC988

(Filed 5 March 1975)

1. **Trespass § 13— criminal trespass — sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of the guilt of two defendants on criminal trespass charges.

2. **Trespass § 13— criminal trespass — instructions — entering without license therefor**

It was not necessary for the court in a trespass prosecution to charge the jury that the State had to prove as one of the elements that defendants entered the property "without a license therefor" since defendants had the burden of showing that they entered under a *bona fide* claim of right.

3. Criminal Law § 126— acceptance of verdict — absence of court reporter

The trial court did not err in accepting the verdict of the jury while the court reporter was not present to transcribe the form of the verdict.

4. Criminal Law § 134— reference to wrong statute in judgment and commitment

Defendant in a criminal trespass case was not prejudiced by the trial judge's reference in the Judgment and Commitment to G.S. 14-135 rather than G.S. 14-134 where the warrant clearly charged a violation of G.S. 14-134, the court gave clear instructions on that statute, and the court instructed the jury to return a verdict of guilty as charged or not guilty.

APPEAL by defendants from *Martin (Harry C.), Judge.* Judgments entered 13 June 1974 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 13 February 1975.

Separate warrants against defendants charged that on or about 11 February 1974 each ". . . did unlawfully, wilfully, go and enter upon the lands of Maggie Cable, without a license therefor and after being forbidden to do so by the said Maggie Cable." In another warrant, defendant Elliott was charged with assault by pointing a gun. In district court, defendants pleaded not guilty to all charges, were found guilty as charged, and from judgments imposed they appealed to superior court where they again pleaded not guilty and were tried *de novo.* Without objection, the cases were consolidated for trial.

Evidence for the State, summarized in pertinent part, tended to show: On 10 February 1974, Mrs. Cable, a widow, lived in her own home near Marion, N. C. Her 17-year-old daughter, Marlene, and her son lived with her. On that day, defendants and a third party went to Mrs. Cable's home in an automobile for purpose of taking Marlene away. Mrs. Cable asked defendants to leave and not carry Marlene with them. In spite of Mrs. Cable's request, Marlene entered the car after which Mrs. Cable told defendants to leave her premises and not to come back. The next day, without Mrs. Cable's permission, defendants, accompanied by Marlene, returned to the premises in an automobile driven by defendant Edgerton. Mrs. Cable ordered defendants some 12 or 15 times to get off her premises before they did so. While on the premises defendant Elliott pointed a gun at Mrs. Cable's son-in-law.

Defendants' evidence, summarized in pertinent part, tended to show: On 11 February 1974, defendants went with Marlene

to her mother's home for purpose of getting Marlene's clothes. Before going on Mrs. Cable's premises, Marlene called her mother on the telephone, told Mrs. Cable that she was coming home for purpose of getting her clothes and that defendants were coming with her. Defendants went on Mrs. Cable's premises because Marlene asked them to.

The record reveals that both defendants were found guilty of trespass but defendant Elliott was found not guilty of assault. From judgments imposing prison sentences of six months as to each defendant, they appealed.

Attorney General Edmisten, by Associate Attorney Raymond L. Yasser, for the State.

Story & Hunter, by Robert C. Hunter and C. Frank Goldsmith, Jr., for defendant appellants.

BRITT, Judge.

[1] Defendants assign as error the failure of the court to allow their motions for nonsuit. We find no merit in this assignment and hold that the evidence was sufficient to survive the motions.

[2] By assignments of error 5 and 6, defendants contend the court erred in its instructions to the jury with respect to the elements of the offense set forth in the warrants. Defendants contend that in addition to charging the jury that the State must prove beyond a reasonable doubt (1) that Mrs. Cable was in possession of the property at the time in question, (2) that defendants entered upon the property intentionally and willfully, and (3) that defendants entered the property after having been forbidden to do so, that the court should have charged a fourth element, that defendants entered the property "without a license therefor". We find no merit in this contention.

In *State v. Durham,* 121 N.C. 546, 550, 28 S.E. 22 (1897), the court said: "Upon an indictment for entry upon land after being forbidden (Code, sec. 1120) [now G.S. 14-134], when the entry, after being forbidden by the party in possession, is shown or admitted, the burden devolves upon the defendant to show that he entered under a *bona fide* claim of right. . . . " This ruling has been followed in many cases including *State v. Wells,* 142 N.C. 590, 55 S.E. 210 (1906), and *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846 (1958). The assignments of error are overruled.

By their assignment of error 7, defendants contend the trial "[c]ourt erred in accepting the verdict of the jury at a time when the Court Reporter was not present to transcribe the form of said verdict." The assignment is without merit.

[3] Defendants cite no authority, and we have found none, for their contention that a court reporter must be present when a verdict is returned by a jury. It is well settled in this jurisdiction that the record on appeal as certified imports verity and the trial judge is the final arbiter as to what occurred during the trial proceedings. 3 Strong, N. C. Index 2d, Criminal Law, § 158.

With respect to defendant Edgerton, the "JUDGMENT AND COMMITMENT" signed by the trial judge recites that defendant appeared for trial upon the charge of trespass, entered a plea of not guilty, and was found guilty of the offense as charged, which is a violation of G.S. 14-134 and of the grade of misdemeanor. We find nothing unclear or ambiguous in this statement by the trial judge as to the jury's verdict.

[4] With respect to defendant Elliott, the "JUDGMENT AND COMMITMENT" signed by the trial judge contains the following:

> In open court, the defendant appeared for trial upon the charge or charges of trespass in 74CR606 and assault by pointing a gun in 74CR605, and thereupon entered a plea of not guilty,
>
> Having been found guilty of the offense of trespass, and not guilty as to the offense of assault by pointing a gun, which is a violation of G.S. 14-135 and of the grade of misdemeanor . . . .

Concededly, the reference to G.S. 14-135 is erroneous. However, inasmuch as the warrant clearly charged a violation of G.S. 14-134, the court gave clear instructions on the provisions of that statute, and as to the charge of trespass, the court instructed the jury to return a verdict of guilty *as charged* or not guilty, we perceive no error prejudicial to defendant Elliott.

We hasten to add that in criminal cases particularly, the superior courts would be well advised to have all trial proceedings recorded to the end that questions with respect to the proceedings might be minimized.

We have considered the other assignments of error argued in defendants' brief but find them likewise to be without merit.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ALFRED LOGAN

No. 7420SC1021

(Filed 5 March 1975)

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

In an armed robbery prosecution evidence was sufficient to support a jury finding that defendant aided and abetted another in the commission of the crime where it tended to show that defendant and a companion went to a grocery store, they wandered around in the store, defendant bought a couple of items and both left, both returned about an hour later with defendant driving, the companion went into the store, came out, then went back in again and robbed the proprietor, and both left the scene in a hurry with defendant driving.

2. **Robbery § 5; Criminal Law § 9— armed robbery — aiding and abetting — failure to define**

Defendant in an armed robbery prosecution who did not actually rob the victim but who drove the getaway vehicle is entitled to a new trial where the court did not define aiding or abetting and did not instruct that mere presence at the scene of the crime is not enough to constitute aiding and abetting.

Judge BRITT dissenting.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 26 August 1974 in Superior Court, UNION County. Heard in the Court of Appeals 18 February 1975.

Defendant was charged with armed robbery in violation of G.S. 14-87. 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 not less than 12 years nor more than 18 years, defendant appealed.

State's evidence tended to show that on 3 July 1974 Anne Helms was operating a small grocery store and gas station near Monroe, North Carolina; that around noontime defendant and

one Wright drove up to the store in a light green Monte Carlo automobile and came into the store; that defendant and Wright wandered around the store for a few minutes and then defendant purchased a soft drink and some crackers and both individuals left the store and drove away; that about an hour later the defendant and Wright returned to the store in the same automobile; that defendant was driving the automobile and although he could have parked near the door to the store, defendant backed the automobile into a parking space some distance away; that Wright got out of the automobile, came into the store and purchased a few pieces of gum; that Wright left the store, then turned around and came back into the store with a ski mask pulled down over his face; and that Wright pointed a gun at Mrs. Helms and said "Money. Give me your money." Other evidence offered by the State tended to show that Mrs. Helms gave Wright $101 and he left the store; that once he was outside the store, Wright pulled off his ski mask and ran and got in the automobile and defendant drove off in a hurry, throwing rocks and skidding onto the pavement as he left.

Defendant's evidence consisted solely of his own testimony. Defendant admitted stopping at the store on two occasions, but he denied going into the store the first time they stopped there. The second time they stopped at the store, defendant testified that Wright went inside the store and purchased "some bubble gum or something" and returned to the automobile, then defendant went inside the store and purchased some bubble gum and a soda. Afterwards defendant returned to the automobile and he and Wright drove off. Defendant testified that he did not have anything to do with the robbery and that he did not know that Wright robbed Mrs. Helms.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Joe P. McCollum, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error relates to the denial of his motion for judgment as of nonsuit at the close of the State's evidence. Under the rationale of *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967), defendant contends it was error to deny his motion. We disagree.

"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." *State v. Davis,* 24 N.C. App. 683, 211 S.E. 2d 849 (1975), citing *State v. Mull,* 24 N.C. App. 502, 211 S.E. 2d 515 (1975), and *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971); G.S. 15-173. Defendant did not renew his motion for nonsuit at the close of the State's evidence. Nevertheless, pursuant to G.S. 15-173.1, we have reviewed the sufficiency of the State's evidence to go to the jury. Considering the evidence in the light most favorable to the State, we conclude there is sufficient evidence from which a jury could find defendant aided and abetted Wright in the commision of the offense charged.

> "One who advises, counsels, procures, encourages or assists another in the commission of a crime is an aider and abettor. (Citations omitted.)
>
> 'A person aids and abets when he has "that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted of being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission." ' (Citations omitted.) *State v. Beach,* 283 261, 266-267, 196 S.E. 2d 214 (1973).
>
> " . . . One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinty for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. . . . " *State v. Price,* 280 N.C. 154, 158, 184 S.E. 2d 866 (1971), and cases cited therein.
>
> " . . . While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if

necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. (Citations omitted.)" *State v. Birchfield,* 235 N.C. 410, 414, 70 S.E. 2d 5 (1952), and cases cited therein.

We find the case of *State v. Aycoth, supra,* distinguishable from the case at bar. As we have found sufficient evidence from which the jury could find defendant aided and abetted Wright in the commission of the armed robbery, defendant's first assignment is overruled.

[2] In his only other assignment of error, defendant contends the trial court erred in its charge by not defining the term "aiding and abetting". An examination of the record reveals that the trial court instructed the jury only that "a person who aids and abets another to commit this crime of armed robbery is guilty of that same crime himself". The trial court did not define aiding and abetting, nor did it state that mere presence at the scene of the crime is not enough to constitute aiding and abetting. *State v. Birchfield, supra,* and cases cited therein. In our opinion this assignment of error has merit and is sufficient to warrant a new trial for the defendant. As we stated in *State v. Vample,* 20 N.C. App. 518, 201 S.E. 2d 694 (1974), "[w]hen the State presents evidence tending to show defendant might have aided and abetted, it is incumbent upon the trial court to explain the principles of aiding and abetting which apply to the particular evidence in the case." *State v. Vample, supra,* at p. 522, citing *State v. Madam (X),* 2 N.C. App. 615, 163 S.E. 2d 540 (1968). Here, the charge was not sufficient as to aiding and abetting, and for that reason, defendant is entitled to a new trial.

New trial.

Judge ARNOLD concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

While the jury charge in this case would not qualify as a model charge in that it did not contain the refinements in defining "aiding and abetting", when the charge is considered as a

whole, I think it presented the case to the jury in a manner that was fair to the defendant. The evidence against defendant was overwhelming as is indicated by the fact that within fifteen minutes after they received the case, the jury returned a verdict of guilty as charged. In my opinion, the error in the charge complained of was not sufficiently prejudicial to defendant to warrant a new trial. I vote to let the verdict and judgment stand.

DOUGLAS CARROWAN SHAW v. THOMAS FRANK SHAW

No. 7426DC999

(Filed 5 March 1975)

1. **Parent and Child § 7— action for child support — N. C. law controlling**

In an action by plaintiff mother who was a resident of S. C. to recover child support from defendant father who was a resident of N. C., G.S. 52A-8 provided that the law of N. C. was to be applied since defendant was the obligor and N. C. was the responding state.

2. **Parent and Child § 7— 18 year old child — no duty of father to support**

Defendant father was under no obligation to support his 18-year-old son where there was no agreement to support beyond the age of majority or emancipation, nor was there any allegation of physical or mental impairment of the child.

ON writ of *Certiorari* to review order entered by *Abernathy, Judge,* on 11 October 1974 in Domestic Court, MECKLENBURG County. Heard in the Court of Appeals 13 February 1975.

Plaintiff, a resident of Bennettsville, South Carolina, filed a complaint on 9 September 1974 in that State, alleging that she and defendant are parents of a son, Thomas C. Shaw, who was born on 17 April 1956; that defendant has refused to support their son since May of 1974; that "[p]ursuant to the Statutory Laws of South Carolina, a parent is responsible for the support of a dependent child until said child reaches the age of 21 years so long as he is dependent upon the parent with whom he is residing and attending school and is not employed and self-supporting"; that the son has no income other than that provided by his parents; and that he is, therefore, in need of support and is "entitled to support under the provisions of the South Carolina Uniform Reciprocal Enforcement of Support Act". The complaint further states that upon information and

belief defendant is residing in Charlotte, North Carolina; that North Carolina "has enacted a law substantially similar and reciprocal to the South Carolina Uniform Reciprocal Enforcement of Support Act"; and, therefore, "[p]laintiff prays for such an order for support, directed to the [d]efendant, as shall be deemed fair and reasonable and for such other and further relief as the law provides."

Pursuant to the South Carolina Uniform Reciprocal Enforcement of Support Act, plaintiff's complaint was transmitted to Mecklenburg County. When the matter came before the court for hearing, defendant moved for a dismissal of plaintiff's action for lack of jurisdiction under Rule 12 of the Rules of Civil Procedure. In his motion defendant alleged that his son is over 18 years of age; "[t]hat the laws of the State of North Carolina are controlling insofar as defendant's obligation to provide support for a minor child, North Carolina being the responding State in this action" and therefore he had "no legal duty to provide support for his emancipated child."

The court noted plaintiff's allegations with respect to the laws of South Carolina, stated that in its opinion the defendant had a duty to provide support to the plaintiff for their minor child and denied defendant's motion to dismiss plaintiff's complaint. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Hamel, Cannon and Hamel, P.A., by Thomas R. Cannon, for defendant appellant.

CLARK, Judge.

Defendant filed a written motion to dismiss in which he stated that it was made pursuant to Rule 12. He did not specify which portion of the rule he feels is the applicable one but asks that the "complaint be dismissed for lack of jurisdiction". If this were properly a question of jurisdiction, defendant's appeal would be properly before us. Since it is not properly a question of jurisdiction, the appeal is not properly before us. We have, however, elected to treat the motion as one under Rule 12(b) (6) —a motion to dismiss for failure of plaintiff to state a claim upon which relief can be granted. Further, we have elected to treat the appeal as a petition for a writ of certiorari which we have allowed in order to correct the error of the trial judge.

The trial judge denied the defendant's motion to dismiss the action, stating that in his opinion the defendant "has a legal duty to provide support to the plaintiff for said minor child."

[1] If the court made this statement under the impression that the law of South Carolina is to be applied, he was in error. Both the South Carolina statute and the North Carolina statute specifically provide otherwise. G.S. 52A-8 provides that the "[d]uties of support applicable under this chapter are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown." We note that Code of Laws of South Carolina, 1962, § 20-318 is identical in phraseology. In her complaint, plaintiff alleges that defendant is a resident of North Carolina. Defendant is, of course, the obligor, and North Carolina is, of course, the responding State. Nor does plaintiff allege anything which would overcome the statutory presumption that obligor has been present in North Carolina during the period for which support is sought.

If the trial judge by his statement quoted herein indicated that he was of the opinion that the applicable North Carolina law would result in the imposition of liability on defendant, he was again in error.

[2] Effective 5 July 1971, "[t]he common law definition of 'minor' insofar as it pertains to the age of the minor" was repealed and abrogated. N.C.G.S. 48A-1. Effective the same date is N.C.G.S. 48A-2 which provides that "[a] minor is any person who has not reached the age of 18 years." In *Shoaf v. Shoaf,* 282 N.C. 287, 192 S.E. 2d 299 (1972), Justice Higgins wrote the opinion for a unanimous Court. The Court held that parents' duty of support ceases when the child becomes of age—now 18 years old. In *Shoaf,* the father, by consent judgment, had agreed to make the payments for support specified therein "until such time as said minor child reaches his majority or is otherwise emancipated". The father continued to make the payments until the enactment of N.C.G.S. 48A-2 and from that time he declined to make any payment for the support of his son, who became 18 years of age in January of 1971. The mother obtained a show cause order citing the father to appear and show cause why he should not be adjudged in contempt for his failure to comply with the order. The district court ordered the father to continue

the payments until the son reached 21 years of age. This Court affirmed, with a dissent, and the Supreme Court reversed, holding that despite the fact that at the time of the agreement the father obviously agreed to support the child until he reached 21 years, his liability, because of the legislative change in the age of majority, ceased when the child reached 18. The Court did not discuss the possible exception by reason of specific language in the judgment to continue support beyond age 18 nor did it discuss the possible exception where the child might be physically or mentally impaired. These questions were not before the Court. The *Shoaf* case is controlling here. There is no agreement to support beyond the age of majority or emancipation, nor is there any allegation of physical or mental impairment — on the contrary, the complaint alleges that the child is a student at Elon College.

For the reasons stated, the judgment of the trial court must be

Reversed.

Judges BRITT and ARNOLD concur.

JAMES F. FREEMAN v. STURDIVANT DEVELOPMENT COMPANY AND FOSTER-STURDIVANT COMPANY, INC.

No. 7425SC985

(Filed 5 March 1975)

1. **Contracts § 27— action on contract — summary judgment — sufficiency of evidence**

In an action to recover an amount allegedly owed under an assignment of an option in which defendant agreed to pay plaintiff an additional sum "during the option or any extension thereof upon the condition that a firm financial commitment . . . is obtained for the construction of an apartment complex on said optioned property," there was a genuine issue of material fact as to whether a firm financial commitment was obtained under the terms of the assignment, and the trial court properly denied defendants' motion for summary judgment; furthermore, the evidence at trial required submission to the jury of the question of whether defendant obtained a firm financial commitment during the period of the option or any extension thereof, and the court erred in directing a verdict for plaintiff.

2. **Rules of Civil Procedure § 50— directed verdict — party having burden of proof**

It is improper to direct a verdict in favor of the party having the burden of proof only when the party's right to recover depends upon the credibility of his witnesses.

3. **Corporations § 1; Contracts § 27; Quasi Contracts § 2— contract action — regarding two corporations as one — quantum meruit**

In an action to recover an amount allegedly owed under an assignment of an option in which one corporate defendant agreed to pay plaintiff an additional sum if a firm financial commitment for construction of apartments was obtained during the option or any extension thereof, there was sufficient evidence from which the jury could find that the two corporate defendants were one and the same, that they obtained a firm financial commitment during an extension of the option, and that they are both liable for the additional amount under plaintiff's contract with the one corporate defendant; however, if the jury should find that defendants are not liable under the contract, there was sufficient evidence to support a verdict for plaintiff against defendants on the theory of *quantum meruit* since defendants ultimately obtained financing and derived benefit from plaintiff's original option.

APPEAL by plaintiff and defendants from *Winner, Judge.* Judgment entered 30 August 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 February 1975.

This is a civil action to recover $15,000 allegedly due under a contract and in the alternative to recover in *quantum meruit* for services rendered. Defendants counterclaimed seeking damages for fraud.

Certain undisputed facts in the case are shown by the pleadings. On 19 October 1971 plaintiff, James Freeman, secured an option to purchase a 23.3-acre tract of land in Catawba County owned by A. B. C. & M. Development Co. (ABC&M). The agreement provided that Freeman had the right to exercise the option on or before 25 February 1972 and to renew the option for 30 days. On 11 November 1971, Freeman assigned this option to defendant Sturdivant Development Company, Inc. (Sturdivant) for $15,000. Under the terms of the assignment, Sturdivant agreed to pay Freeman an additional $15,000 "during the term of the option or any extension thereof upon the condition that a firm financial commitment, subject to approval by Sturdivant Development Company, Inc., is obtained for the construction of an apartment complex on said optioned property." Financial backing for the construction of an apartment complex upon the property was obtained after the expiration date of

plaintiff's option agreement with ABC&M, and the property was leased to defendant Foster-Sturdivant Development Company, Inc. (Foster-Sturdivant). Freeman never received the additional $15,000.

Defendants' motion for summary judgment was denied as was their motion for a directed verdict at the close of plaintiff's evidence. At the close of all the evidence, the trial court granted a directed verdict for plaintiff on defendants' counterclaim for fraud. The court also granted directed verdicts for defendant Foster-Sturdivant Co. on plaintiff's contract and *quantum meruit* claims and for defendant Sturdivant Development Co. on the *quantum meruit* claim. Finally, the trial court granted a directed verdict for plaintiff on his contract claim against Sturdivant Development Co. All parties appealed to this Court.

Tate, Weathers and Young, by E. Murray Tate, Jr., for plaintiff appellant.

Vannoy, Moore and Colvard, by J. Gary Vannoy, for defendant appellants.

ARNOLD, Judge.

APPEAL OF DEFENDANTS

[1] Defendants initially contend that the trial court erred in denying their motion for summary judgment. As movants under Rule 56 they had the burden of establishing the lack of a triable issue of fact. *Houck v. Overcash,* 282 N.C. 623, 193 S.E. 2d 905 (1973); *Stewart v. Singleton,* 280 N.C. 460, 186 S.E. 2d 400 (1972); *Hinson v. Jefferson,* 20 N.C. App. 204, 200 S.E. 2d 812 (1973). Papers of the opposing party are indulgently regarded and all inferences drawn in his favor. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). Viewing in this manner the materials offered, we hold that the question of whether a firm financial commitment was obtained under the terms of the assignment was a genuine issue for trial. Defendants offered affidavits to the effect that no firm financial commitment was secured during the term of the option or any extension. In opposition plaintiff submitted an affidavit stating that "Brian Applefield, agent and officer of the defendants, notified this affiant during the option period that Sturdivant Development Company had received a firm financial commitment . . . . " Defendants' motion was properly denied.

Defendants further contend that it was error to direct a verdict for plaintiff on their counterclaim. This argument is without merit. Even when the case is viewed in the light most favorable to defendants, there is no evidence from which a jury could find any fraudulent misrepresentation on the part of Freeman.

[2] Finally, defendant Sturdivant Development Co. contends that the court erred in directing a verdict for plaintiff on his first cause of action for breach of contract. Defendant argues that under the decision of our North Carolina Supreme Court in *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971), it is improper to direct a verdict in favor of the party with the burden of proof. We read *Cutts v. Casey* to preclude such a ruling only when the party's right to recover depends upon the credibility of his witnesses. *Id.* at 417, 180 S.E. 2d at 311. In the instant case, plaintiff's credibility is not in issue, and the rule enunciated in *Cutts v. Casey* is not controlling. Nevertheless, applying the general rules applicable to motions for directed verdict, we believe that directing a verdict for plaintiff was not proper in this case.

[1] In considering a motion for directed verdict, the court must view the evidence in the light most favorable to the nonmoving party, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973); *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). The motion should be granted only if, as a matter of law, the evidence is insufficient to support a verdict for the nonmovant. *See Younts v. Ins. Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). *See generally* 5A Moore's Federal Practice § 50.02[1] (1974). Viewing in this manner the evidence presented, we are of the opinion that the evidence was sufficient to go to the jury on the crucial question: Did Sturdivant Development Co. obtain a firm financial commitment during the period of the option or any extension thereof?

Plaintiff introduced in evidence the option agreement with ABC&M and the contract assigning the option to Sturdivant. He also introduced a copy of an agreement executed 24 February 1972 in which ABC&M gave to Dollar Organization, Inc. (Dollar) an option to purchase the property on or before 25 May 1972. Plaintiff testified that sometime during the two option periods he had conversations with officers of Sturdivant who

told him the project was progressing. He also said he had been worried that Sturdivant might not obtain a firm financial commitment before the option expired.

Defendants offered evidence which tended to show the following: They did not obtain a financial commitment before 25 February 1972, the expiration date of Freeman's option. Nor did they obtain financing before 25 May 1972 when Dollar's option expired. On 28 June 1972 defendants' president, Alvin Sturdivant, wrote a letter to Freeman advising him that a firm financial commitment was not forthcoming. Sometime after 25 May 1972, Foster-Sturdivant arranged with the Richardson Corporation to finance the construction of an apartment complex on the property. These two firms then acquired a lease effective 1 August 1972.

In light of the foregoing evidence, we hold that the trial court erred in directing a verdict for plaintiff against defendant Studivant Development Co.

APPEAL OF PLAINTIFF

Plaintiff contends that the trial court erred in directing verdicts for Sturdivant on his second cause of action, recovery in *quantum meruit*, and for Foster-Sturdivant on both causes of action. Viewing the evidence in the light most favorable to plaintiff, the nonmovant, we agree.

It is well settled that when a plaintiff "alleges and proves acceptance of services and the value thereof . . . he may go to the jury on *quantum meruit*." *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 148, 139 S.E. 2d 362, 368-69 (1964); *Yates v. Body Co.*, 258 N.C. 16, 128 S.E. 2d 11 (1962); *Allen v. Seay*, 248 N.C. 321, 103 S.E. 2d 332 (1958). *See also* 1 McIntosh, N. C. Practice 2d, § 1133. The evidence showed that Sturdivant, Dollar, and Foster-Sturdivant each had the same president and the same secretary. Alvin Sturdivant testified that the names were used interchangeably, referring to all three corporations as "we". He also testified that before 25 May 1972, when Dollar's option expired, defendants entered into a "gentlemen's agreement" with ABC&M to preserve their rights for an additional period. In mid-July they entered into an agreement with the Richardson Corporation for the construction of an apartment complex and subsequently secured a lease from ABC&M's successors in title.

[3] There was sufficient evidence from which the jury might find that Sturdivant and Foster-Sturdivant were one and the same, that they obtained a firm financial commitment during an extension of the option, and that both are liable for the additional $15,000 under plaintiff's contract with Sturdivant. However, should the jury not so find, there is still evidence to support a verdict for plaintiff on the theory of *quantum meruit*. *See generally* 6 Strong, N. C. Index 2d, Quasi Contracts, §§ 1-2, pp. 528-33. It is clear that Foster-Sturdivant ultimately obtained financing and derived benefit from plaintiff's original option. If both defendants are treated as a single entity, Sturdivant benefited as well. We hold therefore that plaintiff was entitled to go to the jury on both the express contract and on the *quantum meruit* as to each defendant.

The decision of this Court is that the judgments below be

Reversed as to directed verdict for plaintiff on first cause of action against Sturdivant Development Co.

Reversed as to directed verdict for defendant Sturdivant Development Co. on second cause of action.

Reversed as to directed verdict for defendant Foster-Sturdivant Co. on both causes of action.

Judges VAUGHN and MARTIN concur.

H-K CORPORATION v. CHARLES W. CHANCE, SR.

No. 7415SC950

(Filed 5 March 1975)

1. Partnership § 1— proof of partnership — credit applications

Credit applications signed by defendant's son showing defendant as a partner in the son's retail clothing business were inadmissible to show that defendant was a partner in the business since the extrajudicial statements of an alleged partner cannot be used against another to prove the existence of a partnership.

2. Evidence § 29— credit reports — lack of authentication

Dun and Bradstreet reports, purportedly based on representations of defendant to the firm's investigator, were properly excluded where the investigator did not testify and the reports were not authenticated.

3. Partnership § 1— no partnership in fact

Evidence that defendant's son, with defendant's consent, paid for stock bought for a retail clothing store operated by the son with checks drawn on the bank account of a business operated by defendant was insufficient to establish that defendant was a partner in fact in the son's clothing business.

4. Partnership § 1— no partnership by estoppel

Plaintiff's evidence was insufficient to establish that defendant was a partner by estoppel in a retail clothing business operated by defendant's son where the evidence showed no representations made personally by defendant to plaintiff creditor and no expression of consent by defendant to his son that the son could represent him to be a partner. G.S. 59-46.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 13 September 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 23 January 1975.

In its complaint plaintiff alleges that defendant is indebted to it in the sum of $5,527.91 for merchandise sold by plaintiff to defendant during the period from 2 February 1973 to 13 July 1973. The orders for the merchandise were placed by the defendant's son who was actively engaged in the operation of a retail clothing store, but plaintiff contends that the defendant and the son were operating as a partnership in fact or that, in the alternative, the acts and representations of the defendant and his son were sufficient to establish a cause of action against the defendant as a partner by estoppel.

At trial plaintiff offered into evidence the deposition of the defendant who therein testified that he had organized and operated Chance Construction Company as a sole proprietorship for some twenty years and brought his son into the business in early 1970, paying him a salary and promising him that he could have the business if he stayed for several years and worked. In July or August 1971, the son informed defendant that he wanted to leave the partnership to go into the retail clothing business. Defendant reluctantly consented, agreeing to furnish the money that his son needed as initial capital for the clothing store prior to his opening on 1 November 1971. Pursuant to this agreement, the son left the Chance Construction Company, and thereafter the defendant sold the assets of Chance Construction Company and used some of the proceeds of sale to establish a car wash business, which he operated under the name of C.W.C. Enterprises. The son began buying goods to stock his clothing store and paid for them, with the consent of

the defendant, by writing checks in the total sum of about $18,000.00 on the bank account of C.W.C. Enterprises. Defendant testified that his son was not a partner and owned no interest in C.W.C. Enterprises and that he (the defendant) was not a partner and owned no interest in his son's clothing store.

Plaintiff also offered into evidence a deposition of the defendant's son who admitted that he made and signed two credit applications (Exhibits 1 and 2), one dated 3 October 1971, and the other dated 8 November 1971, in which he claimed that defendant was a partner in the clothing store business and that the assets of this business included the assets of C.W.C. Enterprises.

The credit manager of plaintiff testified that Dun and Bradstreet reports (Exhibits 3 and 4) showing defendant to be a partner with his son in the clothing store business, influenced their decision to sell merchandise to the store.

The defendant's motion for directed verdict was allowed, and from the judgment dismissing the action, plaintiff appealed.

Dalton and Long by W. R. Dalton, Jr., for the plaintiff.

Hemric and Hemric by H. Clay Hemric, Jr., for the defendant.

CLARK, Judge.

Whether the action of the trial court in granting the defendant's motion for directed verdict is proper depends primarily upon the admissibility of the evidence offered by the plaintiff and excluded by the trial court.

[1] The plaintiff sought to introduce into evidence the two credit applications (Exhibits 1 and 2) made and signed by defendant's son showing the defendant as a partner in the retail clothing business; but the son testified that the defendant was not a partner, that this was his way of indicating his father's financial backing for the initial capital. The son was not a party to the action. The reports were properly excluded.

The extrajudicial declarations of an alleged partner cannot be used (except as against himself) to prove the existence of the partnership. 2 Stansbury's, N. C. Evidence, § 170 (Brandis rev. 1973). Such a writing may be admissible if made in the course of business, but only after it is shown *prima facie* where

there was a partnership. Here all oral testimony of both defendant and his son shows a denial of partnership status.

[2] Plaintiff also sought to introduce into evidence the two Dun and Bradstreet reports (Exhibits 3 and 4), purportedly based on representations of defendant to an investigator for the firm. The alleged investigator was not a witness and defendant denied making such representations. The reports were properly excluded since they were not authenticated in any manner. See 2 Stansbury's, N. C. Evidence, § 195 (Brandis rev. 1973).

[3] The exclusion of this evidence leaves no support to plaintiff's contention of a partnership in fact. The evidence is clear that the son left the Chance Construction Company partnership, which resulted in the dissolution under G.S. 59-59, and that C.W.C. Enterprises was not a successor partnership. The evidence that the son was authorized to write checks on the C.W.C. Enterprises account does not constitute, in the absence of other fundamental requisites, a partnership in fact.

[4] Nor does the evidence support the plaintiff's contention that there was a partnership by estoppel. This State has adopted the Uniform Partnership Act, Article 2, Chapter 59, General Statutes of North Carolina. G.S. 59-46, entitled "Partner By Estoppel," provides in substance that where a person represents himself as a partner (or consents to another so representing him) he is liable to a person to whom the representation is made, who, in reliance thereon, gives credit to the actual or ostensible partnership; if the representation is made in a public manner, he is liable regardless of whether the representation was known to the person extending credit.

We do not find in the evidence any representations made by the defendant personally to third-party creditors, nor do we find from the evidence any expression of consent on the part of the defendant to his son that the son could represent him to be a partner; and since the Dun and Bradstreet reports were properly excluded from evidence, there is no evidentiary support of the plaintiff's contention that representations were made in a public manner. Under these circumstances, the evidence was not sufficient to warrant submitting the case to the jury upon the theory of partnership by estoppel.

The plaintiff's remaining assignments of error relate to the rulings of the court excluding testimony, and we find that

such testimony, if admitted, would not be sufficient to justify submitting the case to the jury and that such assignments of error are without merit.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

IN THE MATTER OF: BILLY W. SPARKS, PETITIONER

No. 7429SC1010

(Filed 5 March 1975)

Automobiles § 2— limited driving privilege — out-of-state bond forfeiture as prior conviction

A bond forfeiture in a drunken driving case in another state constituted a conviction which would abrogate the discretion of a trial judge to grant a limited driving permit under G.S. 20-179(b)(1).

APPEAL by Respondent from *Snepp, Judge.* Judgment entered 4 September 1974 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 13 February 1975.

The petitioner was convicted on 14 February 1974 in district court of driving while under the influence of intoxicating liquor. It was stipulated that the petitioner had previously been charged with the same offense in Indiana in December, 1968, and that he had posted an appearance bond, but he did not return for trial and thereby forfeited his bond. Respondent, the Department of Motor Vehicles, was notified on 22 December 1968, of petitioner's conviction in Indiana. Shortly thereafter, respondent revoked petitioner's driving privilege for one year.

When petitioner was convicted by the North Carolina District Court in February, 1974, the district judge issued to the petitioner a limited driving permit for the year his license was revoked. Respondent thereafter concluded that the North Carolina conviction was not a first conviction within the meaning of the statute giving the trial judge authority to grant limited driving permits and ordered the limited driving permit revoked.

Petitioner then filed this action challenging respondent's authority to revoke his limited driving permit. Judgment was

duly entered in favor of the petitioner, from which the respondent appealed.

Attorney General Edmisten by Assistant Attorneys General William B. Ray and William W. Melvin for the respondent.

Carnes & Rollins by Everette C. Carnes for the petitioner.

CLARK, Judge.

The only issue to be decided on this appeal is whether the Indiana bond forfeiture within ten years of the present offense is a conviction that would abrogate the discretion of a judge to grant a limited driving permit under G.S. 20-179(b)(1). It should be noted that, under G.S. 20-24(c), a bond forfeiture is equivalent to a conviction.

Prior to 1969, G.S. 20-179 only dealt with penalties for driving under the influence of intoxicating liquor or narcotic drugs. In 1969, the General Assembly in Chapter 1283 amended G.S. 20-179 with legislation entitled, "AN ACT TO ALLOW JUDGES TO ISSUE LIMITED DRIVING PERMITS TO PERSONS CONVICTED OF FIRST OFFENSES OF DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR." This amendment added the entire subsection (b) designating the existing paragraph subsection (a). In 1971, the General Assembly in Chapter 619, §§ 14 and 15 amended the section further adding, *inter alia,* the language ". . . or as appropriate" to the form judgment of subsection (b)(2) wherein the offense for which the permittee has been convicted is to be listed. Another pertinent amendment of the same year to this statute is found in Chapter 1133, which provides in substance that prior offenses occurring within ten years of the date of the present offense counted so that a conviction on a current offense would not be a "first conviction."

In the case of *In Re Oates,* 18 N.C. App. 320, 196 S.E. 2d 596 (1973), this Court held that a prior out-of-state conviction for driving while intoxicated was a conviction to be counted under the mandatory revocation provisions of G.S. 20-19(e). While that case only dealt with the provisions of that section, it is, nevertheless, relevant to the question in the present case in that G.S. 20-19(e) is a *penal* provision allowing *permanent* revocation of a license whereas G.S. 20-179(b)(1) is a license reinstatement provision. Insofar as this Court has already held that the clear legislative intent under a *penal* provision was to

count prior out-of-state convictions, it becomes very difficult to discount them under a *grace* type provision. This is not to say that the legislative intent may have been different when it passed the grace provision, but it is to say that what was contemplated as a conviction under one section may equally be such under another. If it is the clear intent of the legislature to count out-of-state convictions in permanently depriving one of his license under G.S. 20-19(e), it is logical to conclude that the legislature intended them to count for purposes of granting limited driving privileges under G.S. 20-179(b)(1).

It should be noted that all of the amendments to G.S. 20-179 are specifically related to the offenses of driving under the influence. With this in mind and the fact that the only "driving under the influence" statutes in this State are enumerated in G.S. 20-138, 20-139(a) and 20-139(b), it is reasonable to assume that the legislative amendment in 1971 adding "or as appropriate" to the offenses to be listed in the form judgment of G.S. 20-179(b)(2) was referring to out-of-state convictions. This carries through logically in that the language of G.S. 20-179(b)(3) gives the resident judge authority to issue restrictive driving privileges "[u]pon conviction of such offense outside the jurisdiction of this State. . . ."

In view of the legislative intent as defined in the *In Re Oates* case, the legislative recognition of out-of-state convictions in other subparts of G.S. 20-179(b), and the fundamental rule of construction that sections and acts in pari materia, and all parts thereof, should be construed together, it is our opinion that the judgment in the present case should be reversed and the action of the respondent in revoking the petitioner's license be reinstated.

Reversed.

Chief Judge BROCK and Judge HEDRICK concur.

LORENZO BOBBY DANIELS, BY HIS NEXT FRIEND, PAULINE DANIELS GOODSON v. SARAH FORD JOHNSON AND NORWOOD RIGDON JOHNSON

No. 7410SC1009

(Filed 5 March 1975)

1. Automobiles § 41— children near street — duty of motorist

The presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.

2. Automobiles § 63— striking child — no presumption of negligence

No presumption of actionable negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street in the path of his approaching vehicle, but there must be some evidence that the motorist could have avoided the accident by the exercise of reasonable care under the circumstances.

3. Automobiles § 63— striking child — insufficient evidence of negligence

The evidence failed to establish actionable negligence on the part of defendant motorist in striking a child who "trotted" into the street where it failed to show where defendant was at any particular time until she applied her brakes five feet before striking the child and thus left to speculation where defendant was when she saw or should have seen the child.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 20 September 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 13 February 1975.

This is a civil action wherein the plaintiff, Lorenzo Bobby Daniels, brought suit by his guardian ad litem, Pauline Daniels Goodson, to recover damages for personal injuries suffered on 20 January 1970 when he was struck by an automobile driven by Sarah Ford Johnson and owned by her husband, Norwood Rigdon Johnson.

At the trial, plaintiff offered evidence tending to show the following: East Street in Raleigh runs north and south and is approximately 36 feet wide. The 300 block of S. East Street, which is approximately 200 feet long, is straight and level and has a speed limit of 25 m.p.h. There are homes along the west side of the street and both homes and businesses along the east side of the street. The plaintiff's house, located in the middle of the block on the west side of the street, is directly across the street from the Rainbow cabstand.

On 20 January 1970 the plaintiff was eight years old. At about 5:15 p.m. plaintiff, returning home from Keith's grocery store, walked down the sidewalk on the east side of the street as far as the Rainbow cabstand. He stopped in the driveway leading from the street to the cabstand and checked the traffic in both directions. Plaintiff did not see any cars and began "trotting" west across S. East Street toward his home. He was struck by the front part of defendant's car, which was traveling south, at a point nine feet from the west curb of S. East Street. Plaintiff testified that at the time of the accident it was "sort to" getting dark outside and that he did not see the defendant's car until it was so close to him he was unable to avoid being hit. He did not remember hearing either the sound of a horn or the sound of brakes. Plaintiff further stated that there were no cars parked along the east side of S. East Street in the vicinity of the cabstand.

Plaintiff's grandmother, Katy Daniels Lumford, testified that at the time of the accident there was a considerable amount of traffic on S. East Street and that immediately after the accident Mrs. Johnson said that she did not see the plaintiff.

Sergeant B. W. Peoples, the investigating officer, testified that the defendant's vehicle left "tire impressions" prior to the point of impact which were five feet in length and that the automobile traveled six feet after the collision before coming to a stop.

At the conclusion of the plaintiff's evidence, the trial court granted defendant's motion for a directed verdict. Plaintiff appealed.

Hatch, Little, Bunn, Jones, Few & Berry by John N. McClain, Jr., and David H. Permar for plaintiff appellant.

Ragsdale and Liggett by George R. Ragsdale for defendant appellee.

HEDRICK, Judge.

[1] Defendant's motion for a directed verdict at the close of plaintiff's evidence presents the question whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient to justify a verdict in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). It is well-settled in this State that the presence of children on or near a highway is a

warning signal to a motorist, who must bear in mind that children have less capacity to shun danger than adults and they are prone to act on impulse. Therefore, "the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury." *Brinson v. Mabry,* 251 N.C. 435, 438, 111 S.E. 2d 540, 543 (1959).

[2] However, no presumption of actionable negligence arises from the mere fact that a motorist strikes and injuries a child who darts into the street or highway in the path of his approaching vehicle. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610 (1961). There must be some evidence that the motorist could have avoided the accident by the exercise of reasonable care under the circumstances. Until the driver has notice of the presence or likelihood of children near his line of travel, the rule as to the degree of care to be exercised with respect to children is the same as it is with respect to adults. 4 Blashfield, Automobile Law and Practice, (3d Ed. 1965) § 151.11.

Taking as true the minor plaintiff's testimony that there were no vehicles on the street blocking his view to the north along S. East Street, it can be reasonably inferred that the defendant approaching along S. East Street from the north could have seen the plaintiff sometime during his passage from the east side of the street to the point where he was struck near the center of the southbound lane. However, when and where the plaintiff became visible to the defendant would depend on just where she was in relation to the plaintiff while he was trotting the twenty-seven feet from the east side of the street to where he was struck by the defendant's automobile.

[3] There is no evidence in this record whatsoever as to where the defendant was at any particular time until she apparently applied her brakes five feet before striking the plaintiff. Thus, the evidence adduced at the trial does not provide the answer to the crucial question in the case, that is, whether defendant, in the exercise of due care, could have seen the plaintiff in sufficient time to anticipate his collision course and to have taken effective measures to avoid striking him. Left to speculation is where the defendant was when she saw or by the exercise of reasonable care should have seen the plaintiff.

The plaintiff not only had the burden of offering evidence of defendant's negligence, he also had the burden of offering

evidence that the defendant's negligence was at least one of the proximate causes of the injury. Assuming that the defendant failed to keep a proper lookout, there is not sufficient evidence from which it may be inferred that her inattention was a proximate cause of the accident and that in the exercise of reasonable care she might have avoided it. See *Winters v. Burch,* 284 N.C. 205, 200 S.E. 2d 55 (1973); *Badger v. Medley,* 262 N.C. 742, 138 S.E. 2d 401 (1964).

We hold that the evidence in this case fails to establish actionable negligence on the part of defendant. Her motion for a directed verdict, therefore, was properly allowed.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. LIONELL HEATH

No. 7426SC973

(Filed 5 March 1975)

1. **Criminal Law § 62— question about lie detector test — objection sustained — no prejudice**

   In an armed robbery case, defendant was not prejudiced when the district attorney asked him on cross-examination if he had not taken a lie detector test where the court sustained an objection to the question.

2. **Criminal Law § 131— newly discovered evidence — statement by codefendant — new trial denied**

   The trial court properly denied defendant's motion for a new trial on the ground of newly discovered evidence based on a codefendant's statement at a sentencing hearing that defendant did not participate in the robbery in question since the evidence tended only to contradict three eyewitnesses who testified for the State and it does not appear that a different result would probably be reached due to the newly discovered evidence.

APPEAL by defendant from *Falls, Judge.* Judgment entered 9 July 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1975.

Defendant was tried upon a bill of indictment charging him with armed robbery. Upon defendant's plea of not guilty, the State presented testimony from Faye Ingram, Judy Gregory, and Jack Ingram who were employees at a "Kentucky Fried Chicken" store on 2 January 1974 at approximately 8:00 o'clock p.m. At that time, according to witness Faye Ingram, three men entered the store and got in line as customers to place an order. After placing an order, one of them, identified as Willie Garnett, pulled out a shotgun and said, "This is it, let me have it, give me that, give me all that money." Garnett went around behind the counter along with a second unidentified man who was carrying a pistol. Defendant kept his hands in his pockets and did not appear to have a weapon. Garnett took the money from a safe in the store, handed it to defendant, and the three of them left.

The State introduced into evidence photographs taken during the robbery by an automatic system in the store. They were admitted for the purpose of illustrating testimony, and each witness for the State identified defendant as appearing in some of the photographs. Each employee identified defendant as participating in the robbery. About one thousand dollars was taken.

Defendant took the stand and denied that he was in the store on 2 January 1974 at the time of the robbery. He testified that he was at another store with a friend and denied having known Garnett at the time of the robbery. In addition, defendant stated that he lived only two blocks from the "Kentucky Fried Chicken" store and frequently traded there before and after 2 January 1974.

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

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., and Associate Attorney Wilton E. Ragland, Jr., for the State.

Hamel, Cannon & Hamel, by I. Manning Huske, for defendant appellant.

MARTIN, Judge.

[1] In cross-examination of defendant, the district attorney asked, "You took a lie detector test, didn't you?" Counsel for defendant immediately interposed an objection which was properly sustained. It is argued that the question itself was suffi-

cient to justify a new trial for it was made with the purpose of getting prejudicial matter before the jury and left them with the idea that defendant had failed a lie detector test. In *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961) the Court held that the results of a polygraph test are not admissible in evidence to establish the guilt or innocence of one accused of a crime. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Pope,* 24 N.C. App. 217, 210 S.E. 2d 267 (1974). While we strongly disapprove of the district attorney's question, we fail to see how it could have possibly affected the outcome of this case.

[2] In his next assignment of error, defendant contends the trial court erred in denying his motion for a new trial based upon newly discovered evidence. The motion states in part:

> "That since said verdict was entered, the defendant has discovered new evidence material to his defense which with reasonable diligence could not have been discovered and produced at trial, namely, that one John Willie Garnett who had been indicted as a codefendant with Lionell Heath for the crime of armed robbery and had entered a plea of guilty prior to the trial of Lionell Heath but was not sentenced until after the trial of Lionell Heath, stated in open court at such sentencing that Lionell Heath had not participated in the robbery for which he had been indicted."

A motion for new trial based upon newly discovered evidence is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion. *State v. Shelton,* 21 N.C. App. 662, 205 S.E. 2d 316 (1974). Quoting from *State v. Casey,* 201 N.C. 620, 161 S.E. 81 (1931), the Court in *State v. Shelton, supra,* set out the prerequisites for cases involving motions for new trials on the grounds of newly discovered evidence as follows:

> "1. That the witness or witnesses will give the newly discovered evidence. (Citations omitted.)
>
> 2. That such newly discovered evidence is probably true. (Citations omitted.)
>
> 3. That it is competent, material and relevant. (Citations omitted.)

4. That due diligence was used and proper means were employed to procure the testimony at trial. (Citations omitted.)

5. That the newly discovered evidence is not merely cumulative. (Citations omitted.)

6. That it does not tend only to contradict a former witness or to impeach or discredit him. (Citations omitted.)

7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. (Citations omitted.)"

It would appear that the last two prerequisites have not been met. Garnett's testimony would only tend to contradict three eyewitnesses who testified for the State. Furthermore, it does not appear that a different result would probably be reached due to the newly discovered evidence. In the trial court's denial of defendant's motion for a new trial we find no abuse of discretion.

Defendant's remaining assignment of error lacks merit.

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID EARL LOCKLEAR

No. 7416SC982

(Filed 5 March 1975)

Homicide § 21— excessive force in self-defense — jury question

The issue of voluntary manslaughter by reason of excessive force was a question for the jury where the evidence tended to show that defendant and deceased had been drinking, deceased was highly intoxicated, deceased indicated that he was going to take a heater from defendant's trailer, defendant replied he couldn't take it because it belonged to defendant's landlord, defendant pointed a pistol toward the floor and ordered deceased to get out, deceased began pulling a pistol from his belt under a jacket, defendant told deceased, "Don't do it," defendant fired two shots at deceased, and two inches of the barrel of deceased's pistol remained in his belt when he was shot.

State v. Locklear

APPEAL by defendant from *Clark, Judge.* Judgment entered 9 August 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 February 1975.

Defendant was charged with the murder of Rabun Locklear. He was brought to trial for second degree murder and entered a plea of not guilty.

State's evidence tended to show that defendant had moved into a trailer on 22 March 1974 along with one Tina April. That evening defendant left to drink beer. He returned late that night in a truck with Ronald Jacobs and the deceased, Rabun Locklear. They had been drinking beer together. Defendant went into the trailer and asked Tina April if she wanted to get something to eat. Someone shouted from the truck, "Hurry up and come on", and Tina April shouted back, "Wait a damn minute." The deceased, Rabun Locklear, then entered the trailer and said that nobody was going to curse in his grandmother's trailer. He indicated that a heater on the floor was his grandmother's and that he was going to take it. Defendant replied that he couldn't take it because it belonged to the landlord. Ronald Jacobs took the deceased by the arm and said, "Come on, let's go," but the deceased jerked his arm away saying that he wasn't going anywhere. A pistol was lying on a kitchen bar next to defendant. Defendant took the pistol, stood up, and pointed it toward the floor. He ordered the deceased to get out. With that the deceased began pulling a pistol from his belt under a jacket. Defendant pointed his pistol at the deceased and told him, "Don't do it, don't do it." Two shots were fired by defendant, and the deceased, dropping his pistol, ran down the hall to the rear door where he fell. There was evidence that approximately two inches of the barrel of the deceased's pistol remained in his belt at the time he was shot. Dr. Thompson testified for the State as a medical expert in the field of pathology and post mortem examinations. According to this witness, the primary cause of death was a gunshot wound which passed through the deceased's heart. An analysis of a blood sample taken from the deceased revealed 290 milligrams per cent of alcohol which, in the opinion of Dr. Thompson, was enough to make one highly intoxicated.

Defendant offered no evidence.

At the close of the evidence the trial court granted defendant's motion for nonsuit on the charge of second degree murder

and then submitted the issue of defendant's guilt as to voluntary manslaughter to the jury. The jury found defendant guilty of voluntary manslaughter, and from a judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten, by Associate Attorney Jesse C. Brake, for the State.

Horace Locklear, for defendant appellant.

MARTIN, Judge.

Defendant contends it was error to deny his motion for nonsuit for the reason that he acted in self-defense, using only such force as necessary to avoid death or great bodily harm.

"The burden is on defendant to prove his plea of self-defense to the satisfaction of the jury and to prove that he used no more force than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm." *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971).

In *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84 (1964) the Court said:

> "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.*" (Emphasis added.)

When excessive force or unnecessary violence is used in self-defense, the killing of the adversary is manslaughter at least. *State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968).

It was incumbent upon defendant to satisfy the jury that he acted in self-defense and that, in doing so, he used no more force than was or reasonably appeared necessary under the circumstances. In our opinion the issue of voluntary manslaugh-

ter by reason of excessive force was a question for the jury in the present case.

Defendant's remaining assignment of error is without merit.

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. LAWRENCE EDWARD SAMUELS

No. 7421SC974

(Filed 5 March 1975)

1. **Criminal Law § 76— statements during search — constitutional warnings — volunteered statements**

Statements made by defendant during a search of his apartment for narcotics were properly admitted in evidence where the court found upon supporting evidence that when defendant was arrested and advised of his rights before making the statements, he repeatedly said, "I know all that stuff," and that each of defendant's statements was made "suddenly, spontaneously and voluntarily" and was not in response to police interrogation.

2. **Criminal Law § 91—denial of continuance to obtain new counsel**

The trial court did not err in the denial of defendant's motion for continuance for the purpose of retaining new counsel where defendant had court-appointed counsel who was ready for trial and the charges against him had been pending for six months.

APPEAL by defendant from *Exum, Judge*. Judgment entered 16 August 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 February 1975.

Defendant was indicted for possession of heroin in violation of the North Carolina Controlled Substances Act. He also was charged in separate warrants with possession of the controlled substances marijuana, morphine, cocaine and ethchlorvynol. Defendant pleaded not guilty and the cases were consolidated for trial.

The State's evidence tended to show that on 8 February 1974 officers of the Winston-Salem Police Department, having obtained two search warrants, went to an apartment at 911 East 3rd Street, Winston-Salem, where defendant sometimes

resided. They found defendant standing in the bedroom. After reading the warrants to him, the officers began their search. Under the mattress they found an envelope containing material shown by preliminary tests to be marijuana. Defendant was then placed under arrest and given his *Miranda* warnings. The officers continued searching the apartment and discovered other controlled substances and drug paraphernalia. In the dresser they found a steel box which they opened with a key produced by defendant. Inside the box were scales, spoons, tape, gauze and a sifter. As these items were being removed, defendant said, "You are not going to find anything on that stuff. I have washed it. It's all clean." In the hall closet was a jacket containing a letter addressed to Samuels and a packet of white powder. When this was discovered, he said, "That is not mine. All my dope is brown." Finally, when officers found more drugs in a trash bag in the kitchen, defendant said, "That is the stuff I use to cut with. You're a day too late. I sold everything."

After conducting a *voir dire* hearing, the trial court concluded that all of the above statements were admissible in evidence. Defendant did not object to the introduction of physical evidence obtained during the search. He testified that he was not a resident of the apartment and had no knowledge of the drugs found there. Defendant's girl friend testified that she lived in the apartment with her son and also had no knowledge of the drugs.

The jury found defendant guilty of all five charges against him. From judgment imposed thereon, he appealed to this Court.

Attorney General Edmisten, by Associate Attorney Robert P. Gruber, for the State.

Nelson, Clayton, Boyles & Roscoe, by Laurel O. Boyles, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in denying his motion to suppress inculpatory statements made during the search. He argues that the court's findings on *voir dire* do not support the conclusion that he voluntarily and understandingly waived the right to remain silent.

A trial court's finding of voluntariness, when supported by competent evidence, is conclusive on appeal. *State v. Thomp-*

son, 285 N.C. 181, 203 S.E. 2d 781 (1974); *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Wright,* 275 N.C. 242, 166 S.E. 2d 681, *cert. denied* 396 U.S. 934 (1969). Moreover, volunteered statements are admissible regardless of waiver. *Miranda v. Arizona,* 384 U.S. 436 (1966); *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431 (1973); *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972); 2 Stansbury, N. C. Evidence (Brandis rev.), § 184.

In the case at bar, the trial court found that when defendant was arrested and advised of his rights, he repeatedly said, "I know all that stuff." The court further found that each of defendant's statements was made "suddenly, spontaneously and voluntarily" and not in response to police interrogation. These findings are supported by the evidence. The motion to suppress was properly denied.

[2] Defendant also assigns as error the trial court's denial of his motion for a continuance for the purpose of retaining new counsel. He does not contend that his constitutional rights have been violated. His motion therefore rests in the trial court's discretion, reviewable only upon a showing of abuse. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971); *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617 (1967). Defendant had been found indigent and had obtained court-appointed counsel, who was prepared for trial. Charges against him had been pending for almost six months. We find no abuse in refusing to order a continuance at this late date.

We have carefully examined the record and find no error prejudicial to defendant.

No error.

Judges VAUGHN and MARTIN concur.

VIVIAN LAMB THOMPSON v. FREDDIE W. THOMPSON

No. 7410DC990

(Filed 5 March 1975)

1. Divorce and Alimony § 21— failure to make child support payments — contempt

The evidence supported the trial court's determination in a contempt proceeding that defendant had actual knowledge of a court order

requiring him to make child support payments *pendente lite,* that he had the means to comply with the order, and that his failure to comply was wilful.

2. Constitutional Law § 29; Jury § 1— failure to make support payments — contempt — no right to jury trial

Defendant was not entitled to a jury trial in a criminal contempt proceeding based on his failure to make child support payments pursuant to a court order since such contempt is a petty offense. G.S. 5-4.

APPEAL by defendant from *Winborne, Judge.* Judgment entered 16 August 1974 in District Court, WAKE County. Heard in the Court of Appeals 12 February 1975.

Plaintiff wife brought this action against defendant husband for alimony without divorce. On 21 September 1971 the District Court entered an order denying plaintiff's motion for alimony pendente lite but requiring defendant to pay $450 per month pendente lite for the support of the parties' three children. Subsequently plaintiff moved to have defendant held in contempt for failure to make support payments. A hearing was held on the motion in August 1974.

Plaintiff offered testimony which tended to show the following: Although the order of 21 September 1971 was not formally served on defendant, he was aware of it. He saw plaintiff and telephoned her frequently, and she told him about the order. Defendant has had a well-paying job as a salesman for a number of years. He refused to make child support payments from September 1971 to August 1973, but often gave the children expensive luxury items on the condition that they try to persuade plaintiff to live with him.

Defendant testified that he did not learn of the 21 September 1971 order until August 1973 when he began making support payments. He offered testimony concerning his income for the years 1969-73, stating he was unable to make up the arrearage in payments.

The trial court found that defendant had been required to make support payments totaling $13,630 since 1971 and that he had paid to plaintiff only $2,550. The court also made the following findings:

"10. That during the entire duration, the defendant has been employed with the same company, and has been of good health, physically and mentally.

11. That for the following years, the defendant had earned commissions:

(a) 1971	$19,726.00
(b) 1972	20,687.00
(c) 1973	17,489.00

12. That for the following years, the defendant had business expenses, which included his complete auto expenses and most all of his food and lodging:

(a) 1971	$ 9,409.00
(b) 1972	9,465.00
(c) 1973	10,695.00

13. That for the following years the defendant had net income, which said income was almost entirely free to be applied to the support of his minor children:

(a) 1971	$10,317.00
(b) 1972	11,226.00
(c) 1973	6,834.00

14. That on numerous occasions, the plaintiff and defendant had contact with each other and the defendant was fully informed of the orders of the Court, and stated in effect, that he had no intention of complying with same."

From these facts the court concluded that defendant was in arrears in the amount of $11,080, that his failure to pay support was "willful and without lawful excuse," that he was in contempt of court, and that he could not at present make up the arrearage. From an order sentencing him to 30 days' imprisonment, defendant appealed to this Court.

George W. Anderson for plaintiff appellee.

Carl E. Gaddy for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the evidence does not support the trial court's findings of fact and that the findings of fact do not support the conclusions of law. In contempt proceedings findings of fact are conclusive on appeal if supported by any competent evidence and are not reviewable except to determine whether they support the judgment. *Roses Stores v. Tarrytown Center,* 270 N.C. 201, 154 S.E. 2d 320 (1967); *Mauney v.*

Mauney, 268 N.C. 254, 150 S.E. 2d 391 (1966). There is plenary evidence in the record that defendant had knowledge of the court order of 21 September 1971 and from September 1971 to August 1973 he had the means to comply. The conclusion of willfulness is fully supported. *See Little v. Little,* 203 N.C. 694, 166 S.E. 809 (1932).

[2] Defendant urges this Court to hold that he was entitled to trial by jury. Having been punished for acts already accomplished, which he cannot presently rectify, defendant was punished for criminal contempt. *See Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157 (1938). The maximum punishment authorized for criminal contempt is a fine of $250 or 30 days' imprisonment or both. G.S. 5-4. Our North Carolina Supreme Court has held that in such a case contempt is a petty offense for which there is no constitutional right to jury trial. *Blue Jeans v. Clothing Workers,* 275 N.C. 503, 169 S.E. 2d 867 (1969), *citing Bloom v. Illinois,* 391 U.S. 194 (1968); *Duncan v. Louisiana,* 391 U.S. 145 (1968); *and Cheff v. Schnackenberg,* 384 U.S. 373 (1966). We are bound by these decisions.

For willful disobedience of a court order, defendant was properly adjudged in contempt.

Affirmed.

Judges VAUGHN and MARTIN concur.

CAPITAL CITY OIL COMPANY, INC. v. HUMBLE OIL AND REFINING COMPANY, FORMERLY ESSO STANDARD OIL COMPANY

No. 7410SC969

(Filed 5 March 1975)

Contracts § 7; Monopolies § 2— sublease agreements — restraint of trade

Where a third party sold the products of plaintiff oil company on premises subleased from defendant oil company, defendant's cancellation of the sublease of the third party, defendant's entry of a new sublease prohibiting the third party from selling petroleum products on the property, and defendant's cancellation of the second sublease and entry of a third sublease allowing the third party to sell petroleum products on the property, after which the third party began selling the products of defendant oil company, did not constitute an unlawful restraint of trade in violation of plaintiff's rights.

APPEAL by plaintiff from *James, Judge.* Judgment entered 5 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 10 February 1975.

This is a civil action brought by plaintiff (Capital City) seeking to recover from defendant (Humble) treble damages for alleged acts in restraint of trade and in violation of plaintiff's rights under G.S., Chapter 75. Transactions and events giving rise to the controversy are as follows:

On 21 June 1968 Humble (then Esso Standard Oil Company), lessee for twenty years of certain property located on Downtown Boulevard in Raleigh, subleased the premises to J. L. Williams, T/A Raleigh Beverage and Grocery. The duration of the lease was one year beginning 1 July 1968 and from year to year thereafter. Either party could terminate the lease upon 30 days' notice after the first or any subsequent term. Under the agreement, Williams would use the property "only for a drive-in type grocery store selling among other items usually sold at such stores, beer and wine."

On 15 May 1969 Williams entered into a contract-dealer arrangement with Capital City for one year beginning 1 July 1969. Under this agreement Capital City would install two self-service gasoline pumps on the property, and Williams would buy all of his petroleum products and accessories from Capital City. The contract further provided that "in the event the lease with Humble should be cancelled this agreement shall also be cancelled."

On 8 July 1969 Humble notified Williams that his sublease would be terminated as of 1 July 1970, and on 1 April 1970 Williams gave Capital City notice of cancellation. Williams and Humble subsequently entered into a new sublease agreement on 29 June 1970, for one year beginning 1 July 1970 and from year to year thereafter. Again either party had the right to terminate with 30 days' notice at the end of any term. Williams also covenanted not to use the premises for storage, sale or handling of petroleum products.

On 24 March 1972 Williams and Humble cancelled the second sublease and on 5 April 1972 entered into another agreement, leasing the building, tanks, and pumps and allowing Williams to sell petroleum products. The remaining terms of the agreement were the same as before. Williams began selling

Exxon gasoline on the leased property, and on 6 December 1972 Capital City brought suit.

Both parties moved for summary judgment. After a hearing on the motions, the trial court entered judgment for defendant. Plaintiff appealed to this Court.

Vaughan S. Winborne for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by James L. Newsom, for defendant appellee.

ARNOLD, Judge.

The sole question presented by this appeal is whether Humble's activities with respect to the demised premises constitute an illegal restraint of trade. The facts are not in dispute. In support of their motions for summary judgment, both parties relied on affidavits and on documents of admitted authenticity: the leases between Humble and J. L. Williams; the contract between Williams and Capital City; and their correspondence with Williams. On the basis of these papers, the trial court concluded that defendant Humble was entitled to judgment as a matter of law. We agree.

Plaintiff Capital City's contractual right to do business on the premises derived solely from the rights of Williams, the sublessee. As the owner of a leasehold estate, Humble had the right to impose restrictions on Williams' use of the premises. 3 G. Thompson, Real Property § 1146 (1959); J. Webster, Real Estate Law in North Carolina § 217 (1971). Had it chosen to do so, Humble could have required that the premises be used exclusively for the sale of Humble products. *See* 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 598; *cf. Arey v. Lemons*, 232 N.C. 531, 61 S.E. 2d 596 (1950). Humble's motives notwithstanding, it clearly was within its rights in terminating the original sublease and in executing successive ones.

The judgment of the trial court is affirmed.

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. GREG T. RIFE

No. 7410SC1037

(Filed 5 March 1975)

Criminal Law § 34— evidence of another crime — relevance to show joint action

In a prosecution for larceny of a motor vehicle, evidence that marijuana was found in the vehicle when the three defendants, who fit the descriptions of persons seen near the vehicle in N. C., were arrested in another state and that defendants had pleaded guilty to possession of the marijuana was relevant to establish that defendants were acting jointly and in concert when the vehicle was stolen in N. C., although the evidence did show commission of another crime by defendants.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 10 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 19 February 1975.

Defendant was charged in a bill of indictment with the felonious larceny of a motor vehicle. Two other defendants, Buccannon and Turner, were charged with the same offense. The three cases were consolidated for trial, and verdicts of guilty were returned in each case.

The State's evidence tended to show that on 9 April 1974 four young men were observed in the town of Fuquay-Varina. The four were walking along a line of parked vehicles, two on either side of the vehicles. They were stooping and bending and looking into the vehicles. They were observed by three residents and were described as hippie-type boys and as strangers in the community. A blond-haired young man, who strongly resembled defendant Rife, was wearing a brightly colored plaid shirt similar to a shirt found in the stolen vehicle at the time of Rife's arrest. This blond-haired young man was observed getting into the driver's seat of the vehicle in Fuquay-Varina and backing this vehicle from its parking space. The other three young men were then observed getting into the vehicle with the blond-haired young man and riding away with him. The vehicle was a camper-van.

Two days later, on 11 April 1974, a police officer in the town of Delhi, Louisiana, became suspicious when he observed defendant Rife driving the out-of-state vehicle. He checked by his patrol car radio and determined that the vehicle had been

reported stolen in North Carolina. The officer then intercepted the vehicle and asked Rife for his driver's license and motor vehicle registration. Rife did not have either one. The three occupants, Rife, Buccannon, and Turner, were then placed under arrest. Each of the three is from Newport News, Virginia. The fourth young man, who had been described by the witnesses in North Carolina as an Indian-type person with dark complexion and straight long hair, was not with the three who were arrested.

After the three were arrested, a search of the vehicle disclosed a quantity of marijuana in a glove on the right front seat, and marijuana seeds and stems were found throughout the vehicle. Each of the three, Rife, Buccannon, and Turner, pleaded guilty in Louisiana to charges of possession of marijuana and later waived extradition to North Carolina for trial on the charge of felonious larceny of a motor vehicle.

Defendant offered no evidence.

Attorney General Edmisten, by Assistant Attorney General Donald A. Davis, for the State.

Broughton, Broughton, McConnell & Boxley, by Gregory B. Crampton, for the defendant.

BROCK, Chief Judge.

Defendant assigns as error the ruling of the trial judge in permitting the State to offer evidence of defendant's possession of marijuana in Louisiana and his plea of guilty and sentence in Louisiana on the charge of possession of marijuana. "While it is well established that evidence of other crimes, having no bearing upon the crime for which the defendant is on trial, may not be introduced prior to his taking the stand as a witness in his own behalf, it is equally well settled that all facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense." *State v. Atkinson,* 275 N.C. 288, 312, 167 S.E. 2d 241 (1969).

Here there is evidence that four young men stole a camper-vehicle in Fuquay-Varina. Two days later, three young men fitting the description of three of the four seen in Fuquay-Varina were found in Louisiana in possession of the stolen camper-vehicle. They admitted jointly possessing the marijuana found

in the glove on the right front seat. In our opinion this evidence is relevant and has substantial probative value in its logical tendency to establish that the three were acting jointly and in concert at the time the vehicle was stolen in North Carolina. *See* 1 Stansbury, N. C. Evidence 2d, §§ 91, 92 (Brandis rev. 1973). This assignment of error is overruled.

Defendant next assigns as error the action of the trial judge in summarizing, in his instructions to the jury, the evidence of defendant's arrest, plea, and sentence in Louisiana on the marijuana charge. Obviously, if the evidence were properly admitted, it was not error for the judge to summarize it in his charge. This assignment of error is overruled.

No error.

Judges VAUGHN and MARTIN concur.

DUKE POWER COMPANY, PETITIONER v. FERDINAND ARTHUR RIBET, JR., AND WIFE, GRACE KATHLEEN LOWMAN RIBET; BEN S. WHISNANT, TRUSTEE FOR BURKE COUNTY SAVINGS AND LOAN ASSOCIATION; AND BURKE COUNTY SAVINGS AND LOAN ASSOCIATION, RESPONDENTS

No. 7425SC992

(Filed 5 March 1975)

1. **Eminent Domain § 1— choice of route — appellate review**

Power company's choice of a route for an electric transmission line across respondent's property will not be interfered with when there is neither allegation nor evidence that the company acted either arbitrarily or capriciously or in a manner constituting an abuse of discretion in the selection of the route.

2. **Eminent Domain § 11— failure to allege and prove damages**

In an appeal to the superior court from the report of the commissioners in a condemnation proceeding, respondent failed to allege or offer evidence of damages which would justify submitting an issue of damages to the jury.

APPEAL by respondent Ferdinand Arthur Ribet, Jr., from *Thornburg, Judge.* Judgment entered 20 August 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 12 February 1975.

This special proceeding was instituted in September 1972 by Duke Power Company to condemn a right-of-way across respondent's land for the purpose of constructing a line for the transmission of electric current. The proposed right-of-way was described in the petition by metes and bounds, and a plat of respondent's land with the proposed right-of-way charted thereon was attached to the petition. The uses and incidents of the proposed right-of-way were fully set out in the petition. The described and charted right-of-way is 68 feet in width at all points across repsondent's property.

Respondent filed answer in which he argued that (1) Duke Power Company was seeking to take more of respondent's land than was described in the petition, (2) a more direct route for the transmission line could be taken across another's property, and (3) the price Duke Power Company offered respondent for the right-of-way was inadequate.

The clerk of superior court, after due notice, conducted a hearing and concluded that respondent had not denied any material allegation of the petition. The clerk then appointed commissioners of appraisal who, after due notice, heard testimony and assessed respondent's damages at $750.00. Respondent filed exceptions to the report of commissioners, and the cause was transferred to the civil issue docket for trial. When the matter came on for trial in superior court, respondent testified generally in accordance with the answer he had filed. He testified generally that petitioner was seeking to take more right-of-way than was described in the petition; that the right-of-way could have been placed on other property; that the price offered by petitioner was inadequate; that the electric transmission line would destroy his future plans for his property; and that he did not want the right-of-way on his property. At the close of respondent's evidence, the trial judge entered a directed verdict and entered judgment condemning the right-of-way as described in the petition and awarding damages as assessed before the clerk. Respondent appealed.

Patton, Starnes & Thompson, by Thomas M. Starnes, for petitioner.

John H. McMurray, for the respondent.

BROCK, Chief Judge.

[1] The power to condemn private property for electric transmission lines is granted to Duke Power Company, a public utility,

by the provisions of G.S. 40-2. Where an agency has the power of condemnation, the choice of route is primarily in its discretion and will not be reviewed on the ground that another route may have been more appropriately chosen, unless it appears that there has been an abuse of discretion. *City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E. 2d 179 (1972). "Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge." *City of Charlotte v. McNeely, supra* at 690. However, the exercise of discretion by the condemnor will not be interfered with on the ground that condemnor acted unreasonably and without justification when there is neither allegation nor evidence that condemnor acted either arbitrarily or capriciously or in a manner constituting an abuse of discretion in the selection of the route to condemn. *Highway Commission v. Board of Education,* 265 N.C. 35, 143 S.E. 2d 87 (1965). Respondent neither alleged nor offered evidence that petitioner acted in such a manner.

[2] The measure of damages or just compensation to be paid to the landowner is the difference in the fair market value of the land immediately before the taking and the fair market value immediately after the taking of the easement. 3 Strong, N. C. Index 2d, Eminent Domain § 5 (1967). Respondent neither alleged nor offered evidence of such fair market value.

Obviously the respondent did not want the electric transmission line constructed on his property. However, he has failed to allege or offer evidence of facts justifying judicial review of the exercise of the petitioner's discretion in choosing the route. In a like manner he has failed to allege or offer evidence of damages which would justify submitting an issue thereon to the jury. The directed verdict and judgment entered thereon are

Affirmed.

Judges VAUGHN and MARTIN concur.

WILBUR F. KING, JR. v. MARILYN LEE KING ALLEN

No. 748DC1015

(Filed 5 March 1975)

Divorce and Alimony § 24— child custody — changed circumstances — remarriage of mother

Evidence that the mother had remarried was insufficient to show a substantial change of circumstances affecting the welfare of the child so as to require the court to modify a custody order by granting custody to the mother rather than the father.

APPEAL by defendant from *Pate, Judge.* Order entered (filed) 27 September 1974 in District Court, LENOIR County. Heard in the Court of Appeals 18 February 1975.

This action was instituted on 17 September 1968. In his complaint, plaintiff asked for an absolute divorce on ground of one year separation and for custody of Wilbur F. King III who was born on 28 March 1966. On 11 November 1968, the court entered judgment granting plaintiff an absolute divorce but made no specific provision as to the custody of the child except that defendant should not remove the child from this State without prior permission of the court.

Subsequent to the entry of said judgment, various motions were filed by one party or the other, hearings held and orders entered with respect to the custody of the child. Only the proceedings pertinent to this appeal will be alluded to here.

On 17 August 1972, following a hearing on plaintiff's motion in the cause that he be awarded custody of the child, District Judge Pate entered an order making extensive findings of fact including specific findings with respect to misconduct on the part of defendant and her neglect of the child when he was with her. The court found as a fact that defendant was of bad reputation and character and an unfit person to have custody of the child, but that plaintiff was of good character and reputation and a fit and proper person to have the care and custody of the child. The court awarded custody to plaintiff subject to very restricted visitation privileges granted to defendant. Defendant gave notice of appeal from the order, but because the appeal was not perfected, it was dismissed on 9 November 1972.

On 27 March 1973, defendant filed a motion in the cause alleging, among other things, that on or about 1 September 1972 she was married to Victor R. Allen; that she and her new husband had established a home in the City of Durham, N. C.; and that there had been a material change of conditions since the entry of the 17 August 1972 order. Following notice to plaintiff, a hearing was held on this motion on 5 May 1973, at which time considerable evidence was presented by plaintiff and defendant. At the conclusion of the hearing, the trial judge stated that while the evidence showed that there had been a change of conditions in that defendant had remarried, he felt that the best interests of the child required that his custody be retained in plaintiff subject to certain modification of provisions for the child to visit with defendant. Defendant gave notice of appeal from the order and the parties agreed that the written order could be signed " . . . out of term and out of district."

The order entered pursuant to the hearing bears date of 4 August 1973 but was filed on 27 September 1974. In the order the court made detailed findings of fact and conclusions of law including findings and conclusions that plaintiff is a fit and proper person to have the continued care, custody and control of the child, and that defendant had failed to show changed circumstances sufficient to warrant awarding custody of the child to her. The order modified the previous order with respect to defendant's visitation privileges.

White, Allen, Hooten & Hines, P.A., by John R. Hooten and Thos. J. White, and Gerrans & Spence, P.A., by William D. Spence, for plaintiff appellee.

Blackwell M. Brogden for defendant appellant.

BRITT, Judge.

The record provides no explanation for the long delay between the date the order we are asked to review apparently was signed and the date it was filed. Nevertheless, we treat the papers filed by defendant as a petition for writ of certiorari, allow the petition, and consider the cause on its merits.

G.S. 50-13.7(a) provides that an order of a court of this State providing for the custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing

of changed circumstances by either party, or anyone interested. However, the party moving for modification of a custody order has the burden of showing that there has been a *substantial* change of circumstances affecting the *welfare of the child. Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974); *Todd v. Todd,* 18 N.C. App. 458, 197 S.E. 2d 1 (1973).

The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving custody of children, his findings of fact in custody orders are binding on the appellate courts if supported by competent evidence, *Blackley v. Blackley, supra,* and his decision should not be upset absent a clear showing of an abuse of discretion. *Hensley v. Hensley,* 21 N.C. App. 306, 204 S.E. 2d 228 (1974).

The findings of fact in the order under review are fully supported by competent evidence, and no abuse of discretion has been shown, therefore, the order is

Affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. FRED ADAIR VANCE, JR.

No. 748SC945

(Filed 5 March 1975)

1. **Searches and Seizures § 3— validity of warrant — heroin brought to premises after warrant issued**

Fact that an affidavit for a warrant to search for heroin was executed at 7:45 p.m. and defendant brought heroin to the premises at 9:30 p.m. did not subject the warrant to quashal on the ground the affiant misrepresented to the magistrate that heroin was on the premises since there may have been other heroin on the premises when the affidavit was executed and there is no indication that the affiant had knowledge of the falsity of any information furnished by his informant.

2. **Criminal Law § 106; Narcotics § 4— conflicting evidence — credibility of State's case**

In a prosecution for possession of heroin, the credibility of the case was not destroyed as a matter of law by conflicts in the State's evidence relating to whether the heroin offered in evidence was seized before defendant was arrested or after he was placed in jail.

State v. Vance

APPEAL by defendant from *Copeland, Judge.* Judgment entered 2 August 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 23 January 1975.

Defendant was charged in a bill of indictment with felonious possession of a controlled substance, heroin.

The State presented evidence that on the evening of 30 July 1973 law enforcement officers, pursuant to a search warrant, searched a residence located at 410 East Walnut Street in the City of Goldsboro. Defendant was one of nine people in the house at the time of the search. All were placed under arrest as a result of what the search disclosed. Several of them testified as witnesses for the State in the trial of this case. Seven bindles of heroin were found lodged behind the radiator in the den. When the officers announced their arrival, defendant ran into the den for a moment and then returned to the living room. Defendant then commented to one of the residents of the house that he no longer had anything on him because he had "got rid of the stuff." In a conversation at the jail with other of the State's witnesses, defendant confided that he had placed seven quarters of "smack" or "skag" behind the radiator and asked them to return to the house to see if it was still there.

The jury found defendant guilty as charged and judgment was entered imposing a prison sentence of five years.

Attorney General Edmisten by Assistant Attorney General Walter E. Ricks III for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

VAUGHN, Judge.

[1] Defendant moved to quash the search warrant and suppress the evidence obtained as a result of the search made under authority of the warrant. He does not argue that the affidavit and warrant are facially insufficient. He argues that the affiant misrepresented the fact to the magistrate, and that a sufficient warrant on its face may be rendered invalid by misrepresentations made in the affidavit. *U. S. v. Thomas,* 489 F. 2d 664 (5th Cir., 1973). The affidavit was executed at 7:45 p.m. and stated that there was reasonable cause to believe that heroin was then on the premises. Defendant did not enter the subject premises until 9:30 p.m. and immediately thereafter the officers executed

the search. Defendant appears to argue that the foregoing sequence indicates that the affiant did not have information that the drugs were present at the time of the execution of the affidavit and that the affiant had no intention of searching the premises until defendant arrived, presumably with the drugs. Evidence that defendant brought heroin to the premises about 9:30 p.m. does not compel the conclusion that there was not other heroin on the premises at 7:30 p.m. or that the seized heroin was not that brought in by defendant. Moreover, even if the informant's statement to the affiant was false, there is no indication that the affiant had knowledge of the falsity or acted without good faith in the truthfulness of the informer.

[2] Defendant contends that because of conflicts in the State's evidence relating to whether the heroin offered in evidence was seized before defendant was arrested or after defendant was placed in jail, the credibility of the State's case was destroyed, the evidence was unworthy of consideration as a matter of law and the case should have been dismissed. On a motion to dismiss, the State's evidence is, of course, considered in the light most favorable to the State. It is for the jury to resolve the conflicts in the evidence. When considered in this light the evidence is sufficient to go to the jury. This is not a case where the State's evidence is inherently incredible because of undisputed facts. *See State v. Miller,* 270 N.C. 726, 154 S.E. 2d 902.

Without objection by defendant, one of the officers testified that he found syringes and needles in the den, the room where the seven bindles of heroin were discovered. Later, when the State offered these syringes and needles in evidence, defendant objected. Defendant's assignments of error based on the admission of those items in evidence are overruled.

Defendant's able counsel has brought forward other assignments of error. All have been carefully considered and are overruled.

We find no prejudicial error.

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JEROME NATHANIEL ARCHIBLE

No. 7410SC922

(Filed 5 March 1975)

Criminal Law § 75— statements by prison employee — no custodial interrogation

Statements made by defendant, a prison visiting officer, were not the result of custodial interrogation, and waiver of counsel was not required, where defendant was requested to come to the warden's office to talk to the warden and an SBI agent about the delivery of narcotics into the prison that afternoon, defendant was free to leave the warden's office at any time he desired, at the time the warden sent for defendant he did not know defendant was responsible for delivery of the narcotics, and defendant's statements were not made in response to police "interrogation" but were more in the nature of volunteered statements.

APPEAL by defendant from *McLelland, Judge.* Judgments entered 28 June 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 21 January 1975.

Defendant was charged in two bills of indictment with felonious possession with intent to sell and deliver and felonious delivery of a controlled substance, marijuana.

Evidence for the State tended to show the following. On 21 March 1974 defendant was employed by the Department of Correction as a visiting officer at Central Prison. On this day Mrs. Leona Fish came to the prison to visit her son, Mack Fish, an inmate. Defendant was on duty at the time of Mrs. Fish's visit and received her visitor's pass. Mrs. Fish attached a ten dollar ($10.00) bill to the pass and solicited defendant's assistance in delivering some marijuana to her son. Defendant accepted the ten dollars ($10.00) and instructed Mrs. Fish to place the marijuana in a rest room located in the visiting hall. She did so, and defendant later retrieved the marijuana and gave it to inmate Fish. Defendant then admitted Fish back into the general prison population. The evidence also revealed that, prior to this day, Mrs. Fish had established a friendly relationship with defendant over a six to eight week period. Defendant presented no evidence.

The jury returned a verdict of guilty of possession with intent to deliver a controlled substance and a verdict of guilty of delivering a controlled substance. Judgments were entered and defendant appealed.

Attorney General Edmisten by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin, for the State.

J. Larkin Pahl for defendant appellant.

VAUGHN, Judge.

Defendant's principal assignment of error asserts that the trial court erred in admitting into evidence incriminating statements made by defendant. Defendant does not contend that the evidence does not support the court's findings that he was given the full *Miranda* warnings and he made his statements voluntarily with full understanding of his rights. He does argue that there was no affirmative waiver of his right to counsel. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694; *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123. We need not reach that question for we are convinced that there was no custodial interrogation.

As stated in *State v. Lawson,* 285 N.C. 320, 323, 204 S.E. 2d 843, 845:

> "*Miranda* warnings and waiver of counsel are required when and only when a person is being subjected to 'custodial interrogation'; that is, '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]."

Defendant was requested to come into the office of his supervisor, the warden, to answer some questions of the warden and an SBI agent, who were investigating the delivery of illegal drugs into the prison that afternoon. One of defendant's duties was to prevent the delivery of such contraband. Defendant was questioned at his place of employment. He was not under arrest but was free to leave the warden's office at any time he desired. He did leave at the conclusion of the interview. His freedom of action was not inhibited by the investigating officers in any way. At the time the warden sent for defendant he did not know that defendant was responsible for the delivery of the drugs that had been found on Mack Fish. Moreover, defendant's statements were not made in response to police "interrogation," but were more in the nature of volunteered assertions. *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431. Defendant offered his statement in

the form of a narrative, interrupted only by a few questions asked for the purpose of clarifying certain points made by defendant. The investigation was a noncustodial on-the-scene inquiry in the course of a routine investigation of suspected criminal activity in the prison which defendant, as a prison officer, had a duty to prevent. There was no custodial interrogation. *State v. Lawson, supra,* at 323-324, 204 S.E. at 845-846; *State v. Sykes,* 285 N.C. 202, 205-206, 203 S.E. 2d 849, 851-852; *Miranda v. Arizona, supra,* at 477-478, 86 S.Ct. at 1629-1630, 16 L.Ed. 2d at 725-726.

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

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ELWOOD HAMMOCK

No. 7413SC1036

(Filed 5 March 1975)

Criminal Law § 131— new trial for newly discovered evidence — victim's opinion defendant was insane

In a case in which defendant was convicted of assaulting a law officer, the court did not abuse its discretion in the denial of defendant's motion for a new trial on the ground of newly discovered evidence based on the prosecuting witness's opinion formed after the trial that defendant did not know the difference between right and wrong at the time of the assault.

APPEAL by defendant from *Canaday, Judge.* Order entered 17 September 1974 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 18 February 1975.

This is an appeal from an order denying defendant's motion for a new trial on the grounds of newly discovered evidence.

The defendant was charged, tried, convicted, and sentenced in the Superior Court of Brunswick County with feloniously assaulting Richard W. Edwards, a law enforcement officer (Deputy Sheriff) in violation of G.S. 14-34.2. On appeal, this court in a decision reported in 22 N.C. App. 439, 206 S.E. 2d

773 (1974) found no error in the defendant's trial. In 285 N.C. 665, 207 S.E. 2d 759 (1974), the supreme court denied the defendant's petition for writ of certiorari.

After reviewing the record of defendant's trial and the evidence offered at the hearing, the trial court denied the motion and the defendant appealed.

Attorney General Edmisten by Assistant Attorney General Keith L. Jarvis and Associate Attorney James Wallace, Jr., for the State.

Smith, Carrington, Patterson, Follin & Curtis by J. David James and Murchison, Fox & Newton by Carter T. Lambeth for defendant appellant.

HEDRICK, Judge.

Defendant contends Judge Canaday abused his discretion and erred as a matter of law in denying his motion for a new trial on the grounds of newly discovered evidence. Appeal does not lie from a refusal to grant a new trial for newly discovered evidence. *State v. Shelton,* 21 N.C. App. 662, 205 S.E. 2d 316 (1974); *State v. Gordon,* 15 N.C. App. 241, 189 S.E. 2d 550 (1972); *State v. Thomas,* 227 N.C. 71, 40 S.E. 2d 412 (1946); *State v. Ferrell,* 206 N.C. 738, 175 S.E. 91 (1934). We have, however, treated defendant's appeal as a petition for writ of certiorari, which is allowed.

G.S. 15-174 reads as follows:

> "The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases."

G.S. 1A-1, Rule 59(a), in pertinent part reads:

> "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> * * *
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;"

A motion for new trial on the grounds of newly discovered evidence is addressed to the sound discretion of the trial court

and is not subject to review absent a showing of an abuse of discretion. *State v. Shelton, supra.* The record discloses that at his trial the defendant offered evidence tending to show that he was insane and did not know the difference between right and wrong at the time of the alleged assault upon Deputy Sheriff Edwards. At the hearing on the motion, Edwards testified that at the time of defendant's trial he did not know the defendant well enough to form an opinion as to his mental condition at the time of the assault but that after the trial he has become better acquainted with the defendant and that he is presently of the opinion that the defendant did not know "the nature and quality of his act" and that he (defendant) was "messed up" when he pulled the gun on him. Defendant now contends as he did in the superior court that the ability of the prosecuting witness now to testify that in his opinion the defendant was insane and did not know the difference between right and wrong at the time of the alleged assault constitutes newly discovered evidence entitling him to a new trial. Suffice it to say, we have reviewed the entire record and hold that the defendant has not shown any abuse of discretion in the trial court's denial of his motion for a new trial.

Affirmed.

Judges PARKER and CLARK concur.

SUSAN LITTLEFIELD KALE v. THOMAS LAWSON KALE

No. 7416DC1048

(Filed 5 March 1975)

Divorce and Alimony § 17— alimony — divorce from bed and board — final order

Trial court's order granting plaintiff a divorce from bed and board and awarding plaintiff alimony was a final order notwithstanding the order did not dispose of plaintiff's claims for medical expenses, her share of a joint bank account, and damages for assault; it was therefore unnecessary for the court to find that plaintiff lacked sufficient means to subsist during prosecution of the action.

APPEAL by defendant from *Britt, Judge.* Order entered 30 September 1974 in District Court, ROBESON County. Heard in the Court of Appeals 18 February 1975.

This is a civil action wherein the plaintiff, Susan Littlefield Kale, seeks alimony without divorce, alimony pendente lite, the family home, an injunction preventing her husband from interfering with or abusing plaintiff, $500.00 for plaintiff's past medical expenses, plaintiff's share of the joint bank account, and $5,000.00 in damages for assault.

Defendant filed answer denying the material allegations of the complaint.

After a hearing, Judge Britt made detailed findings of fact, conclusions of law, and entered an "order" granting plaintiff a "divorce from bed and board", enjoining defendant from molesting or interfering with her, granting plaintiff possession of the family home and certain other property, and requiring defendant to make monthly alimony payments. The order contained no provisions relating to plaintiff's claim for past medical expenses, the joint bank account, or damages for assault. It contained no finding of fact that plaintiff lacked sufficient means to subsist during the prosecution of the action. From this order, defendant appealed.

Johnson, Hedgpeth, Biggs and Campbell by W. Allen Webster for plaintiff appellee.

W. Earl Britt for defendant appellant.

HEDRICK, Judge.

Defendant contends in his only assignment of error that the district court erred in awarding alimony pendente lite without a finding that plaintiff lacked sufficient means to subsist during the prosecution of this action. He concedes that if the order was a final order awarding permanent alimony, it was not erroneous. The case thus hinges on whether the order was final or interlocutory.

Defendant argues that it was a pendente lite order, because it did not dispose of plaintiff's claims for medical expenses, her share of the joint bank account, and damages for assault. We do not agree. While the order does not recite whether it is final or interlocutory, it seems clear that it is a final order because, after making detailed findings and conclusions, the court awarded the plaintiff a divorce from bed and board, which is a final order. G.S. 50-7. There is no such thing as a divorce from

bed and board pendente lite. The district court simply determined that plaintiff was not entitled to those forms of relief not mentioned in its order.

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. ROGER DALE CURRY

No. 7422SC1000

(Filed 5 March 1975)

Larceny § 7— guilt as aider and abettor

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny as an aider and abettor where it tended to show that defendant rode in a truck with two others to the scene of a break-in, that defendant "went up and down the road" while his companions broke into a house and stole items therefrom, that defendant helped unload the stolen items, that defendant broke open a steel box stolen from the house, and that defendant sold a television stolen from the house.

ON writ of *certiorari* to review proceedings before *Wood, Judge.* Judgment entered 6 June 1974 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 17 February 1975.

Defendant was charged in a bill of indictment with felonious breaking and entering and felonious larceny. He pleaded not guilty.

The evidence, taken in the light most favorable to the State, tended to show that Larry Hamilton and Floyd "Wild-man" Francis broke into the house of Robert Ketchie on 5 November 1973. Items valued at $2,200.00 were stolen. The evidence tended to show that defendant rode to the scene of the break-in in a truck with Hamilton and Francis and that defendant "went up and down the road" while the break-in occurred. After defendant had been apprehended, he signed a waiver of rights and made a statement in which he denied entering the house but admitted selling a color TV, one of the items stolen from Ketchie's house. He also admitted helping unload the goods at Hamilton's trailer.

Defendant's evidence consisted of the testimony of Hamilton and Francis. They testified that defendant did not participate in the break-in. Although Hamilton earlier had implicated defendant, he maintained that he had done this out of spite because he then believed defendant had told on him and Francis.

Mrs. Jacqueline Hamilton, co-defendant Larry Hamilton's wife, testified for the State in rebuttal. She stated that defendant not only helped unload the stolen items at her trailer, but also broke open a steel box containing items that did not belong to him. The box was among the items stolen from the Ketchie house.

The jury found defendant guilty of felonious larceny, and a prison sentence was imposed. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Robert R. Reilly, for the State.

Larry L. Eubanks and Larry G. Reavis, for the defendant-appellant.

BROCK, Chief Judge.

Defendant argues that it was error to deny his motion for nonsuit. He contends there was insufficient evidence to support a verdict of guilty of felonious larceny because the evidence does not show that defendant actually entered the house or actually removed the stolen items from the house. This argument seems to miss the main point in the State's case. The case was tried and submitted to the jury on the theory that defendant aided and abetted in the felonious breaking and the felonious larceny. The evidence is ample to support a verdict of guilty of felonious larceny on this theory.

Defendant argues that he was entitled to a mistrial because of prejudicial error in the reception of evidence. Defendant's motion to strike the objectionable testimony was allowed, and the jury was specifically instructed to disregard it. This prompt action by the trial judge cured the error if error, in fact, existed.

Our review of the record discloses no prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

DREMA DIANA HOWARD LOFLIN v. RICKY WALTER LOFLIN

No. 7419DC1005

(Filed 5 March 1975)

Divorce and Alimony § 18— alimony pendente lite — dependent spouse — methods of proof

The trial court erred in denying plaintiff alimony and counsel fees *pendente lite* based on a finding that plaintiff failed to show that she is substantially dependent on defendant for maintenance and support since the court ignored the alternative method given to plaintiff to prove that she is a dependent spouse by showing that she is substantially in need of maintenance and support from defendant. G.S. 50-16.1(3).

APPEAL by plaintiff from *Hammond, Judge.* Judgment entered 26 July 1974 in District Court, RANDOLPH County. Heard in the Court of Appeals 13 February 1975.

This is an action for alimony without divorce and for counsel fees. The matter was heard upon plaintiff's application for alimony and counsel fees *pendente lite.* Plaintiff requested that her verified complaint be considered as an affidavit. She testified personally and placed in evidence a record of defendant's earnings in 1973 and 1974. Defendant offered no evidence. The trial judge denied plaintiff's application for alimony *pendente lite.*

Ottway Burton, for the plaintiff.

Bell, Ogburn & Redding, by Deane F. Bell, for the defendant.

BROCK, Chief Judge.

In order for a spouse to be entitled to alimony, alimony *pendente lite,* or counsel fees, that spouse must be a dependent spouse. *Little v. Little,* 18 N.C. App. 311, 196 S.E. 2d 562 (1973). The burden of proving dependency is upon the spouse asserting the claim for alimony or alimony *pendente lite.* Under G.S. 50-16.1(3) the dependency of the spouse asserting the claim may be established by proof that such spouse is either (a) actually substantially dependent upon the other spouse for his or her maintenance and support, or (b) substantially in need of maintenance and support from the other spouse.

The trial judge found that "there was no evidence introduced that plaintiff was substantially dependent upon the defendant for her maintenance and support." If this finding may be interpreted as a finding that plaintiff is not substantially dependent upon defendant for her maintenance and support, it nevertheless ignores the alternative given to plaintiff to prove that she is substantially in need of maintenance and support from the defendant. Proof of either would qualify her as a dependent spouse.

We express no opinion upon the evidence presented. We merely hold that the findings by the trial judge do not resolve the issue of whether plaintiff is a dependent spouse within the alternative definitions provided by G.S. 50-16.1(3).

The order appealed from must be vacated and the cause remanded to the District Court for a new hearing upon plaintiff's application for alimony *pendente lite* and counsel fees.

Vacated and remanded.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JOHNNY FORD WATTS

No. 7426SC1025

(Filed 5 March 1975)

Criminal Law § 91— written request for trial by prisoner — trial within eight months

The trial court properly denied defendant's motion to dismiss the charges against him on the ground that he was not brought to trial within eight months after he sent written notice to the solicitor by registered mail requesting final disposition of the charges pursuant to G.S. 15-10.2 where the court found upon supporting evidence that the only registered mail received by the solicitor in the matter was mailed only some 2½ months prior to the trial.

APPEAL by defendant from *Chess, Judge.* Judgment entered 28 August 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 February 1975.

Defendant was charged in bills of indictment with armed robbery and assault with a deadly weapon with intent to kill

inflicting serious injury. He pleaded not guilty to both charges and was tried before a jury. Evidence for the State tended to show that on 14 June 1973, at approximately 7:00 p.m., defendant entered the Little General Store on West Sugar Creek Road in Charlotte. He pointed a shotgun at the clerk, Annie Ruth Chalmers, and demanded money. After Miss Chalmers had gotten about $53.00 out of the cash register, defendant shot her in the abdomen and fled with the money.

Defendant testified that he had never been in the store, had never seen the clerk, and did not rob or shoot her. The jury found him guilty as charged. From judgment imposing a prison sentence, defendant appealed to this Court.

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

John R. Ingle for defendant appellant.

ARNOLD, Judge.

On 4 September 1973, while he was in prison in Union County, a detainer was served on defendant in connection with the instant case. He now assigns as error the State's failure to bring him to trial "within eight (8) months after he shall have caused to be sent to the solicitor of the court in which said criminal charge is pending, by registered mail, written notice of his place of confinement and request for final disposition of the criminal charge against him, . . . " as required by G.S. 15-10.2. A *voir dire* hearing was held on defendant's motion to dismiss on this ground. Defendant's evidence tended to show and the trial court found that a letter postmarked 10 June 1974 was the only registered mail received by the solicitor in the matter. The court then concluded that defendant was not entitled to dismissal under G.S. 15-10.2. Since defendant failed to comply with the statute, this assignment of error is overruled. *See State v. White,* 270 N.C. 78, 153 S.E. 2d 774 (1967).

Defendant also assigns error in the trial court's charge to the jury. It is well settled that the charge of the court will be construed 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 (1970); *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966). The court fully defined the elements of the offenses charged: armed robbery and assault with a

deadly weapon with intent to kill inflicting serious injury. The court then instructed on the elements of the lesser included offense of assault with a deadly weapon inflicting serious injury. Viewing the charge as a whole, we find it to be clear and complete. The jury could not have been misled as to any elements to be proved by the State before they could find defendant guilty as charged.

We have carefully reviewed the record and find no error prejudicial to defendant.

No error.

Judges BRITT and MORRIS concur.

ANITA ORREN v. ROBERT A. ORREN

No. 7427DC1065

(Filed 5 March 1975)

Divorce and Alimony § 18— alimony pendente lite — no dependent spouse

Trial court's conclusion that plaintiff was not a dependent spouse and was thus not entitled to alimony *pendente lite* was supported by findings that plaintiff earns sufficient income to support and maintain herself in the manner to which she was accustomed prior to the separation, that she earns the same amount of money as defendant, and that she is not dependent upon defendant for her support and maintenance.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 7 November 1974 in District Court, GASTON County. Heard in the Court of Appeals 21 February 1975.

Plaintiff wife brought this action against defendant husband for alimony without divorce. From the order of the trial court denying her request for alimony pendente lite, plaintiff appealed to this Court.

Basil L. Whitener and Anne M. Lamm for plaintiff appellant.

No brief filed by defendant.

ARNOLD, Judge.

Plaintiff contends that her testimony, the only evidence presented at the hearing, does not support the trial court's find-

ings of fact and that these findings do not support the court's conclusion that she is not a dependent spouse.

In an action for alimony pendente lite the trial court is not required to find evidentiary or subsidiary facts. The court need only to find the ultimate facts in issue. *Sprinkle v. Sprinkle,* 17 N.C. App. 175, 193 S.E. 2d 468 (1972); *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971); *Hatcher v. Hatcher,* 7 N.C. App. 562, 173 S.E. 2d 33 (1970). A dependent spouse is defined in G.S. 50-16.1(3) as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

The court found in the case at bar that "the plaintiff is employed at this time at Gaston Memorial Hospital and earns sufficient income to support and maintain herself in the manner that she was accustomed to living prior to the separation and earns approximately the same amount of money that the defendant earns. . . . [She] is not dependent upon the defendant for her support and maintenance . . . . " Plaintiff's own testimony amply supports these findings of ultimate fact. They in turn support the conclusion that plaintiff is not a dependent spouse. The judgment of the trial court is affirmed.

Affirmed.

Judges BRITT and MORRIS concur.

ELLIS FOX AND ERNEST FOX v. CAMP YONAHLOSSEE, INC.

No. 7428DC1061

(Filed 5 March 1975)

Trial § 52— sufficiency of evidence to support verdict

In an action for breach of a contract for plaintiffs to serve as caretakers of defendant's campgrounds, a jury verdict awarding plaintiffs $2500 was supported by evidence that plaintiffs were entitled to unpaid salary of $2800 so that it is unnecessary for the appellate court to determine if there was sufficient evidence to support other items of damage claimed by plaintiffs.

Fox v. Camp Yonahlossee

APPEAL by defendant from *Styles, Judge.* Judgment entered 25 September 1974 in District Court, BUNCOMBE County. Heard in the Court of Appeals 21 February 1975.

This is an action for breach of contract. In their complaint, plaintiffs allege in pertinent part: In August of 1970 the parties entered into a contract whereby plaintiffs agreed to become caretakers of defendant's campgrounds on 1 January 1971 and to render specified services with respect to the grounds. Defendant agreed to pay plaintiffs $4200 per year and provide them with a furnished house, a garden plot, and three meals a day in the camp kitchen during camp season. Plaintiffs assumed their duties on 1 January 1971, and performed their duties until April of 1971, when defendant terminated their employment in violation of the contract. Plaintiff prayed for judgment in the sum of $4480, consisting primarily of unpaid salary from 1 May 1971 through 31 December 1971, loss of benefit of garden plot, loss of benefit of caretaker's home, and loss of meals during the camp season.

In its answer, defendant admitted the contract but alleged that plaintiffs breached it in that they failed to perform their duties in a proper manner.

For their verdict the jury found (1) that the parties entered into the contract alleged, (2) that defendant terminated the contract without justification, and (3) that plaintiffs should recover $2500. From judgment predicated on the verdict, defendant appealed.

Herbert L. Hyde for plaintiff appellee.

George W. Moore for defendant appellant.

BRITT, Judge.

Defendant's sole contention is that plaintiffs' evidence was not sufficient to support the verdict of $2500, arguing that plaintiffs failed to present any evidence with respect to the monetary rental value of the caretaker home, the monetary loss allegedly sustained on account of the garden plot, or the value of the meals they did not receive from the camp kitchen.

We find no merit in the contention. The principal item for which plaintiffs sought recovery was the remainder of their $4200 salary for 1971. The evidence showed that they were

paid for the months of January through April or one-third of the $4200, leaving a balance of $2800. Since the amount of the verdict was considerably less than the amount of salary claimed, we find it unnecessary to determine if sufficient evidence was presented to support the other items of damage claimed by plaintiffs.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES PHILLIPS

No. 7426SC1063

(Filed 5 March 1975)

Criminal Law § 155.5— extension of time to serve case — no extension of time to docket

An order of the trial court extending the time to serve the case on appeal does not have the effect of extending the time to docket the appeal.

APPEAL by defendant from *Falls, Judge.* Judgment entered 30 July 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 21 February 1975.

Defendant was charged in a bill of indictment, proper in form, with unlawful possession of heroin, a felony. He pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of five years, he appealed.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Elam & Stroud, by William H. Elam, for defendant appellant.

BRITT, Judge.

The judgment from which defendant appeals was entered on 30 July 1974 but the record on appeal was not docketed in this court until 16 December 1974. Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina requires that the record on appeal be docketed within 90 days after the date

of the judgment appealed from, unless the trial tribunal, for good cause, extends the time for docketing for not more than 60 days.

In numerous cases we have held that an order of the trial tribunal extending the time to serve the case on appeal does not have the effect of extending the time to docket the appeal. The first of these was *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547 (1968), and the principle has been restated in many others including the following: *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); *State v. Hunt,* 14 N.C. App. 626, 188 S.E. 2d 546 (1972); *State v. Brigman,* 8 N.C. App. 316, 174 S.E. 2d 48 (1970); *State v. Fulk,* 7 N.C. App. 68, 171 S.E. 2d 81 (1969); *Reece v. Reece,* 6 N.C. App. 606, 170 S.E. 2d 546 (1969); and *State v. Farrell,* 3 N.C. App. 196, 164 S.E. 2d 388 (1968).

For failure of defendant to comply with the rules of this court, the appeal is dismissed.

Nevertheless, we have considered the questions raised in defendant's brief but find them to be without merit. Defendant received a fair trial and the judgment imposed is within the limits provided by statute.

Appeal dismissed.

Judges MORRIS and ARNOLD concur.

ALBERT AXLER v. CITY OF WILMINGTON

No. 745SC894

(Filed 5 March 1975)

Administrative Law § 5; Municipal Corporations § 29— failure to exhaust administrative remedies — collateral attack

Where plaintiff did not seek judicial review of an administrative decision ordering the demolition of buildings owned by plaintiff which had been declared unfit for human habitation, plaintiff could not collaterally attack such decision by an independent action seeking injunctive relief pursuant to G.S. 160A-446(f). G.S. 160A-446(e).

Axler v. City of Wilmington

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 23 May 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 January 1975.

On 2 April 1974, plaintiff filed a complaint seeking an injunction restraining defendant from demolishing certain buildings owned by him. The action was purportedly filed under the authority of G.S. 160A-446(f).

Judgment dismissing the action was entered.

Ferguson & Tucker by E. G. Tucker for plaintiff appellant.

Burney, Burney, Sperry & Barefoot by David C. Barefoot for defendant appellee.

VAUGHN, Judge.

The record on appeal in this case was not docketed until 7 October 1974, more than six weeks later than the time permitted by Rule 5 of the Rules of Practice in this Court. No order allowing an extension of time within which to docket has been entered. Plaintiff was granted an extension of time within which to serve the case on appeal. The extension, however, expired on 6 September 1974, and the case on appeal was not tendered to appellee until 7 October 1974. For failure to comply with the rules of this Court, plaintiff's appeal is subject to dismissal. We have, nevertheless, elected to consider the case on its merits.

The purpose of the restraining order authorized by G.S. 160A-446(f) is to protect an aggrieved party until there has been a final determination of a proceeding commenced by authority of Part 6, "Minimum Housing Standards," of G.S. Chap. 160A, Art. 19.

Judicial review of administrative proceedings under a municipal ordinance authorized by the "Minimum Housing Standards" section of Article 19 is by "proceedings in the nature of certiorari instituted within 15 days of the decision of the board, *but not otherwise.*" (Emphasis added.) G.S. 160A-446(e). The purpose of the writ of certiorari is to bring the matter before the Court, upon the evidence presented by the record itself.

Plaintiff did not seek judicial review of the administrative decision about which he now complains, as authorized by the statute. He, instead, ignored them and now attempts to make

a collateral attack by this independent action seeking injunctive relief. Plaintiff failed to utilize the administrative remedies available to him and failed to follow the statutory procedures set out in G.S. 160A-446. For these reasons it was proper to dismiss this action against the city. *Harrell v. City of Winston-Salem,* 22 N.C. App. 386, 206 S.E. 2d 802.

Affirmed.

Judges MARTIN and ARNOLD concur.

ROSA F. WILKINS v. K. B. FERRELL

No. 7414DC903

(Filed 5 March 1975)

Contracts § 27— sale of building — failure to disclose facts — recovery of purchase price

In an action to recover the purchase price of a building purportedly sold by defendant to plaintiff, the evidence supported findings by the court that defendant did not disclose to plaintiff that he had no right to the building unless it was removed from a third party's land within 30 days and that it was not removed within that time, and the findings supported judgment for plaintiff.

APPEAL by defendant from *Read, Judge.* Judgment entered 13 May 1974 in District Court, DURHAM County. Heard in the Court of Appeals 17 January 1975.

Bryant, Lipton, Bryant & Battle, P. A. by James B. Maxwell and Lee A. Patterson II for plaintiff appellee.

Edward G. Johnson for defendant appellant.

VAUGHN, Judge.

Plaintiff seeks to recover judgment against defendant, her brother, for $1,500.00.

Plaintiff offered evidence tending to show that defendant purchased certain real estate from Mobil Oil Corporation. As part of the consideration from defendant, he obligated himself to remove a building from other lands of Mobil within thirty days. He purported to sell the building to plaintiff for $1,500.00.

Defendant did not disclose to plaintiff that he had no right to the building unless it was removed from Mobil's land within thirty days. Neither plaintiff nor defendant removed the house within thirty days and Mobil subsequently arranged for someone else to remove the building.

Defendant's evidence tended to show that plaintiff bought the building with full knowledge that it had to be removed within thirty days.

The court, sitting without a jury, found the relevant facts in favor of plaintiff and entered judgment against defendant for $1,500.00, with interest. The evidence supports those findings of facts and the facts so found support the judgment.

Affirmed.

Judges MARTIN and ARNOLD concur.

MABEL LEATH TURNER v. BETTY JEAN TURNER LEA, ADMINISTRATRIX OF THE ESTATE OF VIRGIL ROGERS TURNER

No. 7415DC938

(Filed 5 March 1975)

Courts § 11.1; Executors and Administrators § 18— suit against administratrix — debt owed by decedent — jurisdiction

District Court had jurisdiction of a suit against an administratrix for a $3,244 debt owed by deceased.

APPEAL by defendant from *Allen, Judge.* Judgment entered 6 June 1974 in District Court, ALAMANCE County. Heard in the Court of Appeals 23 January 1975.

Vernon, Vernon & Wooten, P. A., by Wiley P. Wooten, for plaintiff appellee.

David I. Smith for defendant appellant.

VAUGHN, Judge.

Defendant argues that the District Court has no jurisdiction in this suit against the administratrix for a $3,244.58 debt due by deceased. Defendant contends that G.S. 7A-241 vests

exclusive jurisdiction in the Superior Court Division. The argument is without merit and the judgment is affirmed.

Affirmed.

Judges MARTIN and ARNOLD concur.

PIONEER ACOUSTICAL COMPANY, INC. v. CISNE AND ASSOCIATES, INC.

No. 7426DC1031

(Filed 5 March 1975)

1. **Appeal and Error § 6; Rules of Civil Procedure § 55— setting aside entry of default — interlocutory order — appeal**

An order setting aside an entry of default pursuant to G.S. 1A-1, Rule 55(d), is interlocutory and is therefore not appealable.

2. **Rules of Civil Procedure § 55— setting aside entry of default — good cause**

Entry of default may be set aside for good cause shown without findings of excusable neglect and meritorious defense. G.S. 1A-1, Rule 55(d).

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 22 May 1974 in District Court, MECKLENBURG County. Heard in the Court of Appeals 19 February 1975.

John G. Walker for plaintiff appellant.

Alvin A. London and Richard A. Lucey for defendant appellee.

VAUGHN, Judge.

[1, 2] Plaintiff has attempted to appeal from an order setting aside an entry by default previously entered under Rule 55(a) of the North Carolina Rules of Civil Procedure. The order entered pursuant to Rule 55(d), setting aside the entry by default, is interlocutory and plaintiff's appeal is premature. *Trust Co. v. Construction Co.*, 24 N.C. App. 131, 210 S.E. 2d 97. Moreover, plaintiff's argument that defendant failed to show excusable neglect and a meritorious defense is irrelevent. Rule 55(d) authorizes the judge to set aside the entry for good cause

shown. The determination is for the trial judge in the exercise of his sound discretion. *Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735.

Appeal dismissed.

BROCK, Chief Judge, and MARTIN, Judge, concur.

STATE OF NORTH CAROLINA v. I. JUNIOR McCREE

No. 7426SC1045

(Filed 5 March 1975)

ON *writ of certiorari* to review proceedings before *Hasty, Judge.* Judgment entered 10 May 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 February 1975.

Defendant was charged in a bill of indictment with armed robbery. He pleaded not guilty and was tried before a jury. The State's evidence tended to show the following:

Early in the morning of 4 December 1973 two black men entered the lobby of the King's Kastle Inn in Charlotte, drew guns and demanded money. A third man, later identified by the night clerk as defendant, joined them. They escaped with the clerk's wallet and some $700 from the cash register. Shortly thereafter, police officers stopped a car in which defendant and three others were riding. With the consent of the owner-operator, they searched the vehicle and found two pistols, $741 in cash, and the wallet.

Defendant denied taking part in the robbery or knowing any of the participants. He testified that he was on his way home from work when he spotted the car and asked for a ride.

The jury found defendant guilty as charged. From judgment imposing a prison sentence, he appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr., for the State.

T. O. Stennett for defendant appellant.

ARNOLD, Judge.

Defendant presents the record proper for review. We have carefully examined the record, and in our opinion he has received a fair trial free from prejudicial error.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. MARVIN JUNIOR LOCKLEAR

No. 7416SC983

(Filed 5 March 1975)

APPEAL by defendant from *Clark, Judge*. Judgment entered 9 August 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 February 1975.

Defendant was charged in a bill of indictment with the first degree murder of James Delton Bartley. The State chose to prosecute only upon a charge of murder in the second degree, and defendant pleaded not guilty. He was tried before a jury. From judgment imposing a prison sentence upon a verdict of guilty as charged, defendant appealed to this Court.

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

Horace Locklear for defendant appellant.

ARNOLD, Judge.

An exception to the judgment presents the face of the record for review. Neither defense counsel nor the Attorney General has been able to find any prejudicial error in the trial. Evidence for the State included several witnesses who saw defendant shoot James Bartley. We have carefully examined the record and find no error.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. RUDOLPH BERRY, JR.

No. 745SC1008

(Filed 5 March 1975)

APPEAL by defendant from *Cowper, Judge.* Judgment entered 29 August 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 February 1975.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Charles E. Sweeny, Jr., for defendant appellant.

PARKER, VAUGHN and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. TERRY MASON

No. 7422SC866

(Filed 5 March 1975)

APPEAL by defendant from *Copeland, Judge.* Judgment entered 11 June 1974 in Superior Court, IREDELL County. Heard in the Court of Appeals 16 January 1975.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Warren A. Winthrop for defendant appellant.

VAUGHN, MARTIN and ARNOLD, Judges.

No error.

IN THE MATTER OF: SUSAN MARSH

No. 7426DC994

(Filed 5 March 1975)

APPEAL by respondent from *Black, Judge.* Judgment entered 27 September 1974 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 February 1975.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for the State.

Walker & Walker, by John G. Walker, for respondent appellant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

Appeal dismissed.

STATE OF NORTH CAROLINA v. ROBERT LEE FUNDERBURK

No. 7420SC996

(Filed 5 March 1975)

APPEAL by defendant from *Smith, Judge.* Judgment entered 20 June 1974 in Superior Court, UNION County, revoking probation and requiring service of sentence of imprisonment which had theretofore been suspended. Heard in the Court of Appeals 13 February 1975.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

James E. Griffin, for the defendant.

BROCK, Chief Judge, HEDRICK and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. JERRY DAVID REEDER

No. 7419SC1019

(Filed 5 March 1975)

APPEAL by defendant from *Seay, Judge.* Judgment entered 29 August 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 18 February 1975.

Attorney General Edmisten by Assistant Attorney General Myron C. Banks for the State.

William H. Heafner for defendant appellant.

BRITT, MORRIS and ARNOLD, Judges.

No error.

NICK D. KAPERONIS AND PIEDMONT ENTERPRISES, INC. v. UNDERWRITERS AT LLOYD'S, LONDON; INTERNATIONAL GENERAL AGENCY, LTD.; CHAMPION CORPORATION, UNDERWRITERS; HORACE M. JOHNSON & CO., INC.; AND HORACE M. JOHNSON, INDIVIDUALLY

No. 7426SC281

(Filed 19 March 1975)

1. **Insurance § 2— insurance agent — negligent failure to procure insurance**

If an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable skill, care and diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so; furthermore, if the agent or broker is unable to procure the insurance he has undertaken to provide, it is his duty to give timely notice to the proposed insured in order that he may have the opportunity to take the necessary steps to protect himself otherwise.

2. **Insurance § 2— agent's failure to procure valid insurance — negligence in failure to discover fraud**

In an action to recover damages for personal property destroyed in a fire in plaintiff's nightclub which was purportedly covered by a fire insurance policy obtained for plaintiff by defendants through a general agency in Missouri and its successor located in Florida, which policy was purportedly written with Underwriters at Lloyd's, London,

the evidence was sufficient for the jury to find that defendants undertook to procure insurance for plaintiffs and that defendants were negligent in allowing themselves to be misled by the fraudulent acts of others or in failing to make timely discovery of the fraud where it tended to show that neither the Missouri agency nor its Florida successor was authorized to represent Underwriters at Lloyd's, London, the principals in those agencies have been indicted for fraud arising out of their insurance operations, the individual defendant learned of the Missouri agency through an advertisement in an insurance industry periodical but never attempted to ascertain if the agency or its successor was licensed to engage in the insurance business in Missouri or Florida, defendants knew of a U. S. representative of Underwriters at Lloyd's, London, but did not approach him for the purpose of placing plaintiff's risk, defendant never saw any authorization from Underwriters at Lloyd's, London, authorizing the Missouri agency to bind them with regard to this risk and made no inquiry concerning the authority of the agency to act on behalf of the Underwriters at Lloyd's, London, defendants never received any policy of insurance covering plaintiff's nightclub, and the individual defendant signed certificates of insurance on forms supplied by the Missouri agency without having received any authorization or commitment or any acknowledgment or binder from Underwriters at Lloyd's London; defendant's evidence that the custom and practice in the insurance business is not to make investigations of firms advertised in the insurance industry periodical and that defendants acted in accordance with the general practices in the insurance industry would not preclude the jury from finding the defendants negligent.

3. **Insurance § 2; Trial § 40— two defendants — instructions and issues requiring same finding as to both defendants**

In an action to recover for negligent failure of the corporate defendant and the individual defendant, the corporation's president, to procure insurance for plaintiff, the court erred in giving the jury instructions and submitting issues which required the jury to find against both defendants if it found against either where the evidence would have permitted finding against one and not against the other.

APPEAL by plaintiff, Nick D. Kaperonis, and conditional appeal by defendants, Horace M. Johnson & Co., Inc., and Horace M. Johnson, individually, from *Ervin, Judge.* Judgment entered 25 October 1973 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 March 1974.

This is a civil action to recover damages alleged to have been sustained by plaintiffs as result of a fire which occurred in Charlotte on 23 May 1970 in premises occupied by the nightclub known as "The Purple Penguin." Certain personal property belonging to the individual plaintiff, Nick D. Kaperonis, was located on the premises and was destroyed in the fire. (At the trial no ownership in the property was shown in the corporate

plaintiff Piedmont Enterprises, Inc., and the claim of that plaintiff was eliminated from this case by peremptory instruction of the court in its charge to the jury. No question has been raised on this appeal as to that ruling.)

Plaintiffs alleged that at the time of the fire their personal property which was destroyed in the fire was purportedly covered by a fire insurance policy obtained for plaintiffs by the defendants, Horace M. Johnson & Co., Inc., and Horace M. Johnson, individually, through the defendants, International General Agency, Ltd. and Champion Corporation, Underwriters, which policy was purportedly written with Underwriters at Lloyd's, London. The defendant, Underwriters at Lloyd's, London, filed answer in which it denied that the Certificate of Insurance referred to in the complaint had been issued for or by an authorized agent, broker or representative of that defendant, and prior to the trial the motion for summary judgment of that defendant was granted and the action was dismissed as to that defendant. No appeal was noted to that judgment and no question has been raised on this appeal as to the dismissal of this action as to the Underwriters at Lloyd's, London. The defendants, International General Agency, Ltd., and Champion Corporation, Underwriters, filed no answer. At the trial, the only defendants present in defense of the action were the defendants, Horace M. Johnson & Co., Inc. and Horace M. Johnson, individually. Thus, insofar as the questions presented by this appeal are concerned, this action is one between the individual plaintiff, Nick D. Kaperonis, on the one side, and the defendants Horace M. Johnson & Co., Inc. and Horace M. Johnson, individually, on the other.

Kaperonis contended and defendants denied that defendants were negligent in failing to procure the insurance coverage which plaintiff sought and which defendants undertook to procure for him. At the close of plaintiff's evidence and again at the close of all of the evidence, defendants moved for a directed verdict. Johnson & Co., Inc. made its motions on the grounds that the evidence failed to show that the corporate defendant participated in any of the activities alleged by the plaintiff to have constituted negligence and that the evidence failed to establish facts which would constitute negligence of the corporate defendant. Johnson made his motions on the ground that as a matter of law the evidence failed to establish facts which would constitute negligence. Defendants' motions for directed verdict

were overruled, and issues were submitted to the jury and answered as follows:

"1. Did Horace M. Johnson, Individually, undertake to procure fire and extended coverage insurance for the Plaintiff, as alleged in the Complaint?

"ANSWER: Yes.

"2. Did Horace M. Johnson & Co., Inc., undertake to procure fire and extended coverage insurance for the plaintiff, as alleged in the Complaint?

"ANSWER: Yes.

"3. Did the defendants, or either of them, negligently fail to procure for the plaintiff such fire and extended coverage, as alleged in the Complaint?

"ANSWER: Yes.

"4. Did the defendants, or either of them, negligently fail to timely notify the plaintiff of the failure to procure fire and extended coverage insurance, as alleged in the Complaint?

"ANSWER: Yes.

"5. What amount of damages, if any, is the plaintiff entitled to recover of the defendants, or either of them?

"ANSWER: $50,000.00."

Upon return of the jury's verdict, defendants Johnson & Co., Inc. and Johnson, individually, each made motions for judgment notwithstanding the verdict under Rule 50(b)(1) of the Rules of Civil Procedure. The court, being of the opinion that as a matter of law the evidence failed to show actionable negligence on the part of either defendant, granted the motions and ordered that the verdict of the jury be set aside and that plaintiff recover nothing of defendants. Plaintiff moved for a new trial, which motion was denied. Defendants then made a conditional motion for a new trial in event the judgment notwithstanding the verdict should be set aside on appeal, which motion was also denied.

Plaintiff appealed from the judgment notwithstanding the verdict. Defendants also appealed, but their appeal is conditional

upon the eventuality that upon plaintiff's appeal the judgment n.o.v. should be reversed.

Warren C. Stack for Nick D. Kaperonis, plaintiff appellant.

Bryant, Lipton, Bryant & Battle, P.A., by Victor S. Bryant, Jr., for Horace M. Johnson & Co., Inc. and Horace M. Johnson, individually, defendant appellees and conditional appellants.

PARKER, Judge.

PLAINTIFF'S APPEAL

The principal question presented by plaintiff's appeal is whether the court erred in granting defendants' motions for judgment notwithstanding the verdict. The motion for judgment n.o.v. is that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury, and in passing on the motion the same standard for judging the sufficiency of the evidence to withstand the motion is to be applied as in the case of the motion for directed verdict. *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974). Thus, in passing on a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the non-movant. *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973). We must, therefore, examine the evidence in the present case to determine whether, when viewed in the light most favorable to the plaintiff, it was sufficient to support a jury verdict finding that plaintiff's loss resulted from the actionable negligence of defendants or of either of them. The evidence discloses the following:

In 1959 Piedmont Enterprises, Inc., through its president and sole stockholder, Nick D. Kaperonis, leased the premises at 1426 Central Avenue, Charlotte, N. C., from Cole Properties, Inc. for a term of fifteen years. In 1968 Kaperonis and Piedmont, who were together referred to as "the Sub-lessor," subleased the premises to H. & W. Corporation, a corporation with its registered office in Fayetteville, N. C. Paragraph 18 of the sublease, as amended by a subsequent addendum, contained the following provision:

> "The Sub-lessee agrees to maintain in full force and effect, and to pay promptly all premiums as they become due, fire and extended coverage insurance on the equipment in said premises in the sum of ONE HUNDRED THOU-

SAND DOLLARS ($100,000.00), if such amount can be maintained, and if such amount cannot be maintained, then the Sub-lessee agrees to maintain as much as it can up to a maximum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) with the Sub-lessor being designated as the sole beneficiary of the proceeds of said insurance. . . . "

To obtain the required insurance coverage, H. & W. applied to Barrett and Weeks, a local insurance agency in Fayetteville. Because H. & W. conducted a nightclub in the premises which it subleased from Kaperonis and Piedmont, the location was considered a substandard risk, and Barrett and Weeks was unable to place coverage with any insurance company which it represented. Accordingly, Barrett and Weeks in turn contacted the defendant, Horace M. Johnson, to see if the required coverage could be obtained. Horace M. Johnson was a general insurance agent at Durham, N. C., whose business was primarily that of "contracting with companies to produce business for them through independent local agents or brokers or the placement of business for brokers in different companies." He was also president of Horace M. Johnson & Co., Inc., a corporation formed in 1951 under his control and supervision to carry on the business of a general insurance agency. Johnson & Co., Inc., was not licensed by the State of North Carolina, the license being in Johnson's name individually. Johnson held a license as a general agent and as a broker from the State of North Carolina, as a general agent in South Carolina, as a special agent in Virginia, and was also licensed by the Insurance Commissioner of the State of North Carolina to place business in nonadmitted companies in North Carolina. In 1968 the business of Johnson and of Johnson & Co., Inc., was primarily placement and they did not sell insurance to the public as a local agent would. Local agents came to them to place business and they would try to obtain the insurance protection needed by the local agent. For six or seven years they had dealt with Barrett and Weeks on this basis.

When Johnson received the inquiry from Barrett and Weeks about placing the fire insurance risk for H. & W. he told them he would try to place it for them. He had previously, in June or July of 1968, read an advertisement in The National Underwriter, a weekly insurance periodical, of a general agency known as "International General Agency, Ltd.," which had an address in St. Louis, Missouri. As result of this advertisement,

he had phoned International to find out what facilities they had available for placing insurance, particularly for placing substandard fire risks. When Johnson received the application from Barrett and Weeks, he called International and outlined the type of risk involved and asked what rate they would charge. They told him what rate they would need, and Johnson gave this information to Barrett and Weeks and was subsequently told to place the insurance. International told Johnson that the risk would be placed with Underwriters at Lloyd's, London. Because Underwriters at Lloyd's, London was not licensed to do business in North Carolina, Johnson then signed and submitted to the Insurance Commissioner of the State of North Carolina the official form making application for permission to place the insurance with a company not licensed in this State. On this application Johnson set out the name of the unlicensed company that would cover the risk as "Lloyd's of London, Underwriters." The Commissioner of Insurance granted the application and gave his approval to place the insurance as requested. Thereafter a Certificate of Insurance No. 10217US was issued showing fire and extended coverage insurance in the amount of $100,000.00 on the contents of the building occupied by the nightclub in Charlotte, N. C. This certificate, which is plaintiff's exhibit 10, is on a printed form which bears at the top the name "International General Agency, Ltd., P. O. Box 188, St. Louis, Missouri, U.S.A.," and shows the insurance placed "100% with Underwriters at Lloyd's, London and or insurance companies." The words "Underwriters at Lloyd's, London" are part of the printed form, and the words "and or insurance companies" were added by typewriter. The certificate shows the "assured" as "H & W Corp. D/B/A 'The Purple Penguin,'" recites a premium of $2,880.00, and was issued for the period 6 September 1968 to 6 September 1969. At the bottom appears "International General Agency, Ltd., by Horace M. Johnson & Company Inc.," the name "International General Agency, Ltd." being part of the printed form and the name "Horace M. Johnson & Company Inc." having been added by typewriter. There then appears the signature of Horace M. Johnson and the date 1 October 1968. On the bottom of the certificate, and as part of the printed form, there appears the following:

> "It is expressly understood by the (insured) (reinsured) by accepting this instrument that International General Agency, Ltd., is not one of the underwriters or assurers hereunder and neither is nor shall be in any way

or to any extent liable for any loss or claim whatever, but the assurers hereunder are only those underwriters whose names are on file as hereinbefore set forth."

Other than the names "Underwriters at Lloyd's, London and or insurance companies" above noted, no names of any underwriters are set forth in the certificate. H. & W. paid the premium of $2,880.00 for the coverage from 6 September 1968 to 6 September 1969.

In September 1969 substantially the same procedure was followed and Certificate of Insurance No. 10388US, plaintiff's exhibit 9, was issued on the same printed form. This form shows 100% of the insurance "placed with Underwriters at Lloyd's, London," the words "and or insurance companies" being omitted. This form also purports to provide $100,000.00 fire and extended coverage insurance on the contents of the nightclub building, recites a premium of $2,880.00, is issued for the period 6 September 1969 to 6 September 1970, and names H. & W. Corp. as the assured. It bears at the bottom the same printed notation as is above quoted from the previous certificate. Following the printed name of International General Agency, Ltd. at the bottom of the certificate there appears the signature, "Horace M. Johnson Gen. Agt.," and the date "September 9, 1969." In late 1968 or early 1969 Johnson had received written authorization from International General to sign and issue insurance certificates on their printed forms after he had consulted with them and gained their approval of the risk. Certificate No. 10388US bears the endorsement, dated 6 September 1969 and also signed by "Horace M. Johnson, Gen Agt," that the "Name of the Insured is amended to read Nick D. Kaperonis and or Piedmont Enterprises, Inc., as their interest may appear." Premium in the amount of $2,880.00 was also paid for the coverage purportedly provided by Certificate No. 10388US for the period 6 September 1969 to 6 September 1970.

On 15 December 1969 Johnson wrote a letter to the General Adjustment Bureau in which he made reference to The Purple Penguin and in which he said: "Do you have anyone on your staff who can inventory contents of the above risk? We are presently providing $100,000.00 in Lloyd's of London and there is a possibiltiy of over insurance." The General Adjustment Bureau agreed to make the requested inventory and appraisal, but none was made prior to the fire because of difficulty in arranging for access to the building.

On 7 April 1970 plaintiffs' attorney wrote a letter to Johnson & Co. in which he inquired if policy number 10388US was in full force and effect and, if so, requested that he be notified of any future change or cancellation. By letter dated 28 April 1970 and signed by Horace M. Johnson as president of Johnson & Co., Inc., the attorney was informed:

> "Our records indicate the above policy is in full force and effect.
>
> "In accordance with your request we marked our file to promptly notify you of any change or cancellation of this policy."

In early 1970 International General Agency, Ltd., changed its name to Champion Corporation, Underwriters and moved its offices from St. Louis to Fort Lauderdale, Florida. In May 1970, before the fire, Johnson visited its Fort Lauderdale office. He had previously, on receipt of the letter from plaintiffs' attorney, reviewed his files with them. On his visit to the Fort Lauderdale office in May 1970, he made no further inquiry about Mr. Kaperonis's coverage.

After the fire at "The Purple Penguin," which occurred on 23 May 1970 and in which plaintiff Kaperonis's property was destroyed, Champion Corporation, Underwriters employed the General Adjustment Bureau to arrive at an adjustment of the loss. This was done, and agreement was finally reached between the General Adjustment Bureau and Kaperonis fixing the Kaperonis loss at $95,832.72 less a $250.00 deductible, making a net approved claim of $95,582.72. Nothing was ever paid on account of this claim.

After the fire it developed that neither International General Agency, Ltd. nor Champion Corporation, Underwriters were authorized to represent Underwriters at Lloyd's, London or any of its constituent member syndicates or underwriters. Neither was licensed as an insurance agency in the State of Missouri. Champion Corporation, Underwriters was not licensed to transact any insurance business in the State of Florida, and the records in the office of the Secretary of State of Florida do not disclose a record of a corporation by the name of Champion Corporation, Underwriters either as a domestic or foreign corporation. The principals in International and in Champion with whom defendant Johnson dealt have, since the fire, been indicted for fraud arising out of their insurance operations. John-

son testified that he learned of this at some time after August 1970, and that the indictments had been issued in "apparently one of the largest mail frauds in the country."

[1] It is well established in this State that if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable skill, care and diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so. Furthermore, if the agent or broker is unable to procure the insurance he has undertaken to provide, it is his duty to give timely notice to the proposed insured in order that he may have the opportunity to take the necessary steps to protect himself otherwise. *Mayo v. Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972); *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E. 2d 229 (1966); *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632 (1921); *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970).

[2] In the present case the jury found by its answers to the first two issues that both defendants, Johnson individually and Johnson & Co., Inc., undertook to procure the insurance for plaintiff Kaperonis, and there is ample evidence to support the verdict on those issues. All of the evidence shows that defendants never procured valid insurance coverage as they had undertaken to do and that they never gave plaintiff notice of this fact prior to the fire. All of the evidence also shows, however, that defendants thought they had procured the requested insurance in a solvent company and that they learned of their error only after the fire. The question presented, then, is whether the evidence was sufficient to support a jury finding that the defendants failed to exercise reasonable skill, care and diligence in allowing themselves to be misled by the fraudulent acts of others or in failing to make a timely discovery of the fraud. We hold that it was.

Johnson himself testified either by answer to interrogatories and by depositions taken prior to trial or by testimony at the trial, that after seeing the advertisement of International General Agency, Ltd. in the insurance industry periodical he never contacted the Insurance Commissioner of the State of Missouri to determine whether International was licensed in that State, that he never attempted to ascertain if Champion Corporation, Underwriters was licensed to engage in the insurance

business in Missouri or in Florida and did not know if they were authorized to engage in the insurance business in any State, that prior to 6 September 1969 he had transacted business with Underwriters at Lloyd's, London, both directly and through their United States representative, that he knew of a United States representative of Underwriters at Lloyd's, London, but he did not approach that representative for the purpose of placing this risk, that he never saw any written authorization from Underwriters at Lloyd's, London, or any other person, firm or corporation authorizing International to bind them with regard to this risk, that he made no inquiry concerning the authority of International to act on behalf of the Underwriters at Lloyd's, London, that he relied solely upon the information in the advertisement as to the authority of International to act for Underwriters at Lloyd's, London, that International never issued and delivered to him any policy of insurance for the period September 1968 to September 1969 or for the period September 1969 to September 1970, that he never received any policy of insurance either from Underwriters at Lloyd's, London or from any other person, firm or corporation pertaining to the fire and extended coverage insurance as set forth in plaintiff's exhibit 9, that when he signed the certificate of insurance, plaintiff's exhibit 9, on 9 September 1969, he had never received any authorization or commitment directed to him from Underwriters at Lloyd's, London, and that he never received any acknowledgment or binder from Underwriters at Lloyd's, London that they had undertaken to insure the risk covered by either Certificate of Insurance No. 10217US (plaintiff's exhibit 10) or No. 10388US (plaintiff's exhibit 9).

Although defendants presented evidence, in testimony of Johnson and of two other general insurance agents, that the custom and practice in the insurance business is not to make investigations of firms advertised in The National Underwriter and that defendants in this case "acted in accordance with the general practices of the insurance industry," this would not preclude the jury from finding that the defendants were negligent. Conformity to established practices in a particular trade or business, while certainly relevant in judging due care, is not as a matter of law the exercise of due care. Usage and custom do not justify negligence and cannot serve to establish as safe in law that which is dangerous in fact. "What usually is done may be evidence of what ought to be done, but in the last analysis, what ought to be done is fixed according to the standard of the ordi-

narily prudent man, whether or not it is customary to comply with that standard." 57 Am. Jur. 2d, Negligence, § 78, p. 429. Although there was also other evidence in this case which helped to explain how defendants came to be misled by the fraud which was perpetrated upon them, such evidence did not establish as a matter of law that they exercised due care. Viewing all of the evidence in the light most favorable to the plaintiff, it is our opinion, and we so hold, the matter was for the jury and it was error to allow defendants' motions n.o.v.

DEFENDANTS' APPEAL

[3] The evidence shows that certain of the actions taken to secure placement of the insurance and throughout all of the events disclosed by the evidence were taken by the individual defendant, Horace M. Johnson, apparently acting as an individual, while at other times he appeared to have acted in his capacity as president of the corporate defendant, Horace M. Johnson & Co., Inc. However, the third and fourth issues as submitted to the jury were so framed, and the court's instructions to the jury were so expressed, that the jury was required to answer the issues in the affirmative if they should find negligence on the part of either defendant was a proximate cause of plaintiff's loss which resulted from the lack of insurance coverage at the time of the fire. In effect, if the jury found against either defendant, it was required to find against both, though the evidence would have permitted finding against one and not against the other. In this there was error for which defendants are entitled to a new trial.

The result is:

On plaintiff's appeal, the judgment n.o.v. is

Reversed.

On defendants' conditional appeal, a new trial is ordered.

New trial.

Judges BRITT and VAUGHN concur.

JAMES N. DUGGINS, JR. v. NORTH CAROLINA STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

No. 7410SC971

(Filed 19 March 1975)

1. **Accountants— licensing of CPA — experience requirement — supervision of CPA in public practice of accountancy**

The plain meaning of G.S. 93-12(5) is that an applicant for licensing as a CPA shall have two years' experience on the field staff of a CPA in the public practice of accountancy; therefore, a CPA who is also a lawyer engaged in the public practice of law is not a CPA in public practice within the meaning of the statute, and plaintiff could not satisfy the experience requirement for certification as a public accountant by practicing law under the supervision of a lawyer who was was also a CPA.

2. **Constitutional Law § 20— CPA — experience requirement for certification — constitutionality of statute**

The requirement of G.S. 93-12(5) that an applicant for licensing as a CPA have two years' experience on the field staff of a CPA in the public practice of accountancy is not unconstitutional since the classification made by the statute is not arbitrary and without reasonable basis, the rule has been uniformly applied, and no discrimination has been shown.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 7 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 11 February 1975.

Plaintiff passed the written examination to become a Certified Public Accountant (CPA) in 1965, but was informed by the defendant, North Carolina State Board of Certified Public Accountant Examiners, that his certification would be held in suspense until he fulfilled the two-year experience requirement set forth in G.S. 93-12(5) and Rule (9)(c), Section II, of the Rules of the Board. Subsequently, plaintiff became a lawyer and practiced for more than four years with a Greensboro law firm under the supervision of Richard Tuggle, a lawyer and CPA, where over 50% of his work was on tax accounting matters. In 1972 plaintiff sought certification on the grounds that he had satisfied the experience requirement for certification by working under Tuggle. Defendant denied his application, however, concluding that experience with a law firm under a lawyer-CPA, did not fulfill the requirement of the statute. Upon appeal to the Superior Court, the trial judge concluded plaintiff had satisfied the experience requirement set forth in G.S. 93-12(5) and Rule

(9) (c) and ordered that the decision of the defendant be reversed and the matter remanded for entry of a decision not inconsistent with the judgment of the court. Defendant appealed.

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

Tuggle, Duggins and Donahue, P.A., by Daniel W. Donahue, for plaintiff appellee.

Allen, Steed and Pullen, P.A., by Lucius W. Pullen and D. James Jones, Jr., for defendant appellant.

MORRIS, Judge.

In pertinent part, G.S. 93-12 provides that the powers and duties of the State Board of Certified Public Accountant Examiners shall be as follows:

> "(3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as certified public accountants.
>
> . . .
>
> (5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed examinations to the satisfaction of the Board, in 'theory of account', 'practical accounting', 'auditing', 'commercial law', and other related subjects.
>
> From and after July 1, 1961, any person shall be eligible to take the examination given by the Board who is a citizen of the United States, or has declared his intention of becoming such citizen, and has resided for at least one year within the State of North Carolina, is twenty-one years of age or over and of good moral character, submits evidence satisfactory to the Board that he has completed two years in a college or university, or its equivalent, and shall have completed a course of study in accountancy in a school, college or university approved by the Board. *Such applicant, in addition to passing satisfactorily the examinations given by the Board, shall have had at least two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice, or shall have*

served two or more years as an internal revenue agent or special agent under a District Director of Internal Revenue, or at least two years on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant and shall have the endorsement of three certified public accountants as to his eligibility. A master's or more advanced degree in economics or business administration from an accredited college or university may be substituted for one year of experience. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such persons shall have had the required experience." (Emphasis supplied.)

G.S. 93-1, which defines certain terms used in Chapter 93, further provides that

"An 'accountant" is a person engaged in the public practice of accountancy who is neither a certified public accountant nor a public accountant as defined in this chapter.",

and

"A 'certified public accountant' is a person engaged in the public practice of accountancy who holds a certificate as a certified public accountant issued to him under the provisions of this chapter." (Emphasis supplied.)

The statute further defines a "public accountant" as

"[a] person engaged in the public practice of accountancy who is registered as a public accountant under the provisions of this chapter.",

and provides that

"A person is engaged in the 'public practice of accountancy' who holds himself out to the public as an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports." (Emphasis supplied.)

Rule 9(c) of Section II of the Rules of the Board, promulgated under the authority of G.S. 93-12, tracks the experience requirement of the statute in its provisions that:

> "Each applicant must submit proof, acceptable to the Board, that he has had:
>
> (1) At least two years' experience on the field staff of a certified public accountant in public practice or a North Carolina public accountant in public practice.
>
> (2) Or, shall have served two or more years as an internal revenue agent or special agent under a District Director of Internal Revenue.
>
> (3) Or, shall have served at least two years on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant.
>
> (4) A master's or more advanced degree in economics or business administration from an accredited college or university as provided in Rule 9(b)(2) may be substituted for one year of experience."

[1] The major question presented by this appeal is whether the phrase "in public practice" as used in that portion of G.S. 93-12(5), which reads "two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice", is equivalent to the phrase "public practice of accountancy", as that phrase is defined in G.S. 93-1(5). The trial court specifically found that the two phrases were not equivalent and therefore concluded that "[a] certified public accountant who is also a lawyer engaged in the public practice of law is a certified public accountant in public practice within the meaning of G.S. 93-12(5)." The defendant Board assigns error to this interpretation of the statute and seeks a reversal of the trial court's decision finding that the plaintiff "has satisfied the experience requirement of G.S. 93-12(5)." More specifically, defendant contends that well-settled rules of construction preclude such an interpretation of the statute. We agree.

It is an accepted principle of statutory construction in this State that " 'parts of the same statute, and dealing with the same subject are "to be considered and interpreted as a whole . . . " ' " *Fishing Pier v. Town of Carolina Beach,* 274

N.C. 362, 370, 163 S.E. 2d 363 (1968), [quoting from *In Re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129 (1952)] and cases cited therein. Furthermore, our courts have consistently held that "[s]tatutes dealing with the same subject matter must be construed *in pari materia,* and harmonized, if possible, to give effect to each." 7 Strong, N. C. Index 2d, Statutes, § 5, p. 75. Considering and interpreting the provisions of Chapter 93 of the General Statutes as a whole, we think it clear that the plain meaning of G.S. 93-12(5) is that an applicant for licensing as a certified public accountant shall have two years' experience on the field staff of a certified public accountant *in the public practice of accountancy.* An examination of the experience requirement of our statutes since 1913 provides additional support for our holding.

Within the act creating a State Board of Accountancy in 1913 our General Assembly provided that:

> "Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over the age of twenty-one years, of good moral character, being a graduate of a high school or having had an equivalent education, *who has had at least three years experience in the practice of accounting,* and has passed a satisfactory examination as herein provided, shall be entitled to a certificate to practice accounting and shall be styled and known as a certified public accountant." (Emphasis supplied.) Public Laws 1913, c. 157, § 8.

The act further provided that " . . . be it understood that by 'public accountant' is meant one actively engaged and practicing accountancy as his principal vocation during the business period of the day . . . "

Chapter 261 of the Public Laws of 1925, which "was evidently intended to cure the defects or omissions of former statutes", *Respess v. Spinning Co.,* 191 N.C. 809, 813, 133 S.E. 391 (1926), carried forward the experience requirement. Section 11(5) of the act empowered the Board to issue certificates of qualification to practice as certified public accountants to each applicant, "who, being the graduate of an accredited high school or having an equivalent education, shall have had at least two years experience *or its equivalent* next preceding the date of his application on the field staff of a certified public accountant or public accountant one of which shall have been as

a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years experience *or its equivalent,* above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; . . . " (Emphasis supplied.) Under the statute "equivalent" experience was recognized as sufficient to meet the experience requirement for certification. Undoubtedly, plaintiff's chances of becoming qualified for admission to practice as a certified public accountant would have been better under the 1925 act, under the identical circumstances which are before us. We find it significant, however, that the 1951 Session of the General Assembly completely deleted the phrase "or its equivalent" from the statute effective 1 July 1955.

From 1 July 1955 until 1 July 1961 the statute provided that an applicant, "in addition to passing satisfactorily the examinations given by the board, shall have had at least two years' experience next preceding the date of his application on the field staff of a certified public accountant or public accountant or on the field staff of an accounting firm of which at least one member is a certified public accountant or public accountant, one year of which experience shall have been as a senior or accountant in charge *or shall have served two or more years as a field agent under an Internal Revenue Agent in Charge or Special Agent in Charge of the Bureau of Internal Revenue,* and shall have the endorsement of three certified public accountants as to his eligibility . . . " (Emphasis supplied.) Chapter 844, § 6, 1951 Session Laws of North Carolina.

Experience as a field agent under an Internal Revenue Agent in Charge or Special Agent in Charge of the Bureau of Internal Revenue was specifically held to be sufficient for certification under the 1951 act. Apparently, however, the General Assembly decided that after 1 July 1955, it would no longer recognize other "equivalent" experience as sufficient.

On 1 July 1961, the Legislature changed the experience requirement of the statute further. The 1961 rewrite of the statute provided that an applicant "in addition to passing satisfactorily the examinations given by the board, shall have had at least two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice, *or shall have served two or more years as an internal revenue*

agent or special agent under a District Director of Internal Revenue, or at least two years on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant . . . " (Emphasis supplied.) Chapter 1010, § 2, 1961 Session Laws of North Carolina.

Effective 1 July 1961, experience on the field staff of the North Carolina State Auditor under the direct supervision of a certified public accountant also was specifically held to be sufficient for certification. Again, however, the Legislature refused to recognized other "equivalent" experience as sufficient.

It is a well-established rule of construction in this State that "[t]he intent of the legislature controls the interpretation of a statute." 7 Strong, N. C. Index 2d, Statutes, § 5, pp. 68-69, and cases cited therein.

In 1961, by again refusing to recognize "equivalent" experience as sufficient for certification, except as otherwise specifically provided in the statute, we think the clear intent of the Legislature was to require experience on the field staff of a certified public accountant in the "public practice of accountancy" or a North Carolina public accountant in the "public practice of accountancy".

Additionally, our courts often have held that "[a]n administrative interpretation of a statute, acquiesced in over a long period of time, is properly considered in the construction of the statute by the courts." Strong, supra, at p. 75.

> "Where an issue of statutory construction arises, the construction adopted by those who execute and administer the law in question is relevant and may be considered. Such construction is entitled to 'great consideration,' *Gill v. Commissioners,* 160 N.C. 176, 76 S.E. 203 (1912); or to 'due consideration,' *Faizan v. Insurance Co.,* 254 N.C. 47, 118 S.E. 2d 303 (1961). It is said to be 'strongly persuasive,' *Shealy v. Associated Transport,* 252 N.C. 738, 114 S.E. 2d 702 (1960), or even *prima facie* correct,' *In re Vanderbilt University,* 252 N.C. 743, 114 S.E. 2d 655 (1960). . . . " *MacPherson v. City of Asheville,* 283 N.C. 299, 307, 196 S.E. 2d 200 (1973).

We note that in the 21 August 1973 decision of the State Board of Certified Public Accountant Examiners, denying plaintiff application for certification, it is stated "[t]hat it has been

the long standing administrative practice of the Board to interpret the provisions of G.S. 93-12(5) to mean that employment by a licensed certified public accountant engaged in the practice of law is not experience which would qualify an applicant for licensing by the Board as a certified public accountant."

Considering the long-standing practice of the Board and interpreting the statute consistently with the legislative intent, we hold that the trial court erred in concluding that plaintiff has satisfied the experience requirement of G.S. 93-12(5). In our opinion experience with an attorney-CPA is not sufficient for certification unless the attorney-CPA is in the "public practice of accountancy" as that phrase is defined by G.S. 93-1(5). In this case Tuggle was not in the "public practice of accountancy", since he did not perform all of an accountant's functions. Furthermore, he could not ethically hold himself out to the public as an accountant as required by G.S. 93-1(5).

> "A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business." Code of Professional Responsibility of the North Carolina State Bar, Disciplinary Rule 2-102(E), (effective 1 January 1974).

It is conceded by all parties that plaintiff did not, nor did Mr. Tuggle, prepare, verify or certify, "financial, accounting and related statements *intended for publication*" during the period in question here. Although preparation of financial statements, etc., intended for publication if only to the stockholders of a corporation, is one of the services which, by statutory definition, is a part of the public practice of accountancy, neither plaintiff nor Tuggle could, as practicing lawyers, ethically perform that service.

[2] Plaintiff argues in his brief that the experience requirement of the statute is unconstitutional in that it establishes a system of obligatory apprenticeship for practicing certified public accountants and discriminates against certified public accountants who are not in the "public practice of accountancy". We are aware of the rule that "[a]ppellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court." *City of Durham v. Manson*, 285 N.C. 741, 743,

208 S.E. 2d 662 (1974), and cases cited therein. Although the question was not passed upon by the trial court, it was raised by plaintiff in his notice of appeal from the decision of the North Carolina State Board of Certified Public Accountant Examiners. We, therefore, feel that the question is properly before us.

There can be no question but that the public practice of accountancy is a highly skilled and technical profession and one which affects the public welfare. The plaintiff concedes that the State, in the exercise of its police powers, may regulate the profession and those who practice it. This must be so in order to protect the public against fraud, deception, and the possible consequences of ignorance, incompetence or incapacity to practice such a highly technical profession.

> " . . . Provisions classifying applicants for licensing or certification *on the basis of experience,* or exempting those already engaged in the profession who have had experience for a stated length of time, are reasonable and valid if they apply equally to all similarly situated." (Emphasis supplied.) 1 Am. Jur. 2d, Accountants, § 5, p. 360, and cases cited therein.

The North Carolina General Assembly in several other professions and occupations has either required by statute experience before licensing or authorizing the licensing board to require experience, including but not limited to Landscape Architects (G.S. 89A-4), Pharmacists (G.S. 90-61.1), Embalmers (G.S. 90-210), Cosmetologists (G.S. 88-12), Engineers [G.S. 89-7(b)(1)], Practicing Psychologists [G.S. 90-270.11(1)].

In *Davis v. Sexton,* 207 N.Y.S. 377, 211 App. Div. 233 (1925), the Court noted that the Regents of the University of the State of New York had been given, by the Legislature, the "express and exclusive power to prescribe the professional qualifications to practice as a public expert accountant under the title of 'certified public accountant' ". One of the rules adopted by the Regents was Rule No. 426a:

> "A candidate must also present satisfactory evidence of five years' experience in the practice of accountancy, at least three of which must have been completed prior to his admission to the written certified public accountant examination, *and at least two of the five years' experience shall*

> *have been in the employ of a certified public accountant in active practice in no less grade than that of a junior accountant or its equivalent.*" (Emphasis supplied.)

The petitioner, Davis, admitted that he had not complied with the rules as interpreted by the Regents. He was *not employed* by a certified public accountant. He was employed by a firm of auditors, none of whom was a certified public accountant. However, petitioner worked under and was supervised by two employees who were certified public accountants. In its discussion, the New York Court said:

> "The rule itself, as interpreted by the regents, is not arbitrary and capricious. It has a basis in reason. The reason assigned by the regents is that the integrity and high standard of the group of public accountants, who are to be certified by the regents as worthy of this honorable rank in their profession, justifies the test of a substantial period of experience as an employee of one who has been certified and who will feel a personal and professional responsibility as the employer of such candidate. A coemployee has no such direct responsibility for the character and quality of the candidate's work, and has no power to select him or discharge him. Proper supervision and training of the candidate are more likely to be secured if the employer is a certified accountant, for the reason that 'he is responsible professionally as well as personally for the acts of the candidate and is bound to exercise a much greater degree of supervision than would be exercised by any mere employee. His own self-interest demands it.' "

The Court held that the Legislature had properly granted the Regents the power to fix the professional requirements and that the rule had been uniformly applied and was not being applied arbitrarily and capriciously in petitioner's case.

In the case before us, the Board by G.S. 93-12, is given the power to "formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as Certified Public Accountants". The General Assembly also, by G.S. 93-12(5), required that in addition to passing satisfactorily the exam given by the Board, an applicant shall have had "at least two years' experience on the field staff of a certified public accountant or a North Carolina public accountant in public practice, . . . " By

its Rule 9(c) (1) the Board interprets that as meaning "At least two years' experience on the field staff of a certified public accountant *in public practice* or a North Carolina public accountant in public practice." (Emphasis supplied.)

> "It is a well understood rule of constitutional law that the General Assembly may distinguish, select and classify objects of legislation provided such classifications are reasonable and just and apply uniformly to all members of the affected class. Inequality does not render a statute unconstitutional if the selections are not arbitrary and capricious. The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if such legislation can be upheld on any reasonable ground." (Citations omitted.) *Ramsey v. Veterans Commission,* 261 N.C. 645, 647, 135 S.E. 2d 659 (1964).

Plaintiff here has not shown that the classification of which he complains is essentially arbitrary and without any reasonable basis. The rule has been uniformly applied. It has been uniformly observed by the Board. No discrimination has been shown. Plaintiff has not complied with the rule, but its application to him does not deny him the equal protection of the laws guaranteed by the State and Federal Constitutions.

For the reasons stated, the decision of the trial court is

Reversed.

Judges PARKER and HEDRICK concur.

IN RE ADOPTION OF THOMAS CAMERON DAUGHTRIDGE

No. 747SC1055

(Filed 19 March 1975)

1. **Adoption § 2— consent for adoption required**

The consent of respondent department of social services to the adoption sought by petitioners is required by virtue of G.S. 48-9(b).

2. **Adoption § 2— consent of board of social services — reasonableness of withholding consent**

The General Assembly, in furtherance of the State's desire to protect the welfare of dependent children, has provided for the consent

of the Board of Social Services or person appointed by the court to consent to their adoption, and that consent may not be unreasonably and unjustly withheld; if the court shall find that a failure to grant the petition for adoption would be inimical to the best interests and welfare of the child, it may proceed as if the consent which it finds ought to have been given has been given.

3. **Adoption § 2— failure of department of social services to give consent — reasonableness**

The trial court in an adoption proceeding properly determined that the withholding of consent by respondent department of social services was not unjust and unreasonable and was in the best interests of the child where the evidence tended to show that petitioners lived in the same community as the child's natural mother, the circumstances indicated a real possibility that the natural mother or other members of her family might successfully pierce the veil of confidentiality which should be maintained for the best interests of the child, and respondent had made no investigation as to petitioners but as to prospective adoptive parents in another county, a full investigation had been made.

APPEAL by petitioners from *Webb, Judge.* Judgment entered 30 October 1974 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 21 February 1975.

This action is an adoption proceeding brought by Gordie Justice Daughtridge and his wife, Vicki Leonard Daughtridge (hereinafter referred as "petitioners") for the adoption of a baby whom they desire to name Thomas Cameron Daughtridge.

On 27 September 1973, the Edgecombe County Department of Social Services (hereinafter called "respondent") placed the child with the petitioners, who were paid foster parents, for the purpose of their providing foster care only. The child has remained with the petitioners continuously since that time. On 19 August 1974, the child's natural mother executed a Parent's Release, Surrender and Consent to Adoption in favor of respondent, and this release was accepted for respondent by its Director. The consent of the child's father is not required under the circumstances of this case, and the period within which the mother could revoke her consent had expired at the time the adoption proceeding was brought. Respondent refused to consent to the adoption, and petitioners secured an order making respondent a party. Petitioners then moved that the respondent be required to appear at a hearing for the purpose of having the court determine whether consent had been withheld without proper justification. The Clerk allowed the motion and entered an order requiring respondent to appear before him in order that he might determine whether the respondent had authority

to withhold consent, and if so, whether the refusal to give consent was unwarranted and unjust.

Respondent filed a response to the petition for adoption in which it averred that it did not deny that petitioners, insofar as foster care was concerned, are fit persons to have the care, custody, supervision and training of the child and did not deny that petitioners are financially able to provide for the child. Respondent, by way of further response, averred that it placed the child with petitioners for the purpose of providing foster care only; that the mother had consented to adoption and the consent was irrevocable; that the father's consent was not necessary; that the petition was filed without the consent of respondent as required by G.S. 48-9(b); that respondent had authority to withhold consent and that its refusal was warranted, just, and in the best interests of the child, the petitioners, and the mother of the child for the following reasons: there is a strong likelihood of interference with the orderly and proper adjustment of the child in the proposed adoptive home by reason of "the lack of confidentiality which exists with regard to the mutual knowledge of who the natural mother and proposed adoptive parents are or the ease by which such confidentiality could be destroyed", the fact that petitioners have not been provided with background information with respect to the child, the fact that no investigation had been made of petitioners' suitability as adoptive parents, the fact that just a few days prior to the filing of the petition, petitioners became the natural parents of a baby girl born prematurely and neither petitioners nor respondent had had time properly to evaluate or determine what effect, if any, the birth of this child to petitioners might have on the suitability of the adoption sought by petitioners, the fact that adoptive parents in a distant county had been approved subject only to an opportunity to see the child and that respondent is of the opinion that it would be in the best interests of the child for him to be adopted by parents living in a distant county. Respondent further asked that the matter be transferred to the civil issue docket for trial of issues at the next ensuing term of Superior Court in accordance with G.S. 1-273 upon the premise that whether respondent has the authority to withhold its consent and, if so, whether the refusal is warranted and just raises issues of law and fact.

The Clerk refused to transfer the matter to the civil issue docket but heard it himself and entered an order in which he

made 32 findings of fact and 7 conclusions of law resulting in his concluding that respondent's withholding its consent was unreasonable, not justified, and that the best interests of the child required its placement with petitioners. He ordered "[t]hat the consent of respondent to the petition for adoption filed in this cause be, and the same is hereby dispensed with by this court."

Respondent appealed to the Superior Court. The Court, with two exceptions, adopted the findings of the Clerk. Upon the findings, the Court made the following conclusions of law:

"1. That the welfare of the minor child the subject of this cause is the primary concern of this court.

2. That the consent of the respondent to the adoption sought by the petitioners is required by virtue of G.S. 48-9(b) unless otherwise ordered by a court of competent jurisdiction as provided for in G.S. 48-9.1(1).

3. That the respondent has wide latitude and discretion concerning whether it should give or withhold its consent to adoption and a court of competent jurisdiction should not dispense with said consent or permit an adoption proceeding to continue without said consent unless it clearly appears that the withholding of consent is unreasonable.

4. That the respondent has reasonably withheld its consent to the proposed adoption by basing such refusal on the lack of confidentiality surrounding the proposed placement of said child for adoption with the petitioners.

5. That the respondent has in all respects properly withheld its consent to the adoption filed herein and its refusal has not been shown to be clearly unreasonable but, on the contrary, is based upon reason and the best interest of all parties concerned.

6. That the welfare of said minor child will be best served by dismissing the Petition for Adoption filed herein."

The court ordered that the order entered by the Clerk be reversed and the petition for adoption be dismissed. Petitioners appealed.

Cleveland P. Cherry, by Will H. Lassiter, III, for petitioner appellants.

Taylor, Brinson & Aycock, by William W. Aycock, Jr., for respondent appellee.

MORRIS, Judge.

The adoption of children is purely a statutory procedure and "[t]he only procedure for the adoption of minors is that prescribed by G.S. Chapter 48. 'Adoption shall be by a special proceeding before the clerk of the superior court.' G.S. 48-12. A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. See G.S. 48-21 and G.S. 48-27." *In Re Custody of Simpson,* 262 N.C. 206, 210, 136 S.E. 2d 647 (1964).

Appellant raises certain procedural questions on appeal. Among other things, he contends that the Superior Court could only hear the matter in its appellate capacity and erred in considering the matter *de novo.* The parties concede that respondent did not except to any particular finding of fact on its appeal to the Superior Court but entered only a general exception. The record contains a stipulation by the parties that "at the time this cause was heard before Judge John Webb, counsel for each of the parties stipulated orally in open court to Judge Webb that the findings of fact set forth in paragraphs 1 through 18, paragraph 20 and paragraphs 22 through 32 of the order of Don Gilliam, Jr., dated October 16, 1974, were agreed to by the parties and were not in dispute and could be accepted by the court as fully supported by the evidence received at the hearing before Don Gilliam, Jr., Clerk of Superior Court of Edgecombe County." As to findings of fact 19 and 21, Judge Webb heard evidence in the form of the sworn testimony of Claudia Edwards, Director of the Edgecombe County Department of Social Services. The record contains no objection to this testimony, nor do petitioners except to the modified findings of fact made by the court. The net effect is that the facts were agreed facts and the court reached a different conclusion as a matter of law. In this procedure, we find no error. *In Re Estate of Moore,* 25 N.C. App. 36, 212 S.E. 2d 184 (1975). See also *In Re Holder,* 218 N.C. 136, 10 S.E. 2d 620 (1940), where the hearing in superior court on appeal from the clerk was, by agreement of counsel, *de novo* and upon the record and the evidence taken be-

fore the clerk. It thus appears that whether the court heard the matter *de novo* or in its appellate capacity is not determinative of this appeal. The question whether the Clerk should have transferred the cause to the civil issue docket for trial in the Superior Court is presented in appellee's brief. True, respondent's answer to the petition requested this, because the answer raised issues of law and of fact. See G.S. 1-273. However, any issues of fact were resolved by agreement of the parties, and the question, while an intriguing one, is not raised by appellant and is not before us on this appeal.

The question before us is whether the respondent may withhold its consent to an adoption and, if so, was the refusal in this case warranted and in the best interests of the child.

An analysis of the pertinent adoption statutes and such case law as is available is necessary. *In Re Adoption of Hoose*, 243 N.C. 589, 593, 594, 91 S.E. 2d 555 (1956), Justice Denny, later Chief Justice, said: "Consent is essential to an order of adoption.", and further:

> "Under our statute G.S. 48-7, except as provided in G.S. 48-5 and G.S. 48-6, before a child can be adopted, the written consent of the parents, or surviving parent, or guardian of the person of the child must be obtained."

G.S. 48-5 provides for procedure where a child has been found to be an abandoned child by a court of competent jurisdiction, and G.S. 48-6 makes provisions for situations in which the consent of the father is not necessary.

G.S. 48-9 is entitled "When consent may be given by persons other than parents". Section (b) thereof provides:

> "The surrender of the child and consent for the child to be adopted given by the parent or guardian of the person to the director of public welfare or to the licensed child placing agency *shall be filed with the petition along with the consent of the director of public welfare or of the executive head of the agency to the adoption prayed for in the petition.*" (Emphasis supplied.)

Section (c) provides that if the child has been surrendered to an agency operating in another state which is authorized by that state to place children for adoption, the written consent of that agency shall be sufficient. Section (d) provides that if one or

both parents has or have been found incompetent to give valid consent because one has or both have been adjudged mentally incompetent, the court may appoint a person or the director of social services to act as next friend for the child *"to give or withhold such consent"*. (Emphasis supplied.)

[1] It seems clear that the General Assembly recognizes and follows the court's admonition that consent is essential to an order of adoption. It also seems clear that the General Assembly recognizes that there are cases in which consent might be and some times should be withheld by the person or agency qualified to give consent. This is further evidenced by the provisions of G.S. 48-9.1(1) as follows:

> *"The county department of social services* which the director represents, or the child-placing agency, to whom surrender and consent has been given, *shall have legal custody of the child and the rights of the consenting parties,* except inheritance rights, until entry of the interlocutory decree provided for in G.S. 48-17, or until the final order of adoption is entered if the interlocutory decree is waived by the court in accordance with G.S. 48-21, or until consent is revoked within the time permitted by law, *or unless otherwise ordered by a court of competent jurisdiction. . . .* " (Emphasis supplied.)

We think the pertinent sections of Chapter 48 support and require the conclusions of Judge Webb "that the consent of the respondent to the adoption sought by petitioners is required by virtue of G.S. 48-9(b) unless otherwise ordered by a court of competent jurisdiction as provided for in G.S. 48-9.1(1)" and we note that petitioners do not except to this conclusion.

Should the court find that the agency has unreasonably withheld its consent, we think the court has the right to order that the adoption proceed without the written consent of the agency—resulting, as a practical matter, in the adoption of the child proceeding with the consent of the court substituted for the consent of the agency. Or, as the Minnesota Court put it, "proceeding as if the consent which ought to have been given had been given." *In re McKenzie,* 197 Minn. 234, 266 N.W. 746, 748 (1936). That case is similar in many respects to the one before us. There the petitioners, as foster parents for the Minnesota Board of Control, had been given the care of the child when it was four months old and had kept it for three

years. They were non-Catholic, and the child's parents were Catholic, but petitioners had agreed to rear the child in the Catholic faith and had faithfully adhered to that agreement. The child's mother had been confined in the State Hospital for the Feeble Minded since shortly after the child's birth and the father, who was unable to care for the child, had petitioned the juvenile court of St. Louis County to commit it to the care of the State. There was no dispute about the ability of petitioners to care for the child nor the fact that they were of good moral character. Nevertheless, the board of control withheld its consent to the adoption by the petitioners. The sole reason therefor was that it had a rule prohibiting the adoption of a child by parties of a different religious faith than that of the child's natural parents. The court noted that the consent of parents, not otherwise incapacitated, must be obtained before a valid adoption of their child could be effected, and, where the parents are incapacitated, the consent of a guardian must be obtained. Where a child has been placed in the custody and care of the State, the inherent rights of parenthood are not transferred, said the court; but the welfare of the child is the chief concern of the State. Therefore, the court concluded that the board could not withhold its consent and thereby defeat the petition for adoption when the best interests of the child would compel a finding that a failure to grant the petition for adoption would be inimical to the best interests of the child. "Jurisdiction is complete in the court, and it may proceed with the sole view to the best interests of the child. It need not dismiss on motion of the board, and it may disregard the board's refusal to consent in case that refusal is unreasonable." *In re McKenzie, supra,* at 747. The court found that the consent had been unreasonably withheld and reversed the judgment of the District Court denying the petition.

[2] Our General Assembly, in furtherance of the State's desire to protect the welfare of dependent children, has provided for the consent of the Board of Social Services or person appointed by the court to consent to its adoption. The consent of those in custody of the child under statutory provisions, unlike the absolute required consent of competent natural parents, is simply an additional safeguard to the welfare and best interests of the child. We agree with the Minnesota court that that consent may not be unreasonably and unjustly withheld. If the court shall find that a failure to grant the petition for adoption would be inimical to the best interests and welfare of the child, it may

proceed as if the consent which it finds ought to have been given has been given.

[3] Left for determination then, is whether the withholding of consent by respondent was unjust and unreasonable and not in the best interests of the child. We do not think so. The undisputed findings of fact show that the child's natural mother lives and works in the same city as do petitioners, as do the natural mother's father, and stepmother; that the petitioners know the name of the child given him by his natural mother; that it is an unusual name in that there are very few other families with that name in the city; that the natural mother had had the child with her for two periods of several months' duration prior to 27 September 1973, when he was placed with petitioners; that although the parents of the natural mother, who were distressed over the birth of an illegitimate child, continually encouraged the natural mother to allow the child to be adopted, the natural mother was firm in her desire to keep the child and, on 15 August 1974, had the child baptized in a church of her choice; that though the child was born on 12 September 1972, the natural mother did not give consent to adoption until 19 August 1974; that during the months that petitioners had the child in their home, the natural mother and maternal grandparents of the child visited with the child in the office of respondent; that they waited in respondent's office while a representative went to get the child which took only a short while; that the decision of the natural mother to give the child up for adoption was contrary to all her previous actions and statements; that the respondent has at all times maintained confidentiality as to natural parents' names with prospective adoptive parents in another county with whom respondent has been in contact; that the adoption by these prospective parents has the tentative approval of both respondent and the prospective parents; that respondent has made no investigation as to petitioners but as to the prospective adoptive parents in another county, full investigation has been made and detailed background information about the child has been disclosed to them; that although it is against the policy of respondent to place children for adoption with their foster parents, this has been done in a few cases where the children were older and knew their natural parents and other members of their family.

We think that the best interests of the child would not be served by placing him in a home in the same community

where his natural mother lives under circumstances which indicate a real possibility that the natural mother or other members of her family might successfully pierce the veil of confidentiality which should be maintained for the best interests of the child. We think the facts clearly indicate that the respondent's fear or lack of confidentiality is well founded and justifies its withholding of consent, because of the strong likelihood of interference with the orderly and proper adjustment of the child in the home of petitioners.

For the reasons stated herein, we conclude that the order entered by Judge Webb should be and is

Affirmed.

Judges BRITT and ARNOLD concur.

AIDA T. WHITE v. CARL L. WHITE

No. 7428DC1064

(Filed 19 March 1975)

1. **Divorce and Alimony § 23; Parent and Child § 7— consent judgment — agreement to pay college expenses of child — obligation to support**

Where, by the terms of a consent judgment, defendant father agreed to pay an amount each week for the support of a child until 11 September 1972 and thereafter to pay $2,000 per year for college expenses for each year the child remained in college for up to four years, and the child attained age 18 on 8 May 1972 and would attain age 21 prior to the completion of four years of college, the father's obligation to provide support for the child by payment of college expenses did not end when the child reached majority at age 18.

2. **Divorce and Alimony § 23; Parent and Child § 7— consent judgment — argeement to support child beyond majority — enforcement by contempt**

A consent judgment in which the father agreed to provide child support by payment of college expenses after his statutory duty to support ended when the child became 18 years of age could be enforced by contempt proceedings.

APPEAL by plaintiff from *Israel, Judge.* Judgment entered 20 November 1974 in District Court, BUNCOMBE County. Heard in Court of Appeals 21 February 1975.

On 30 October 1962, a judgment was entered in a divorce action giving plaintiff custody of the two minor children of plaintiff and defendant and requiring defendant to pay to plaintiff $50 each week for the support and maintenance of the minors. Thereafter, defendant left the State and failed to comply with the terms of the order. In 1963, plaintiff, by invoking the provisions of the Reciprocal Enforcement of Support Act, obtained an order in the State of New York requiring defendant to pay the sum of $10 per week for the support of the two minor children. These payments were made by defendant as required by the order. In addition, from 1965 through 1969, he paid $850 per year to assist with the educational expenses of Tony, the older of the children, and provided an allowance for the two children of $11 per week until Tony became 21 at which time he reduced the allowance to $6 per week and at the end of 1969 stopped that payment.

In July 1970, plaintiff moved the court that defendant be adjudged in contempt of the court for his failure to comply with the orders of the court, that the court determine the arrearage due, and that the court enter an appropriate order requiring defendant to provide for the support of the minor child, Marco White, who was then 15 years of age and residing with plaintiff in Brevard. The defendant was a resident of Charlotte, and plaintiff alleged that his income was in excess of $10,000 per year.

In September 1970 the court entered an order reciting that prior to hearing the parties had reached a compromise agreement and desired the court to enter an order by and with their consent. The order provided that defendant should pay $25 per week for Marco's support until 13 September 1971 at which time the payments would be increased to $35 per week and continue until 11 September 1972, at which time the weekly payments would end. Thereafter, defendant was to pay to the child or to the college he attended the sum of $2,000 annually for educational expenses. Plaintiff was to claim the child as her dependent for State and Federal income tax purposes for the years 1967 through 1971, and thereafter the defendant would be entitled to claim him as a dependent. The order further provided that defendant would be relieved of any obligation to plaintiff for arrearage due her under the original judgment.

In September 1974, plaintiff again moved the court for the entry of an order adjudging defendant in contempt for his fail-

ure to comply with the terms and provisions of the consent order. In support of her motion, plaintiff filed an affidavit in which she stated that defendant had paid only $1500 toward Marco's educational expenses and that he was in arrears the sum of $2500, having paid only $1500 for the 1972-73 college year and nothing for the year 1973-74.

The court entered an order finding facts, among them that plaintiff did not contend that Marco White is physically or mentally incapable of supporting himself, and that Marco White attained age 18 on 8 May 1972. The court concluded as a matter of law, upon the authority of *Shoaf v. Shoaf,* 282 N.C. 287, 192 S.E. 2d 299 (1972), that "[d]efendant's legal obligation to support Marco White or to comply with the Order of September 10, 1970, ended when Marco White attained the age of eighteen years on May 8, 1972, and the Court is without authority to go behind or to inquire into the contentions of the parties or matters and things existing prior to the entry of the Consent Order of September 10, 1970, and should deny the Plaintiff's request to determine the arrearage." The court, thereupon, dismissed plaintiff's application. Plaintiff appealed.

Riddle and Shackelford, P.A., by Robert E. Riddle, for plaintiff appellant.

McGuire, Wood, Erwin & Crow, by William F. Wolcott, III, for defendant appellee.

MORRIS, Judge.

[1] Plaintiff earnestly contends that the court erred in refusing to enforce the consent order of 10 September 1970, with respect to educational expenses of Marco White. On the other hand, defendant contends that the court properly applied *Shoaf v. Shoaf, supra,* in holding that, as a matter of law, defendant was relieved from any further obligation of support of any kind for his son after his son attained age 18.

The question presented here was not before the Court in *Shoaf.* There the question was, as stated by Justice Higgins: "Since the effective date of G.S. 48A, does a father's legal liability for the support of his son born on January 13, 1953, continue until the son becomes twenty-one years of age, by reason of a consent judgment dated June 11, 1970, providing that *'payments for child support shall continue until such time*

as said minor child reaches his majority or is otherwise emancipated?' " (Emphasis supplied.) At the time the *Shoaf* judgment was entered, an infant became emancipated at age 21. However, the 1971 General Assembly made minors adults at age 18 effective 5 July 1971, by enactment of G.S. 48A-1 providing: "The common-law definition of minor insofar as it pertains to the age of the minor is hereby repealed and abrogated.", and G.S. 48A-2 providing that "A minor is any person who has not reached the age of 18 years." The minor in *Shoaf* reached 18 years of age prior to the effective date of the legislation. Subsequent to the effective date, defendant in *Shoaf* made two payments and then refused to make any more. Plaintiff in *Shoaf* obtained an order citing defendant to appear and show cause why he should not be cited for contempt. The district court ordered defendant to make payments until the child became 21. We affirmed, with one dissent, holding that it was obviously the intent of the parties that the father support his son until he reached age 21, since it was presumed that both parties knew that the boy "would reach his majority" at age 21, the age of majority at the time the consent order was entered. The Supreme Court, however, held that when parents invoke the jurisdiction of the court in custody and support of children, the minor becomes a ward of the court, and "[t]he court thereafter has authority to force the parent to discharge the legal obligation to support a minor child until he reaches legal age", and during minority changed conditions always justify the court entering an order changing the obligations of parents with respect to children. The court held that the clear wording of the judgment did not require or permit an interpretation that the father intended the support to continue despite any change in the law. The General Assembly alone has the authority to determine the age of majority. It did so and made the effective date 5 July 1971, beyond which time the defendant Shoaf had no obligation to support his son. When the legal duty of support ended at age 18, the father's obligation under the consent order ended, the General Assembly having changed the conditions by fixing a different date upon which liability to support a child terminated. The Shoaf order by its own provisions carried no obligation to furnish support beyond the date the child reached his majority. In this situation, the Washington Court (see *Waymire v. Waymire,* 10 Wash. App. 262) has held that the Legislature was "without power to set aside, annul, or change the liability upon a judgment affecting solely the rights of private parties

by the enactment of a general law," and, therefore, the statute changing majority from 21 to 18 could not have retrospective application to a judgment providing for support of minors "until such time as she shall reach age twenty-one years, become self-supporting or married, whichever shall first occur, . . . " *Waymire v. Waymire,* 10 Wash. App. 262, 517 P. 2d 219 (1973), reh. denied 8 February 1974, rev. denied 18 March 1974.

The Florida Legislature in changing the age of majority to 18 specifically provided that it should have only prospective application and should not affect existing rights and obligations. In holding a father subject to contempt for refusing to furnish support beyond age 18 where the consent order provided for support to "majority," the Florida Supreme Court said that to apply the statute retroactively would cause review of innumerable cases, disrupt family budgets, education and other plans. The Court said further: "It is hardly conceivable that husband-petitioner herein could have anticipated the age reduction by the Legislature and intended support only to the reduced age of 18 . . ." *Daugherty v. Daugherty,* 308 So. 24 (Fla. 1975), reh. denied, 5 March 1975.

The order before us is entirely different than the order in *Shoaf* and that in *Waymire* and *Daugherty.* By the terms of the order, to the entry of which defendant consented, defendant was obligated to pay $35 per week for the child's support to 11 September 1972. The child would have attained age 18 on 8 May 1972. The order then provided for the payment of $2,000 per year on college expenses for each year the child remained in school up to four years. Obviously, the child would attain age 21 prior to the completion of four years of college so that the defendant consented to the entry of an order obligating him to furnish educational expense for his son not only beyond the present age of majority but beyond the then age of majority.

[2] That the order is of the type enforceable by contempt is, we think, clear. It fits the pattern prescribed by Justice Sharp, now Chief Justice, in *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964), where "the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband (father) to pay the specified amounts as alimony (child support)." See also *Shoaf v. Shoaf, supra; Parker v. Parker,* 13 N.C. App. 616, 186 S.E. 2d 607 (1972). However, the question of whether such an order can be enforced by contempt beyond the time of the existence of a

statutory duty of support is a question which has not been answered in this jurisdiction. The precise question was before the Michigan Court in *Ovaitt v. Ovaitt,* 43 Mich. App. 628, 204 N.W. 2d 753 (1972). There the father had agreed to contribute $100 each month for each child for each month that the child was in attendance at an accredited college or university, the support payments to continue so as to provide four years of college for each child. The agreement was incorporated verbatim in a divorce judgment entered on 31 August 1965. The parties agreed that at the time of the entry of the judgment, both knew that the children would be more than 21 years of age by the time they completed four academic years of college. The parties also agreed that in the absence of a specific agreement providing for child support beyond majority, the court was without authority to order post-majority support payments. The Court, in a well-reasoned opinion, concluded that the agreement between the parties providing for post-majority support, which was incorporated into the divorce judgment, served to provide the Court with enforcement power which it would not have in the absence of the agreement. In doing so, the Court said that "the court has jurisdiction to make an order or judgment for support and college expenses for the children of the parties who are minors at the time of entry of such order or judgment. We find no statutory prohibition against continuing such order or judgment provisions for support and other benefits beyond minority. Further, we believe in the present technological age in which we live that it is not unreasonable to extend support to include provisions for a college education for the minor children of the parties even though such requirement would extend beyond the children's minority."

A similar result was reached by the Ohio Court in the earlier case of *Robrock v. Robrock,* 167 Ohio St. 479, 150 N.E. 2d 421 (1958). There the father had agreed to pay all necessary tuition for his children, if either of them should desire to secure a college education, in a college or university mutually agreed upon among the child affected, the father, and the mother. Plaintiff moved that defendant be cited for contempt for failure to pay for tuition for his daughter's attending college, the agreement with respect thereto having been incorporated in and made a part of the judgment granting plaintiff a divorce from defendant. The Court, in reversing the trial court, and holding that the

defendant's failure to pay his daughter's tuition was a basis for the charges in contempt, said:

> "It is entirely possible, perhaps probable, that a wife may be willing to give up, by way of agreement with her husband, much to which she would be entitled in consideration of the husband doing more than he might be required to do for their children. To disregard such agreements when incorporated in a divorce decree, at least so far as the power of the court to enforce them is concerned, would discourage the settlement of differences between husband and wife or reduce such agreements, when made, to cloaks to be put on or shed at will.
>
> A trial court, even though satisfied in every respect as to the fairness of an agreement, in considering the incorporation of that agreement in a divorce decree, should not be required to separate items in the agreement that the court has the present power to enforce from those it does not have the power to enforce and include in the decree only the former. Nor should such court be required to find itself in the position of saying to a wife, 'Now, of course, the obligations you assume, being such as I have the power to impose, will be enforced against you, but this court will not be able to enforce the obligations your husband is here assuming because I do not have the power to impose them.' " *Robrock v. Robrock, supra,* pp. 427-428.

Undoubtedly the equities in the case before us lie with the plaintiff. She should not have to resort to a separate action in contract where her only means of collection would be a judgment upon which execution would probably result in nothing. Certainly the contempt route is more conducive to successful action than a civil judgment which the debtor can disregard with little difficulty and no punishment.

We are in agreement with the reasoning of and the result reached by the Michigan and Ohio Courts and, having already concluded that *Shoaf* has no application to the facts presented here, we hold that the judgment of the trial court must be reversed and the matter remanded for the entry of a judgment in accordance with this opinion.

Reversed and remanded.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. FRANK WALKER, JR.

No. 7418SC943

(Filed 19 March 1975)

1. **Criminal Law § 84; Searches and Seizures § 1— warrantless search of car — probable cause — articles in plain view**

Officers had reasonable grounds to believe that defendant's automobile contained contraband materials used in the operation of a numbers lottery, and officers lawfully searched the automobile without a warrant and seized lottery tickets and money found therein, where officers had information that a certain house was a pickup point in a lottery operation, officers on six occasions saw defendant stop his car in front of the house at 7:00 a.m. and a man hand him a package, police officers stopped their car in front of the house and a man gave them a package containing money and lottery tickets, shortly thereafter defendant's car appeared near the house and officers stopped the car, an officer by use of a flashlight saw a taped package on the floorboard with "P-7" written on it and recognized this as a code number used in a numbers lottery, the officer also saw a paper bag on the floorboard, officers arrested defendant, and officers then seized the paper bag containing money and the taped package; furthermore, the items were in plain view and no warrant was required for their seizure.

2. **Gambling § 3— sale of tickets for use in lottery — sufficiency of warrant**

A warrant charging that defendant sold tickets and tokens to be used in a numbers "lottery" was sufficient to charge a violation of G.S. 14-291.1 without alleging that there was to be a "drawing or paying at any time, either within or without the State," since the word "lottery" embraces the elements of chance and prize.

3. **Criminal Law § 51; Gambling § 3— qualification of expert in numbers lotteries**

The trial court did not err in finding that a police officer was qualified to testify as an expert in the field of numbers lotteries where the officer testified that he worked as vice squad detective for four years and was assigned to numbers lottery cases for one year, that he had read several books about numbers lotteries and had received instruction concerning such lotteries in two schools on criminal investigation, and that he had previously testified for the State as an expert in the field of numbers lotteries.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 31 July 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 January 1975.

This is a criminal prosecution wherein the defendant, Frank Walker, Jr., was charged in a warrant with the unlawful sale of lottery tickets in violation of G.S. 14-291.1.

The State offered evidence tending to show the following: At about 6:25 a.m. on 4 February 1974, Detectives Hill and Tysinger of the Greensboro Police Department stopped a white Volkswagen automobile operated by the defendant near the intersection of East Lee and Haskett Streets in the City of Greensboro. The defendant, who was the only occupant of the car, got out of the automobile and walked towards the police car. Detective Hill walked past the defendant and shined his flashlight into the Volkswagen. He observed a "heavily taped package" lying on the floorboard on the passenger side of the car. He recognized the number "P-7", which was written on the outside of the package, as a code number used in the operation of a numbers lottery and arrested the defendant for "operating a . . . lottery". Detective Hill also observed a "large paper bag" on the floorboard on the driver's side of the car. After arresting the defendant, he seized both the package and the paper bag. The two items taken from defendant's automobile contained $1,738.70 and pieces of paper with numbers and letters written on them. Detective Hill testified that he had been assigned to the Vice Division of the Greensboro Police Department for two years and that the Vice Division handles numbers lottery cases. On 4 February 1974 he was specifically looking for the automobile being driven by the defendant.

Over defendant's objection, Larry Gibson, a member of the Vice Division of the Greensboro Police Department from October 1970 until January 1974, was allowed to testify as an expert witness in the field of numbers lotteries. After explaining to the jury how a numbers lottery is operated, Gibson testified that the items contained in the package and bag taken from the Volkswagen automobile were "tickets, tokens, certificates and money used in the operation of a numbers lottery".

Defendant did not testify or offer any evidence in his own behalf.

The jury found the defendant "guilty as charged". From a judgment imposing a jail term of two (2) years, which was suspended and the defendant placed on probation, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Rafford E. Jones for the State.

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

HEDRICK, Judge.

Defendant contends the trial court erred in admitting into evidence, over his objection and motion to suppress, the money and lottery tickets taken from his automobile without a search warrant.

Evidence obtained by an unreasonable search is inadmissible in both federal and state courts. U. S. Const., Amend. IV and V; N. C. Const., Art. I, § 20; *Mapp v. Ohio,* 367 U.S. 643 (1961); *State v. Simmons,* 278 N.C. 468, 180 S.E. 2d 97 (1971). However, it is equally well-settled that when contraband material is in plain view no search is necessary and the constitutional guarantee against unreasonable search and seizure does not prevent either the seizure of the contraband without a warrant or its introduction into evidence. *State v. Simmons, supra; State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95 (1967); *State v. Dawson,* 23 N.C. App. 712, 209 S.E. 2d 503 (1974), cert. denied, 286 N.C. 417, 211 S.E. 2d 798 (1975). Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials. *Carroll v. U. S.,* 267 U.S. 132 (1925); *State v. Simmons, supra.*

In the instant case, a voir dire hearing was conducted by Judge Kivett prior to defendant's trial to determine the admissibility into evidence of the articles seized. Detective B. R. Dotson testified that he and several other members of the Vice Division of the Greensboro Police Department, including Detective Hill, had maintained a surveillance of a house located at 614 Bennett Street in Greensboro during January and the first part of February of 1974. They had information to believe that the house was being used in the operation of a numbers lottery as a pickup point in the collection process of money and lottery tickets.

On six different occasions between 18 January 1974 and 1 February 1974, Detective Dotson observed a light-colored Volkswagen with one taillight out and a bent license tag with the prefix "AZR" stop in front of the house at 614 Bennett Street. Each time, at approximately 7:00 a.m., the driver would turn

off his lights and pull over to the curb. A man would then come out of the house and hand a package to the driver, the sole occupant of the car. The Volkswagen would then proceed down the street.

On 4 February 1974 at 6:00 a.m., Detective Dotson and another officer, following the above described procedure, stopped their automobile in front of 614 Bennett Street. A black male, identified as Woodrow Crump, came out of the house and handed them a package containing money and lottery tickets. The officers arrested Crump; and Detectives Hill and Tysinger, who were present at the time of the arrest, stationed themselves in an unmarked patrol car around the corner from the house. At approximately 6:20 a.m., the light-colored Volkswagen with one taillight out with the license plate bent in such a manner so that only the prefix "AZR" was visible, which the officers had observed on other occasions, passed slowly by the officers but did not turn the corner and stop in front of 614 Bennett Street. The officers gave pursuit and stopped the automobile, which was being driven by the defendant. While the defendant was showing Detective Tysinger his driver's license, Detective Hill shined his flashlight into the car and observed a "brown paper sack" lying on the floorboard on the driver's side of the car. He also observed a package lying on the floorboard on the passenger side of the car with the number "P-7" written on it. Because Hill had seen "numbers used in the operation of lotteries of this nature numerous times", he arrested the defendant. Thereafter, he seized both the package and the "brown paper sack".

Based on the evidence adduced at the voir dire, Judge Kivett concluded that the officers had the right to stop the vehicle being operated by the defendant and the right to seize the "objects they saw in clear view with the flashlight".

[1] We think the facts and circumstances of this case were sufficient to furnish the officers reasonable grounds to believe that this particular Volkswagen automobile, which was driven by the defendant, contained contraband materials used in the operation of a numbers lottery. Furthermore, since the seizure of contraband does not require a warrant when its presence is fully disclosed without the necessity of a search, *State v. Kinley, supra,* the officers were justified in seizing the items containing the money and lottery tickets. *State v. Simmons, supra; State v.*

Dawson, supra. Both the heavily taped package with the number "P-7" written on it and the brown paper bag were in plain view on the floorboard of the car. The fact that Detective Hill saw the articles with the aid of a flashlight does not negate their admissibility. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967).

[2] Defendant next contends the trial court erred in denying his motion to quash the warrant because the warrant failed to allege all the essential elements of the offense defined by G.S. 14-291.1. The pertinent portion of the warrant charged that the defendant

> " . . . did unlawfully, wilfully, have in his possession tickets, tokens, certificates and orders used in the operation of a lottery commonly known as a numbers lottery and further did cause to be sold and did sell tickets, tokens, certificates, and orders for shares in said numbers lottery at E. Lee St. and Hackett St. Greensboro, N. C.
>
> The offense charged here was committed against the peace and dignity of the State and in violation of law N.C.G.S. 14-291.1."

G.S. 14-291.1 provides:

> "If any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section."

Defendant argues that the warrant here is fatally defective in that it failed to allege that there was to be a "drawing or paying at any time, either within or without the State . . . . " A warrant is sufficient if it clearly gives the defendant notice of the charge against him so that he might prepare his defense, enables him to plead former acquittal or conviction should he again be brought to trial for the same offense, and enables the

court to pronounce judgment in case of conviction. *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838 (1970).

In *State v. Lipkin,* 169 N.C. 265, 271, 84 S.E. 340, 342 (1915), our Supreme Court said:

> "A lottery, for all practical purposes, may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine."

A lottery is a chance for a prize for a price. Black's Law Dictionary 1097 (4th Ed. 1968). Thus, since the warrant charges the defendant with the sale of tickets and tokens to be used in a numbers "lottery", we are of the opinion that none of the essential elements of the offense has been omitted from the warrant. The word "lottery" embraces the elements of chance and prize. The warrant, in our opinion, is sufficient to give the defendant notice of the offense charged, to allow him to plead former jeopardy, and to allow the court to proceed to judgment. This assignment of error is overruled.

[3] Finally, defendant contends the trial court erred in permitting Larry Gibson to testify as an expert witness in the field of numbers lotteries.

> "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. To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact type of subject matter under investigation, nor need he be engaged in any particular profession or calling. 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.
>
> 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." 1 Stansbury, N. C. Evidence (Brandis Rev.) § 133 [footnotes omitted] Accord, *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

There is plenary evidence in this record to support the finding of the trial judge that Gibson was qualified to testify as an expert in the field of numbers lotteries. Gibson testified that he worked as a "Vice Squad" Detective with the Greensboro Police Department for four years and was specifically assigned to numbers lottery cases for one year. Furthermore, he testified that he had read several books about numbers lotteries, had received instruction in the field of numbers lotteries "in two . . . schools on criminal investigation", and had previously testified for the State as an expert witness in the field of numbers lotteries. This assignment of error is overruled.

Defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

J. R. GRAHAM AND SON, INC. v. THE RANDOLPH COUNTY BOARD OF EDUCATION

No. 7419SC1017

(Filed 19 March 1975)

1. **Contracts § 16; Damages § 7— construction project — time of completion — delay by defendant — no liquidated damages**

In this action arising out of a contract between the parties for the construction of a high school where the evidence tended to show that defendant ignored plaintiff contractor's request for a 60-day extension of time for completion of construction, plaintiff had every reason to expect that additional requests would be futile, defendant was well aware of the difficulties being encountered at the job site, and defendant executed a change order for the remainder of the contract price more than one month after the 300-day construction period elapsed, defendant clearly had waived any expectation of adherence to the original contract schedule, plaintiff was not required to submit further requests for extension of time, and defendant was not entitled to withhold liquidated damages.

2. **Architects; Contracts § 16— failure to pay contractor's estimates — delay by architect — right of contractor to interest on late payments**

In an action arising out of a contract between the parties for the construction of a high school where the evidence tended to show that plaintiff submitted valid estimates and failure to approve them was an intentional delay on the part of the architect for the reason that defendant did not have the funds available to pay plaintiff on the

estimates, the trial court properly awarded plaintiff interest on the late payments.

3. **Contracts § 18— oral instruction from architect to contractor — modification of contract**

Where the architect instructed plaintiff contractor to do additional work not called for in the parties' contract, this constituted oral modification of the contract for which plaintiff was entitled to recover without having first requested additional sums through written change order.

4. **Contracts § 18— oral agreement ancillary to original contract — enforceable modification**

Where the contract and change order were submitted for plaintiff contractor's signature and plaintiff and the architect entered into an oral agreement which was ancillary to the original contract, this parol modification of the contract was enforceable, and plaintiff was entitled to recover on the agreement.

5. **Architects; Contracts § 21— defective specifications for roof — architect's instruction to follow specifications — leaking roof — no liability of contractor**

In an action arising out of a contract between the parties for the construction of a high school, the trial court properly denied defendant recovery on its counterclaim for roof repairs under plaintiff's two year contractual guarantee where plaintiff offered evidence tending to show that when the roof was being constructed the roofing subcontractor pointed out to the architect that the specifications were defective and the roof would leak if they were followed exactly, the architect ordered the subcontractor to follow the specifications, and the roof leaked.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 28 June 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 18 February 1975.

This is a civil action arising out of a contract between the parties for the construction of a high school in Randolph County. In 1967 the Randolph County School Board decided to replace the existing Trinity High School. J. Hyatt Hammond was employed as architect. In September 1967 the Board awarded four prime contracts for the construction of five buildings. One of these went to J. R. Graham and Son, Inc., as general contractor on its bid of $514,672: the actual contract amount was to be $339,672, with a letter of the Board's intent to extend the sum by $175,000 when funds became available for the 1968-69 fiscal year.

Plaintiff's president, J. R. Graham, testified that on 10 October 1967 he received from Hammond a copy of the written

contract, executed by defendant Board and accompanied by a change order (GC #1) for $60,000.00 in cost reductions authorized by the architect. Graham objected to some of these reductions but signed the contract at Hammond's urging and on his assurance that adjustments would be made.

Graham started construction on the project, and there were problems from the outset. The architect repeatedly withheld certification on Graham's applications for monthly payments. On 19 February 1968, Graham requested a 60-day extension of time for performance on account of inclement weather and difficulties with the roof, but the architect did not respond. Work on the project continued.

On 12 September 1969, the Board issued a change order (GC #4) increasing the contract price by $175,000 pursuant to the letter of intent. A final inspection was held on 21 January 1969, 469 days after construction began. Final payment was not made until 21 July 1969. The contract provided that the school was to be completed 300 days after construction was begun, and for every day over 300 the sum of $100.00 was to be deducted from the price as liquidated damages. Defendant withheld $16,900.00 in liquidated damages. Plaintiff brought suit and defendant counterclaimed for expenses incurred in repairing a leaking roof.

The trial court made findings of fact and awarded plaintiff interest on late payments; liquidated damages withheld in the amount of $16,900.00, plus interest; the cost of extra work done at the architect's request, plus interest; and cost reductions to which plaintiff objected when the contract was signed. The court denied defendant's counterclaim. From judgment entered, defendant appealed to this Court. Additional facts necessary to a disposition of the case will be set out in the opinion.

Schoch, Schoch, Schoch and Schoch, by Arch K. Schoch, for plaintiff appellee.

Miller, Beck, O'Briant and Glass, by G. E. Miller, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the contract documents, including the standard AIA contract, preclude plaintiff's recovering the relief granted by the trial court. Upon a voluminous record, the

court made detailed findings of fact. It is for this Court to inquire whether these findings are supported by the evidence and whether they support the conclusions of law.

The North Carolina Supreme Court has said:

> "Obviously, as an elementary general proposition, a contractor is not liable under a clause for liquidated damages based on a time limit if his failure to complete the contract within the specified time was wholly due to the act or omission of the other party in delaying the work, whether by omitting to provide the faculties [sic] or conditions contemplated in the contract to be provided by him, or by those for whom he is responsible, or by interfering with the work after the contractor has begun, or otherwise. *Dunavant v. R. R.*, 122 N.C. 999, 29 S.E. 837; *United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 58 L.ed. 1294; Anno. 152 A.L.R., p. 1350; 22 Am. Jur., 2d, Damages, § 233; 25 C.J.S., Damages, p. 1096. The concept of justice back of the decisions appears to be that the other party should not be allowed to recover damages for what he himself has caused."

Reynolds Co. v. Highway Commission, 271 N.C. 40, 50, 155 S.E. 2d 473, 482 (1967). *See also* Annot. 152 A.L.R. 1349 (1944); 5 A. Corbin, Contracts, § 1072 (1964).

[1] Plaintiff's evidence tended to show and the trial court found that the delay in completing the project was caused by defendant's failure to pay plaintiff on time, defendant's failure to provide water for and a road to the job site, the failure of the heating contractor employed by defendant to install the heating system on time, and bad weather. The court further found that delay was caused by the "ineptness of the architect, Hammond, and his lack of cooperation with Graham and the other contractors." Defendant nevertheless contends that plaintiff's failure to request an extension of time under the terms of the contract constitutes a waiver of grounds for delay. While defendant's position is generally tenable, *see e.g., Austin-Griffith, Inc. v. Goldberg*, 224 S.C. 372, 79 S.E. 2d 447 (1953), we believe the facts belie the reasoning behind it. The record shows that when plaintiff on 19 February 1968 requested a 60-day extension, it was ignored. Plaintiff had every reason to expect that additional requests would be futile. Defendant was well aware of the difficulties being encountered at the job site. Moreover,

defendant did not execute the change order for the remainder of the contract price until 12 September 1968, more than a month after the 300-day construction period elapsed. Defendant clearly had waived any expectation of adherence to the original contract schedule. On the basis of these facts, plaintiff was not required to submit further requests for extension of time and defendant was not entitled to withhold liquidated damages.

[2] As a general rule, when the contract so provides, the architect's certification is a condition precedent to the contractor's recovery of installment payments, absent a showing of bad faith or failure to exercise honest judgment. 13 Am. Jur. 2d, Building and Construction Contracts, § 37. In the case at bar, the evidence tended to show and the trial court found that plaintiff submitted valid estimates and failure to approve them was an "intentional, arbitrary and capricious delay on the part of Hammond in an effort to delay the payments to Graham for the reason that defendant did not have funds available to pay Graham on said estimates." Defendant contends that plaintiff's remedy was to stop work under a contract provision until payment owed was received. If, as defendant also contends, Hammond's refusal to certify requests for payment was because the project was behind schedule, a work stoppage by the general contractor would only have compounded the problem. We do not read the contract to mean that plaintiff must jeopardize the entire project when defendant wrongfully refuses payment. The trial court's findings, based on plenary evidence, support the award of interest on late payments.

[3] The trial court also concluded that plaintiff was entitled to recover the cost of additional work not called for in the contracts. Defendant contends that plaintiff failed to request additional sums through written change order as required by the contract. This was not necessary to effect the agreement:

> " 'The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. *Mfg. Co. v. Lefkowitz,* 204 N.C. 449, 168 S.E. 517; *Bixler v. Britton,* 192 N.C. 199, 134 S.E. 488. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. *Allen v. Bank,* 180 N.C. 608, 105 S.E. 401.' *Whitehurst v. FCX Fruit and Vegetable Service,* 224 N.C. 628, 32 S.E. 2d 34."

Childress v. Trading Post, 247 N.C. 150, 154, 100 S.E. 2d 391, 394 (1957); *accord, Fishel and Taylor v. Church,* 9 N.C. App. 224, 175 S.E. 2d 785 (1970).

The evidence tended to show and the court found that Hammond instructed plaintiff to do additional work on the disposal plant and to waterproof a wall beyond original specifications. Plaintiff complied. This constituted an oral modification of the contract for which plaintiff was entitled to recover.

[4] With respect to the disputed portions of change order #1, the trial court found that there had been a conditional delivery and ordered that plaintiff recover the amount of cost reductions to which Graham objected. While we agree with the result, we do not believe the facts show a conditional delivery. *See* 2 Stansbury, N. C. Evidence (Brandis rev.) § 257, pp. 253-56. Instead, we think Graham's testimony reveals the existence of a collateral agreement. Parol evidence is competent to establish a contemporaneous oral agreement not inconsistent with a written contract. *Michael v. Foil,* 100 N.C. 178, 6 S.E. 264 (1888); *Sherrill v. Hagan,* 92 N.C. 345 (1885). *See Evans v. Freeman,* 142 N.C. 61, 54 S.E. 2d 847 (1906); *cf. Hoots v. Calaway,* 282 N.C. 477, 193 S.E. 2d 709 (1973). *See also* 30 Am. Jur. 2d, Evidence, § 1049. When the contract and change order were submitted for Graham's signature, J. R. Graham and the architect Hammond entered into an oral agreement which was ancillary to the original contract. They agreed to a subsequent and future change order which Hammond never executed. This parol modification of the contract is enforceable. *See Childress v. Trading Post, supra; Fishel and Taylor v. Church, supra.* Plaintiff was entitled to recover on the agreement.

[5] Finally, defendant contends that the trial court erred in denying recovery on its counterclaim for roof repairs under plaintiff's two-year contractual guarantee. Plaintiff offered evidence tending to show that when the roof was being constructed the roofing subcontractor pointed out to Hammond that the specifications were defective and the roof would leak if they were followed exactly. Hammond ordered the subcontractor to follow the specifications, and the roof leaked. The court found that any resulting leaks were not caused by faulty construction on the part of the general contractor. The counterclaim therefore was properly rejected.

There is nothing in the record before us to suggest that the construction of Trinity High School was a happy experience for any of the parties concerned. Nevertheless, the trial court found on competent evidence that defendant Board and the architect Hammond were responsible for many of the problems that arose. We are bound by these findings of fact and hold that they support the conclusions of law. The judgment of the trial court is affirmed.

Affirmed.

Judges BRITT and MORRIS concur.

WILLIAM FREDERICK GADDY v. NORTH CAROLINA NATIONAL BANK, EXECUTOR AND TRUSTEE OF THE ESTATE OF W. F. GADDY; AND GERALDINE G. ELDRIDGE, JACK GADDY, AND VERA H. GADDY, DEVISEES UNDER THE WILL OF W. F. GADDY

No. 7423DC997

(Filed 19 March 1975)

1. **Appeal and Error § 30— objection to evidence — similar evidence admitted without objection**

Exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection.

2. **Contracts § 12— intention of parties — understanding of one party — knowledge by other party**

Where an agreement between plaintiff and defendant executor provided that plaintiff "agrees to accept at face value, including all accrued interest," notes issued to decedent by a corporation of which plaintiff was sole shareholder as partial distribution of plaintiff's share under decedent's will, and the evidence tended to show that defendant knew, or had reason to know, that plaintiff understood the language in the contract to mean that interest on the notes would not accrue after the date of the agreement, the intention of the parties was plaintiff's interpretation which defendant understood, not the language *per se* in the agreement, and defendant is in effect estopped to assert a different meaning.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 5 September 1974 in District Court, WILKES County. Heard in the Court of Appeals 13 February 1975.

This civil action, instituted on 29 January 1974, was brought under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, for the purpose of having the court construe a contract entered into on 11 June 1971 between plaintiff and North Carolina National Bank, as Executor and Trustee under the Last Will and Testament of W. F. Gaddy (father of plaintiff), deceased. The contract provides in pertinent part:

> THIS CONTRACT, made and entered into this 11 day of June, 1971, by and between WILLIAM FREDERICK GADDY, of Wilkes County, North Carolina, party of the first part; and NORTH CAROLINA NATIONAL BANK, as Executor and Trustee under the last will and testament of W. F. Gaddy, deceased, a duly organized banking corporation, party of the second part;
>
> WITNESSETH:
>
> WHEREAS, the party of the first part is the sole owner and shareholder of a corporation known as "Gaddys, Inc.," which, among other things, is engaged in the real estate business; and whereas, said corporation has purchased and has borrowed from W. F. Gaddy and/or Vera H. Gaddy various sums of money in excess of $100,000.00, as evidenced by notes held by party of the second part in the estate of W. F. Gaddy, deceased; and whereas, party of the first part, as sole shareholder of Gaddys, Inc., is desirous of making arrangements with party of the second part, whereby party of the second part will not demand payment of the notes, when due, and party of the second part is agreeable to forebearance of collection upon the terms and conditions hereinafter set forth;
>
> NOW, THEREFORE, in consideration of the mutual covenants and conditions hereinafter set forth, IT IS AGREED:
>
> (1) Party of the first part, as beneficiary under the last will and testament of W. F. Gaddy, deceased, *agrees to accept, at face value, including all accrued interest,* those notes issued by Gaddys, Inc., in favor of W. F. Gaddy, deceased and/or Vera H. Gaddy (which notes are now held by party of the second part), as partial distribution of the share due party of the first part under the last will and testament of W. F. Gaddy, deceased. (Emphasis added.)

(2) In consideration of the agreement to accept said notes at face value, plus accrued interest, without recourse, party of the second part agrees that it will not demand payment of said notes as the same becomes due and will not take action for collection by reason of default in the payment thereof.

. . .

Plaintiff alleged that he was advised by an agent of defendant bank that interest on the notes would terminate as of the date of the contract; however, in the proposed distribution of the estate of W. F. Gaddy, defendant bank has charged plaintiff with interest from 11 June 1971 until the date of distribution. Plaintiff prayed that the court declare the rights of the parties under the contract and that defendant bank not charge plaintiff's share of the distribution with interest after 11 June 1971.

In their answer, defendants bank and Jack Gaddy denied that bank's agent advised plaintiff that interest would accrue only to 11 June 1971; they admitted that interest had been included in plaintiff's share until the date of distribution of the estate. Answering defendants further alleged that by virtue of the phrase in the contract "agrees to accept", interest should be included until the estate is distributed. They prayed that interest in amount of $18,734.08 be charged to plaintiff's share.

At trial plaintiff introduced evidence that tended to show: *Prior* to the signing of the contract, Miles Frost, trust officer of defendant bank, told plaintiff that interest would not accrue on the notes beyond 11 June 1971. (Defendants objected to this testimony as an attempt to vary the written words of the contract. The court overruled the objection.) C. M. Drum, a C.P.A., testified without objection with respect to a conversation with Frost *subsequent* to the execution of the contract as follows:

. . . In June of 1971, I remember a conversation with Mr. Frost concerning Gaddy's, Inc. notes. Miles came to my office and told me that—This was in June of '71. Mr. Frost came to my office. And as I remember, he was very elated at that time. He told me that he had met with Fred Gaddy earlier. And he was very happy that he had been able to persuade Mr. Gaddy to take these notes from Gaddy's, Inc. as a partial distribution of his equity or his interest in the estate of W. F. Gaddy. He was happy that he had been able to do this because he was of the opinion that at the time

> they got ready to settle the estate that Gaddy's, Inc. would be insolvent. He would be stuck with some worthless notes. HE TOLD ME AT THAT TIME THAT AS A CONDITION OR AS A MEANS OF INDUCING MR. GADDY TO TAKE THESE NOTES, WHICH WOULD NOT FALL DUE FOR SEVERAL YEARS HENCE, THAT THERE WOULD BE NO INTEREST ON THE NOTES AFTER THAT DATE. AFTER THAT DATE, YES, SIR. . . . (Emphasis added.)

On recross examination, Drum stated: " . . . That was Mr. Wrenn's (another trust officer of defendant bank) indication that on the contract the interest was computed. But he also indicated that perhaps Miles had reached a different agreement and he was not sure what Miles' agreement was."

Defendants' primary witness, Miles Frost, testified: " . . . We did not waive any of the principal or any of the interest. Nothing was said about stopping the interest or anything like that. . . . " He denied making the statement as testified to by Drum but stated: " . . . I'm sure that I might have mentioned the fact about paying interest to himself and that sort of thing, which made it attractive, I would think, to Mr. Gaddy. That could have come up. I don't know."

The court entered judgment finding facts and adopting conclusions of law as contended by plaintiff. On the crucial finding, the court found that the agreement was prepared by the attorney for defendant bank and " . . . [t]hat it was the intent of said agreement that the agreement speak as of the 11th day of June, 1971, and that no accrued interest would accumulate on said notes beyond 11 June 1971". The conclusion of law vital to this appeal is:

> (2) That the contract dated 11 June 1971 . . . speaks as of the 11th day of June, 1971, and that the phrase "including all accrued interest" is construed to mean that no interest would accrue on said notes past the 11th day of June, 1971, and that therefore, the plaintiff is entitled to his distributive share under the will of W. F. Gaddy, less the face value of said four promissory notes . . . with accrued interest to and including 11 June 1971.

The judgment decreed that defendant bank distribute to plaintiff his distributive share of the estate, less the face value of the notes and accrued interest due on the notes up to and

including 11 June 1971. Defendants bank and Jack Gaddy appealed.

Vannoy, Moore and Colvard, by J. Gary Vannoy, for plaintiff appellee.

W. G. Mitchell for defendant appellants.

BRITT, Judge.

In their brief, appellants state the questions presented as follows:

(1) Did the Court below err by admitting testimony in contradiction of the written contract dated June 11, 1971 between Fred Gaddy and North Carolina National Bank?

(2) Did the Court below err by finding facts as follows:

(a) That it was the intent of said agreement that the agreement speak as of the 11th day of June, 1971, and that no accrued interest would accumulate on said notes beyond June 11, 1971?

(b) That none of the beneficiaries of the will have appeared to contest the plaintiff's interpretation of said agreement dated June 11, 1971?

(3) Did the Court below err in its Conclusion of Law that the phrase "including all accrued interest" means that no interest would be due after June 11, 1971; and, further, by signing the Judgment as appears of record?

[1] Appellants' argument with respect to the first question appears to be directed primarily to the testimony of plaintiff, and particularly that part pertaining to plaintiff's conversation with defendant bank's agent Frost prior to, and at the time of, the signing of the agreement. While defendant bank entered numerous objections to plaintiff's testimony, plaintiff's witness Drum provided very similar testimony to which there was no objection. It is well settled that exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection. *Glace v. Pilot Mountain,* 265 N.C. 181, 143 S.E. 2d 78 (1965). Therefore, assuming *arguendo,* that the court erred in admitting the testimony objected to, we think evidence of like import

was admitted without objection, thereby rendering any error harmless.

[2] The main focus of the controversy presented by this appeal is on the phrase of the agreement "including all accrued interest", and whether the interest on the notes stopped accruing on 11 June 1971, the date of the agreement, or whether the interest continued to "accrue" until the estate was settled. Defendant bank insists that the court is bound by the rule restated in *Corbin v. Langdon,* 23 N.C. App. 21, 25, 208 S.E. 2d 251 (1974), " . . . that when the language of a contract is clear and unambiguous, the court must interpret the contract as written . . . . " While we recognize the validity of this rule, we do not think it controls this case.

In *Oldham v. Kerchner,* 79 N.C. 106, 111 (1878), Justice Rodman, speaking for the court, said: " . . . If the words are clear and unequivocal, neither party can say that he understood them in a different sense from what they plainly bear; *and if either party knows that the other understands him as speaking of one object, or with one meaning, he will not be allowed to say that he had in his mind another object, or intended a different meaning. . . .* " (Emphasis added.)

In 3 Corbin, Contracts § 537, at 45 (1960), we find similar language. " . . . If . . . A knew or had reason to know the meaning that B in fact gave to A's promissory words, then the substantive law declares that B's understanding shall be given legal effect. . . ." *See also* Corbin, *supra,* § 610; 13 Williston, Contracts §§ 1573, 1577 (Jaeger ed. 1970 and 1974 Supp.); Restatement of Contracts § 505 (1932).

In deciding what evidence should be allowed to determine the meaning of the portion of the contract under consideration, Corbin, *supra* at 48-9 states:

> But there are now two separate issues before the court; (1) What was the meaning that B in fact gave to the quoted promissory words? (2) Did A know or have reason to know that B gave the words that meaning? On each of these issues, the court should admit all relevant evidence; it should know all surrounding circumstances that may have influenced B's interpretation of the words, and also all that tend to prove or to disprove knowledge, or reason to know, on A's part. All other circumstances are immaterial and should be excluded.

> If the second of these issues is found affirmatively by the court, this determines *whose* meaning must be given effect; it is B's meaning. And the process of interpretation has been and still is the process of determining what B's understanding was. It is not the meaning that A gave; or the meaning that a normal user of English would have given; or the meaning that the court may hastily think is "plain and clear." All of these should be considered in the process of determining whether or not B in fact held any of them, and also in the process of determining whether or not A had "reason to know" the understanding that B had. But they are merely steps in the evidential search of B's meaning and A's reason to know it; no one of them is the one that must itself prevail. All of them together, even though they happen to be identical, may be wholly overpowered by other more compelling testimony.

Applying the stated principles to the case at bar, we conclude that the evidence fully supports a finding that defendant bank's agent Frost knew the interpretation that plaintiff was giving to the agreement, " . . . that there would be no interest on the notes after that date (11 June 1971)".

Assuming that the words of the agreement are unambiguous, the parol evidence rule is not applicable in this case for the reason that the intention of the parties was plaintiff's interpretation which defendant bank understood, not the language *per se* in the contract. The evidence tended to show that defendant bank knew, or had reason to know, that plaintiff understood the language in the contract to mean that interest would not accrue after 11 June 1971. Defendant bank in effect is estopped to assert a different meaning. 13 Williston, Contracts § 1577, at 505 (Jaeger ed. 1974 Supp.).

With respect to the court's finding " . . . [t]hat none of the beneficiaries of the will have appeared in this action to contest the plaintiff's interpretation of said agreement . . . ", it is true that the beneficiary Jack Gaddy is an appellant. While technically this finding was erroneous, we conclude that it was not prejudicial to defendants.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. LUTHER W. SIMPSON

No. 747SC1056

(Filed 19 March 1975)

1. **Criminal Law § 143— hearing to revoke suspended sentence — applicable rules of evidence**

At a hearing to revoke the suspension of a prison sentence for the alleged violation of a valid condition of suspension, the court is not bound by strict rules of evidence; rather, all that is required in such a hearing is that the evidence be such as reasonably to satisfy the judge in the exercise of his sound discretion that the defendant has wilfully violated without lawful excuse a valid condition upon which the sentence was suspended.

2. **Criminal Law § 142— suspension of sentence — time period**

Where the judgment does not specify the period of time that execution of the sentence is suspended upon conditions, execution of the sentence is suspended or stayed for the period of time that the court is empowered by G.S. 15-200 to suspend the sentence.

3. **Criminal Law § 143— consent to suspended sentence — attack on validity of revocation of suspension**

A defendant who expressly or impliedly consents to the suspension upon specified conditions of an otherwise valid sentence to imprisonment may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, 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.

4. **Criminal Law § 142— conditions of suspended sentence — relation to crime — reasonableness — no violation of constitutional rights**

Where defendant had been convicted of a violation of G.S. 14-100 on evidence showing that he obtained money from a homeowner under the false pretense that he was a painting contractor authorized by an insurance company to paint the exterior of the house, the condition of defendant's suspended sentence that his participation in the building or repair trade be limited to "employment with others" was clearly related to and grew out of the offense for which the defendant was convicted, was consistent with proper punishment for the crime, and the condition neither violated the defendant's constitutional rights nor was otherwise unreasonable.

5. **Criminal Law § 143— violation of condition of suspended sentence — sufficiency of evidence**

Evidence was sufficient to support a finding that defendant violated the condition of his probation that he not engage in the trade of building or repair contractor and limit himself to employment with others.

6. False Pretense § 2— indictment — promise to repay money in future — false representation of employment — indictment not defective

An indictment charging defendant with false pretense under G.S. 14-100 was not fatally defective in that the alleged false pretense was a promise to repay money in the future, since the bill clearly charged that defendant falsely represented himself to be working for an insurance company which had authorized him to make an advertising offer.

APPEAL by defendant from *Cowper, Judge.* Order entered 15 July 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 20 February 1975.

This is an appeal from an order activating a prison sentence imposed in a judgment entered on 15 February 1973 in the superior court wherein the defendant was charged with "unlawfully, wilfully, feloniously, knowingly, designedly and with the intent to cheat and defraud obtain $420.00 from Cad Harrell without making proper compensation or bona fide arrangements therefor. This property was obtained by means of a false pretense in that Bill Simpson claimed to be working for an insurance company in Morehead City and the Company was allowing him to take an advertising offer whereas he would paint the exterior of the home. Bill Simpson claimed he needed $420.00 to balance his books and that the money would be returned January 15, 1972, when in fact he did not represent an insurance company and was not authorized to make an advertising offer. The pretense made was calculated to deceive and did deceive against the form of the statute in such case made and provided and against the peace and dignity of the State."

The execution of the prison sentence was suspended upon certain conditions including the following: " . . . that he abstain from engaging in the trade of Building Contractor or Repairing Contractor and limit himself to employment with others . . . . "

On 4 June 1974, the defendant was served with a Notice and Bill of Particulars that the State would pray that the prison sentence be activated because the defendant had willfully violated the terms and conditions upon which the prison term was suspended in that the defendant had willfully engaged in the trade of Building Contractor or Repairing Contractor. After a hearing on the State's motion to activate the prison sentence, Judge Cowper made the following pertinent findings:

"THE COURT FINDS THAT the defendant wilfully and knowingly violated the terms of this suspended sentence

in that he represented himself as a painting contractor to Mrs. Fountain William Carroll and obtained checks totalling $640.00 from that person; that he did a limited amount of work and promised to repay the money and has never done so, this being in July, 1973.

THE COURT FURTHER FINDS as a fact that the defendant represented himself to Mrs. Maggie Wood as a painting contractor and solicited work and that he obtained from this person a total sum of $582.50, including a check for $210.00 given as security to be returned at the end of the job; that the work was never completed and the money was not returned.

THE COURT FURTHER FINDS that on June 28, 1973, Mr. Lennie Bunn was approached by the defendant at his residence regarding a painting contract and received $124.00 in cash to purchase paint with; that on August 24, 1973, Mr. Bunn paid the defendant by check $225.00; that no work has been done and no money has been repaid depite promises therefor."

Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Robert A. Farris for defendant appellant.

HEDRICK, Judge.

Defendant's first three assignments of error relate to the admission and exclusion of certain testimony at the hearing on the State's motion to activate the prison sentence.

[1] At a hearing to revoke the suspension of a prison sentence for the alleged violation of a valid condition of suspension, the court is not bound by strict rules of evidence. 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. *State v. Hewett,* 270 N.C. 348, 353, 154 S.E. 2d 476, 480 (1967). Suffice it to say, therefore, we have carefully examined each exception upon which these assignments of error are

based and conclude that the defendant has failed to show any prejudicial error. While some of the testimony challenged by these exceptions, in the strictest sense, may be considered hearsay, there is plenary competent evidence in the record to support all of the material findings of the trial court.

Next, defendant contends the suspended sentence was invalid because it was not suspended for a definite period of time. G.S. 15-200 in pertinent part provides:

> "The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and *may be continued or extended, terminated or suspended by the court at any time, within the above limit.*" (Emphasis ours.)

[2] Ordinarily, the suspension of a prison sentence upon conditions is valid for the period of time the court is empowered to suspend or stay the execution of the sentence. *State v. McBride*, 240 N.C. 619, 83 S.E. 2d 488 (1954). Thus, where the judgment does not specify the period of time that execution of the sentence is suspended upon conditions, we are of the opinion and so hold that execution of the sentence is suspended or stayed for the period of time that the court is empowered by G.S. 15-200 to suspend the sentence.

Defendant contends the court erred in revoking the suspension of the sentence for that the condition allegedly breached by the defendant was in violation of his constitutional right to work.

[3] A defendant who expressly or impliedly consents to the suspension upon specified conditions of an otherwise valid sentence to imprisonment may not thereafter attack the validity of an order putting such sentence into effect, entered after due notice and hearing, 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. Defendant's consent to the suspension of a prison sentence does not preclude him from contesting the reasonableness of the condition which he has broken when such breach is made the ground for putting the prison sentence into effect. A condition which is a violation of the defendant's constitutional right and, therefore, beyond the

power of the court to impose is *per se* unreasonable, *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970).

The primary purpose of a suspended sentence is to further the reform of the defendant. *State v. Smith,* 233 N.C. 68, 62 S.E. 2d 495 (1950). A defendant must not be oppressed or unduly burdened by the suspension. *State v. Everitt,* 164 N.C. 399, 79 S.E. 274 (1913).

[4] In the instant case, defendant has been convicted of a violation of G.S. 14-100 on evidence showing that he obtained money from a homeowner under the false pretense that he was a painting contractor authorized by an insurance company to paint the exterior of the house. It is obvious from the condition upon which defendant's prison sentence was suspended and the nature of the crime involved that the trial judge considered as an important aspect of the defendant's rehabilitation that the defendant not find himself in a position wherein he would more than likely repeat this same offense. Without totally preventing the defendant from engaging in the building or repair trade, the trial judge merely limited defendant's participation in the trade to "employment with others". This condition was clearly directly related to and grew out of the offense for which the defendant was convicted, see *State v. Smith, supra,* and was consistent with proper punishment for the crime, see *State v. Doughtie,* 237 N.C. 368, 74 S.E. 2d 922 (1953). We hold that under the circumstances of this case this condition neither violated the defendant's constitutional rights nor was otherwise unreasonable.

[5] Defendant contends that the evidence adduced at the hearing does not support a finding that he violated the condition of his probation that he not engage in the trade of Building or Repair Contractor and limit himself to employment with others. "Ordinarily, in hearings of this character, the findings of fact and the judgment entered thereupon are matters to be determined in the sound discretion of the court, and the exercise of that discretion in the absence of gross abuse cannot be reviewed here." *State v. Davis,* 243 N.C. 754, 756, 92 S.E. 2d 177, 178 (1956) (citations omitted). We have carefully reviewed the evidence introduced at the hearing and find no abuse of discretion. The court's findings of fact are amply supported in the record and such findings support the order activating defendant's prison sentence.

[6] When this appeal was heard in this court, defendant's counsel argued that the original bill of indictment was fatally defective because the alleged false pretense was a promise to repay $420.00 in the future. A motion in arrest of judgment is one made after verdict and to prevent entry of judgment and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503 (1940). Judgment may be arrested in a criminal case when a fatal defect appears on the face of the record proper. When a motion in arrest of judgment is based on a fatal defect appearing on the face of the record proper, it may be made at any time, even in the appellate court; and, in the absence of such a motion, the appellate court *ex mero motu* will examine the record proper for such defect. Therefore, in the light of defendant's argument, we have examined the bill of indictment and have determined that it is sufficient to support the judgment. While a promise to do something in the future, i.e., repay money, cannot be a false pretense sufficient to support a charge under G.S. 14-100 because the false pretense must be of a past or existing fact, *State v. Hargett,* 259 N.C. 496, 130 S.E. 2d 865 (1963); *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954), the bill here clearly charges that the defendant falsely represented himself to be working for an insurance company which had authorized him to make an advertising offer.

The order appealed from is

Affirmed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. JACQUETTA ANNE DAVIS

No. 7414SC1001

(Filed 19 March 1975)

1. Narcotics § 4— heroin found in bedroom — constructive possession — sufficiency of evidence

In a prosecution for possession of heroin, evidence was sufficient to raise an inference that defendant possessed heroin hidden in the base of an artificial potted plant located in a bedroom ordinarily occupied by the defendant.

2. **Criminal Law § 75 —heroin in bedroom — statement by defendant that bedroom was hers — voluntariness**

A statement made by defendant to an officer that the bedroom where heroin was found in a glassine bag was defendant's was volunteered by defendant and was not the result of custodial interrogation.

3. **Criminal Law § 112— proof of each fact of evidence beyond reasonable doubt not required**

Where the State relied upon several factors to show that the defendant was in constructive possession of heroin, it was not necessary for the State to prove each separate fact beyond a reasonable doubt; rather it was enough, if upon the whole evidence, the jury was satisfied beyond a reasonable doubt of defendant's guilt.

4. **Criminal Law § 112— circumstantial evidence — failure of defendant to request instruction**

Having instructed the jury that "proof of possession may be either by circumstantial or direct evidence," the trial court was not required further to explain to the jury "what circumstantial evidence was and how it should be considered by the jury" in the absence of a request by defendant for such instruction.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 22 August 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 February 1975.

This is a criminal prosecution wherein the defendant, Jacquetta Anne Davis, was charged in a bill of indictment, proper in form, with the felony of possession of the controlled substance heroin. At the trial, defendant entered a plea of not guilty. The jury returned a verdict of "guilty as charged"; and from a judgment imposing a prison sentence of five (5) years, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Alfred N. Salley for the State.

Daniel K. Edwards for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of her motions for judgment as of nonsuit. When considered in the light most favorable to the State, the evidence tends to show the following:

At approximately 7:25 p.m. on 12 April 1974, Officer J. C. Fuller and other officers of the Durham Police Department, armed with a search warrant, went to an apartment located at 2805 Ashe Street in Durham. Defendant and her mother, Mable

Davis Wright, lived in the apartment. When the officers arrived, the defendant, her mother, her two brothers, a cousin, and a male friend of the defendant's mother were present. Upon a search of the premises, Officer Fuller found a white envelope containing two needles and syringes and two bottle caps, referred to as "cookers", outside the apartment about four feet from the kitchen door. The "cookers" contained a small residue of heroin. In one of the bedrooms of the apartment, Officer Fuller also found a glassine envelope containing heroin hidden in the base of an artificial potted plant. Defendant told Officer Fuller that she occupied the bedroom in which he found the glassine envelope containing the heroin. Before defendant was taken to the police station, she put on a coat or "some kind of garment", which she obtained from a closet in this same bedroom. While in the police car, defendant told Officer Fuller: "You didn't find my stash of heroin." Evidence was also introduced that the defendant was a heroin addict and that during April of 1974 she was taking methadone under the supervision of the North Carolina Department of Mental Health.

The defendant's mother, who was also charged with possession of heroin and who was found not guilty, testified that she and her daughter, the defendant, ordinarily occupied the apartment and that the defendant ordinarily occupied the bedroom where the heroin was discovered. However, on some occasions, when her two sons, ages eight and fourteen, came to spend the night with her, they occupied her daughter's bedroom. The apartment contained two bedrooms, a living room, and a kitchen.

[1] Constructive possession of contraband material exists when there is no actual personal dominion over the material but when there is an intent and capability to maintain control and dominion over it. *State v. Crouch,* 15 N.C. 172, 189 S.E. 2d 763 (1972). An accused has possession of contraband material within the meaning of the law when he has both the power and the intent to control its disposition or use. *State v. Summers,* 15 N.C. App. 282, 189 S.E. 2d 807 (1972). Applying these principles to the evidence adduced at defendant's trial, we are of the opinion the evidence is sufficient to raise an inference that the defendant possessed the heroin found in the pot containing the artificial plant located in the bedroom ordinarily occupied by the defendant. This assignment of error is not sustained.

[2] Defendant contends the court erred in allowing Officer Fuller to testify to a conversation he had with the defendant wherein she stated that the bedroom where the heroin was found in the glassine bag was hers. Defendant argues that this statement was obtained as a result of a custodial interrogation and was not competent in the absence of a showing by the State and a finding by court that she had understandingly and voluntarily waived her rights against self-incrimination. We do not agree.

Before any statements attributed to defendant were admitted into evidence, the trial court, following the approved procedure, conducted a voir dire hearing in the absence of the jury regarding the conversation between the defendant and the officer to determine whether any of the statements made by the defendants were admissible. After the hearing, in which only the State offered any evidence, the trial court found and concluded "that the statements made on the scene by each defendant was lawful and competent and voluntarily made and competent to be received in evidence". The conclusion made by the trial judge is supported by the evidence adduced at the voir dire hearing. While the record is confusing as to whether the statement challenged by this exception was made before or after her arrest, it is nevertheless clear that the statement was volunteered by the defendant and was not the result of custodial interrogation. This assignment of error has no merit.

By assignments of error two and three, defendant contends the court failed to declare and explain the law arising on the evidence as required by G.S. 1-180.

[3] First, defendant argues that the trial judge should have instructed the jury that it must find beyond a reasonable doubt the specific evidential facts relied upon by the State to show that defendant was in constructive possession of the heroin. Every element of the crime charged must be proved beyond a reasonable doubt but it is not necessary that every circumstance relied upon for conviction be established by that high standard of proof. *State v. Crane,* 110 N.C. 530, 15 S.E. 231 (1892); *State v. Trull,* 169 N.C. 363, 85 S.E. 133 (1915); 2 Stansbury's N. C. Evidence (Brandis Revision) Sec. 211. Thus, in this case, where the State relied upon several factors to show that the defendant was in constructive possession of the heroin, it was not necessary for the State to prove each separate fact beyond a reasonable doubt. It is enough, if upon the whole evidence, the jury is satis-

fied beyond a reasonable doubt of the defendant's guilt. Stansbury, *supra.*

[4] Next, defendant argues that having instructed the jury "proof of possession may be either by circumstantial or direct evidence", the trial court should further have explained to the jury "what circumstantial evidence was and how it should be considered by the jury". In *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207 (1947), quoted with approval in *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971). Justice Denny, later Chief Justice, addressing himself to a similar contention stated:

> "This defendant also assigns as error the failure of the trial Judge to define circumstantial evidence and to instruct the jury how to appraise or evaluate such testimony. In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof." [citation omitted.]

Here, the defendant made no request for special instructions regarding circumstantial evidence. Indeed, we can understand why he did not. The charge of the court with respect to the burden of proof was fair, adequate, and complete. The State relied on direct evidence tending to show that the defendant was in constructive possession of the heroin. The mere fact that there was evidence of other facts and circumstances tending to establish defendant's guilt, i.e., the syringes and "cookers" found on the premises and defendant's addiction to heroin, did not make it necessary for the trial judge to define circumstantial evidence and to instruct the jury how to appraise or evaluate such evidence. These assignments of error are overruled.

The defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

JOE NATHAN SANDERS v. BENJAMIN J. DAVIS

No. 7410SC1024

(Filed 19 March 1975)

1. **Animals § 2— liability for injuries caused by dog**

The test of the liability of the owner of a dog for injuries caused by the dog is whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result.

2. **Animals § 2— injuries caused by dog — knowledge dog would rush at persons — summary judgment**

In an action to recover damages for personal injuries sustained by plaintiff when he was frightened by a German shepherd dog owned by defendant and fell down the steps leading to defendant's house, there was a genuine issue of material fact as to whether defendant knew or should have known that his dog, when released, would rush at plaintiff with every indication of imminent attack while plaintiff was on the steps leading to defendant's house, and summary judgment was improperly entered for defendant.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 27 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 18 February 1975.

This is a civil action to recover damages for personal injuries allegedly sustained by the plaintiff, Joe Nathan Sanders, when upon being frightened by a German shepherd dog owned by the defendant, Benjamin J. Davis, he fell down the steps leading to the defendant's front porch.

Plaintiff alleged in his complaint, filed 29 December 1972, that at about 4:15 p.m. on 14 May 1970, at the request of the defendant, he went to the defendant's home located at 2346 Wade Avenue, Raleigh, to discuss a potential investment in a corporation being formed by the defendant. The defendant's house is "situated on a hill approximately 15 feet above the level of Wade Avenue and is approached by an excavated driveway leading from Wade Avenue to a garage and from said garage driveway by two flights of concrete steps approximately three feet in width, adjacent to and on the east side of said driveway, ending at the front porch of said dwelling. . . . " Plaintiff parked his automobile in defendant's driveway; and, as he reached the top of the first flight of steps leading to the front porch, the defendant opened the front door and allowed his German shep-

herd dog to "rush suddenly out of the door . . . toward the plaintiff". The dog, which weighed approximately 100 pounds, "rushed toward the plaintiff, barking loudly and viciously with fangs bared as if to attack . . . " thereby causing the plaintiff to step backwards and fall off the stairs. The defendant knew or should have known that the plaintiff was on the stairs when he opened the front door and knew or should have known that his dog habitually rushed at strangers, giving every evidence of imminent attack.

Plaintiff further alleged that the defendant was negligent in that he maintained narrow steps to his home; maintained a large, vicious German shepherd on his premises without proper restraint; and failed to restrain said dog when the defendant knew the plaintiff was in a position of danger.

Defendant filed answer and denied the material allegations of the complaint.

Defendant filed a motion for summary judgment, which he supported with a deposition of the plaintiff. Plaintiff did not file any affidavits or other evidence in opposition to defendant's motion.

After a hearing, the trial court granted summary judgment for defendant. Plaintiff appealed.

Purrington, Hatch & Purrington by Edwin B. Hatch for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by Samuel G. Thompson and Maupin, Taylor & Ellis by Charles B. Neely, Jr., for defendant appellee.

HEDRICK, Judge.

The sole question for resolution on this appeal is whether the trial court erred in allowing defendant'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). Therefore, in the case at bar, plaintiff,

the party opposing the motion, did not have the burden of coming forward with evidence in support of his claim until the defendant, the moving party, produced evidence of the necessary certitude which negatived plaintiff's claim in its entirety. *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).

In passing upon a motion for summary judgment, all material filed in support of and in opposition to the motion must be viewed in the light most favorable to the non-moving party and such party is entitled to the benefit of all inferences in his favor that may be reasonably drawn from such material. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972); *Whitley v. Cubberly, supra.*

Applying the foregoing principles to the present case, we must determine whether plaintiff's deposition, which was the only evidentiary material offered either in support of or in opposition to the motion, shows that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law. The pertinent portions of plaintiff's deposition, considered in the light most favorable to him, tends to show that his sole purpose for visiting the defendant on 14 May 1970 was to discuss the formation of a corporation by the defendant. As the plaintiff got out of his car, he heard a dog barking inside the house. The defendant came to the front door, looked outside, and by the expression on his face apparently recognized the plaintiff. The defendant opened the door and the German shepherd, which was still barking, darted towards the plaintiff. At this point, the plaintiff, who had reached the top of the first flight of stairs to the front porch, stepped backwards and fell down the stairs. Plaintiff had no personal knowledge of the dog's habits and had "not talked to anyone about the dog." He had visited the defendant on one previous occasion "either in the latter part of '69 or the first part of 1970", and at that time, the defendant did not own a German shepherd.

[1] Although it is generally stated that the gravamen of an action to recover for injuries inflicted by a domestic animal is technically not classified as negligence but is the wrongful keeping of an animal with knowledge of its malicious or dangerous propensities, *Swain v. Tillett,* 269 N.C. 46, 152 S.E. 2d 297 (1967), the standard of a reasonable person must still be applied, *Miller v. Snipes,* 12 N.C. 342, 183 S.E. 2d 270 (1971).

"The test of the liability of the owner of the dog is . . . whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog. The size, nature and habits of the dog, known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent." *Sink v. Moore,* 267 N.C. 344, 350, 148 S.E. 2d 265, 270 (1966).

[2] We are of the opinion that the defendant did not come forward with sufficient evidentiary material to negative plaintiff's claim in its entirety. *Tolbert v. Tea Co., supra.* There is nothing in the plaintiff's deposition to establish that there is no genuine issue of fact as to whether the defendant knew or should have known that his German shepherd, when released, would rush at the plaintiff with every indication of imminent attack while the plaintiff was on the steps to the defendant's house. Although plaintiff's deposition indicates that the *plaintiff* did not know the dog would act the way it did, the record is silent as to the *defendant's* knowledge of his dog's habits. Consequently, we hold that the defendant, the movant for summary judgment, failed to offer evidence of sufficient certitude to establish the absence of a genuine issue as to a material fact, and therefore hold that summary judgment for defendant was inappropriate. This is true even though the plaintiff did not offer any evidence in opposition to the motion.

Reversed.

Judges PARKER and CLARK concur.

OLA BLANTON LUCAS, WIDOW OF LEONARD M. LUCAS, DECEASED, EMPLOYEE v. LI'L GENERAL STORES, A DIVISION OF GENERAL HOST CORPORATION, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7427IC1043

(Filed 19 March 1975)

Master and Servant § 49— workmen's compensation — dismissed employee rehired without authority

Decedent was not an "employee" within the meaning of the Workmen's Compensation Act when he was shot and killed during a robbery while operating the cash register at defendant's store where decedent had been dismissed as an employee at another of defendant's stores for selling beer to a minor, decedent's wife was employed at defendant's store, defendant's district manager told decedent's wife that decedent could work at the store with her but that decedent would have to be paid through the wife's check, the district manager had no authority to allow decedent to work in the store, and both decedent and his wife were aware that the district manager had exceeded his authority in permitting decedent to work in the store. G.S. 97-2(2).

APPEAL by defendants from order of North Carolina Industrial Commission entered 12 October 1974. Heard in the Court of Appeals 19 February 1975.

On 26 April 1973 Leonard M. Lucas was shot during an apparent robbery attempt on the premises of defendant Li'l General Stores on Carolina Avenue in Gastonia. He died the next day. Plaintiff Ola Blanton Lucas, as surviving spouse, filed claim with the Industrial Commission under the North Carolina Workmen's Compensation Act. G.S., Chap. 97. Hearings were held before Deputy Commissioner Ben E. Roney, Jr., on 12 November 1973, and Deputy Commissioner A. E. Leake on 7 February 1974.

Deputy Roney entered the following findings of fact and conclusions of law:

"FINDINGS OF FACT

1. Decedent was dropped from the payroll of defendant employer on February 27, 1973 on account of an allegation that he sold beer to a minor.

2. During the evening of April 26, 1973 decedent was shot during a robbery while he was operating the cash reg-

ister at the Highland Avenue Store. The shooting resulted in death on April 27, 1973.

3. Prior to and following decedent's death Mr. George Shaver managed the Gastonia-Asheville district of Li'l General Stores. There existed five stores in the Gastonia area.

4. Prior to and following decedent's death Li'l General Stores were open seven days a week for 16 hours a day, or 28 eight-hour shifts based upon two-week pay periods.

5. During February 1973 Mrs. Lucas started working for defendant employer. During the pay period beginning February 11, 1973 and ending February 24, 1973 Mrs. Lucas worked ten shifts at the Carolina Avenue Store. During the pay period beginning February 25, 1973 and ending March 10, 1973 Mrs. Lucas worked 13 shifts at the Carolina Avenue Store. During the pay period beginning March 11, 1973 and ending March 24, 1973 Mrs. Lucas worked six shifts at the Highland Avenue Store and one shift at the Carolina Avenue Store. During the pay period beginning March 25, 1973 and ending April 7, 1973 Mrs. Lucas worked two shifts at the Ozark Avenue Store and 15 shifts at the Highland Avenue Store. During the pay period beginning April 8, 1973 and ending April 21, 1973 Mrs. Lucas worked 24 shifts at the Highland Avenue Store.

6. On the evening of April 8, 1973 Mr. Shaver told Mr. and Mrs. Lucas that they were to open the Highland Avenue Store on the morning of April 9, 1973. Mr. Lucas, decedent, was to get paid through Mrs. Lucas; [sic] check because the allegation of selling to a minor prohibited Mr. Lucas from being on the payroll. Mr. Lucas was to work two shifts per day on Thursdays, Fridays, Saturdays and Sundays at two dollars per hour.

7. On the evening of April 8, 1973 Mr. Shaver gave the keys and safe combination to the Highland Avenue Store to the Lucases.

8. On the morning of April 9, 1973 Mr. and Mrs. Lucas opened the Highland Avenue Store. Decedent was on the premises of the Highland Avenue Store frequently thereafter until the fatal shooting which occurred on April 26, 1973. While on the premises decedent shelved stock, op-

erated the cash register and otherwise engaged in activities which involved a direct benefit to defendant employer.

9. Mr. Lucas entered into an oral contract of employment with defendant employer on April 8, 1973 at an average weekly wage of $128.00. The contract of employment terminated on April 27, 1973.

10. Decedent was injured by accident arising out of and in the course of the employment. The injury by accident was the cause of death.

11. Mrs. Lucas is the widow of decedent and is thereby presumed to be decedent's whole dependent.

* * * * * * * * * *

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

CONCLUSIONS OF LAW

1. Mr. Lucas, decedent, entered into an oral contract of employment with defendant employer on April 8, 1973 at an average weekly wage of $128.00. N.C.G.S. 97-2(2), *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965).

2. Decedent was injured by accident arising out of and in the course of the employment because the fatal gunshot wound was inflicted during a robbery, said event not occasioned by a force unconnected with the employment, while decedent was actively carrying out the duties of cash register operator. *Robbins v. Bossong Hosiery Mills*, 220 N.C. 246, 17 S.E. 2d 20 (1941); *Goodwin v. Bright*, 202 N.C. 481, 163 S.E. 576 (1932); *West v. East Coast Fertilizer Co.*, 201 N.C. 556, 160 S.E. 765 (1931); *Rosser v. Wagon Wheel*, 19 N.C. App. 507, ____ S.E. 2d ____ (1973).

3. As presumptive whole defendant Mrs. Lucas is entitled to the entire death benefit which amounts to $56.00 per week commencing on April 26, 1973 and continuing for 350 weeks. N.C.G.S. 97-38; N.C.G.S. 97-39."

The Full Commission adopted the opinion and award of Deputy Roney as its own and affirmed the results. Defendants appealed to this Court.

Basil L. Whitener and Anne M. Lamm for plaintiff appellee.

Mullen, Holland & Harrell, P.A., by James Mullen, for defendant appellants.

ARNOLD, Judge.

The sole question presented by this appeal is whether there existed an employer-employee relationship between defendant Li'l General Stores and decedent Leonard M. Lucas at the time of the shooting which resulted in Lucas' death. This is a jurisdictional question "to be determined by the rules governing the establishment of contracts, . . . " *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934). Jurisdictional findings are not conclusive on appeal, but the appellate court may review the evidence and make its own findings as to jurisdiction. *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966); *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). The Industrial Commission found and concluded that Mr. Lucas entered into a contract of employment with defendant employer. Having carefully reviewed the evidence, we do not agree.

The term "employee" is defined by G.S. 97-2(2) as one who is "engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, . . . " Mrs. Lucas testified that when she was assigned to manage the Carolina Avenue Store she discussed with George Shaver, her immediate supervisor and defendant employer's district manager, the possibility of having her husband employed as her assistant. Mr. Lucas had been dismissed for selling beer to a minor at another Li'l General Store. Shaver told Mrs. Lucas, "He can't work over there but four days a week." She asked him, "What about Mr. Pepper and them [Shaver's superiors]?" to which he replied, "Well, what they don't know won't hurt them." Shaver also stated, "I'll have to run his pay through your check."

Shaver testified that he had no authority to allow Mrs. Lucas to keep her husband in the store with her. Myron E. Jacobson, the divisional manager, testified that Shaver had no authority to put Mr. Lucas back on the payroll.

It is well settled that one who deals with an agent, knowing that his authority is limited and he is acting beyond its scope, cannot bind the principal. *Texas Co. v. Stone*, 232 N.C. 489, 61

S.E. 2d 348 (1950); *Thompson v. Assurance Society,* 199 N.C. 59, 154 S.E. 21 (1930); *see* Restatement (Second) of Agency § 166 (1958); *cf. Research Corp. v. Hardware Co.,* 263 N.C. 718, 140 S.E. 2d 416 (1965). The evidence clearly shows that both Mr. and Mrs. Lucas were aware of defendant employer's rule, that employees would be dismissed for ABC violations, and that Shaver exceeded his hiring authority by circumventing the rule.

The case of *Michaux v. Bottling Co.,* 205 N.C. 786, 172 S.E. 406 (1934), cited by plaintiff, is distinguishable. In that case, truck drivers hired boys, with the knowledge and consent of the employer, to assist in distribution of the employer's products. When one of the boys fell while attempting to climb in the truck, it was held that he suffered an accident that arose out of and in the course of his employment. In the instant case, there is no showing that defendant employer had any knowledge of the arrangement between Shaver and the Lucases or that Shaver's superiors ratified his unauthorized acts. *See generally* 6 Strong, N. C. Index 2d, Principal and Agent, § 6, pp. 413-14. Thus, Shaver lacked both actual and apparent authority to enter into a contract for hire on behalf of Li'l General Stores with respect to decedent Leonard M. Lucas.

We find therefore that decedent was not an "employee" within the meaning of the Workmen's Compensation Act. There being no employer-employee relationship, the Industrial Commission could not take cognizance of the claim. The order granting plaintiff's claim is reversed.

Reversed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. DONALD JULE WATTS

No. 7410SC1029

(Filed 19 March 1975)

Larceny § 7— taking property to coerce payment by owner — intent to return — no larceny

The State's evidence was insufficient for the jury in a prosecution for misdemeanor larceny of a television set where it tended to show

that defendant took the set for the purpose of coercing the owner to pay him $150 in return for defendant's promise not to tell others that the owner was a homosexual and that defendant intended to hold the set until the owner paid.

APPEAL by defendant from *Webb, J.* Judgment entered 6 September 1974, in Superior Court, WAKE County. Heard in the Court of Appeals 18 February 1975.

Defendant pled not guilty to the charge in the warrant of larceny of a television set having a value of $157.

For the State, the testimony of James W. Harris tended to show that around midnight, he picked up the defendant near the Union Bus Terminal in Raleigh. After riding around for awhile, Harris asked the defendant if he was interested in homosexual relations, and defendant replied in the affirmative. They rode to Harris's house, arriving there about 12:45 a.m. They went into the bedroom and the defendant began looking at some "sex books". Harris made a sexual advance; defendant submitted, and during homosexual play the defendant suddenly grabbed Harris's head in a hammerlock, then threatened him him with a hammer and a pair of scissors and demanded money; Harris gave defendant his wallet, which contained only $1.00, and credit cards; defendant demanded more money and threatened to call Harris's boss and the police and inform them of his homosexual acts; Harris informed the defendant that he was to receive that morning his paycheck in the sum of $150, which he would give to him; defendant agreed that he would take the money but forced Harris to get his television set and place it and other items in a paper bag, which defendant would hold as security until Harris could get the money. They agreed to make the exchange in a parking lot near the bus station at 9:30 a.m. Then Harris drove the defendant back downtown where he got out of the car with the bag containing the television set and other items. Harris further testified that he was terrified of the man; that he avoided any kind of fighting; and that he did not want to do anything that would cause any violence.

Harris reported these facts to the police and they formulated a plan to observe Harris and the defendant make the exchange of money and property. Defendant met Harris in the parking lot at 9:30 a.m. as agreed. When the plan for the exchange of the money for the television set went awry, a city policeman approached the defendant in the bus station. At the request

of the officer, the defendant went to the police station, admitted that he had taken the television set and gave the officer the key to a locker in the bus terminal. There the officer found the television set.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit, upon denial offered no evidence, and renewed his motion, which was again denied. The jury found the defendant guilty as charged, and from a judgment imposing a term of imprisonment, the defendant appealed.

Attorney General Edmisten by Associate Attorney Noel Lee Allen for the State.

Crisp, Bolch and Smith by Benjamin F. Clifton, Jr., for the defendant.

CLARK, Judge.

Defendant assigns as error the failure of the trial court to grant his motion for judgment of nonsuit on the grounds that there was no evidence of any intent to permanently deprive the owner of the television set.

Larceny is a common law offense. In *State v. Griffin,* 239 N.C. 41, 45, 79 S.E. 2d 230, 232 (1953), the court defines larceny as " . . . a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property *and* to appropriate it to the taker's use fraudulently. . . . " (Emphasis added).

It is obvious that common law larceny does not include every wrongful taking and carrying away of the personal property of another, and that such wrongs, which do not constitute larceny or the violation of some criminal statute, have long been the subject of judicial concern. For instance, in *State v. Long,* 2 N.C. 154 (1795), the defendant was tried in Hillsboro on an indictment charging him with stealing a mare from Samuel Parks in Randolph County. The jury, by its special verdict, found that the defendant borrowed the horse to ride to the home of John Candles, four miles away, and was to return the horse after riding her thither; but that after riding the mare to Candles' home, he forthwith rode her into the County of Lincoln, a distance of some eighty miles, and there sold the mare to Andrew Hoyle, as his own property. Since there was a

division of opinion of the two judges present, they ordered a copy of the special verdict transmitted " . . . to each of the judges of this State, and that they be requested to return their opinions to this Court at the next term. . . . At the next term, October, 1795, the opinion of all the judges was had on this special verdict. Ashe and Macay, JJ., were of the opinion it was felony; Williams and Haywood, JJ., that it was not; and the prisoner was recommended to mercy, and obtained his pardon." 2 N.C. at 157.

In some jurisdictions, including North Carolina, the "intent to appropriate the goods to his own use" has been eliminated and is not now an essential element of the crime of larceny. In *State v. Lee*, 282 N.C. 566, 571, 193 S.E. 2d 705, 708 (1973), the Court said:

> " . . . To constitute larceny it is not required that the purpose of the taking be to convert the stolen property to the pecuniary advantage or convenience of the taker. It is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. . . . "

In a number of cases which purport to apply common law principles, persons have been held guilty of larceny in spite of the fact that it was not the intention of the taker permanently to deprive the owner of his property. 52A C.J.S., Larceny, § 27 (1968). There appears to be some erosion of the common law principle of permanent deprivation in this State. In *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966), the defendant, in the course of a robbery, disarmed and took the rifle of a filling station owner. The rifle was found shortly thereafter near the wrecked getaway car. Sharp, J., (now Chief Justice) in the opinion for the Court which found no error, wrote: "In robbery, as in larceny, the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property." 268 N.C. at 170. After reviewing early English and American decisions, she added: "In contrast to the severe penalties of the old English law, the punishments provided for robbery and larceny by the law today do not evoke such nice distinctions in defining felonious intent. Where the evidence does not permit the inference that defendant ever intended to return the property forcibly taken but requires the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there is no justification for indulging the fiction

that the taking was for a temporary purpose, without any *animus furandi* or *lucri causa*." 268 N.C. at 172.

In the present case, the defendant was charged only with misdemeanor larceny of a television set. All of the evidence tends to show that he took the set for the purpose of coercing the owner to pay him $150.00, intending to hold the set until the owner paid. There is a split of authority as to whether such a taking for the purpose of coercing the owner would constitute larceny. See 52A C.J.S., Larceny, § 27 b.(2) (1968). But since *State v. Smith, supra,* is not applicable here and we do not judicially expand the common law principles of larceny to include this factual situation, we conclude that there was insufficient evidence on the essential elements of larceny to warrant submitting the case to the jury and that consequently the court erred in its failure to grant defendant's motion for judgment of nonsuit.

This conclusion eliminates the need for comment on the assigned error of the trial court in its instructions relating to permanent deprivation. However, we consider it appropriate to point out that the trial court, in charging the jury in larceny and robbery cases where the factual situation raises a question as to the intent to deprive permanently, should instruct on this element and add that while temporary deprivation will not suffice, if the defendant did not ever intend to return the property and was totally indifferent as to whether the owner ever recovered it, then that would constitute an "intent to permanently deprive."

Reversed.

Judges PARKER and HEDRICK concur.

MICHAEL ROBERTS AND BRENDA ROBERTS v. JULIA ROBERTS AND JUANITA ROBERTS

No. 7428DC1016

(Filed 19 March 1975)

1. Infants § 9— child custody — hearing disability — ability to provide care — past care

In a child custody proceeding, findings that the child has a severe hearing disability for which she has been fitted with a hearing aid and

has received speech and language therapy, findings pertaining to petitioners' ability to provide proper medical care and the availability of special treatment for the child's disability where petitioners live, and findings pertaining to the type of care the child had received in the past and the abilities of the parties to care for the child in the future were relevant to the court's determination of the fit and proper persons to have custody of the child.

2. **Infants § 9— child custody — sufficiency of evidence to support findings**

The evidence supported the court's findings in a proceeding in which the court awarded custody of a child to its maternal uncle and aunt rather than to its mother or maternal grandmother.

APPEAL by respondents from *Weaver, Judge.* Judgment entered 28 August 1974 in District Court, BUNCOMBE County. Heard in the Court of Appeals 18 February 1975.

This is a civil action, filed pursuant to G.S. 50-13.5, seeking custody of a minor child. Following the presentation of evidence by both petitioners and respondents, the trial court entered the following order awarding custody of the minor child to petitioners:

"THIS CAUSE coming on to be heard on a Petition filed on the 15th day of July, 1974 for custody of Angela D. Roberts, a minor child born on September 18, 1971, to Juanita Roberts, before the Undersigned Judge Presiding over the District Court of Buncombe County and it appearing to the Court that all parties are before the Court and that the Petitioners are represented by George W. Moore, Esq., and that the Respondents are represented by Floyd Brock, Esq., and the Court after hearing the evidence of all parties hereto makes the following

FINDINGS OF FACTS

1. That the Petitioners are citizens and residents of Prince George's County, Maryland and are maternal uncle and aunt of the said minor child.

2. That the Respondents are citizens and residents of Buncombe County, North Carolina; that the Respondent, Juanita Roberts is the mother of the said minor child and that the Respondent, Julia Roberts is the maternal grandmother of the said minor child.

3. That the said minor child is an illegitimate child and that the present whereabouts of the said father are not known.

4. That the said child is physically present in the State of North Carolina.

5. The said minor child has a profound sensorineural hearing loss bilaterally which loss was identified when the said child was approximately 13 months old at the Speech and Hearing Clinic, Memorial Mission Hospital in Asheville; the child was at that time fitted with a hearing aid and received speech and language therapy.

6. On or about the 31st day of December, 1973, the Petitioners requested permission to take the said child to their home in Hyattsville, Maryland, in order to provide necessary medical aid and training for the child; the Respondent Juanita Roberts agreed for the Petitioners to do so and executed a statement to such effect.

7. The Petitioners and the said child enrolled in the Parent-Infant Program for the Hearing Impaired in Landover, Maryland, which program consisted of intensive auditory training and speech and language stimulation activities.

8. The Petitioners have enrolled the said child in the Prince George's County Pre-School Total Communication class.

9. That the Petitioners have enrolled the minor child in a testing and research program for children with hearing losses at Johns Hopkins University Hospital.

10. On or about the 26th day of May, 1974, the Respondents came to the Petitioners' home in Maryland, removed the said child and brought her back to North Carolina where she has remained in the custody of the Respondent, Julia Roberts.

11. The Petitioners maintain a suitable and proper home in Hyattsville, Maryland, and are financially able and willing and anxious to support the said minor child and to care for her and provide her with the necessary training and assistance to allow her to develop to her fullest capability and potential; the Petitioners are fit and proper per-

sons to be awarded the care and custody of the said minor child.

12. That the Respondent, Juanita Roberts has not at any time since the birth of the said minor child provided a fit or suitable home environment for the said child and has not at any time had physical custody of the said child; the Respondent Juanita Roberts is a lesbian; the said Respondent Juanita Roberts does not maintain a fit and proper home for the said child.

13. That the Respondent Julia Roberts owns a home in Asheville, North Carolina wherein she resides with her daughter, Jean Roberts who is unmarried and has a minor child.

14. That the Respondent Julia Roberts is a fit and proper person to be awarded custody of the said minor child; however, the said Respondent is ..... years of age and employed full time at the Vanderbilt Shirt Company in Asheville and is not able to provide the everyday care necessary for the said minor child.

15. That the Petitioner Michael Roberts is employed as an electrical engineer with the Westinghouse Corporation in Washington, D. C. and has an annual income of $11,000.00.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That this cause is properly before this Court and this Court has jurisdiction of all parties hereto.

2. That the Petitioners, Michael Roberts and Brenda Roberts are fit and proper persons to be awarded the custody of the minor child Angela D. Roberts and it would be in the best interest of the said minor child to be placed in the custody of the said Petitioners.

3. That Respondent, Juanita Roberts, the mother of the said minor child is an unfit person to have the custody of the said child and the said Respondent does not maintain a suitable or proper home for the said child.

BASED UPON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Petitioners Michael Roberts and Brenda Roberts are hereby awarded custody of the minor child, Angela D. Roberts and that the said Petitioners shall maintain custody of the said child at their home in Hyattsville, Maryland.

This the 28 day of August, 1974.

s/ ZEBULON WEAVER, JR.
Judge Presiding".

Respondents appealed.

George W. Moore for petitioner appellees.

Pope and Brown, by Ronald C. Brown, for respondent appellants.

MORRIS, Judge.

[1] In their first assignment of error respondents maintain the trial court included irrelevant and improper findings of fact in its order dated 28 August 1974, awarding custody of Angela Roberts to the petitioners. More specifically, respondents contend that findings of fact numbers 5, 6, 7, 8, 9, 11, 13 and 15 and conclusions of law number 2 are irrelevant. We disagree. We conclude that the fact that the child has a severe hearing disability, for which she has been fitted with a hearing aid and has received speech and language therapy, was a relevant factor for the court to consider in determining whether petitioners were fit and proper persons to have custody of the child. Findings which pertain to the petitioners' ability to provide proper medical care and to the availability of special treatment for the child's disability in Maryland likewise were relevant to this question. Finally, in our opinion, an inquiry into the type of care the child has received in the past and the abilities of the respective parties to this action to care for the child in the future also was proper in this case. This assignment of error is overruled.

[2] In their sole remaining assignment of error respondents contend certain of the trial court's findings of fact and conclusions of law are not supported by competent evidence. Respondents specifically point to findings of fact numbers 6, 11,

12 and 14 and conclusions of law numbers 2 and 3. It is well settled that in a hearing to determine the right to custody of children, the court's findings of fact are conclusive on appeal if supported by competent evidence. *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871 (1963). At the hearing petitioners testified that the child was illegitimate and that her mother was a lesbian; that the child had lived with her grandmother in North Carolina; that the child had a severe hearing disability; that with the mother's consent they took the child to their home in Maryland for treatment and enrolled her in various special programs and worked with her at home, and that the child was showing improvement when the grandmother came and took her back to North Carolina. Petitioners also testified regarding their ability to provide and care for the child and the inabiltiy of respondents to properly provide and care for the child.

In our opinion, there is competent evidence to support each of the trial court's findings of fact. Therefore, this assignment of error is overruled and the decision of the trial court is hereby affirmed.

Affirmed.

Judges BRITT and ARNOLD concur.

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

No. 7419SC977

(Filed 19 March 1975)

1. Deeds § 20— restrictive covenant prohibiting trailer — one trailer in subdivision — no radical change in character

In an action to enjoin defendants from maintaining a mobile home on their property which was subject to a subdivision restrictive covenant prohibiting use of the property for trailers, evidence that one other trailer is used as a residence in the subdivision some 800 feet from plaintiff's property was insufficient to show such a radical change in the character of the subdivision as to defeat the objects and purposes of the restriction.

2. **Trial § 40; Rules of Civil Procedure § 49— waiver of submission of issue**

Where defendants in an action to enforce a restrictive covenant neither objected to the issue of waiver submitted to the jury nor requested the court to submit an issue of substantial change in the character of the neighborhood, they waived their right to have such an issue passed on by the jury. G.S. 1A-1, Rule 49(c).

3. **Deeds § 20— restrictive covenants — waiver of right to enforce — lapsus linguae in instructions**

In an action to enforce a restrictive covenant, the court's instruction that the burden was on defendants to prove that "defendants" waived their right to enforce the restriction was a mere *lapsus linguae* and was not prejudicial to defendants.

4. **Deeds § 20— restrictive covenant — waiver of right to enforce — silent acquiescence**

In an action to enforce a restrictive covenant prohibiting trailers, the trial court did not err in failing to instruct the jury that it should find for defendants if plaintiffs "silently acquiesced" in the violation of the covenant where the evidence showed that if plaintiffs waived their right to enforce the covenant, they did so by expressly stating to defendants that they could place a trailer on their property.

ON writ of *certiorari* to review trial before *Exum, Judge.* Judgment entered 28 May 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 11 February 1975.

In this civil proceeding plaintiffs, Edwin L. Van Poole and wife, Laura D. Van Poole, and Robert L. Hudson and wife, Linda Hudson, brought suit against defendants, Violet D. Messer and Ruth E. Dull, to enforce a restrictive covenant on certain property owned by defendant Dull by having defendants permanently enjoined from maintaining a mobile home on said property.

In an amended complaint, filed 27 October 1972, plaintiffs alleged that they and defendant Dull were lot owners in East Jackson Park Subdivision in China Grove Township, Rowan County, and that all lots in the subdivision were subject to the following restrictions, duly recorded in the Rowan County Register of Deeds Office.

> "6. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently."

Plaintiffs further alleged that defendants had placed a mobile home on lot 39 in East Jackson Park owned by defendant Dull.

Defendants admitted that the property was subject to the foregoing restrictive covenant and that Dull had placed a mobile home on lot 39. However, as a further answer and defense, defendant Dull alleged that the "plaintiffs, by their silence and acquiescence in allowing other violations of a similar nature, have assented to the abandonment of the restrictions of which they complain in their complaint against the defendants" and that "there has been such a substantial and radical change in the character of the property surrounding defendant's property that enforcement of the restrictions would be inequitable to the defendant and all other property owners similarly situated within the subdivision".

At the trial the defendants offered evidence tending to show that defendant Dull, who is defendant Messer's mother, purchased a mobile home and placed it on lot 39 behind her daughter's house. Prior to the purchase, plaintiff Edwin L. Van Poole, who owns an adjoining lot, told both Mrs. Dull and her daughter that he did not object to their placing a mobile home on the lot. Plaintiffs offered the testimony of Mr. Van Poole, who denied telling the defendants he did not object to the mobile home.

The following issue was submitted to and answered by the jury in favor of the plaintiffs:

> "Are the plaintiffs precluded from enforcing Restrictive Covenant No. 6 by reason of having waived their right to do so or by having acquiesced in the defendants' violation thereof?"

From the judgment that defendants be permanently enjoined from maintaining a mobile home on lot 39 in East Jackson Park, defendants appealed.

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

Larry G. Ford for defendant appellants.

HEDRICK, Judge.

The three assignments of error brought forward and argued in defendants' brief all relate to the court's instructions to the jury.

[1] First, defendants contend the court erred in not submitting an issue as to whether the restrictive covenant in question had become unenforceable by reason of substantial and radical changes in the character of the East Jackson Park Subdivision.

In *Tull v. Doctors Building, Inc.*, 255 N.C. 23, 39, 120 S.E. 2d 817, 828 (1961), we find the following pertinent statement:

> " '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.' "

The only evidence in the record tending to show any changed conditions within the subdivision relating to the restrictive covenant is that one other trailer is used as a residence approximately 800 feet from plaintiff's property. Van Poole testified that this particular trailer was on another street and was not visible from his residence. While this evidence tends to show a violation of the restrictive covenant, we are of the opinion that it is not sufficient to show such a radical change as to defeat the purpose and object of the restrictive covenant and to require the submission of an issue to the jury on this point.

[2] Furthermore, defendants neither objected to the issue which was submitted to the jury nor requested the court to submit an issue of substantial change in the character of the neighborhood, and, therefore, waived their right to have such issue passed upon by the jury. G.S. 1A-1, Rule 49(c), Rules of Civil Procedure; *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).

[3] Defendants next contend the trial court erred in its instructions to the jury when it stated:

> "Now, the burden of proof is on the defendants, members of the jury, to satisfy you by the evidence and by its greater weight, that the *defendants* have in fact waived their right to enforce this covenant or have acquiesced in the defendants' violation of it." [Emphasis ours.]

Although the trial judge erred in using the word "defendants" rather than "plaintiffs" in the portion of the charge ob-

jected to, we are of the opinion that this error, obviously a *lapsus linguae,* did not mislead the jury and was therefore not prejudicial to defendants. The trial judge properly instructed the jury in several other portions of the charge that the plaintiffs were seeking to enforce restrictive covenant number six against the defendants and that the issue to be decided was whether the *plaintiffs,* not the defendants, were precluded from doing so either because they had waived their right to enforce the covenant or because they had acquiesced in defendants' violation of it.

[4] Finally, defendants contend the court erred in not instructing the jury it would answer the issue in favor of the defendants if it found that the plaintiffs "silently acquiesced" in the violation of the restrictive covenant. We do not agree.

There is no evidence in this record that the plaintiffs silently acquiesced in the violation of the restriction. If the plaintiffs waived their right to enforce the covenant at all, they did so by expressly stating to defendants that they could place a trailer on the property.

We find no error prejudicial to the defendants in the trial in the superior court.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. CLINTON RICHARD SHELTON, III

No. 7419SC891

(Filed 19 March 1975)

1. Homicide § 9— self-defense — use of force apparently necessary

In the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect him from death or great bodily harm, and in this connection, a person may kill even though to kill is not actually necessary to avoid death or great bodily harm if he believes it to be necessary and has reasonable ground for that belief.

State v. Shelton

2. Criminal Law § 113; Homicide § 28— facts tending to show self-defense — failure to give instruction erroneous

The trial court in this second-degree murder prosecution erred in failing to instruct the jury on defendant's right to act in self-defense where defendant's evidence tended to show that he and his companions attempted to leave a restaurant to avoid trouble, they were prevented from doing so by the victim's unprovoked assault on one of defendant's companions, there was an ensuing scuffle during which defendant saw a pistol fall to the floor, as defendant picked up the pistol he saw one of the victim's companions appear to draw a shiny object from his belt, and defendant instantly fired the pistol which he had just picked up.

APPEAL by defendant from *Winner, Judge.* Judgments entered 7 May 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 16 January 1975.

Defendant was charged in separate indictments with the first-degree murder of Bobby Gene Basinger and with assault with a deadly weapon with intent to kill inflicting serious injury upon Leonard Cresswell. He was tried for second-degree murder and for the assault as charged, having pled not guilty to both charges.

At trial the State's evidence tended to show: Shortly before 12:30 a.m. on 23 March 1974 defendant entered Irby's Restaurant in Kannapolis accompanied by Leo and Sandra Singleton and that couple's child. The Singletons ordered food. While they were waiting to be served, Basinger, a customer in the restaurant, spoke to Mrs. Singleton, trying to attract her attention. The Singletons and defendant started to leave. As Leo Singleton started out the door, Basinger kicked him and Singleton turned and began grappling with Basinger. Singleton broke loose and again started out the door, and defendant, who had been standing directly behind Singleton, fired three shots rapidly from a small pistol. One bullet struck and blinded Leonard Cresswell, who had been sitting in the booth with Basinger. One bullet struck Basinger in the left side, causing a massive hemorrhage which, in the opinion of the physician who performed the autopsy, resulted in his death. Neither Cresswell nor Basinger had a weapon on his person at any time during the scuffle and subsequent shooting.

The defendant's evidence tended to show: Defendant, age 16, on 22 March 1974 lived in Kannapolis where his best friend was Leo Singleton. After leaving work that evening at 11:00 p.m. he and the Singletons and their baby stopped at Irby's Res-

taurant on their way to Asheville. They placed an order, and while defendant and Leo Singleton played pinball, Sandra walked over to the opposite end of the room to visit with her aunt. Defendant noticed a man whom he later learned to be Basinger trying to speak to Sandra. A few minutes later Leo Singleton decided that they should leave, and as they were going, Basinger stuck his foot in the aisle and tripped Singleton. Singleton proceeded to the door, but Basinger grabbed him and kicked him. A scuffle ensued, and defendant saw a gun fall on the floor next to where the two were fighting. Defendant picked up the gun "so nobody would pick it up and start shooting." Someone then yelled, "get them," and when defendant straightened up he saw that a man he later learned was Leonard Cresswell had stood up in the booth where Basinger and Cresswell had been sitting. Cresswell's hand was at his belt, and defendant saw "a shiny object within his grasp." Scared by this shiny object into "a state of shock," and afraid that Cresswell was about to shoot him and Singleton, defendant quickly fired three times at Cresswell. Defendant then ran outside, traveled with the Singletons to Asheville, where he threw the gun into a river, and turned himself in to law enforcement officers approximately 16 days later.

The jury returned verdicts of guilty in both cases and from judgments imposing prison sentences, defendant appealed.

Attorney General Rufus L. Edmisten by Associate Attorney Robert W. Kaylor for the State.

Earl J. Fowler, Jr. for defendant appellant.

PARKER, Judge.

In apt time the defendant requested that the court instruct the jury with regard to the law applicable to defendant's right to act in self-defense. The court refused to do so, and instead instructed the jury:

> "Members of the jury, the court instructs you that in this case, there is no evidence of any legal justification that has been presented in the trial of this case."

[1] The right of self-defense rests upon necessity, real or apparent. In the exercise of his lawful right of self-defense, a person may use such force as is necessary or apparently necessary to protect him from death or great bodily harm. "In this

connection, the full significance of the phrase 'apparently necessary' is that a person may kill even though to kill is not actually necessary to avoid death or great bodily harm, if he believes it to be necessary and has a reasonable ground for that belief. The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to him at the time of the killing." *State v. Gladden,* 279 N.C. 566, 572, 184 S.E. 2d 249, 253 (1971).

[2] In this case, defendant's evidence, if believed by the jury, would support the following findings: Defendant and his friends, seeking to avoid trouble, attempted to leave the restaurant. They were prevented from doing so by Basinger's unprovoked assault on Singleton. During the ensuing fight, defendant saw a pistol fall to the floor. This gave notice of the possibility that others in the room might also be armed. As defendant straightened up after picking up the pistol, Cresswell, one of Basinger's companions, appeared to be drawing "a shiny object" from his belt. Thinking that this object was another weapon which Basinger's companion was about to use in an attack upon Singleton and upon him, defendant instantly reacted by firing the pistol which he had just picked up. In so doing, defendant believed it to be necessary in order to avoid death or great bodily harm and he had reasonable ground for that belief.

Certainly the jury might disbelieve some or all of defendant's evidence. Certainly also the jury, even had they believed him, might well find that he did not act under a reasonable apprehension that it was necessary for him to do so under the circumstances as they appeared to him in order to save himself from death or great bodily harm, or that he used more force than reasonably appeared to be necessary. It was, however, for the jury and not for the court to make such findings. By withdrawing these matters from jury consideration, the court committed error for which defendant is entitled to a

New trial.

Judges MORRIS and HEDRICK concur.

THE CAROLINA BANK, INC. v. NORTHEASTERN INSURANCE FINANCE COMPANY, INC.; JOHN I. LEE AND WIFE, DOROTHY T. LEE; JOHN B. RICHARDSON AND WIFE, RUBY G. RICHARDSON; AND WILLIAM JORDAN COLLIE

No. 7410SC883

(Filed 19 March 1975)

1. **Judgments § 29— setting aside default judgment — meritorious defense**
   Even if there is a determination of excusable neglect, a meritorious defense must be shown before a default judgment may be set aside.

2. **Judgments § 29— determination of meritorious defense**
   In determining defendant's motion to set aside a default judgment, the trial court erred in finding that defendant had no meritorious defense by resolving the controverted principal factual allegations since the court should determine only whether defendant has, in good faith, presented by his allegations, *prima facie*, a valid defense.

APPEAL by defendant John I. Lee from *Bailey, Judge*. Judgment entered 17 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 17 February 1975.

Plaintiff instituted this action to recover the balance of $118,000.00 due on promissory note No. 0263 in the principal amount of $134,250.00, allegedly executed by the corporate defendant on 2 August 1972. Plaintiff alleges that defendants Lee executed an agreement personally guaranteeing payment by the corporate defendant; that defendants Richardson executed an agreement personally guaranteeing payment by the corporate defendant; and that defendant Collie executed an agreement personally guaranteeing payment by the corporate defendant. Plaintiff seeks judgment against the individual defendants upon their respective guaranty agreements.

Defendants Lee failed to file an answer within the time allowed, and a default and a default judgment were duly entered. Defendants Lee filed a motion to set aside the entry of default and the default judgment. Judge Bailey found that the failure to file an answer was due to excusable neglect; that defendant Dorothy T. Lee had never been served with a summons; and that defendant John I. Lee did not have a meritorious defense. Judge Bailey set aside the entry of the default and the default judgment as against Dorothy T. Lee but denied the motion of John I. Lee to set aside the entry of default and default judgment. Defendant John I. Lee appealed.

Dillard M. Powell, for the plaintiff.

Richard B. Conely, for the defendant John I. Lee.

BROCK, Chief Judge.

Whether excusable neglect has been shown is a question of law. The trial court considers the evidence and finds the facts. Upon the facts found, the trial judge determines, as a matter of law, whether they constitute excusable neglect. *Equipment, Inc. v. Lipscomb,* 15 N.C. App. 120, 189 S.E. 2d 498 (1972). Upon the facts found in this case, we think the trial judge correctly concluded that the failure of defendant John I. Lee to file an answer within the time allowed was due to excusable neglect.

[1] Even if there is a determination of excusable neglect, our case law requires a showing of a meritorious defense before the default judgment can be set aside. *Kirby v. Contracting Co.,* 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied,* 278 N.C. 701 (1971). Therefore, the sole question presented by this appeal is whether the trial court erred in determining that defendant John I. Lee "has no meritorious defense to said action."

[2] Along with his motion to vacate the default and the default judgment, defendant tendered his proposed verified responsive pleadings. Plaintiff filed affidavits controverting defendant's factual allegations. It is clear that the trial judge resolved these controverted principal facts before making his determination that defendant John I. Lee had "no meritorious defense." In resolving these controverted principal factual allegations, his honor fell into error. In determining whether a meritorious defense has been shown, the court should determine whether the movant has, in good faith, presented by his allegations, *prima facie,* a valid defense. *Estes v. Rash,* 170 N.C. 341, 87 S.E. 109 (1915). "Where a party, in good faith, shows facts which raise an issue sufficient to defeat his adversary, if it be found in his favor, it is for the jury to try the issue and not for the judge, who merely finds whether on their face the facts show a good defense in law; otherwise, the defendant, though he establish ever so clear a case of excusable neglect entitling him to have the judgment set aside, would be deprived of the right of trial by the jury of the issue thus raised." *Gaylord v. Berry,* 169 N.C. 733, 735, 86 S.E. 623 (1915).

It appears that defendants' proposed verified answer, *prima facie,* states a valid defense.

So much of the judgment appealed from as relates to the defense of defendant John I. Lee is reversed, and the cause is remanded for a new hearing to determine whether, from his proposed verified pleadings and his affidavits, defendant John I. Lee has, in good faith, stated a valid defense. If so, it will constitute the statement of a meritorious defense.

Reversed in part.

Judges VAUGHN and MARTIN concur.

THE CAROLINA BANK, INC. v. JOHN I. LEE AND WIFE, DOROTHY T. LEE

No. 7410SC1041

(Filed 19 March 1975)

APPEAL by defendants from *Bailey, Judge.* Judgment entered 30 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 17 February 1975.

Dillard M. Powell for plaintiff appellee.

Richard B. Conely for defendant appellants.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

For the reasons and purpose stated in No. 7410SC883 filed this day, judgment is reversed and the case is remanded.

CONNIE KARNELLIA SHIPMAN v. JOSEPH ARTHUR KIRKWOOD SHIPMAN

No. 7429DC1030

(Filed 19 March 1975)

1. Divorce and Alimony § 23— modification of child support order — remarriage of defendant — no change of circumstances

Evidence that defendant had married and was living with his wife and their child did not require a finding of a change of circumstances

and a modification of a child support order where defendant was living with those same two persons at the time of the court's most recent order and that fact was referred to in the order.

2. **Divorce and Alimony § 23— modification of child support order — change in circumstances since most recent order**

In determining a motion for modification of a child support order, the court was not required to consider changes in the circumstances from the time of the original order to the present but could consider only changes in circumstances since entry of the most recent order.

APPEAL by defendant from *Hart, Judge.* Judgment entered 9 September 1974 in District Court, HENDERSON County. Heard in the Court of Appeals 19 February 1975.

Plaintiff Connie Shipman instituted this action against her husband for alimony without divorce, child custody and support. In an order dated 31 August 1973, entered by consent of the parties, plaintiff was awarded custody of the child and defendant was required to make child support payments of $120.00 every two weeks. On 27 March 1974 defendant moved for a reduction of support payments on the ground that his income had decreased. By order dated 8 April 1974, the district court denied this motion. Therein the court found, *inter alia,* that subsequent to the entry of the order dated 31 August 1973, "[T]he defendant was engaged in employment at a variety of places at the same time whereby he was making a salary of Four Hundred Twenty-Five Dollars ($425.00) every two weeks and that during the course of the time elapsing between the Order [31 August 1973] and the date of this hearing, that the defendant on his own motivation and without any bona fide reason ceased to work at said places of employment." "[T]he defendant is presently maintaining a separate home away from the plaintiff and child born of the marriage and that in the course of maintaining said separate home he is applying funds toward the support and maintenance of two other individuals." In the order dated 8 April 1974, the court concluded that no substantial change in circumstances had occurred involving the support and maintenance of the child since the entry of the order dated 31 August 1973. No appeal was taken from the 8 April 1974 denial of defendant's motion for reduction.

In May 1974 plaintiff was granted an absolute divorce from defendant. Thereafter defendant married Mary Longdale, with whom he had been living and by whom he had had a child. In August 1974 defendant filed another motion for reduction of

support payments. From evidence offered upon the hearing of defendant's latter motion for reduction of payments, the court found no change of circumstances since entry of the 8 April 1974 order. The court again denied the motion for reduction of payments. Defendant appealed.

Tharrington, Smith & Hargrove, by Peter E. Powell, for the plaintiff.

Prince, Youngblood & Massagee, by James E. Creekman, for the defendant.

BROCK, Chief Judge.

[1] The 8 April 1974 order found that defendant was currently earning $92.00 per week. Defendant's evidence at the August 1974 hearing was that he was currently earning $101.00 per week. Clearly this does not show a change justifying a reduction in payments. Defendant's evidence at the August hearing showed that subsequent to May 1974 he married Mary Shipman and was currently living with her and their child. But his evidence also clearly showed that they were the same "two other individuals" with whom he was living at the time of entry of the 8 April 1974 order. This evidence requires neither a finding of a change of circumstances nor a modification of the former support order.

Defendant makes no exception to the findings of fact. He seems to argue that the fact of his marriage subsequent to the 8 April 1974 order requires a finding of a change of circumstances. In the first place, as we have hereinabove pointed out, defendant's evidence shows that he was living with his present wife and child prior to the entry of the 8 April 1974 order. Although the legal status between him and his present wife has changed since 8 April 1974, there is absolutely no showing of a substantial change in his financial status since 8 April 1974. In the second place, payment of support for a child of a former marriage may not be avoided merely because the husband has remarried and thereby voluntarily assumed additional obligations. *See Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966).

[2] Defendant strenuously argues that the trial court committed error by refusing to consider circumstances at the time of entry of the 31 August 1973 order and changes from that time to the present. We do not agree with this argument. "It is generally recognized that decrees entered by our courts in

child custody and support matters are impermanent in character and are *res judicata* of the issue *only so long as the facts and circumstances remain the same as when the decree was rendered." Crosby v. Crosby,* 272 N.C. 235, 237, 158 S.E. 2d 77 (1967). In this case defendant has failed to offer evidence of change of circumstances since entry of the 8 April 1974 decree.

Defendant cites *Dept. of Social Services v. Roberts,* 23 N.C. App. 513, 209 S.E. 2d 374 (1974), in support of his argument that the court must consider again, on each subsequent application for change, the entire circumstances and their developments since entry of the original order in a custody, support, or alimony case. Defendant has misread the meaning and purport of *Roberts.* The statement in the opinion of this Court in *Roberts* to which defendant points was merely an agreement with an observation of the trial judge. The case was decided on the basis of a failure to show a change of circumstances since the entry of the most recent decree.

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. JOE HITT

No. 7415SC1042

(Filed 19 March 1975)

Embezzlement § 6— money given to purchase corporation stock — failure of defendant to purchase — sufficiency of evidence of embezzlement

Evidence was sufficient to be submitted to the jury in an embezzlement case where it tended to show that the prosecuting witness gave defendant checks on two occasions for the purpose of purchasing stock in a corporation, both checks were made payable to defendant who endorsed and cashed them but never delivered stock as he had promised, on one occasion defendant told the prosecuting witness that his stock had been issued and received but had to be returned for corrections and on a later occasion that he needed the money and this was the only way he knew how to get it, and the corporation never received the funds in question nor did the prosecuting witness ever receive stock in the corporation.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 6 September 1974. Heard in the Court of Appeals 19 February 1975.

Defendant was charged in separate indictments with two counts of embezzlement in violation of G.S. 14-90. Upon his pleas of not guilty, the jury returned verdicts of guilty as charged. From judgments sentencing him to imprisonment for a term of not less than two years nor more than four years in case number 73CR9430, and for a consecutive term of not less than two years nor more than three years in case number 73CR9431, defendant appealed.

State's evidence tended to show that the prosecuting witness gave the defendant two checks, one in the amount of $1000 and another in the amount of $1500, for the purpose of purchasing stock in a corporation; that both checks were made payable to the defendant and defendant endorsed and cashed the checks, but never delivered the stock as he had promised; that on one occasion defendant told the prosecuting witness that his stock had been issued and received, but had to be returned for corrections and on a later occasion that he needed the money and this was the only way he knew how to get it. Other evidence offered by the State tended to show that the corporation never received the funds in question and the prosecuting witness never received stock in the corporation.

Defendant admitted receiving $2500 from the prosecuting witness for the purchase of stock in a corporation to be formed in California, but stated that the allocation of ownership in the corporation was changed, and thereafter he did not consider it to be advisable to invest in the corporation. Defendant further testified that a North Carolina corporation in which he and the prosecuting witness each held stock subsequently got into serious financial difficulties and that the prosecuting witness agreed to allow defendant to invest the $2500 in that corporation, which he did. Defendant admitted that the prosecuting witness later asked that his $2500 be returned.

Attorney General Rufus L. Edmisten, by Associate Attorney Robert Kaylor, for the State.

Graham and Cheshire, by Lucius M. Cheshire, for defendant appellant.

MORRIS, Judge.

Defendant's first three assignments of error relate to the denial of his motions for judgment as of nonsuit at the close

of the State's evidence, at the close of the defendant'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, 212 S.E. 2d 515 (1975), citing *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971)." *State v. Davis,* 24 N.C. App. 683, 211 S.E. 2d 849 (1975).

> " . . . To convict a defendant of embezzlement in violation of G.S. § 14-90, our Supreme Court has declared that 'four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment, and (4) knowing it was not his own, converted it to his own use. (Citations omitted.)' " *State v. Buzzelli,* 11 N.C. App. 52, 54-55, 180 S.E. 2d 472 (1971), and cases cited therein.

Viewing the evidence before us in the light most favorable to the State and giving the State the benefit of every reasonable inference which may be fairly drawn therefrom, as we are required to do when passing on a motion for nonsuit, *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968), and cases cited therein, we find substantial evidence tending to show, or from which reasonable inferences may be drawn which would tend to show, every essential element of the crime of embezzlement. Defendant's motion for nonsuit, therefore, was properly denied.

Defendant's fourth and fifth assignments of error relate to the denial of his motions to have the verdict set aside and for judgment notwithstanding the verdict. It has long been held that "[w]hen the court rules on a motion to set aside the verdict in the exercise of its discretion, its ruling is not reviewable in the absence of abuse of such discretion" and that "[d]enial of a motion to set aside a verdict which was supported by the evidence will not be disturbed." 7 Strong, N. C. Index 2d, Trial, § 48, p. 364, and cases cited therein. As we have found sufficient evidence to support a denial of defendant's

motions and defendant has failed to show an abuse of discretion in the denial of the motions, these assignments of error are overruled.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

TERRENCE C. SAMS v. MICHAEL R. SARGENT

No. 7410SC1035

(Filed 19 March 1975)

1. **Animals § 2— liability for injuries inflicted by dog**

Absent a showing that a leash-law was in effect or that a dog was a vicious animal requiring confinement or leashing under G.S. 106-381, the owner of a dog was not required to keep his dog under restraint unless it is shown under common law rules (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character and habits.

2. **Animals § 2— motorcycle-dog collision — liability of dog owner — summary judgment for owner**

In an action to recover for personal injuries received when plaintiff's motorcycle collided with a dog owned by defendant, the trial court properly granted defendant's motion for summary judgment where defendant carried the burden of establishing the lack of a triable issue of fact and plaintiff presented no evidence to show either a vicious propensity on the part of the dog or that defendant knew or should have known of such propensity.

APPEAL by plaintiff from *Bailey, Judge.* Order entered 14 October 1974. Heard in the Court of Appeals 19 February 1975.

This is a civil action in which the plaintiff seeks to recover damages for personal injuries he received when his motorcycle collided with a dog allegedly owned by the defendant. In his complaint plaintiff alleged defendant was negligent in that: "(a) he failed to keep his dog chained or leashed although he knew that the dog chased motor vehicles; (b) he failed to keep his dog out of the roadway in front of his home." In his answer

defendant denied negligence on his part, and plead unavoidable accident, and contributory negligence on the part of plaintiff. Defendant also moved for summary judgment under Rule 56 of the Rules of Civil Procedure and introduced his own affidavit, the affidavit of a witness to the accident, and the deposition of plaintiff in support of his motion. Plaintiff neither responded nor appeared at the hearing and summary judgment was entered in favor of the defendant. Plaintiff appealed.

Clayton, Myrick, McCain & Oettinger, by Grover C. McCain, Jr., for plaintiff appellant.

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

MORRIS, Judge.

The sole question presented by this appeal is whether the trial court erred in allowing defendant's motion for summary judgment.

Rule 56 of the Rules of Civil Procedure provides that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). "The burden is upon the moving party to establish the lack of a triable issue of fact." *Robinson v. McMahan,* 11 N.C. App. 275, 279, 181 S.E. 2d 147 (1971), cert. denied 279 N.C. 395 (1971), citing *Haithcock v. Chimney Rock Company,* 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

> " . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." G.S. 1A-1, Rule 56(e).

[1] After carefully reviewing the affidavits and deposition filed by defendant in support of his motion for summary judgment, we conclude defendant has carried the burden of estalishing the lack of a triable issue of fact in this case. Plaintiff,

on the other hand, has failed to offer any evidence of negligence on the part of the defendant. Plaintiff's only allegations of negligence are that defendant "failed to keep his dog chained or leashed although he knew that the dog chased motor vehicles" and that defendant "failed to keep his dog out of the roadway in front of his home." There has been no showing that the City of Cary has enacted an ordinance requiring dogs to be kept under restraint (a so-called "leash law"), nor has plaintiff shown this dog was a vicious animal requiring confinement or leashing under G.S. 106-381. Absent such a showing the owner of a dog is not required to keep his dog under restraint unless it can be shown under common law rules " '(1) that the animal was dangerous, vicious, michievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known that the animal's vicious propensity, character, and habits.' " *Sink v. Moore* and *Hall v. Moore*, 267 N.C. 344, 349, 148 S.E. 2d 265 (1966), citing *Plumidies v. Smith*, 222 N.C. 326, 22 S.E. 2d 713 (1942). Even if plaintiff had shown that a dog belonging to defendant frequently dashed into the street to bark at and pursue motor vehicles, that fact standing alone, would not be sufficient to justify classifying the dog as a "vicious" animal. *Sink v. Moore* and *Hall v. Moore, supra.*

[2] As there was no competent evidence to prove either a vicious propensity on the part of the dog or that the defendant, as owner, knew or should have known of the vicious propensity plaintiff's sole assignment of error is overruled and the decision of the trial court granting defendant's motion for summary judgment is affirmed.

Affirmed.

Judges BRITT and ARNOLD concur.

JAMES T. SPEIGHT AND MAGGIE B. SPEIGHT v. ELIJAH H. GRIFFIN AND EDITH V. GRIFFIN

No. 7418SC899

(Filed 19 March 1975)

Waters and Watercourses § 1— diversion of flow of surface waters — concrete driveway

The evidence was insufficient to support a cause of action against defendants for diversion of the natural flow of surface water onto plaintiff's property where it tended to show only that the parties are adjoining lot owners, defendants' property is higher than plaintiff's, defendants replaced a gravel driveway near the property line of the parties with a concrete driveway, and the concrete driveway does not absorb and drain water away from plaintiff's lower lot as the gravel driveway did but the water now flows across the driveway and accumulates under plaintiff's house.

APPEAL by plaintiff, Maggie B. Speight, from *Long, Judge.* Judgment entered 29 May 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 January 1975.

This is an action to recover for trespass and diversion of water onto plaintiff's property.

Plaintiff and defendants are adjoining lot owners on Willow Road in a subdivision in Guilford County. Defendants' property is on higher ground that plaintiff's. Defendants formerly had a gravel driveway which ran from the street towards the rear of the lots and was located near the property line of the parties. There was no problem with water from defendants' higher lot. The water generally flowed down the gravel driveway to the rear of the lots. Plaintiff has a drainage ditch at the rear of her lot. Plaintiff's trouble with water from defendants' lot began after defendants replaced the gravel driveway with a higher concrete driveway. Instead of going down the driveway to the rear of the lot, the water now flows across and seeps under the driveway onto plaintiff's property causing much water to accumulate under her house.

The jury found that defendants diverted the natural flow of surface water onto plaintiff's property and awarded damages in the amount of $1,000.00.

The court then allowed defendants' motion for judgment notwithstanding the verdict.

Norman B. Smith for plaintiff appellants.

Pell, Pell & Weston, by Gerald A. Pell and Alston and Hart by E. L. Alston, Jr., attorneys for defendant appellees.

VAUGHN, Judge.

We agree with the trial judge's conclusion that there was no competent evidence to support a cause of action against defendants for diversion of the natural flow of surface water onto plaintiff's property.

In some respects the case is similar to *Sykes v. Sykes,* 197 N.C. 37, 147 S.E. 621 (1929), where plaintiff and defendants owned adjoining rural tracts fronting on the highway. The tracts were divided by what was found to be a private road. Defendants' land was higher than plaintiff's and water flowed across his land towards defendants' property until it reached a ditch on defendants' side of the road. It then flowed down the ditch to the rear of the properties with no damage to plaintiff. Defendants then filled the ditch with dirt. The closing of the ditch caused most of the surface water to flow directly across the road onto plaintiff's property and resulted in great damage to plaintiff. The court held:

> "If the ditch was not on a public road, but on defendants' land, defendants had the right to fill it, and are not liable to plaintiff for damages, if any, caused by filling the ditch. Defendants, as the upper proprietors, had the right to accelerate and even increase the flow of water from their land to the land of plaintiff, the lower proprietor."

In the case now before us the property is located in an urban residential area. Defendants' land is higher than plaintiff's and surface waters naturally flow from defendants' property to that of plaintiff. Defendants' old gravel driveway tended to absorb and drain surface waters away from plaintiff's property. They, as was their right, replaced the gravel driveway with a concrete driveway. That the new concrete driveway does not absorb and drain water away from plaintiff's lower lot does not give rise to a cause of action against defendants.

The judgment from which plaintiff appeals is, in all respects, affirmed.

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. THOMAS WAYNE KILLIAN

No. 7415DC932

(Filed 19 March 1975)

Criminal Law §§ 18, 146— appeal from district court to Court of Appeals — necessity for appeal to superior court

Defendant had no right to appeal to the Court of Appeals from the district court's allowance of the entry of a second *nolle prosequi* by the State of a charge of possession of marijuana or from the district court's failure to rule on defendant's motion to dismiss the charge on the ground he had been denied a speedy trial and the right to confront his accusers, since appeals in criminal cases in the district court must first go to the superior court. G.S. 7A-271(b).

APPEAL by defendant from *Paschal, Judge.* Order entered 19 September 1974 in District Court, ORANGE County. Heard in the Court of Appeals 22 January 1975.

In a warrant issued on 31 July 1974, defendant was charged with possession of marijuana, a misdemeanor. On 22 August 1974 the State entered a *nolle prosequi* in the case.

On 27 August 1974 defendant filed a motion in district court showing: This case was calendared for trial on 22 August 1974 at which time defendant and his attorney appeared. The State attempted to take a *nolle prosequi,* defendant objected, and the court ordered the case continued and set for trial on 19 September 1974.

On 19 September 1974 the State entered a second *nolle prosequi* in the case. Defendant objected to the entry on the ground that his constitutional rights were violated in that he was denied a speedy trial and the right to confront his accusers; he moved for a dismissal of the charges. The court "allowed" the entry of *nolle prosequi* by the State but did not rule on defendant's motion for dismissal of the charges.

From the court's ruling, defendant gave notice of appeal to the Court of Appeals.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., and Associate Attorney Raymond L. Yasser, for the State.

Winston, Coleman and Bernholz, by Roger B. Bernholz, for defendant appellant.

BRITT, Judge.

While the point had not been raised by the State when this case came on for oral argument, we questioned the right of defendant to appeal a criminal cause from the district court to this court. Consequently, we allowed the defendant and the State to file supplemental briefs addressed to that question. After consideration of the authorities cited in the supplemental briefs and other authorities, we hold that defendant does not have that right.

Our State Constitution, Article IV, § 12(2), provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." G.S. 7A-26 provides: "The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, *in accordance with the system of appeals provided in this article.*" (Emphasis added.) G.S. 7A-27 provides for appeals from the district court to the Court of Appeals from final judgments and certain interlocutory orders or judgments in *civil* actions. Article 22 of Chapter 7A is entitled "Jurisdiction of the Trial Divisions in Criminal Actions" and within that article G.S. 7A-271(b) specifically provides that "[a]ppeals by the State or the defendant from the district court are to the superior court. . . . " We think the last quoted statute clearly mandates our holding.

We perceive the constitutional and statutory structure of our General Court of Justice to provide that, generally, appeals from the district court in *civil* causes go to the Court of Appeals, while appeals in *criminal* causes must go first to the superior court.

In view of the foregoing, we do not reach the question of whether the action or inaction of the trial court from which defendant attempted to appeal violated his constitutional rights as declared in *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967). The question must be considered in the superior court before it can be considered by us.

For the reasons stated, the appeal, *ex mero motu*, is

Dismissed.

Chief Judge BROCK and Judge CLARK concur.

EULA DOWNING ROETHLINGER v. PAUL W. ROETHLINGER, ANNE C. ROETHLINGER, CHARLES A. ROETHLINGER, JR., RUTH C. ROETHLINGER, HERSHALL R. SUMMERS, AUGUSTA R. SUMMERS, JACK R. HARRELL, KATHRYN R. HARRELL, RICHARD R. ROETHLINGER AND MINNIE M. ROETHLINGER

No. 745SC1053

(Filed 19 March 1975)

Wills § 34— fee simple interest given to wife under will — no contingent remainder interest in children

Statement in the testator's will, "That I do bequeath my entire holdings to my beloved wife — Eula Downing Roethlinger — and I do not wish any interference from my children," gave plaintiff widow all of testator's property absolutely and without restriction, and his subsequent statement, "If she remarries — it will be divided accordingly," did not give defendant children a contingent remainder interest in the same property upon remarriage of the plaintiff.

Judge MARTIN dissenting.

APPEAL by plaintiff from *Tillery, Judge.* Judgment entered 5 September 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 February 1975.

Smith & Spivey by Jerry L. Spivey for plaintiff appellant.

No counsel for defendant appellees.

VAUGHN, Judge.

The question presented is whether plaintiff Eula Downing Roethlinger, widow of testator, took a fee simple interest under the following will:

"To all concerned —

That I do bequeath my entire holdings to my beloved wife—Eula Downing Roethlinger—& I do not wish any interference from my children—she may give Augusta Mae what she wishes otherwise do not wish any other interference—I am not well—but I am well satisfied as to conditions I do hope Eula will be happy & I do want her to have my home. If she remarries—it will be divided accordingly—but otherwise she has everything—

Charles Albert Roethlinger Sr.

(Don't contest this writing)"

The trial judge concluded that testator's intent "was to convey to his wife, Eula Downing Roethlinger a defeasible fee simple estate to the lands described in the Complaint, and upon the remarriage of his wife, Eula Downing Roethlinger, the lands would go over to his surviving children, the defendants in this action."

The court then decreed that plaintiff " . . . has a defeasible fee simple estate in the land described in the Complaint, and that the defendants [children of testator] have a contingent remainder interest in the same land upon the remarriage of the plaintiff."

The opening part of the will is not ambiguous: "That I do bequeath my entire holdings to my beloved wife—Eula Downing Roethlinger—and I do not wish any interference from my children. . . . " No rules of construction need be employed to conclude that this sentence gives his wife all of his property absolutely and without restriction.

Does the following part of the will, "If she remarries—it will be divided accordingly" clearly take away that which he had already given unconditionally? We do not think so. The language is ambiguous and does not unmistakably show an intent to divest testator's wife of the fee first given in the will. The judgment is reversed and the case is remanded for entry of judgment in conformity with this opinion.

Reversed and remanded.

Chief Judge BROCK concurs.

Judge MARTIN dissenting: I would affirm the judgment of the trial court.

CHARLES F. LAUTENSCHLAGER (NOW DECEASED) AND WIFE, MILDRED LAUTENSCHLAGER, PLAINTIFFS v. BOARD OF TRANSPORTATION (FORMERLY NORTH CAROLINA STATE HIGHWAY COMMISSION), SUBSTITUTED DEFENDANT

No. 7417SC921

(Filed 19 March 1975)

Eminent Domain § 13— action instituted by landowner — hearing by judge without jury proper

In an action started by landowners under G.S. 136-111 where there is an alleged taking of land and no complaint and declaration of taking by the Board of Transportation, the procedures set out in G.S. 136-108 shall be followed for the determination of the matters raised by the pleadings; therefore, it was proper for the trial judge without a jury to determine whether an interest in plaintiff's property had been taken.

APPEAL by plaintiff, Mildred Lautenschlager, from *Rousseau, Judge.* Judgment entered 5 August 1974 in Superior Court, SURRY County. Heard in the Court of Appeals 21 January 1975.

Plaintiff alleges that defendant has taken her right of access to U. S. Highway 52, South of Mt. Airy.

Defendant did not file a declaration of taking and plaintiff has utilized the remedy provided by G.S. 136-111.

Over defendant's objection, Judge Rousseau undertook to determine the question of whether defendant had taken plaintiff's right of access and deferred jury trial on the issue of damages. Plaintiff had requested jury trial on issues.

After evidence from both parties the court concluded that defendant had not taken plaintiff's right of access and dismissed the action.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for plaintiff appellant.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr., for defendant appellee.

VAUGHN, Judge.

Plaintiff stressfully contends that she is entitled to a jury trial on all questions of fact.

G.S. 136-108 expressly provides that when the Board of Transportation institutes a condemnation action the judge shall hear and determine all issues raised by the pleadings other than the issue of damages.

Here the Board did not institute the action or file a declaration of taking. Where there is an alleged taking and no complaint and declaration of taking by the Board, the person who contends his land has been taken may institute the action by utilizing the authority and procedures authorized by G.S. 136-111. That statute details what the landowner must set out in his complaint and memorandum of action and also provides "The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation."

We hold that in an action started by the landowners under G.S. 136-111, the procedures set out in G.S. 136-108 shall be followed for the determination of the matters raised by the pleadings. It was, therefore, proper for the judge to determine whether an interest in plaintiff's property had been taken.

Plaintiff's remaining assignments of error have been considered and are overruled. The material findings of fact are supported by competent evidence. The facts found support the judgment.

Affirmed.

Judges MARTIN and ARNOLD concur.

PEMERL L. ROGERS v. DAVID H. ROGERS

No. 7410DC1052

(Filed 19 March 1975)

Appeal and Error § 42— admissibility of foreign divorce decree — failure to bring up decree with appeal

In a child custody and support action, the appellate court is unable to rule upon the admissibility of a foreign divorce decree or the validity of the trial court's finding of the existence of the foreign decree where defendant failed to bring up a copy of the decree with his appeal; however, neither the evidence nor the finding thereon was requisite to an order for child custody and support sought by plaintiff.

Rogers v. Rogers

ON writ of *certiorari* to review an order entered by *Winborne, Judge.* Order entered 9 August 1974 in District Court, WAKE County. Heard in the Court of Appeals 20 February 1975.

Plaintiff instituted this action for custody and support for four minor children born of a marriage between plaintiff and defendant. The trial judge heard evidence relative to the circumstances of the parties and entered an order awarding custody of the children to plaintiff, allowing visitation rights for defendant, and ordering defendant to make monthly support payments for the children. Defendant seeks review of that order.

No appearance for plaintiff.

Defendant David H. Rogers, pro se.

BROCK, Chief Judge.

At trial plaintiff offered in evidence a copy of a Washington State decree of divorce between the parties. The trial judge's order contains a finding that the parties were divorced in the State of Washington. Defendant assigns as error the admission into evidence of a copy of the Washington State decree and the finding thereon by the trial judge.

Defendant has failed to bring up this exhibit with his appeal, and we are therefore unable to rule upon the admissibility of the evidence or the validity of the finding by the trial judge of the existence of a divorce decree in the State of Washington. Suffice to say, neither the evidence nor the finding thereon was requisite to an order for the custody and support sought by plaintiff in this action. We therefore express no opinion upon the question of what faith and credit should be given to the evidence of the foreign decree offered at the hearing herein reviewed.

We have examined defendant's remaining assignments of error and find them to be without merit. Insofar as the order of the trial judge determines the right of custody and visitation and the obligation to support, the same is

Affirmed.

Judges VAUGHN and MARTIN concur.

GILBERT M. SHOOK, JR., PLAINTIFF, v. HERRING CONSTRUCTION CO., INC., EMPLOYER, SENTRY INSURANCE COMPANY, CARRIER

No. 7412IC1044

(Filed 19 March 1975)

1. **Master and Servant § 93— workmen's compensation — uncontroverted testimony**

The Industrial Commission is not required to accept as true the uncontroverted testimony of a witness.

2. **Master and Servant § 96— workmen's compensation — review of evidence on appeal**

Upon appeal the Court of Appeals does not have the right to weigh the evidence and decide the issue on the weight it gives the evidence.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 13 September 1974. Heard in the Court of Appeals 12 March 1975.

The evidence in this claim was heard before Deputy Commisisoner Roney in Fayetteville on 30 April 1974. He entered his award denying compensation on 24 June 1974. Upon appeal the full Commission affirmed the denial of compensation. Plaintiff appealed to this Court.

William J. Townsend, for the plaintiff.

Anderson, Nimocks & Broadfoot, by Hal W. Broadfoot, for the defendants.

BROCK, Chief Judge.

The crux of plaintiff's argument on appeal is that plaintiff's testimony was the only evidence of how his injury occurred; that plaintiff's testimony supports an award of compensation; and that the Commission erred in denying compensation.

[1, 2] We note that defendant offered considerable evidence which tended to show that plaintiff's testimony was incredible. In any event the Commission is not required to accept as true even the uncontroverted testimony of a witness. *Wallace v. Watkins-Carolina Express, Inc.*, 11 N.C. App. 556, 181 S.E. 2d 767 (1971). Upon appeal this Court does not have the right to

weigh the evidence and decide the issue on the weight given the evidence by this Court. *Hollman v. City of Raleigh,* 273 N.C. 240, 159 S.E. 2d 874 (1968).

Affirmed.

Judges VAUGHN and MARTIN concur.

IN RE: JAMES A. GRUBBS, 310 BANNER AVENUE, WINSTON-SALEM, N. C., N. C. DRIVER'S LICENSE NUMBER 1875945

No. 7421SC1028

(Filed 19 March 1975)

Automobiles § 2— discretionary suspension of license — authority of superior court to set aside

Upon appeal from the discretionary suspension of petitioner's license under G.S. 20-16(a)(5) for the accumulation of eight points within the three-year period following the reinstatment of his license which had been suspended for the accumulation of twelve points, the superior court had no authority to substitute its discretion for that of the Department of Motor Vehicles by ordering reinstatement of the license where the facts found by the court show the Department had discretion to suspend the license under G.S. 20-16(a)(5).

APPEAL by respondent, North Carolina Department of Motor Vehicles, from *Exum, Judge.* Judgment entered 30 August 1974. Heard in the Court of Appeals 18 February 1975.

This action arose out of a petition to the superior court to review the action of the respondent, Department of Motor Vehicles, in suspending the petitioner's driving privileges under G.S. 20-16(a) (5).

The petitioner's driving privileges were suspended for eight months, effective 25 May 1974, for the accumulation of eight points within the three-year period immediately following the reinstatement of his license which had previously been suspended for the accumulation of twelve points.

Upon receiving notice that his driving privileges were being suspended, the petitioner asked for a hearing before the respondent. A hearing was conducted, but the suspension was left in effect. Petitioner then started this action which resulted in a

hearing before the Forsyth County Superior Court. Pursuant to this hearing, the trial judge entered a judgment ordering the petitioner's driving privileges restored. From this judgment, the respondent appealed.

Attorney General Edmisten by Assistant Attorneys General William B. Ray and William W. Melvin for the respondent.

No counsel contra.

CLARK, Judge.

It is established that the petitioner has the right to a full *de novo* review of respondent's action in the superior court. However, "[o]n appeal and hearing *de novo* in superior court, that court is not vested with discretionary authority. It makes judicial review of the facts, and if it finds that the license of petitioner is in fact and in law subject to suspension . . . the order of the Department must be affirmed. . . . " *In Re Donnelly,* 260 N.C. 375, 381, 132 S.E. 2d 904, 908 (1963).

The facts as found by the trial court are in exact conformity with the suspension provisions of G.S. 20-16(a)(5). In those circumstances, the respondent had complete authority by law to suspend petitioner's license, and the superior court judge had no authority to substitute his discretion for that of respondent. Consequently, the judgment below is

Reversed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. STACY DONALD BRYAN

No. 7516SC10

(Filed 19 March 1975)

Rape § 11— carnal knowledge of female under twelve — sufficiency of evidence

In a prosecution for carnal knowledge of a female under the age of twelve, evidence was sufficient to be submitted to the jury where it included testimony by defendant's stepdaughter, who was eleven years old at the time of the crime, that defendant threatened to beat her and had sexual intercourse with her.

State v. Bryan

APPEAL by defendant from *Clark, Judge.* Judgment entered 14 October 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 March 1975.

Defendant was tried on a bill of indictment charging him with carnal knowledge of a female under the age of twelve. The jury found him guilty of assault with intent to commit rape. From judgment imposing a sentence of thirteen to fifteen years imprisonment, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Norman L. Sloan, for the State.

W. Earl Britt for defendant appellant.

ARNOLD, Judge.

Defendant's sole assignment of error concerns the trial court's denial of his motions for nonsuit. The State's evidence included the testimony of defendant's stepdaughter that on the afternoon of 6 February 1974 defendant threatened to beat her and had sexual intercourse with her. The child was eleven years of age at the time. This evidence was quite sufficient to submit the case to the jury. *State v. Robertson,* 284 N.C. 549, 202 S.E. 2d 157 (1974); *State v. Murry,* 277 N.C. 197, 176 S.E. 2d 738 (1970). We have examined the record and find no error prejudicial to defendant.

No error.

Chief Judge BROCK and Judge PARKER concur.

HARRY M. CARPENTER v. KENAN CASTEEN CARPENTER

No. 7415DC976

(Filed 2 April 1975)

1. **Parent and Child § 7— child support after majority — contract of parent**

A parent can by contract bind himself to support his child after emancipation and past majority.

2. **Divorce and Alimony § 23; Parent and Child § 7— separation agreement — child support and education after majority**

Plaintiff's obligation undertaken in a separation agreement to make monthly support payments for the benefit of his children and to contribute toward their preparatory and college education expenses, with the amount of the support payments to be reduced "as each child completes his or her undergraduate college education," did not terminate by operation of law when each child became 18 years of age by reason of the enactment of G.S. Chap. 48A which lowered the age of majority from 21 to 18 years.

3. **Appeal and Error § 68— dismissal of appeal — law of the case**

Court's order requiring plaintiff to continue to make support and educational payments for the benefit of his 18-year-old son became the law of the case upon the dismissal of plaintiff's appeal therefrom.

4. **Divorce and Alimony § 23; Parent and Child § 7— separation agreement — preparatory educational expenses — private school**

Where plaintiff agreed in a separation agreement to contribute toward the preparatory educational expenses of his children in addition to making monthly support payments, a court order requiring plaintiff to provide funds for his children to attend private schools did not violate Article IX, Section 3 of the N. C. Constitution or the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.

5. **Divorce and Alimony § 23— motion to reduce child support — failure to show substantial change of financial circumstances**

Plaintiff physician failed to show a substantial change of circumstances in his earning capacity such as to entitle him to a reduction in the amount of his payments for support of his children where it tended to show that prior to September 1973 plaintiff received $7,000 per month for medical services rendered to three hospitals, that plaintiff's contracts with the hospitals terminated in September 1973, that plaintiff's income was $75,000 in 1972 and $52,000 in 1973, that plaintiff is engaged in private practice, and that his income for March, April and May 1974 was in excess of $15,000.

6. **Divorce and Alimony § 23— father's motion to reduce child support payments — attorney fees of mother**

Where defendant's employment of counsel was necessitated by plaintiff's unilateral reduction of child support and educational pay-

ments and by his filing of a motion in the cause to reduce such payments, the court did not err in requiring plaintiff to pay a fee to defendant's attorney.

APPEAL by plaintiff from *Allen, Judge.* Order entered 24 June 1974 in District Court, ORANGE County. Heard in the Court of Appeals 11 February 1975.

Plaintiff and defendant, who were formerly husband and wife, had three children: David, born 18 March 1954; Laura, born 2 May 1956; and Margaret, born 1 August 1960. By separation agreement dated 22 January 1968 the parties agreed that defendant wife should have "the custody, care and control" of the three children and plaintiff husband agreed to make monthly payments to defendant for her support and for the support of the children. Thereafter this divorce action was instituted by plaintiff husband and on 22 May 1969 a decree of absolute divorce was entered. On the same date, and prior to entry of the divorce decree, the parties entered into a supplementary agreement by which they made certain amendments to the 22 January 1968 separation agreement. The court in entering the divorce decree inquired into and examined the separation agreement of 22 January 1968 and the supplementary agreement dated 22 May 1969 and approved the same in all respects.

By the separation agreement as amended by the supplementary agreement the husband agreed to pay to the wife, beginning with the month of June 1969, the sum of $1,400.00 per month, of which $500.00 per month was for her support and $900.00 per month was for the support and maintenance of the children. Paragraph 11(d) of the agreement as amended contained the following:

> "That as each child completes his or her undergraduate college education (and if he or she is not enrolled in an undergraduate college reaches twenty-one or is emancipated) then the said payments are to be reduced by $275.00 per month for each of the first two children to which this becomes applicable and by $350.00 per month for the last child so involved."

The supplementary agreement of 22 May 1969 also added a new provision, paragraph 3A, to the contract, as follows:

> "The party of the first part [the husband] recognizes the mutual obligation of the parents to provide for the

proper education of the children (both preparatory and college) and the party of the first part pledges to assist financially in the same in addition to the monthly payments herein provided."

In October 1971 defendant wife filed a motion in the cause to require plaintiff to make additional contributions toward the educational expenses of the children. After hearing on this motion, District Judge Horton entered an order dated 29 August 1972 in which the court ordered the plaintiff to pay, in addition to the monthly installments for support of the children, sixty percent of the cost of private preparatory education for the two daughters, Laura and Margaret and of college education for David. Plaintiff gave notice of appeal from this order, but his appeal was dismissed by the Court of Appeals for failure of plaintiff to comply with the Rules of Practice in the Court of Appeals and his petition for certiorari to the North Carolina Supreme Court was thereafter denied.

In September 1973 plaintiff filed a motion in the cause in which he alleged a change in his financial circumstances and asked for a reduction in the amounts he should be required to pay for the support and maintenance of the children. Following the filing of this motion in September 1973, plaintiff reduced the amount of the monthly payment which he thereafter made to defendant for her support and for the support of the three children from $1,400.00 per month to $600.00 per month. On 5 June 1974 plaintiff moved to amend his motion so as to allege as an additional ground for relief that his son, David, had become 18 years of age on 18 March 1972, and his daughter, Laura, had become 18 on 2 May 1974. In the amended motion plaintiff prayed that the court rule as a matter of law that as to these children he no longer had any obligation to furnish support. The District Court denied his motion to amend and, after a hearing at which plaintiff testified to changes in his income and financial circumstances, Judge Allen entered an order dated 24 June 1974 in which the court found that no substantial change in circumstances had occurred, found that plaintiff was still obligated and bound by the separation agreement and the supplementary agreement and by the previous order of the court, determined that plaintiff was in arrears, and ordered him to make good the arrearage and to continue to make the payments as provided in the separation agreements and as di-

rected in the earlier order of the court. From this order dated 24 June 1974 plaintiff appeals.

Wilkinson & Vosburgh by James R. Vosburgh for plaintiff appellant.

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

PARKER, Judge.

The question presented is whether the contractual obligations which plaintiff undertook when he entered into the separation agreement as amended on 22 May 1969 to make monthly support payments for the benefit of his children and to contribute toward their educational expenses terminated by operation of law as to each child becoming 18 years of age by reason of the enactment of G.S. Chap. 48A effective 5 July 1971 which lowered the age of majority from 21 to 18 years of age. We hold that they did not.

[1, 2] A parent can by contract assume an obligation to his child greater than the law otherwise imposes, *Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425 (1971), and by contract bind himself to support his child after emancipation and past majority. *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964). Such was the case here. By contract with the defendant, the plaintiff bound himself to make undiminished monthly support payments for his children, the amount of the payments to be reduced "as each child completes his or her undergraduate college education." So long as a child was engaged in that endeavor no limitation of age or time was imposed. Only in the event a child should not be enrolled in an undergraduate college was provision made for reduction in the monthly support payments as such child reached twenty-one or was emancipated. Clearly, the parties contemplated that a child might not complete his undergraduate education and might remain enrolled after becoming emancipated and that in such event plaintiff's obligation to make undiminished support payments would continue.

Shoaf v. Shoaf, 282 N.C. 287, 192 S.E. 2d 299 (1972), cited and relied on by plaintiff, is distinguishable on its facts and is not here controlling. The consent order involved in that case by its own provisions imposed no obligation to furnish support beyond the date the child reached his majority or was otherwise

emancipated. See opinion of Morris, Judge, in *White v. White,* 25 N.C. App. 150, 212 S.E. 2d 511 (1975).

[3] We note that when Judge Horton entered the order in the present case dated 29 August 1972, David, the oldest child, was already 18 years old and G.S. Chap. 48A was then in effect. The plaintiff made no contention at that time that his son's reaching majority relieved him of all further obligation to provide for his son's support and education. Judge Horton's order, which provided among other things that plaintiff continue to make support and educational payments for the benefit of his 18-year-old son, became the law of this case upon the dismissal of plaintiff's appeal therefrom. Furthermore, when in September 1973 plaintiff unilaterally reduced the monthly support payments for his children, he still did not contend he had a right to do so because David was no longer a minor, but contended only that his own changed financial circumstances made the reduction necessary. It was not until 5 June 1974, when his motion came on for hearing, that plaintiff for the first time contended that his obligations toward any of his children terminated as each became 18. His own prior conduct clearly demonstrates that he had theretofore otherwise understood the nature of his contractual obligations for the benefit of his children and that he had long recognized that these obligations might continue without regard to the time any child should attain majority. Plaintiff's own prior conduct is consistent with the construction which we place upon his contract.

[4] In the second and third arguments set forth in plaintiff's brief on this appeal, plaintiff contends that under the equal protection clause of the Fourteenth Amendment to the United States Constitution and under Article IX, Section 3 of the North Carolina Constitution, he may not be required to provide funds for his children to attend private schools. The record does not indicate that these constitutional contentions were raised or passed upon in the trial court, and as a general rule an appellate court will not pass upon a constitutional question which was not raised and considered in the court from which appeal was taken. *Wilcox v. Highway Comm.,* 279 N.C. 185, 181 S.E. 2d 435 (1971). Moreover, we find plaintiff's arguments unpersuasive. Article IX, Section 3 of our State Constitution directs that "[t]he General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other

means." Here, obviously, the children are being educated by other means. Neither is there any denial of equal protection in requiring a father to pay for his children's educations at a private school. Plaintiff agreed in the separation agreement that defendant should have "the custody, care and control" of the three children, and in general the custodian is the one to decide the extent and the place of the education of the child beyond that which is provided by the public school system, subject to the approval of the court in cases where the father is required by the court to pay therefor. *Zande v. Zande,* 3 N.C. App. 149, 164 S.E. 2d 523 (1968) ; *see* Annot., 36 A.L.R. 3d 1093. Here, the order of Judge Horton dated 29 August 1972 expressly found that the children's attendance at private schools was in their best interest. As above noted, plaintiff failed to perfect his appeal from that order.

[5] Plaintiff contends that the order of Judge Allen now appealed from demonstrates a "gross abuse of discretion" in failing to find a substantial change of circumstances in regard to plaintiff's earning capacity such as to entitle him to the relief sought in his motion. We do not agree. The evidence discloses and Judge Allen found as facts that plaintiff is a medical doctor who, prior to September 1973, received $7,000.00 per month for medical services rendered to three hospitals, that plaintiff's contracts with the hospitals terminated in September 1973 and he thereafter engaged in private practice through a professional association of which he was the sole owner, that his adjusted gross income for 1972 was in excess of $75,000.00 and for 1973 was in excess of $52,000.00, and that the total income of the professional association for March, April and May 1974, was $15,012.00. No exception was taken to any of the foregoing findings. Plaintiff had the burden of showing a change in circumstances sufficient to warrant Judge Allen's modifying the order previously entered by Judge Horton. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967). Plaintiff failed to carry that burden and we find no merit in plaintiff's present contention that Judge Allen abused his discretion.

[6] Finally, plaintiff assigns error to the portion of the order appealed from which directed him to pay a fee to the defendant's attorneys. In this connection plaintiff does not contest the amount of the fee allowed but contends only that as a matter of law he should not be required to pay any fee. We do not agree. By his own actions in unilaterally reducing the support payments

for the children and by filing his motion in the cause, plaintiff forced defendant to employ counsel to secure for their children the support and educational benefits to which they were entitled. Plaintiff cannot now justly complain at being required to assist in the payment of defendant's necessary counsel fees. *Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967); *Andrews v. Andrews,* 12 N.C. App. 410, 183 S.E. 2d 843 (1971); *see Shore v. Shore,* 15 N.C. App. 629, 190 S.E. 2d 666 (1972).

The order appealed from is

Affirmed.

Judges MORRIS and HEDRICK concur.

ROBERT LEE WOOD, JR., BY HIS GUARDIAN AD LITEM ROBERT LEE WOOD, SR. v. B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF ARCHIE MERRELL CREEF, JR., DECEASED

No. 7419SC1087

(Filed 2 April 1975)

1. Trial § 3— plaintiff in prison — denial of motion to continue proper

In an action to recover for personal injuries sustained in an automobile accident where plaintiff moved for a continuance on the ground that he could not be present for trial since he was confined in a prison in another state, the trial court did not err in denying his motion since plaintiff's counsel who had represented him at the first trial of the action had ample opportunity to prepare for trial, plaintiff had at his disposal for his use his own testimony in the form of an adverse examination as well as his testimony at the first trial, plaintiff had the benefit of the live testimony of three other witnesses who were passengers in defendant's automobile at the time of the accident, and plaintiff made no showing to the court that he would be able to attend the trial if the judge granted his motion for a continuance for the term.

2. Rules of Civil Procedure § 42; Trial § 8— four actions arising from one automobile accident — consolidation proper — limitation of issues to be decided

The trial court did not abuse its discretion in consolidating for trial four cases involving one automobile accident where the same defenses were interposed to each claim, and the court properly ordered trial of the issues of negligence and contributory negligence only.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 1 August 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 11 March 1975.

Civil action by a passenger against estate of the deceased driver to recover for personal injuries sustained by the passenger in an automobile accident in which the driver was killed and the passenger injured. Plaintiff alleged that the accident occurred when the driver, driving his vehicle at night on a two-lane blacktop road at a high and dangerous rate of speed in excess of 100 miles per hour, attempted to pass other vehicles around a curve and lost control of his car, which skidded off of the highway and struck a utility pole. Defendant answered that prior to and at the time of the accident the driver was intoxicated, that the plaintiff had been with the driver a considerable period of time prior to the accident and had been with him at the time he purchased and consumed alcoholic beverages, and that after plaintiff knew or by exercise of due care should have known of the driver's intoxicated condition he had an opportunity to get out of the vehicle but failed to do so. Defendant pleaded this conduct of plaintiff as contributory negligence.

The jury answered issues of negligence and contributory negligence in the affirmative. From judgment on the verdict dismissing the action, plaintiff appealed.

Ottway Burton for plaintiff appellant.

Smith & Casper by Archie L. Smith for defendant appellee.

HEDRICK, Judge.

This case was first tried at the May 1972 Session of Superior Court held in Randolph County. Issues of negligence and contributory negligence at the first trial were submitted to and answered by the jury in the affirmative. From a judgment entered on the verdict dismissing his action, the plaintiff, represented then as now by Ottway Burton, appealed. The decision of this court finding error in the charge and ordering a new trial, filed 27 December 1973, is reported at 20 N.C. App. 307, 201 S.E. 2d 225 (1973).

When this case came on for trial again at the 29 July 1974 Session of Superior Court held in Randolph County, the defendant moved to consolidate the present case with three other civil actions instituted by three other plaintiffs against the same

defendant for damages arising out of the same automobile accident. All of the plaintiffs in the four actions were represented by Mr. Burton. Two of the plaintiffs (James Creed Solesbee, Jr., and Ross Clarence Ayers) were passengers with Wood and the deceased driver in the automobile at the time of the accident. The third plaintiff (Robert Lee Ayers) is the father of the minor plaintiff (Ross Clarence Ayers) who, in his action, seeks to recover damages for medical expenses expended by him for treatment of injuries received by his son in the accident. Plaintiff Wood, through his attorney, made a motion to continue his case. The motion was supported by an affidavit of Era N. Wood, mother of the plaintiff, stating that the plaintiff Wood had been confined in the Glade Correctional Institution at Belle Glade, Florida since 28 January 1973, having received a sentence of three years, and that it would be impossible for him to be present at the trial of his case in the Superior Court of Randolph County during the week of 29 July 1974 because "the Florida correctional institute officials do not provide for furloughs out of the State on civil matters." The affiant further stated that she and the plaintiff's attorney were doing all they could to obtain a parole for the plaintiff "and that she expects some answer in the very near future as to her son's expected parole."

The trial court denied plaintiff Wood's motion to continue, allowed the defendant's motion to consolidate all the cases for trial, and further ordered "that all of said cases be tried at this term of Court solely upon the questions of negligence and contributory negligence and that the trial of such cases insofar as issues of damages are concerned be tried at a subsequent term of this Court in the event that such trial shall become necessary after the trial thereof upon the issues of negligence and contributory negligence as herein ordered."

[1] Plaintiff first contends the trial court erred in denying his motion to continue. It is a well-established rule that continuances are addressed to the sound discretion of the trial judge and may be granted only for good cause shown and as justice may require. G.S. 1A-1, Rule 40(b), Rules of Civil Procedure; *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971). A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of a manifest abuse of discretion. *O'Brien v. O'Brien,* 266 N.C. 502, 146 S.E. 2d 500 (1966).

Since Wood's attorney represented all the plaintiffs and had represented Wood at the first trial in May 1972, it is clear he had ample opportunity to prepare for trial. Although Wood was unable to testify in person, he had at his disposal for use his own testimony in the form of an adverse examination taken 19 March 1971 by the defendant and the transcript of his testimony at the first trial. In addition, plaintiff Wood had the benefit of the live testimony of three other witnesses who were passengers in the defendant's automobile at the time of the accident. Furthermore, plaintiff Wood made no showing to the court that he would be able to attend the trial if the judge had granted his motion for a continuance for the term. In fact, the plaintiff made no showing as to the possibility of his attendance at any reasonable future time. The record discloses that Wood was imprisoned on 28 January 1973 and that unless paroled he would remain incarcerated until 28 January 1976. While we can sympathize with any litigant's desire to be in court when his case is tried, under the circumstances here presented we cannot say Judge Seay abused his discretion in refusing to continue the case for the term. See, *Janousek v. French*, 287 F. 2d 616 (8th Cir. 1961); *Cleeland v. Cleeland*, 249 N.C. 16, 105 S.E. 2d 114 (1958); *Clolinger v. Callahan*, 204 Ky. 33, 263 S.W. 700 (1924); 17 C.J.S. Continuances, §§ 27 and 31; Annot. 4 A.L.R. Fed. 929.

[2] Next, defendant contends the court erred in consolidating the four cases for trial and in ordering that the cases be tried only upon the issues of negligence and contributory negligence.

G.S. 1A-1, Rule 42(a), Rules of Civil Procedure, in pertinent part provides:

> "When actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

It is well-settled that the trial court in the exercise of its discretion may consolidate several cases involving different plaintiffs against a common defendant when the causes of action grow out of the same transaction and substantially the same defenses are interposed if such consolidation does not result in prejudice or harmful complications to either party. 7 Strong, N. C. Index 2d, Trial § 8.

Obviously, the four cases here arose out of the same transaction, i.e., the one car accident, and the same defenses were interposed to each claim. Plaintiff has failed to demonstrate that the order consolidating the cases for trial resulted in any harmful complications or prejudice to any party. Moreover, the trial judge supported his order to try the cases only on the issues of negligence and contributory negligence by finding that "considerable expense would be involved in the trial of the damage issues in the various cases, and that the ends of justice would best be served by a trial at this session on the negligence and contributory negligence issues only." Plaintiff has failed to demonstrate any abuse of discretion upon the part of Judge Seay in consolidating the four cases for trial on the issues of negligence and contributory negligence. These assignments of error are overruled.

By his sixth, seventh, ninth, and tenth assignments of error, plaintiff contends the trial court erred in (1) allowing into evidence the results of a blood alcohol analysis performed upon the blood sample extracted from the deceased driver's corpse; (2) allowing a chemist from the SBI laboratory to give his opinion, based on the blood alcohol analysis, as to whether the deceased driver was under the influence of an intoxicating beverage at the time of the accident; (3) allowing a medical doctor to give his opinion, based on the blood alcohol analysis, as to whether the deceased driver was under the influence of an intoxicating beverage at the time of the accident; and (4) submitting to the jury an issue of contributory negligence.

Upon evidence substantially identical to the evidence now before us, each of these questions was raised and argued by plaintiff in the prior appeal of this case. On authority of the opinion in the former appeal of *Wood v. Brown, supra,* and the citations therein, we hold these assignments of error to be without merit.

Plaintiff has other assignments of error which he has argued in his brief which were not raised in the former appeal and which we have not discussed here. We have carefully considered each exception upon which all of the assignments of error are based, including each exception to the charge, and conclude that plaintiff had a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

HILDA GENTRY McKNIGHT v. DON B. McKNIGHT

No. 7521DC13

(Filed 2 April 1975)

1. **Husband and Wife § 12— support provided in separation agreement — survival of right after absolute divorce**

Where plaintiff and defendant entered into a separation agreement by the terms of which defendant was to make support payments to plaintiff, plaintiff thereby acquired a right arising out of contract, not one arising out of marriage, and such right survived the absolute divorce between the parties.

2. **Rules of Civil Procedure § 15— amendments — supplemental pleadings — distinction**

The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented, whereas amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. G.S. 1A-1, Rule 15.

3. **Husband and Wife § 11; Rules of Civil Procedure § 15— support provision of separation agreement — action to enforce — amendment of complaint proper**

In an action by plaintiff to enforce the provisions for her support in a separation agreement entered into by the parties prior to their absolute divorce, the trial court did not err in allowing plaintiff to "amend" her complaint to include defendant's arrearages from the time plaintiff filed the action until the date of trial.

4. **Husband and Wife § 11— support provided in separation agreement — fairness not in question**

In an action to recover support under the provisions of a separation agreement, the trial court's instruction that an officer of the court had examined into the facts and certified that the agreement was fair to both parties did not prejudice defendant.

5. **Husband and Wife § 11— separation agreement — no ambiguity — requested instruction properly denied**

Where the trial court determined that a separation agreement between the parties was plain and unambiguous, the court did not err in failing to instruct the jury as requested that any ambiguities in the agreement would be resolved against the party drafting it.

McKnight v. McKnight

APPEAL by defendant from *Henderson, Judge.* Judgment entered 9 September 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 13 March 1975.

This is a civil proceeding wherein the plaintiff, Hilda Gentry McKnight, divorced wife of the defendant, Don B. McKnight, seeks to enforce the provisions for her support in a separation agreement entered into between the parties prior to their absolute divorce.

The following facts are not controverted: Plaintiff and defendant were married on 31 January 1959 and on 17 January 1969 they entered into a separation agreement which contained, among other things, the following provisions:

> "XX. The Husband agrees to pay to the Wife, as alimony, $25.00 on or before the 20th day of each September, October, November, December, January, February, March, April and May, and $25.00 on or before the 5th day of each September, October, November, December, January, February, March, April and May and $45.00 on or before the 20th day of each June, July and August and $45.00 on or before the 5th day of each June, July and August, with the first payment beginning January 20, 1969, and continuing until either the Husband or the Wife shall die or until the Wife shall have become remarried.
>
> XXI. The Husband warrants that his present earned income is not in excess of $7,500.00 per year. The Husband agrees that with each $2,000.00 increase in his total income he shall increase his payments a total of $50.00 per month, divided equally between support for Bart Thomas McKnight and alimony for the Wife and paid as set out above, that is, on or before the 5th and 20th day of each month. In the event the Husband's income should increase and then decrease the payments shall be increased and then decreased according to the formula set out above, said payments to begin the year following the increase in income. The payments shall not be decreased below the payments set out in Paragraphs XIX and XX hereof.
>
> In order to keep the Wife informed of any change in income the Husband agrees to furnish to the Wife, on or before January 31 of each year, beginning January 31, 1970, any and all W-2 forms and 1099 forms, or their equivalents, which he shall be entitled to for the previous year.

* * *

XXV. Nothing herein contained shall be deemed to prevent either of the parties from maintaining a suit for absolute divorce against the other in any jurisdiction based upon any past or future conduct of the other nor to bar the other from defending any such suit. In the event any such action is instituted the parties shall continue to be bound by any applicable terms of this agreement."

On 19 January 1970, based upon one year's separation, the parties obtained an absolute divorce. Thereafter, on 8 January 1974, plaintiff filed this action alleging that the defendant was in arrears in his support payments under the terms of the separation agreement. Defendant filed answer admitting execution of the contract but pleaded the judgment of absolute divorce in bar of plaintiff's claim.

At the trial, plaintiff offered evidence tending to show that the defendant was $2,470.00 in arrears in his payments for the support of the plaintiff under the terms of the contract. This figure included payments for the first eight months of 1974. Defendant offered no evidence.

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

"I. Did the defendant breach the separation agreement made between the parties?

ANSWER: Yes.

II. If so, what amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $2,470.00."

From a judgment entered on the verdict, defendant appealed.

Hamilton C. Horton, Jr., for plaintiff appellee.

Hall, Scales & Cleland by Roy G. Hall, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Assignments of error 1, 2, 4, 6 and 10 raise the question of whether plaintiff's claim under the provisions of the separa-

tion agreement entered into on 17 January 1969 is barred by the judgment of absolute divorce entered on 19 January 1970.

G.S. 50-11(a) in pertinent part provides: "After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . . . "

Defendant argues that since plaintiff's claim is based on a right arising out of the marriage it did not survive the judgment of absolute divorce because of the plain language of G.S. 50-11(a). The fallacy in defendant's argument is that plaintiff's claim is based on a right arising out of contract which survives a judgment of absolute divorce, *see Hamilton v. Hamilton,* 242 N.C. 715, 89 S.E. 2d 417 (1955); *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118 (1946); *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233 (1945); *Williford v. Williford,* 10 N.C. App. 451, 179 S.E. 2d 114 (1971); *Sebastian v. Kluttz,* 6 N.C. App. 201, 170 S.E. 2d 104 (1969); 2 Lee, North Carolina Family Law § 192, not a right arising out of the marriage which was terminated by the judgment of absolute divorce. These assignments of error are overruled.

By assignments of error 3, 8, and 9, defendant contends the trial court erred in allowing "evidence of defendant's alleged arrearages accruing after the action was filed and permitting plaintiff's eleventh-hour motion to amend the complaint . . . . "

G.S. 1A-1, Rule 15, Rules of Civil Procedure, in pertinent part, provides:

> "(b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. * * * "

"(d) *Supplemental pleadings.*—Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense."

[2] The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented; whereas, amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. *Williams v. Freight Lines,* 10 N.C. App. 384, 179 S.E. 2d 319 (1971). Therefore, although designated as an "amendment", plaintiff's allegations with respect to the failure of the defendant to make his support payments from January 1974 to the date of trial was in effect a supplementary pleading. See *New Amsterdam Casualty Company v. Waller,* 323 F. 2d 20 (4th Cir. 1963); 3 Moore's Federal Practice § 15.16[1].

[3] In any event, since both motions to amend and motions to file supplemental pleadings are granted in the discretion of the trial judge, *Minnesota Min. & Mfg. Co. v. Superior Insulating Tape Co.,* 284 F. 2d 478 (8th Cir. 1960); *Galligan v. Smith,* 14 N.C. App. 220, 188 S.E. 2d 31 (1972); 3 Moore's Federal Practice § 15.16[3], we perceive no prejudice to the defendant in the court allowing the "motion to amend". Furthermore, since the amount of defendant's arrearage under the contract was an issue raised by the pleadings, since the amendment only served to bring the cause of action up to date, and since the amount of support the defendant was obligated to pay for the first eight months of 1974 was to be determined from defendant's income in 1973, it was not error for the trial judge either to permit the plaintiff to introduce evidence of defendant's arrearage between the date she filed this action, 8 January 1974, and the date of trial or to allow the plaintiff to "amend" her complaint to include the additional amount owed to her. These assignments of error are overruled.

[4] Next, defendant contends the court erred in instructing the jury that an officer of the court had examined into the facts

and certified that the separation agreement was fair to both parties. Under the pleadings and the evidence, the instruction challenged by this exception was, as characterized by the defendant, gratuitous. However, since the defendant admitted entering into the contract and neither the pleadings nor the evidence raised an issue as to whether the agreement was fair to either party, we do not perceive how the gratuitous and erroneous remarks of the judge could have prejudiced the defendant.

[5] Finally, defendant contends the court erred in not instructing the jury as requested that any ambiguities in the separation agreement would be resolved against the party drafting it. The requested instruction is a rule of construction bottomed on the premise that there is an ambiguity in the contract. *Windfield Corp. v. Inspection Co.*, 18 N.C. App. 168, 196 S.E. 2d 607 (1973). Where the contract is plain and unambiguous, the construction of the agreement is a matter of law for the court. *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477 (1969). The issues submitted to the jury obviously do not require any construction of the contract. The defendant did not request that additional issues be submitted to the jury or object to the issues submitted. It is clear from the issues submitted that the trial judge had already determined that the contract was plain and unambiguous and there would have been no reason for the judge to have given the requested instruction in any form. This assignment of error is overruled.

We find and hold that the trial in the district court was without prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. SAMUEL PETE TANNER

No. 7410SC1062

(Filed 2 April 1975)

1. **Weapons and Firearms— discharging firearm in city — failure to instruct on self-defense**

The trial court was not required to charge the jury that a city ordinance prohibiting the firing of a gun within the city limits is not

violated if the gun is fired in defense of person or property where there was no evidence that defendant was acting in defense of person or property when he fired the shot for which he was on trial. G.S. 160A-189.

2. **Property § 4— wilful damage to personalty — amount of damage — maximum sentence**

A sentence of six months was the maximum term that could be imposed for wilful damage to personal property, an automobile, where there was no proof and jury finding that the amount of damage to the automobile exceeded $200. G.S. 14-160(a), (b).

3. **Assault and Battery § 15— discharging firearm into occupied automobile — instructions — wilful act — knowledge of occupancy**

In a prosecution for wilfully discharging a firearm into an occupied automobile, the trial court erred in giving the jury an instruction which equated wilful and wanton conduct with knowledge of occupancy since it thereby attempted to condense two elements of the crime into one.

4. **Property § 4; Weapons and Firearms— discharging firearm in city — malicious damage to personalty — merger of offenses**

Elements of the offense of discharging a firearm in a city in violation of a city ordinance are embraced within the offense of wilful damage to personalty by shooting out an automobile window when that offense is proved to have been committed within the city, and defendant could not be convicted and sentenced for both offenses.

5. **Assault and Battery § 5; Property § 4— wilful damage to personalty — firing into occupied vehicle — no merger of offenses**

The elements of the offense of wilful damage to personalty by shooting out an automobile window are not embraced within the elements of the offense of discharging a firearm into an occupied vehicle since the element of damage in a charge of wilful damage to personalty is not an element of discharging a firearm into an occupied vehicle, and defendant could be convicted of both crimes.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 25 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 20 February 1975.

Defendant was convicted in superior court (1) of discharging a firearm within the Raleigh city limits in violation of § 15-21 of the Raleigh Code in Case No. 74CR16956, (2) of wilful damage to personal property, a violation of G.S. 14-160, by shooting out the front window of an automobile in Case No. 74CR16957, and (3) of discharging a firearm into an occupied automobile in violation of G.S. 14-34.1 in Case No. 74CR16958.

The State's evidence indicated that on 16 March 1974, during a date with one Ethel Partin, defendant discovered that

$1,300.00 of his money had disappeared. Earlier defendant had placed thirteen one hundred dollar bills in his front pocket. He and Partin got into an argument over the disappearance of the money. While they were arguing at defendant's house, Partin's son and nephew arrived and became involved in the argument. A scuffle ensued, and Partin, her son, and her nephew went outside, got into a car, and drove away. When they returned to the neighborhood later that night, defendant shot through the window of their car at them, injuring Partin's son, Robert. Defendant was arrested at his home following the shooting.

The only material difference between the State's evidence and that offered by the defendant was the fact that defendant maintained that he fired into the ground rather than at the car. Defendant offered several witnesses who supported his testimony.

The jury found the facts against the defendant, and a sentence was imposed in each case. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Vaughan S. Winborne, for the defendant-appellant.

BROCK, Chief Judge.

Case No. 74CR16956

[1] Defendant assigns as error the failure of the trial court to instruct that § 15-21 of the Raleigh Code, proscribing the firing of a gun within the city limits, is not violated if the gun is fired in defense of person or property. G.S. 160A-189 grants cities authority to regulate, restrict, or prohibit by ordinance "the discharge of firearms at any time or place within the city except when used in defense of person or property or pursuant to lawful directions of law-enforcement officers, and may regulate the display of firearms on the streets, sidewalks, alleys, or other public property."

Although firing in defense of person or property would not constitute a violation of the ordinance, there is no evidence that defendant fired either in self-defense or in defense of his property. Defendant testified that "[t]hey were running up the street, Ethel and another, I don't know if it was her son or nephew, but they was running up the street, and I shot, went

to the end of the porch, the balance (sic), and throwed the gun over and shot right down in the ground, and came on back in the house."

Without some evidence which would justify the jury's finding that defendant was acting in defense of person or property, the trial judge was not required to instruct the jury on the principle of self-defense. This argument is without merit.

Case No. 74CR16957

[2] Defendant assigns as error the two-year sentence imposed for the violation of G.S. 14-160. That statute provides in G.S. 14-160(a) that, in cases of wilful or wanton injury to personal property, punishment is not to exceed either six months or a $500.00 fine, or both. G.S. 14-160(b) provides that injury to property causing damage in an amount in excess of $200.00 shall be punishable either by fine, imprisonment for a term not exceeding two years, or both.

There is no evidence or jury finding in this case as to the amount of damage done to the car in which Ethel Partin, her son, and her nephew were riding. In the absence of any proof that the damage was greater than $200.00, the defendant should have been sentenced pursuant to G.S. 14-160(a). We note that this would normally constitute only harmless error because the two-year sentence is to run concurrently with the four-to-six-year sentence imposed in Case No. 74CR16958 for shooting into an occupied vehicle. *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, *cert. denied,* 283 N.C. 666 (1973). However, because we find error in the trial court's charge in Case No. 74CR16958, the error in sentencing defendant without proof of damage in excess of $200.00 is prejudicial error. Accordingly the case will be remanded for imposition of a proper sentence.

Case No. 74CR16958

[3] Defendant assigns as error the following portion of the trial judge's instructions to the jury:

> "I will go over those elements for you again. Seat them in your minds because you must resolve and say whether the evidence has established that you are satisfied beyond a reasonable doubt as to these three things: One, that the defendant intentionally discharged a shotgun into the

Pontiac automobile described in the bill of indictment and evidence in the case. Two, also that the Pontiac automobile was occupied at the time that the gun was discharged; and, third and finally, that the defendant acted willfully or wantonly, which means that he had knowledge that the automobile was occupied by one or more persons or that he had reasonable ground to believe that the automobile might be occupied by one or more persons. They are the three things that are essential to constitute guilt."

In *State v. Williams*, 21 N.C. App. 525, 204 S.E. 2d 864 (1974), an almost identical instruction was given to the jury. The defendant argued that the "instruction equated wilful and wanton conduct with knowledge of occupancy of the building and attempted thereby to condense two separate elements of the crime into one." 21 N.C. App. at 527. We found merit in his argument and held that the charge was erroneous, despite the fact that it was taken from "Pattern Jury Instructions for Criminal Cases in North Carolina." We are therefore similarly constrained to hold that the charge in this case, concerning a violation of G.S. 14-34.1, was erroneous. As stated in *Williams*, a correct charge would provide that the accused would be guilty if the defendant intentionally, without legal justification or excuse, discharged a firearm into an occupied vehicle with knowledge that the vehicle was occupied by one or more persons or when he had reasonable grounds to believe that the vehicle might be occupied by one or more persons. 21 N.C. App. at 527. Defendant's assignment of error is sustained, and a new trial on this charge (Case No. 74CR16958) is ordered.

Defendant has filed a separate motion in arrest of judgment in Cases No. 74CR16956 (discharging a firearm in the city) and No. 74CR16957 (wilful damage to property by shooting out the automobile window), contending that these two offenses merge into the greater offense charged in Case No. 74CR16958 (discharging a firearm into an occupied vehicle).

[4] It seems clear that the elements of the offense charged in Case No. 74CR16956 (discharging a firearm in the city) are embraced within the offense charged in Case No. 74CR16957 (wilful damage to property by shooting out the automobile window) when that offense is proved to have been committed within the city. The two offenses were shown to arise out of the same set of facts. "It is generally agreed that if a person is tried for a greater offense, he cannot be tried thereafter for a lesser

offense necessarily involved in, and a part of, the greater, . . . " 1 Wharton, Criminal Law and Procedure § 148, *quoted in State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972). The fact that one constitutes a violation of the city code and the other constitutes a violation of a state statute does not justify successive convictions. *See Waller v. Florida,* 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435, *reh denied,* 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed. 2d 79 (1970). Therefore, judgment in Case No. 74CR16956 (discharging a firearm in the city) must be arrested.

[5] We do not agree with defendant's contention that the elements in Case No. 74CR16957 (wilful damage to property by shooting out the automobile window) are the same as the elements in Case No. 74CR16958 (discharging a firearm into an occupied vehicle). The element of damages which must be shown in a charge of wilful damage to property is not an element in a charge of discharging a firearm into an occupied vehicle. Therefore, the two charges are not the same in fact or in law. Defendant's motion in arrest of judgment in Case No. 74CR16957 (wilful damage to personal property) is denied.

The result is this:

In Case No. 74CR16956, judgment arrested.

In Case No. 74CR16957, remanded for proper sentence.

In Case No. 74CR16958, new trial.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. ALFONZO DAVIS AND GEORGE BLANKS

No. 745SC1018

(Filed 2 April 1975)

Criminal Law § 66— in-court identification of defendant — pre-trial photographic identification not improper

Evidence was sufficient to support the trial court's conclusion that a witness's in-court identification of defendants as the persons who robbed him was not tainted by a pre-trial photographic identification of one defendant where such evidence tended to show that robbers

were in a store for fifteen minutes where the witness was cashier, the store was brightly lighted, the witness had an opportunity to observe the taller robber who was wearing a loose stocking, an officer brought the witness several photographs and indicated that there was a possible suspect among the photographs, the witness selected one defendant's photograph and the officer told him that he was right.

APPEAL by defendants from *Cowper, Judge.* Judgments entered 30 August 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 17 February 1975.

By separate bills of indictment defendants were charged with armed robbery. Each defendant entered a plea of not guilty and the cases were consolidated for trial.

State's evidence tended to show that Robert Brunson III was employed as a night cashier at a Zip Mart store in Wilmington, North Carolina. The store remained open all night. Brunson was in the rear of the store marking prices on stock when he heard the main door open. He turned and observed two males enter the store with stockings over their heads. According to Brunson, they wore a sheer, light brown stocking, probably called "French Coffee", through which he could see. One was tall, one was short, and both were Negro. The taller one had a small caliber pistol and crouched behind the counter approximately five inches from Brunson. The stocking mask was loosely fitted, and Brunson noticed that he was dark-skinned with braided hair and that he had either "peach fuzz" or a goatee on his chin. The shorter man took approximately $200.00 from the cash register and questioned Brunson about a floor safe. The floor safe was opened and approximately $500.00 was taken from it. After the two men left with the money, Brunson phoned the police, giving a description of the men. He described the robbers as being two black men with braided hair. The taller one was described as approximately six feet six inches in height, weighing approximately 150 pounds, wearing dungarees and a red sleeveless shirt, and having dark skin and a slender build. The shorter one was described as about five feet ten inches in height, weighing approximately 145 pounds, wearing a white "T-shirt" and white hat, and having light skin.

In court, Brunson identified defendants Davis and Blanks as the two men who robbed him. He testified that on 27 July 1974 Officer Gurganious came to the Zip Mart and showed him some photographs. From these he picked out a photograph of

Blanks. Brunson further testified that he saw Davis among the spectators at a preliminary hearing for Blanks, told Officer Carr that Davis was the second man who robbed him, and pointed him out to Officer Carr. Officer Carr then arrested Davis.

Officers Gurganious and Carr primarily testified concerning the pre-trial identification of defendants Blanks and Davis, respectively.

Defendant Davis offered no evidence.

Defendant Blanks recalled Officer Gurganious for questioning and also called James Richburg, Jr. Richburg stated he was present when Officer Gurganious showed Brunson the photographs. According to this witness, Officer Gurganious told Brunson that he had some "mug shots" for Brunson to look at and that he had a possible suspect among the pictures. Brunson picked out a photograph, and Officer Gurganious reportedly said, "Yes, that is the one."

The jury found defendants Davis and Blanks guilty as charged, and from judgments imposing prison sentences, defendants appealed.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Charles E. Rice III, for defendant appellant Alfonzo Davis.

Thomas I. Benton, for defendant appellant George Blanks.

MARTIN, Judge.

Defendant Blanks assigns as error the admission, over his objection, of the in-court identification of Blanks by the prosecuting witness, Robert Brunson, III. He argues that this testimony was tainted by an impermissibly suggestive out-of-court identification procedure using photographs; that the testimony was not of independent origin based upon what the witness saw at the scene; that the testimony was inherently incredible; and that the trial court's findings do not support its conclusions.

The trial court conducted a voir dire hearing which disclosed the following pertinent evidence relating to the photographic identification of defendant Blanks. The day following the robbery, Officer Gurganious went to the Zip Mart store and handed Brunson six photographs of Negro males. Brunson stated that

he went through the pictures and picked out one of George Blanks without any indication from any officer as to which picture he should select. He testified that there was no question at all in his mind as to whether or not George Blanks was the man; that his in-court identification was based on what he saw the night he was robbed; and that his identification was not at all based on the photograph of Blanks. He further testified that throughout the entire investigation he had identified only two individuals and that defendants were these two individuals with Blanks being the taller of the two robbers. On cross-examination Brunson said he thought that he recognized the taller robber when the taller one was down on his knees looking up at him.

Officer Gurganious testified that prior to the time Brunson was shown the photographs he did not say anything concerning who may or may not have been the one that robbed him and that Brunson pulled out a photograph of Blanks and identified Blanks as one of the robbers. It was possible, according to Officer Gurganious, that he informed Brunson the selected photograph belonged to a man named George Blanks. He stated that Brunson never identified anyone as being involved in the robbery other than Alfonzo Davis and George Blanks.

James Richburg, Jr. testified on voir dire that he was present at the time Officer Gurganious gave the pictures to Brunson. According to this witness, Officer Gurganious indicated that there was a possible suspect among the photographs, and upon Brunson's selection of a photograph, Officer Gurganious said, "Yes, you are right. That is the one."

At the conclusion of the voir dire hearing the trial court found that the robbers were in the store for fifteen minutes; that the store was brightly lighted; and that the witness Brunson had an opportunity to observe the taller man who was on his knees and wearing a loose stocking. It then concluded that the in-court identification of George Blanks was of independent origin, based solely on what the witness saw at the time of the crime and not subject to any pre-trial identification procedure suggestive and conducive of mistaken identification. Its finding was supported by clear and convincing evidence adduced from voir dire. A conclusion that the in-court identification had an independent origin establishes the lack of a "very substantial likelihood of irreparable misidentification" required for reversal. See *State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283

(1972). Brunson's testimony was not inherently incredible, and his in-court identification of defendant Blanks was properly admitted into evidence.

Relying on *State v. Knight, supra,* defendant also argues it was error to admit testimony of Officer Gurganious concerning the pre-trial photographic identification. In *State v. Knight* the Court stated, "[T]he introduction of testimony concerning an out-of-court photographic identification must be excluded where . . . the procedure used is impermissibly suggestive, even though that suggestiveness does not require exclusion of the in-court identification itself under the *Simmons* test." In refusing to prohibit absolutely the use of identification by photograph, the Court in *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968) held that "each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

In our opinion there was no impermissible suggestiveness in the photographic identification which would necessitate the exclusion of Officer Gurganious's testimony. *See State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). Brunson had a sufficient opportunity to view defendant Blanks during the robbery. The day after the robbery Brunson viewed six photographs of Negro males, went straight through them, and picked out the photograph of defendant Blanks. Throughout the entire investigation he identified only the two defendants as being the ones who robbed him. Under such circumstances, the possibility that Officer Gurganious may have indicated that he had a suspect or possible suspect among the photographs was inconsequential. Also, the fact that the other five photographs did not look exactly like that of defendant Blanks did not contribute to a possibility of misidentification here. Impermissible suggestiveness amounting to a denial of due process has not been shown. In any event, there is no reasonable possibility that it could have affected the outcome of this case. The State's witness, Brunson, positively identified the two defendants as the robbers while defendant Davis offered no evidence and defendant Blanks merely offered evidence concerning the photographic identification.

At defendant Blanks's preliminary hearing, Brunson saw defendant Davis seated as a spectator and at that time identified Davis to a police officer as the second robber. There was no evidence that the meeting was prearranged. At trial, Brunson again identified Davis as the shorter man who robbed him. Defendant Davis contends that this in-court identification was tainted by the pre-trial photographic identification of defendant Blanks and thereby became inadmissible as the "fruit of a poisonous tree". It suffices to say that first, the pre-trial identification of defendant Blanks was not a poisonous tree, and second, the in-court identification of Davis was not the fruit of the pre-trial identification of Blanks.

We find no error prejudicial to defendants.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

JUDITH ANN SPILLERS v. JOHN RYON SPILLERS, JR.

No. 7418DC1067

(Filed 2 April 1975)

1. **Divorce and Alimony § 16— alimony — consideration of recipient's earning capacity**

It was proper for the trial judge to consider plaintiff's "earning capacity" as a school teacher in determining the amount of alimony to be awarded to her. G.S. 50-16.5(a).

2. **Divorce and Alimony § 16— alimony — failure to require transfer of assets**

The trial court did not abuse its discretion in failing to require defendant to transfer property to plaintiff as part of plaintiff's alimony, and the court's failure to order a transfer of property does not show that the court failed to consider defendant's "estate" in determining the amount of alimony.

3. **Divorce and Alimony § 16— alimony — surrender of possession of car for cash**

In an action to obtain alimony, the trial court did not abuse its discretion in ordering plaintiff to surrender possession of an Eldorado Cadillac upon defendant's payment to her of $5,000 so that she could purchase other transportation.

4. Divorce and Alimony § 16— alimony — failure to order continuation of country club membership

In an action to obtain alimony, the trial court did not err in refusing to order defendant to continue his membership in a country club in order to assure plaintiff continued use of the club's facilities.

APPEAL by plaintiff from *Haworth, Judge.* Order entered 18 September 1974 in District Court, GUILFORD County. Heard in the Court of Appeals 11 March 1975.

On 18 September 1973, plaintiff filed a complaint alleging that she and the defendant were married on 29 October 1965 and lived together as husband and wife until 31 May 1973; that no children were born of the marriage; that during the marriage she had been a dutiful and faithful wife, but that on 31 May 1973, without any provocation on her part, the defendant had abandoned her and since that time had lived separate and apart from her against her will and without her consent; that she was a dependent spouse and defendant was the supporting spouse; that she was informed and believed defendant had committed and was continuing to commit adultery; and that in numerous ways defendant had made her life burdensome. Plaintiff sought alimony pendente lite, attorney fees, sole possession of a 1973 Eldorado Cadillac and sequestration of the home and furnishings therein, and "such other and further relief as the Court may seem (sic) just and proper."

Defendant answered, denying any wrongful acts, but admitting that the plaintiff was a dependent spouse and alleging that he was providing her adequate support to enjoy the standard of living to which she had been accustomed.

Upon plaintiff's motion, a hearing was held and a temporary order entered granting plaintiff alimony pendente lite of $885 per month, and exclusive use of the Eldorado Cadillac, the home and household furnishings, and ordering that the defendant

(1) continue his membership in the Sedgefield Country Club so that the plaintiff could continue to use the Club's facilities;

(2) maintain life insurance payable to his estate and not redesignate beneficiaries or otherwise change the policies so as to preclude any right the plaintiff might have in the policies;

(3) maintain in present form such medical and hospital insurance benefits as presently were available to the plaintiff as wife of the defendant;

(4) pay all personal and household bills incurred by plaintiff up through the hearing on 16 October 1973;

(5) make an interim payment to the plaintiff of $70 to provide for her needs until 5 November 1973, the date of the first alimony pendente lite payment ordered by the court; and

(6) pay plaintiff's counsel fees of $750 at the rate of $100 per month until paid in full.

Subsequently this cause was tried before a jury which found that the defendant had abandoned the plaintiff, committed adultery and rendered her life burdensome as alleged in the complaint. Judgment was therefore entered in favor of the plaintiff, but determination of plaintiff's relief was deferred until a hearing on 18 September 1974. At the hearing the trial court heard evidence and made findings and then granted plaintiff permanent alimony of $885 per month, exclusive use of the home and all household furnishings and attorney fees of $2,500; in addition to the $750 previously ordered paid. Plaintiff was ordered to surrender the Eldorado Cadillac to defendant upon his payment of $5,000 to her so that she could purchase other transportation. Plaintiff appealed.

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

Smith, Moore, Smith, Schell & Hunter, by Richmond G. Bernhardt, Jr., for plaintiff appellant.

Schoch, Schoch, Schoch, and Schoch, by Arch Schoch, Jr., for defendant appellee.

MORRIS, Judge.

Assignment of error No. 4 was not brought forward and argued in plaintiff's brief, and, therefore, is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Four questions are raised by plaintiff's remaining assignments of error.

[1, 2] Plaintiff first contends that the trial judge abused his discretion by failing to award her the alimony to which she is

entitled. In support of her argument plaintiff reviews the evidence and argues (1) that the payments ordered by the court are inadequate to permit her to continue to maintain her accustomed standard of living; (2) that the court erroneously considered her earning capacity as opposed to her actual earnings in determining that "by a reasonable application of her professional skills and training as a school teacher . . . plaintiff can substantially continue to maintain the standard of living previously enjoyed during her marriage and cohabitation with the defendant, . . . " ; and (3) that the court should have ordered the transfer of certain property to her. We disagree. As we noted in *Bowen v. Bowen,* 19 N.C. App. 710, 713, 200 S.E. 2d 214, 217 (1973), and in cases cited therein, "[t]he amount to be awarded for alimony . . . is within the discretion of the trial court and will not be disturbed in the absence of a manifest abuse of such discretion." In our opinion defendant has failed to show an abuse of discretion. Furthermore, we note that 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." (Emphasis supplied.) We therefore conclude that it was proper for the trial judge to consider plaintiff's "earning capacity" in determining whether she could continue to maintain the standard of living enjoyed by her during her marriage to the defendant. Finally, we find it significant that G.S. 50-16.7(a) states that "[a]limony or alimony pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, or a security interest in or possession of real property, as the court *may* order. . . . " (Emphasis supplied.) This statute in no way renders it mandatory or incumbent upon the trial court to order any transfer of property as part of the wife's alimony. Plaintiff contends that the court is directed to give due consideration to the "estates" of the parties and that the court's failure to order transfer of assets in addition to the monthly payments, which were the same as had been provided in the pendente lite order, is clearly an abuse of discretion. Undoubtedly the court could have required the defendant to transfer some of his assets to plaintiff. However, his failure to do so does not constitute abuse of discretion nor is it, in and of itself, conclusive indication that the court failed to consider defendant's estate.

[3] Plaintiff next contends the trial judge abused his discretion in ordering her to surrender possession of a 1973 Eldorado Cadillac upon defendant's payment of $5,000 to her so that she could purchase other transportation. We are unable to find in this action any abuse of discretion on the part of the trial judge. Moreover, the record contains plenary evidence to support the trial judge's findings that Sample, Incorporated, owned the automobile and defendant only had given plaintiff the *use* of the automobile during the marriage. This assignment of error, therefore, is overruled.

In her third assignment of error plaintiff again argues that the trial judge erred in refusing to order the defendant to transfer certain property to her. Plaintiff further argues that the court should have determined her partial ownership in the home. As we already have pointed out, while the trial judge has authority to order a transfer of property under G.S. 50-16.7(a), the statute in no way requires him to order a transfer of property. Additionally, plaintiff never prayed for a determination of her ownership interest in the home or personalty in either her original or amended complaint. She may not raise this issue for the first time on appeal.

[4] Plaintiff's final assignment of error relates to the court's refusal to order the defendant to continue his membership in the Sedgefield Country Club in order to assure plaintiff the continued use of the Club's facilities. Plaintiff maintains this was error in light of her testimony at the trial "as to the importance of her continuing to live in the home at Sedgefield and to the importance of being a member, or having member's privileges, in Sedgefield Country Club." She asserts that loss of the privileges will "substantially impair" her life-style and that the trial court abused its discretion in refusing to require the defendant to assure her the continued use of the Club. No authority is cited by plaintiff in support of this argument, nor has the plaintiff shown that the trial judge acted arbitrarily in denying her request. This assignment of error, therefore, is overruled.

Plaintiff has not been able to show that the court failed to consider those things he is directed by statute to consider nor has she been able to show abuse of discretion.

Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. HAROLD GENE TRIVETTE AND WILLIAM HAROLD ELDRETH

No. 7424SC1076

(Filed 2 April 1975)

1. **Criminal Law §§ 73, 89— statement made to officer — similar testimony elicited from speaker on cross-examination — no hearsay**

The trial court did not err in allowing into evidence a statement made to an officer by one who participated in the larceny in question where defendant had elicited such testimony from the participant himself on cross-examination prior to testimony by the officer.

2. **Criminal Law § 128— newspaper article alleging other crimes by defendant — jury not influenced**

The trial court did not err in denying defendants' motion for a mistrial on the basis of a newspaper article describing other offenses allegedly committed by defendants where the court inquired of the jurors whether they had read the article, one juror read the headline but intentionally did not read the article, another juror did read the article but both assured the judge that they felt that they could completely disregard what they had read in the paper and reach a verdict solely on the evidence.

APPEAL by defendants from *Thornburg, Judge.* Judgments entered 5 April 1974 in Superior Court, WATAUGA County. Heard in the Court of Appeals 10 March 1975.

Attorney General Edmisten by Assistant Attorney General Charles R. Hassell, Jr., for the State.

C. Banks Finger for defendant appellant Harold Gene Trivette.

Charles E. Clement for defendant appellant William Harold Eldreth.

PARKER, Judge.

Defendants appeal from convictions for felonious breaking and entering and felonious larceny. They make two assignments of error. First, they assign error to admission of evidence as to an extrajudicial statement made to the officers by one Larry Haga, contending this was inadmissible as hearsay. Second, they assign error to denial of their motion for mistrial. We overrule both assignments of error.

The State's evidence showed the following: On the late afternoon of 11 June 1973 the Tucker residence near Boone was

broken into during the owner's absence and personal property was taken therefrom. A neighbor, whose attention was attracted by activity near the residence, investigated and saw two young men putting something into the trunk of a car parked nearby. He reported the tag number of the car to the police. Shortly thereafter the police stopped an automobile bearing the reported tag number and found defendant Eldreth was the driver and his codefendant Trivette was a passenger. Larry Haga and two girls were also passengers in the automobile. Property taken from the Tucker residence was found in the trunk of the car.

Haga, called as a witness for the State, testified that he and the two defendants jointly participated in breaking into the Tucker residence and in taking property therefrom. On cross-examination he admitted that after his arrest he had first told the officers that he alone committed the offenses but that after he went back up to jail and started thinking about it, he decided he didn't want to take it all upon himself. The State then called as a witness one of the deputy sheriffs who had interviewed Haga on the night of the arrest. This witness testified that Haga had at first told the officers that he was going to take the blame upon himself and he would not tell on anybody else, but that he then said he wasn't going to take the entire blame himself and that Trivette had helped him break into the house.

[1] There was no error in admission of the deputy's testimony as to what Haga told him. Haga himself had already testified to the same effect as a result of cross-examination by defendants' counsel, and defendants are hardly in a position to complain that the State corroborated what their counsel had been so diligent to expose. Since Haga himself testified, no question of infringement upon defendants' constitutional right to confront the witnesses against them is here involved and the holding in *Bruton* and in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968) has here no application. The case cited and relied on by appellants, *State v. Cannon*, 273 N.C. 215, 159 S.E. 2d 505 (1968), is also not here apposite, since in that case also, unlike in the present case, the person whose extrajudicial statements were admitted in evidence did not take the stand. In the present case the deputy's testimony as to Haga's prior statements substantially corroborated Haga's trial testimony and was competent for that purpose. 1 Stansbury's N. C. Evidence, § 51 (Brandis Rev.). Furthermore, there was no request that it be restricted to that purpose. The only objection made was a general objection

interposed by counsel for defendant Eldreth, who in any event was not implicated by the deputy's recitation of what Haga told the officers. "Where evidence competent for a restricted purpose . . . is admitted generally, an exception thereto will not be sustained in the absence of a request that its admission be restricted." 1 Strong, N. C. Index 2d, Appeal and Error, § 30, p. 164. Appellants' first assignment of error is overruled.

[2] Relative to the second assignment of error, the record reveals the following: The trial began on 4 April 1974 and continued into the next day. On 4 April an article appeared in the local newspaper under the headline, "Two Men are Jailed for Tampering with Witness." The article referred to the two defendants, Trivette and Eldreth, by name and stated that they were to face charges of three counts each of breaking and entering and larceny in connection with break-ins of three homes. It also contained an account of charges brought by a "woman slated to testify in the cases" that the defendants had approached her, stating they wanted to talk; that they had driven to a deserted road where Trivette had raped her and Eldreth had taken $80.00 from her pocketbook, and that defendants threatened that they "ought to kill her and hide her body where she wouldn't be able to testify." The article also reported that Trivette had been charged with the rape and Eldreth with common-law robbery.

When, on the second day of the trial, this article was brought to the attention of the trial judge, he carefully interrogated the jurors as to whether any of them had seen it. Only two jurors responded that they had. One of these stated that she saw the headline but made it a point not to read the paper. The other juror stated that he had read the entire article, stating that he "just picked it [the newspaper] up, reading, and happened to run across it," and read it "like he did the rest of the paper." The judge carefully questioned the two jurors as to whether they felt that they could completely disregard what they had read in the paper and "reach a fair and impartial verdict based solely on the evidence and the law and the contentions of the attorneys." Each of the two jurors answered that he could. Each also told the court that he had not discussed the article in any way with the other jurors. The judge thereupon entered the following order:

> "[T]he Court having made inquiry of the entire panel concerning the article appearing in the WATAUGA DEMOCRAT

April 4, 1974, issue and only two jurors having responded that they were in any way knowledgeable about the article, and the Court, after extensive questioning of both jurors—some of the questions having been suggested by the State and some by counsel for the defendant [sic] and others of the Court's own decision—and both jurors having assured the Court that the article would in no way influence or enter into verdict that they might reach in the case; and the Court being of the opinion that the two jurors involved have been absolutely truthful with the Court, and being of the opinion that the defendants would be in no way prejudiced by continuing the trial of this cause, and being of the further opinion that the jurors are qualified to continue service in the case; IT IS THEREFORE ORDERED that the trial continue to its conclusion."

On these findings the court overruled defendants' motion for a mistrial. The court further instructed the jury that in the course of their deliberations no reference at all should be made to what the article contained or what the headline was.

The motion for mistrial was addressed to the sound discretion of the trial judge. *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814 (1971); *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 754 (1971), *cert. denied,* 279 N.C. 396, 183 S.E. 2d 243 (1971). The record amply demonstrates that the able trial judge in this case was diligent to see that defendants' right to a fair trial was fully protected, and we find no error in his denial of the motion for mistrial.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT COLUMBUS CALDWELL

No. 7425SC877

(Filed 2 April 1975)

1. Criminal Law § 92— breaking and entering and larceny — two service stations — consolidation for trial

Indictments charging defendant with felonious breaking and entering of and felonious larceny from two service stations on the same night were properly consolidated for trial. G.S. 15-152.

2. **Searches and Seizures § 3— search warrant — affidavit — confidential informant**

Affidavit of a police officer was sufficient to support a finding of probable cause to search defendant's apartment for items stolen from service stations where it stated that a confidential informant had told the officer within the past four hours that he had observed some of the stolen items upon defendant's premises and that the informant had given the officer information in the past which proved to be true and correct.

3. **Criminal Law § 88— cross-examination of defendant — fiancee in defendant's house at 2:50 a.m.**

In a prosecution for breaking and entering and larceny, the trial court did not err in failing to sustain defendant's objection to a question asked him on cross-examination as to what his fiancee was doing at his house when a search warrant was executed at 2:50 a.m., since the question came within the legitimate bounds of cross-examination; furthermore, defendant was not prejudiced by the question since his fiancee gave alibi testimony that she had spent the entire night of the crimes with defendant.

4. **Criminal Law § 113— four counts — instructions — guilt or innocence of each count**

In a prosecution upon two counts of breaking and entering and two counts of larceny, the trial court sufficiently instructed the jury that it could return a verdict of guilty or not guilty on each of the four counts.

APPEAL by defendant from *Chess, Judge.* Judgment entered 10 May 1974. Heard in the Court of Appeals 15 January 1975.

By separate indictments defendant was charged with felonious breaking and entering into and felonious larceny from two service stations in Catawba County on 11 December 1973. He pled not guilty to each charge and the cases were consolidated for trial over his objection.

The State's evidence showed: At approximately 7:00 a.m., 11 December 1973, the Hickory Police Department received calls that both the Southgate Phillips 66 and the Holiday Gulf service stations had been broken into during the previous night. Investigation disclosed forcible entries and property missing at each location. At approximately 10:30 p.m. that evening Captain McGuire of the police department obtained a warrant to search defendant's residence. A search made pursuant to this warrant at approximately 2:50 a.m. on 12 December 1973 resulted in finding in defendant's residence a number of items identified at the trial as among those missing from the two service stations.

Defendant's evidence showed: On the night the offenses were allegedly committed he remained at his apartment, located in his parents' home, with his fiancee from 9:30 p.m. until leaving for work on the following morning. Defendant's father testified that at approximately 7:30 a.m. on 11 December 1973, after defendant had left for work, he saw one Bob Templin, who rented a room in his son's apartment, carry some items in a Phillips 66 box into the apartment.

The jury found defendant guilty on all charges. The cases were consolidated for judgment, and from judgment sentencing defendant to prison for not less than three nor more than five years, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Norman L. Sloan for the State.

Williams, Pannell, Matthews & Lovekin by Phillip R. Matthews; and Cagle & Houck by William J. Houck for defendant appellant.

PARKER, Judge.

[1] There was no abuse of discretion in consolidating the indictments for trial. The offenses charged were of the same class and were not so separate in time or place and so distinct in circumstances as to render consolidation unjust. G.S. 15-152; *State v. Johnson,* 280 N.C. 700, 187 S.E. 2d 98 (1972); *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962).

[2] Defendant's motion to suppress the evidence obtained as a result of the search was properly denied. The search warrant described with reasonable certainty the premises to be searched and the items of stolen property for which search was to be made, as required by G.S. 15-26(a). It was issued by a magistrate and bore the date and hour of its issuance, as required by G.S. 15-26(c). As grounds for probable cause, the affidavit of Captain McGuire upon which the warrant was issued stated in part:

> "This affiant has received information within the past 4 hours from a confidential source that has given me information in the past that proved to be true and correct that Robert C. Caldwell and R. (Bob) Templin has [sic] the following items on their premises that was [sic] stolen during break ins at Viewmont Shell, Holiday Gulf, Southgate

66. . . . Part of these items was observed personally by the confidential informer heretofore mentioned. . . . "

We find the affidavit adequate to meet the tests set forth in *Aguilar* and *Spinelli* for a constitutionally valid finding of probable cause. Obviously there was a sufficient statement of the "underlying circumstances" to enable the magistrate independently to judge with respect to the validity of the informant's conclusion that the stolen property was where he said it was; the informant told the affiant that he had personally seen some of the items, and this information was given within four hours of the time the affidavit was signed. There was also a statement of the underlying circumstances from which the officer concluded that his confidential informant was reliable; the informant had given the officer information in the past that proved to be true and correct. While in this regard the affidavit might well have contained greater detail, we held a similar statement to be sufficient in *State v. Brown,* 20 N.C. App. 413, 201 S.E. 2d 527 (1974), *appeal dismissed,* 285 N.C. 87, 204 S.E. 2d 21 (1974), and we find it so in the present case.

[3] During cross-examination of the defendant, the district attorney asked, with reference to the defendant's fiancee's being at his residence when the officers arrived to search the premises,

"Will you explain to this jury what she was doing in your house at 2:50 a.m. in the morning?"

Defendant objected to the question. The record shows no explicit ruling by the trial court on this objection, but does show that defendant then replied that his fiancee was at his apartment studying for a history exam because her mother had some guests over at her house. Defendant now contends that the district attorney's question was clearly calculated to prejudice the jury against him by implying that he was sleeping with his fiancee and that the trial court's failure to sustain his objection resulted in condoning what defendant describes as "prosecutorial misconduct" such as to deprive him of a fair trial. We do not agree. If it be granted that the question might carry the implication which defendant now suggests, yet it was not beyond the bounds of legitimate cross-examination. Furthermore, it is difficult to see how the mere asking of the question resulted in the prejudice which defendant now asserts in view of the fact that his fiancee subsequently testified as a defense witness attempting to establish an alibi that she had spent the entire preceding

night with him in his apartment. The defendant's assignment of error directed to the trial court's ruling, or lack of ruling, on his objection to the district attorney's question is overruled.

[4] Finally, defendant assigns error to the trial court's charge to the jury, contending that the court failed specifically to instruct the jury that it could enter a verdict of guilty or not guilty on each of the four counts for which defendant was indicted. The record discloses, however, that the trial judge did separately instruct the jury concerning each element of each of the four offenses for which defendant was tried and instructed as to what facts it would be necessary for the jury to find beyond a reasonable doubt in order to return a verdict of guilty as to each offense. As to each separate offense the jurors were also instructed, "if you do not so find or have a reasonable doubt as to one or more of these things, you will return a verdict of Not Guilty." The charge when read contextually and as a whole was sufficiently clear and correct in informing the jury as to what verdicts it might return.

In defendant's trial and in the judgment appealed from, we find

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD PAUL BINDYKE

No. 7515SC60

(Filed 2 April 1975)

1. Property § 4— conspiracy to destroy property by incendiary device — aiding and abetting destruction of property by incendiary device

The State's evidence was sufficient for submission to the jury on issues of defendant's guilt of felonious conspiracy to damage the real and personal property of a certain individual and with an attempt to damage that individual's personal property (an automobile) by the use of an incendiary device where it tended to show that there was an agreement between defendant and another to burn the bushes and fences around the victim's house and that defendant and another agreed to fire bomb the victim's automobile and the other person threw a Molotov cocktail at the automobile; the State's evidence was also sufficient for submission to the jury on the issue of defendant's guilt

of aiding and abetting damage to the real property of a second person by the use of an incendiary device where it tended to show that defendant instigated the burning of the victim's lawn by others and provided the gasoline and created a diversion while the others carried out the plan.

2. **Criminal Law § 3; Property § 4— instructions on attempt**

In a prosecution for attempt to damage personalty by use of an incendiary device, the trial court did not err in failing to include wilfulness in its definition of attempt where the court used the phrase "acted maliciously" which imports wilfulness.

3. **Criminal Law § 9— aiding and abetting — presence at crime scene — conspiracy — instructions**

In a prosecution for aiding and abetting damage to realty, the trial court did not err in failing to charge that in order to aid and abet one must be actually or constructively present during commission of the crime where the evidence tended to show defendant conspired with another to commit the crime and the court charged that if defendant so conspired he would be vicariously liable for the co-conspirator's attempt to carry out the conspiracy.

4. **Jury § 3— permitting alternate juror to go in jury room — absence of prejudice**

Defendant was not prejudiced when the court allowed the alternate juror to go into the jury room with the other jurors where the court corrected its mistake after only three or four minutes and the alternate did not participate in the deliberations and verdict.

APPEAL by defendant from *Chess, Judge.* Judgments entered 21 August 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 20 March 1975.

Defendant was tried on a three-count information charging him with feloniously conspiring to damage the real and personal property of Harold G. Younger, with attempting to damage the personal property (an automobile) of Harold G. Younger by the use of an incendiary device, and with aiding and abetting damage to the real property of W. Hal Laughlin by the use of incendiary material.

The State's evidence tended to show the following: In June 1974 defendant was chief of police in Gibsonville and had come under public criticism. On 3 June 1974 he told Steve Montgomery, a Gibsonville policeman, and Gregory Moon that he was having trouble with the mayor, Harold G. Younger, and the Board of Aldermen. He talked about scare tactics he knew of in Pittsburgh, including sending coffins to people's homes and making threatening telephone calls. On 4 June 1974 defendant told Moon that "something needed to be done" about the mayor

and the aldermen and that "he had in mind a bomb." On June 5 Moon made a false telephone call reporting a drug overdose at the mayor's house, and he threw rocks through the mayor's picture window. On June 6 Moon had a load of concrete delivered to the mayor's house.

On June 9 defendant told Montgomery that "he didn't believe the Mayor was scared enough" and that "maybe the Mayor needed a fire in his bushes or on his fences." Montgomery repeated these remarks to Moon, and on June 10 Montgomery and Moon drove by the mayor's house and Moon said he would bomb the mayor's car with a Molotov cocktail. Moon and Bobby Glenn prepared the Molotov cocktail, and Moon threw it at the car, but the car did not burn. Later that night Moon telephoned Mayor Younger and Alderman Hal Laughlin and told them he was "Satan the Fire God."

On June 11 defendant told Montgomery that "he wondered how Laughlin would like a fire in his front yard." Montgomery repeated this to Moon. Defendant later told Montgomery that, in order to create a diversion while Moon was burning Laughlin's lawn that night, he would take a shot at himself and report it to Montgomery on the police radio. Montgomery was to turn on his blue light and siren as a signal to Moon to start the fire. Defendant poured some gasoline into milk jugs for Moon to use, and Montgomery delivered them to Moon. When Moon and a friend heard the sirens, they went to Laughlin's house and, using the gasoline, set fire to the lawn. Milk jug caps were found at the scene.

Defendant offered no evidence. The jury found him guilty on all three counts. From judgments imposing prison sentences, defendant appealed to this Court.

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

Harris & McEntire, by Mitchell M. McEntire, and Loflin, Anderson & Loflin, by Thomas F. Loflin III, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that his motions for nonsuit should have been granted with respect to each of the charges against him. Viewing the evidence in the light most favorable

to the State, we find it ample to support convictions on all three counts. *See State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466, *cert. denied* 398 U.S. 959, *rehearing denied* 400 U.S. 857 (1970); *State v. DeGraffenreidt,* 17 N.C. App. 550, 195 S.E. 2d 84, *cert. denied* 283 N.C. 394, 196 S.E. 2d 276 (1973). The jury could reasonably conclude that there was an agreement between defendant and Montgomery to burn the bushes and fences. Burning involves the use of an "incendiary device" as defined by G.S. 14-50.1 thus making the conspiracy a felony under G.S. 14-50(b). The jury could also find that defendant and Moon agreed to fire bomb the mayor's car and that Moon threw a Molotov cocktail at the car. As a co-conspirator, defendant was vicariously liable for the acts of Moon in furtherance of the conspiracy. *State v. Kelly,* 243 N.C. 177, 90 S.E. 2d 241 (1955); *State v. Brooks,* 228 N.C. 68, 44 S.E. 2d 482 (1947). Finally, the evidence clearly supports the conclusion that defendant not only instigated the burning of Laughlin's lawn but provided the gasoline and created a diversion while others carried out the plan. Defendant's motions for nonsuit were properly overruled.

Defendant next contends that the court expressed an opinion in certain portions of its recapitulation of the evidence. This contention is without merit. Nothing in the record indicates that defendant brought his objections to the attention of the court. *See State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206, *cert. denied* 406 U.S. 928 (1972). Moreover, we do not see how these statements contain an expression of opinion or convey prejudicial suggestions to the jury.

[2, 3] Defendant further contends that the court erred in failing to include willfulness in its definition of attempt and in failing to charge that in order to aid and abet one must be actually or constructively present during the commission of the crime. While the court in its definition may not have used the word "willfully," it expressed that concept by use of the phrase "acted maliciously," which clearly imports willfulness. If defendant conspired with Moon, he was vicariously liable for Moon's attempt to carry out the conspiracy, and the court so instructed. *See State v. Kelly, supra; State v. Brooks, supra.* Moreover, the evidence showed that defendant aided in the burning of Laughlin's lawn not by his presence but by his absence, thereby creating a diversion.

[4] Finally, defendant contends that the court erred in allowing the alternate juror to go into the jury room with the other

jurors. Although the alternate juror was not discharged, as required by G.S. 9-18, when the jury retired, the record shows that the court corrected its mistake after only three or four minutes had elapsed. Unlike the case of *State v. Alston,* 21 N.C. App. 544, 204 S.E. 2d 860 (1974), the alternate did not participate in the deliberation and verdict of the other twelve. His brief visit to the jury room was not prejudicial.

In defendant's trial, and in the judgment appealed from, we find

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM NEWTON

No. 7410SC1075

(Filed 2 April 1975)

1. **Criminal Law §§ 38, 95— receiving stolen goods — evidence of similar transaction — admission for restricted purpose**

In a prosecution for receiving stolen goods and feloniously conspiring to receive stolen goods, the trial court did not err in allowing evidence of transactions between a State's witness, a police officer and defendant, since such evidence was admissible to show a plan embracing the commission of a series of crimes, and the court specifically instructed the jury as to the limited purpose for which the evidence was admitted.

2. **Receiving Stolen Goods § 5— conspiracy to receive — sufficiency of evidence**

In a prosecution for felonious conspiracy to receive stolen goods, evidence was sufficient to be submitted to the jury where it tended to show that defendant had purchased stolen television sets from a State's witness on prior occasions and had told the witness he could use more television sets, the witness and a police officer went to defendant's store and disposed of ostensibly stolen items, and both men made it clear to defendant that the goods were "hot," it was stipulated between the State and defendant that, if called, one witness would testify that someone broke into his house in the daytime without his permission and stole a color TV worth more than $200 and that same television set was stolen by a State's witness and sold to defendant.

3. **Criminal Law §§ 113, 119— request for instruction on circumstantial evidence — failure to give instruction erroneous**

Defendant is entitled to a new trial where the court committed error in failing, after proper request, to explain the law of circumstantial evidence.

State v. Newton

APPEAL by defendant from *McLelland, Judge.* Judgment entered 25 July 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1975.

Defendant was charged in separate bills of indictment with two counts of receiving stolen goods and with feloniously conspiring to receive stolen goods. He pleaded not guilty and was tried before a jury. The principal State's witness, James Mann, testified that on 11 May 1974 he and Danny Goldston broke into a house at 1400 Altama Drive in Raleigh and took a Sears portable color television set. That same day they sold the television to James Newton at Newton's Grocery. On 11 or 12 May 1974, Mann, Goldston, and Vincent Hedgepeth broke into an apartment at 216 Washington Terrace and took a black and white television set, which they also sold to defendant. Defendant was quoted as saying to Mann, "Do you remember where you sold this, who you sold this to?" to which Mann replied no. Defendant allegedly told Mann he could use more television and stereo component sets. There was never any discussion about the origin of the goods.

In mid-May, Mann was arrested and decided to assist the district attorney and police in the investigation of Newton's activities. On 30 May 1974, accompanied by Officer Sanders of the Raleigh Police Department, Mann went to Newton's Grocery and disposed of ostensibly stolen items. Both men made it clear to defendant that the goods were "hot." Later that day, having obtained a warrant, officers conducted a search of defendant's residence and recovered these goods. The next day, defendant brought in two color television sets, one of which was identified as having been stolen earlier in the month from the apartment of Patricia McIntyre at Washington Terrace.

It was stipulated between the State and defendant that, if called, Mr. Albert Lee Purcell of 1400 Altama Avenue would testify that on 11 May 1974 someone broke into his house in the daytime, without his permission, and stole a color television set worth more than $200.00. It was also stipulated that Mr. Prentice Poole of 216 Washington Terrace would testify that on 12 May 1974 someone broke into his apartment in the nighttime, without his permission, and stole a black and white television set valued at less than $200.00.

Defendant testified that during April 1974 a friend, Gordon Welch, supplied him with television sets to sell in his grocery

store. David Vick, who delivers pies to the store, noticed the sets and introduced defendant to Danny Goldston, who, according to Vick, had some television sets that were not stolen and that he wanted to sell through defendant's store. Defendant testified that he believed James Mann to be a television repairman by the way he worked on the sets he brought to the store. He denied knowing any of the items were stolen and asserted that he was not trying to hide anything but conducted all of the transactions in areas accessible to the public. Welch and Vick gave testimony tending to corroborate defendant's. Other witnesses testified as to the reputation of defendant.

The jury found defendant not guilty on the charges of receiving stolen goods and guilty on the charge of felonious conspiracy to receive stolen goods. From judgment imposing a prison sentence, defendant appealed to this Court.

Attorney General Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

Mitchiner, DeMent, Redwine & Yeargan, by Russell W. DeMent, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in admitting evidence of transactions on 30 May 1974 involving James Mann, Officer Sanders and defendant. We disagree. Evidence of other offenses is admissible when, as in the case at bar, it tends to show guilty knowledge on the part of defendant or a plan "embracing the commission of a series of crimes. . . . " *State v. McClain,* 240 N.C. 171, 175-76, 81 S.E. 2d 364, 367 (1954). *See also* 1 Stansbury, N. C. Evidence (Brandis rev.), §§ 91, 92. Furthermore, the trial court specifically instructed the jury as to the limited purpose for which this evidence was admitted.

[2] Defendant next contends that the trial court should have granted his motion for judgment as of nonsuit on the ground that there was no evidence of an agreement to receive goods exceeding $200.00 in value. This contention also is without merit. It is well settled that a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be inferred. *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466,

cert. denied 398 U.S. 959, *rehearing denied* 400 U.S. 857 (1970). Viewed in the light most favorable to the State, *see generally* 2 Strong, N. C. Index 2d, Criminal Law § 106, pp. 655-57, the testimony of Mann and the stipulation regarding testimony of Purcell amply support the inference that there was an agreement to receive stolen goods valued at more than $200.00.

[3] Defendant's remaining assignments of error concern the court's instructions to the jury. Reading the charge as a whole, we find it adequate in all respects but one: defendant correctly contends that the court committed error in failing, after proper request, to explain the law of circumstantial evidence. Although there is no set formula by which the court is required to instruct on circumstantial evidence, when a proper request is tendered it must be given, at least in substance. *See State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64 (1965); *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207 (1947); *State v. Shoup,* 226 N.C. 69, 36 S.E. 2d 697 (1946). *Compare State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329 (1944), *with State v. Hooker,* 243 N.C. 429, 90 S.E. 2d 690 (1956). For failure of the trial court to give proper instructions to the jury, defendant is entitled to a new trial.

New trial.

Judges BRITT and MORRIS concur.

TERRY P. SMITH III, WILLIAM H. WADE, JR., AND LEO J. LISTER v. DONALD P. McCLURE, JR., AND VIVIAN McCLURE

No. 7510SC35

(Filed 2 April 1975)

1. Arrest and Bail § 11— arrest in civil action — bail bond — liability of surety

Plaintiffs were entitled to judgment against the surety on a bond given for the release of a defendant arrested in a civil action where plaintiffs recovered judgment against defendant, executions against the property and person of defendant were returned unsatisfied, the surety had not been exonerated by defendant's death, imprisonment or legal discharge, the surety had not surrendered defendant to the sheriff, and the surety was given ten days' notice of the proceeding against him.

2. Arrest and Bail § 11 —bail bond in civil action — action against surety — laches

Plaintiffs in a proceeding against the surety on a bond given to obtain the release of a defendant arrested in a civil action were not guilty of laches where they proceeded against the bail bond within three years, the statutory period under G.S. 1-52(7), and no change in the relations of the parties resulted from the lapse of time.

3. Arrest and Bail § 11— surety on bail bond — motions to vacate arrest, summary judgment — standing

The surety on a bail bond in a civil action had no standing to vacate the arrest of defendant or to move to vacate an order entering summary judgment against defendant.

APPEALS by surety from *Bailey, Judge.* Judgments entered 15 October 1974 and 14 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 19 March 1975.

Plaintiffs instituted this action on 8 February 1971 seeking to recover compensatory and punitive damages for the alleged fraudulent acts of defendants. On 2 April 1971 a default judgment was entered against defendant Vivian McClure. On 24 May 1971 plaintiffs moved pursuant to G.S. 1-410 for an order to arrest defendant Donald McClure. The order was issued, and McClure was arrested on 26 May 1971. William A. Glenn signed a $15,000.00 bond for his release. On 11 June 1971 McClure filed an answer in the cause, denying all material allegations.

On 7 February 1974 plaintiffs moved for summary judgment against McClure. Judgment granting the motion was entered on 26 June 1974. Execution against McClure's property was issued and returned in Wake County. Execution against his person was issued and returned undated, indicating that the Sheriff was unable to find McClure in Wake County.

On 26 August 1974 plaintiffs moved pursuant to G.S. 1-436 for judgment against the surety Glenn in the amount of the bond. From judgment for plaintiffs entered on 15 October 1974, Glenn appealed to this Court.

Subsequently, on 1 November 1974, Glenn moved under G.S. 1A-1, Rule 60, to vacate the order entering summary judgment against McClure and to stay the effect of the judgment against Glenn. On 5 November 1974 Glenn moved to vacate the order of arrest entered against McClure. The court held that the surety was not entitled to appeal the order of 26 June 1974 (summary judgment) and that, pending the surety's appeal from judgment

on the bond, the court was without jurisdiction to entertain the motions. From judgment entered 13 November 1974, Glenn also appealed.

Davis, Davis & Debnam, by W. Thurston Debnam, Jr., for plaintiff appellee.

Purser & Barrett, by George R. Barrett, for surety appellant.

ARNOLD, Judge.

[1] The primary question presented by this appeal is whether plaintiffs were entitled to judgment against defendant's surety. In *Pickelsimer v. Glazener,* 173 N.C. 630, 636, 92 S.E. 700, 703 (1917), the North Carolina Supreme Court said:

> "Our statute provides that when an action is brought for the recovery of a debt contracted by fraud, and the jury find the fact of fraud, the plaintiff as creditor, may take judgment for his debt against the defendant, as his debtor, and execution shall then issue against the latter's property. If it is returned *"Nulla bona"* (no goods or chattels, etc.), and the defendant has given bail in the action, and is at large, an execution may issue against his person. If this writ is returned *"Non est inventus"* (not to be found, etc.), the plaintiff may then move, on ten days notice, for judgment against the bail. The latter may then answer and set up any defense open to them, such as death of the principal, a legal surrender of him, release or discharge of him or them, or any other matter which if found to exist, will entitle them to an exoneration."

See G.S., chap. 1, art. 34. The record shows, and the trial court found, the following: appellant Glenn executed a bond as surety for defendant McClure; plaintiffs recovered a judgment against McClure; executions against the property and person of McClure were issued and returned unsatisfied by the Sheriff of Wake County; Glenn had not been exonerated by McClure's death, imprisonment, or legal discharge; Glenn had not surrendered McClure to the Sheriff; and Glenn was given ten days' notice of the proceeding against him. These facts are clearly sufficient to support an order holding the surety liable.

[2] Appellant's contentions, that plaintiffs should first have attempted execution against both defendants and that plaintiffs

were guilty of laches, are without merit. Donald McClure was the only principal on whose undertaking Glenn was obligated. *See generally Jackson v. Hampton,* 32 N.C. 579 (1849). Plaintiffs proceeded against the bail within three years, the statutory period under G.S. 1-52(7), after obtaining judgment against the principal. No change in the relations between the parties resulted from the lapse of time. *See Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83 (1938). Glenn's interest was adequately protected and he was liable on the bond.

[3] With respect to appellant's motions under Rule 60, we note that, as bail, Glenn had no standing to object to the arrest or summary judgment against the defendant. The surety is liable for any breach of the bail bond obligations. G.S. 1-436. The defendant may be legally discharged in several ways, including an order under G.S. 1-417 to vacate the arrest or a decision on the merits, and such discharge exonerates the bail. G.S. 1-433; 2 McIntosh, N. C. Practice 2d, § 2069. But the bail has no right other than to defend an action on the bond on grounds of legal discharge, death, surrender or imprisonment of the principal. *Id.* Moreover, the trial court correctly ruled that, pending the surety's appeal from judgment on the bond, it was without jurisdiction to entertain motions in the cause. *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971).

The orders from which the surety has appealed are affirmed.

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. R. L. McKINNEY AND JOSEPH DWAYNE WILMOUTH

No. 7423SC1084

(Filed 2 April 1975)

Burglary and Unlawful Breakings § 5; Larceny § 7— larceny of goods from home — insufficiency of evidence

In a prosecution for breaking and entering and larceny, evidence was insufficient to be submitted to the jury where it tended to show that a residence was broken into and goods were taken therefrom,

tracks led from the house to a highway embankment where the goods were covered by a bedspread and pillowcase, law enforcement officers established a stake-out, defendant and another arrived at the scene in an automobile owned and operated by defendant, the companion got out of the automobile, came down the embankment, and was arrested by officers, defendant was arrested at his vehicle, no fingerprints were taken linking defendant to the break-in or larceny of the goods, and no effort was made to determine whether the footprints leading from the residence to the embankment matched those of defendant.

Judge VAUGHN dissents.

ON writ of *certiorari* to review the trial of the defendant McKinney before *Gambill, Judge.* Judgment entered 27 June 1974 in Superior Court, WILKES County. Heard in the Court of Appeals 13 March 1975.

Defendant McKinney was charged with breaking and entering and larceny in violation of G.S. 14-54 and G.S. 14-72. Upon his pleas of not guilty, the jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of not less than three nor more than six years for breaking and entering, with a recommendation for work release, and judgment sentencing him to imprisonment for a consecutive term of not less than three nor more than six years for the crime of larceny, sentence suspended for five years on the condition "[t]hat the defendant be and remain of general good behavior and not violate any laws", defendant appealed.

Taken in the light most favorable to the State, the evidence tends to show that the residence of William Parsons was the subject of a break-in sometime between 7:45 a.m. and 4:00 p.m. on 22 May 1974, and several guns and some power tools were stolen therefrom; that Parsons discovered two sets of footprints in the mud leading from the river to his home, "two sets of tracks that come in the house and two sets that went back"; that Parsons and his brother followed the tracks to an embankment beside a highway, where they discovered the missing merchandise wrapped in a bedspread and a pillowcase; that the articles were lying in honeysuckle vines about half way down the embankment; that law enforcement officers were summoned to the scene and a stake-out was established; that at approximately 10:20 p.m., the defendant and Joseph Dwayne Wilmouth arrived at the scene in an automobile owned and being operated by the defendant; that Wilmouth got out of the automobile and came

down the embankment from the highway, and was arrested by the officers when he picked up the stolen guns; and that another officer went up the embankment and arrested the defendant as he came around the front of his automobile toward the location of the stolen goods.

Defendant's evidence tended to show that the defendant left for work on 22 May 1974 at about 6:45 a.m. and arrived at work at about 7:15 a.m.; that defendant left work at about 10:10 a.m. because of rain and visited his mother for about 20 minutes, having arrived there sometime between 10:00 and 10:30 a.m.; that from his mother's, defendant went directly home and remained with his wife from about 10:30 or 11:00 a.m. until about 9:30 p.m. Defendant's testimony was corroborated by his wife, a co-worker, his mother, and a neighbor.

Wilmouth testified that he had been hitchhiking on Highway #16 and was between rides and walking along the road when a blue sheet attracted his attention; that he examined the sheet and discovered the stolen guns and "some saws and stuff" and decided to return that night to pick up the goods; that sometime between 3:00 and 4:00 p.m. he went to the defendant's home and shared the information concerning the goods with the defendant; and that he remained at the defendant's home until after 10:00 p.m., when he and the defendant drove out to the location of the stolen goods and were arrested.

Both the defendant and Wilmouth denied participating in any breaking or entering of the Parsons home. Defendant testified that when Wilmouth came and told him about the guns, he suspected that there was something not legitimate about the transaction. He admitted driving Wilmouth to the location of the stolen goods but testified he was still in his automobile when he was arrested.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

John S. Willardson for defendant appellant McKinney.

MORRIS, Judge.

Defendant's only assignment of error relates to the denial of his motions for judgment as of 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. Davis,* 24 N.C. App. 683, 211 S.E. 2d 849 (1975), citing *State v. Mull,* 24 N.C. App. 502, 211 S.E. 2d 515 (1975), and *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971).

> "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. Mull, supra,* citing *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968).

Even considering the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, we conclude there is insufficient evidence from which the jury could find that the defendant McKinney committed the offenses charged. We note that no fingerprints were taken linking the defendant to the break-in or larceny of the guns and tools, and no effort was made to determine whether the footprints leading from the Parsons home matched the defendant's footprints. Clearly defendant never had actual possession of the stolen merchandise. The State relies entirely upon the doctrine of possession of recently stolen property to overcome the question of nonsuit.

The State contends that the defendant was in such close physical proximity to the stolen merchandise at the time of his arrest that he had the power to control the property to the exclusion of others and that he had the intent to so control it. We disagree. The record shows that at no time was the defendant closer than 10 feet from the stolen merchandise. Furthermore, the merchandise was found at an open embankment to which all members of the public had access. The evidence was that although the sheet and pillowcase could not be seen from highway, they were visible from the shoulder. As was noted in *State v. English,* 214 N.C. 564, 566, 199 S.E. 920 (1938):

> " . . . The evidence is wholly circumstantial. To convict upon this type of evidence all the circumstances proved must be

consistent with each other, consistent with the hypothesis that accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt. Only when the evidence considered in the light most favorable to the State excludes any reasonable hypothesis except that of guilt and the circumstances are inexplicable on the theory of innocence is a conviction warranted. *S. v. Madden,* 212 N.C., 56, 192 S.E., 859, and cases there cited. When the circumstances taken together are as compatible with innocence as with guilt there arises a reasonable doubt and it is the duty of the jury to adopt the hypothesis of innocence even though that of guilt is the more probable. *S. v. Madden, supra.*"

While the evidence in this case might raise in the minds of average persons a strong suspicion that defendant is guilty of the offense charged, in our opinion it is not sufficient to support a conviction and therefore not sufficient to submit the issue of his guilt to the jury. His motion for nonsuit should have been allowed.

Reversed.

Judge ARNOLD concurs.

Judge VAUGHN dissents.

LEASE PROPERTIES, INC. v. JOSEPH M. SHINGLETON AND WIFE, ELIZABETH C. SHINGLETON

No. 745SC1078

(Filed 2 April 1975)

Waters and Water Courses § 1— paving portion of tract — no wrongful diversion of surface waters

The evidence was insufficient for the jury to find that plaintiff wrongfully diverted surface waters onto defendants' land where it tended to show only that plaintiff paved a portion of its tract and thereby increased the flow of water onto defendants' land.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 5 September 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 March 1975.

This is a civil action seeking damages for the alleged wrongful closing of a drainage ditch by the defendants and seeking a mandatory injunction requiring the defendants to reopen the ditch and enjoining the defendants from interfering in any way with the use of the ditch by the plaintiff, or its successors or assigns, in the future. In its complaint plaintiff alleged it had an easement across the defendants' land for drainage purposes by implication or by defendants' land's being servient to plaintiff's dominant land. Defendants answered denying that plaintiff had an easement across their land and counterclaiming that plaintiff: (1) wrongfully dumped large quantities of water on their land; (2) wrongfully trespassed on their land; and (3) slandered defendants' title to their land.

At the trial, plaintiff offered evidence tending to show that on 5 September 1969, it purchased a tract of land fronting on Highway #132 from Alex M. Trask and his wife, Virginia C. Trask; that this tract of land sloped from south to north and was higher than the tract of land immediately adjoining it on the north; and that there was a large ditch that began to the south of plaintiff's tract, flowed from south to north across plaintiff's tract and then flowed on across plaintiff's northern boundary line onto the adjoining tract of land to the north. Other evidence offered by the plaintiff tended to show that plaintiff constructed a building and three sheds on its tract and paved a large portion of its property; and that plaintiff made the ditch across its tract into an asphalt swale to drain the paved portion of its property. The deed from the Trasks permitted the plaintiff to close the ditch at the southern boundary of its tract and plaintiff did close the ditch at that point. As required by the deed from the Trasks plaintiff also constructed a swale along the southern boundary of its tract, leading to the highway.

The tract of land adjoining plaintiff's tract of land to the north was purchased from the Trasks by the defendants on 8 July 1972. In the spring of 1973, defendants filled in and completely closed the portion of the ditch that was on their property. This made it necessary for the plaintiff to dig a new ditch along its northern boundary, leading to the ditch running alongside Highway #132. According to the plaintiff's evidence, this new ditch did not drain as well as the ditch crossing defendants' land.

Evidence offered by the defendants tended to show that their land was higher than the plaintiff's land; that the water-

course running across plaintiff's land onto their land was not really a ditch, but only a little indentation, and there rarely was any water flowing through it until the plaintiff paved a large portion of its land; that until defendants filled in the indentation in 1973, a very large amount of water flowed from the paved portion of plaintiff's land onto their land; and that plaintiff never constructed a swale along its southern boundary as its deed from the Trasks required.

At the close of the evidence and upon plaintiff's motion, the trial court directed a verdict against the defendants on each of their counterclaims. These issues then were submitted to the jury and answered as follows:

"1. Does the plaintiff have a drainage easement across the lands of the defendants?

ANSWER: Yes.

2. Was this drainage ditch or drain wrongfully obstructed by one or more of the defendants?

ANSWER: Yes.

3. In what amount, if any, has the plaintiff been damaged by the wrongful acts of the defendants?

ANSWER: $350.00."

From judgment on the verdict awarding the plaintiff damages of $350, and ordering defendants to "re-open and reconstruct the drainage ditch that [previously] crossed their land", defendants appealed.

Ellis L. Aycock and L. Gleason Allen for plaintiff appellee.

Addison Hewlett, Jr., for defendant appellants.

MORRIS, Judge.

In our opinion the evidence in this case simply shows that the plaintiff paved a portion of its tract and thereby increased the flow of water onto defendants' land. There is no evidence of any diversion of surface water by the plaintiff. As we noted in *Apartments, Inc. v. Hanes*, 8 N.C. App. 394, 399, 174 S.E. 2d 828, 831 (1970), cert. denied 277 N.C. 110 (1970):

"It is well established that while neither a corporation nor an individual can divert water from its natural course

so as to damage another, they may increase and accelerate its flow. *Rice v. Railroad,* 130 N.C. 375, 41 S.E. 1031; *Davis v. Cahoon,* 5 N.C. App. 46, 168 S.E. 2d 70. In the case of *Davis v. R. R.,* 227 N.C. 561, 42 S.E. 2d 905, we find the following at pages 565, 566:

> '" . . . As long as the drainage results in carrying the water along the natural course the servient proprietor may not complain, even though natural barriers on the higher land have been cut down and the flow of water both accelerated and increased. Were the rule otherwise, there would be no method by which any one owner could improve his land by the construction of ditches and drains which would carry the drainage upon another's property, because the purpose of such improvement in every instance is to hasten and increase the flow of water, and this object is only attained by the removal of natural barriers." *Fenton & Thompson R. Co. v. Adams,* 211 Ill., 201, 77 N.E., 531, 535.
>
> If the owner of adjacent property on a high level were not permitted to prepare his property for any legitimate purpose to which it might be put by leveling it or clearing it or other improvement, on the theory that he had no right to accelerate the flow of water therefrom but must leave it as an absorbant to retard its flow, it would deprive such owner of the use of his property.' "

Defendant's argument that by asphalting a large portion of its property, the plaintiff covered up the soil and made natural saturation impossible, thereby causing a diversion of the water, is ingenious but not persuasive. We think this case is controlled by *Apartments, Inc. v. Hanes, supra.*

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. WOODROW CURRY

No. 7423SC1074

(Filed 2 April 1975)

1. **Criminal Law § 91— reading of calendar before jury — no prejudice — continuance properly denied**

The trial court did not err in denying defendant's motion for a continuance made after the solicitor read the court calendar in the presence of prospective jurors, though the calendar contained charges against defendant other than the charges for which he was tried and convicted, since defendant failed to show that he was prejudiced by the reading.

2. **Homicide § 21— shooting of bar owner — 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 others were at a bar and grill where fighting erupted, the owner of the establishment demanded that the fighting stop, when another fight commenced the owner fired several shots into the ceiling and announced that the bar was closed, and defendant pointed a gun at the owner and shot him.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 4 October 1974 in Superior Court, WILKES County. Heard in the Court of Appeals 11 March 1975.

Defendant was charged with first degree murder. In open court the solicitor announced that the defendant would be tried for second degree murder or manslaughter, as the evidence might warrant. Upon defendant's plea of not guilty the jury returned a verdict of guilty of voluntary manslaughter. From judgment sentencing him to imprisonment for a term of ten years, defendant appealed.

The evidence, taken in the light most favorable to the State, tended to show that following an automobile race in North Wilkesboro on 21 April 1974 a group of people gathered at a bar and grill known as Kathy's Place; that deceased, R. T. Staley, was one of the owners of Kathy's Place and was there apparently in charge on the day he was killed; that a fight erupted involving the defendant and resulting in injuries to several people, and that despite requests from Staley that the fighting stop, a few minutes later another fight began.

Other evidence offered by the State tended to show that Staley attempted to stop the fighting, but when the fighting con-

tinued, Staley got a gun and fired several shots into the ceiling and announced that the bar was closed. No argument or threats had been exchanged between Staley and the defendant. One of the State's witnesses, however, testified that at the time Staley fired at the ceiling, she heard someone say, "you son of a bitch" and looked around to see the defendant with a gun pointed straight at Staley. The witness further testified that the defendant shot Staley, and several witnesses testified that they observed the defendant with a gun shooting in the direction of Staley. Testimony of an SBI agent, who investigated the shooting, was offered by the State to corroborate the testimony of several of the State's witnesses. A physician, stipulated to be an expert in pathology, testified that Staley's death was caused by multiple organ perforations resulting from three gunshot wounds.

Defendant's evidence tended to show that one of the shots fired by Staley struck him in the arm, that he knew Staley's reputation and character in the community was that he was a violent and dangerous fighting man because Staley previously had shot one Thurmond Brown; and that after Staley shot him, defendant brought out his own gun and shot five times toward Staley. One of the witnesses for the defendant testified that he, himself, had been hit in the arm when Staley fired the shots. Another witness for the defendant also testified that Staley had a reputation for being a dangerous violent fighting man and a third witness testified that he observed that the defendant had been shot in the left shoulder and arm. Defendant also offered the testimony of an SBI agent to the effect that he found what appeared to be a bullet in an air conditioning unit in a window in the southeast corner of Kathy's Place. Another witness testified he saw Staley fire his gun toward the front door.

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

Franklin Smith for defendant appellant.

MORRIS, Judge.

Defendant has abandoned all but three of his assignments of error for failure to argue them in his brief. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[1] The first assignment of error argued in defendant's brief relates to the denial of his motion for a continuance. Defendant maintains it was prejudicial error for the trial court to deny his motion for a continuance after the solicitor read the court calendar in the presence of prospective jurors, since the calendar contained charges against the defendant other than the charges for which he was tried and convicted. We find no merit in defendant's argument that the minds of the jurors in this case were prejudiced by their hearing other charges against the defendant prior to his trial. We note that the record reveals that the only charge against the defendant read in the presence of prospective jurors, other than the one for which defendant was tried and convicted, was the charge of robbery with a dangerous weapon. The prospective jurors were not in the courtroom when other charges against the defendant were read aloud by the solicitor. Defendant has failed to show he was prejudiced by the reading of this charge. Moreover, counsel for the defendant had ample opportunity to challenge prospective jurors on voir dire if he felt they were influenced by the reading of the charge.

Defendant next contends that the trial court committed prejudicial error in refusing to admit testimony as to the dangerous character of the deceased. We fail to see how defendant was prejudiced by the trial court's failure to permit such testimony earlier in the trial when both the defendant and one of his witnesses later were permitted to testify that Staley had a reputation and character in the community for being a violent and dangerous fighting man. This assignment of error is overruled.

[2] Defendant's final assignment of error relates to the denial of his motions for judgment as of nonsuit and directed verdict.

> "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. Davis,* 24 N.C. App. 683, 211 S.E. 2d 849 (1975), citing *State v. Mull,* 24 N.C. App. 502, 211 S.E. 2d 515 (1975), and *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971).

Considering the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom, as we must on motion for nonsuit, *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), we conclude there is plenary evidence in the record from which the jury could find defendant committed the offense charged. Defendant's motions for judgment as of nonsuit were properly denied.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOSEPH DEAS, JR.

No. 7429SC1020

(Filed 2 April 1975)

1. **Criminal Law § 102— jury argument of solicitor — reference to races of defendant and prosecuting witness — no prejudice**

In a prosecution for assault with intent to commit rape where the black defendant contended that he and the white prosecuting witness had registered as man and wife at a motel on another occasion but the motel operator testified that he did not recall seeing defendant come to the motel, defendant was not prejudiced by the solicitor's jury argument that, had the motel operator "seen a white woman in the car and this man was registering as man and wife, he would have remembered it because it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County."

2. **Constitutional Law § 34; Criminal Law § 26— mistrial to employ other counsel — no double jeopardy**

Defendant was not placed in double jeopardy by being twice tried for the same offense where, at the first trial of the case, defendant voluntarily consented to a mistrial in order to employ other counsel.

APPEAL by defendant from *Snepp, Judge*. Judgments entered 12 July 1974, Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 14 February 1975.

Defendant was charged in separate bills of indictment with burglary and assault on a female with intent to commit rape. In open court the solicitor for the State announced that he would seek a verdict of guilty of second degree burglary, and thereupon

defendant entered a plea of not guilty. Defendant also pleaded not guilty to the charge of assault on a female with intent to commit rape.

Phyllis Hamilton testified for the State that on 20 May 1973, she was employed as a waitress at Connestee Falls. She got off work and went home to her apartment where her fiance visited with her until 12:45 a.m. After he left, Miss Hamilton locked the door, undressed, and went to bed. She was awakened by someone in the room. She testified that someone was on top of her and was hitting her while she screamed; that the person moved his hands under the covers and onto her private parts; that she struggled and scratched him on the neck; and that he ran out of the room after being pushed off the bed. She called the police but was unable to identify the person. On cross-examination, she testified that she worked with defendant and that she did not complain when he frequently talked to her and put his arm around her.

According to Deputy Sheriff Brown, defendant made a statement to him which indicated the following events. Defendant went to the home of Miss Hamilton and was invited in by her. They were in the bedroom talking about sex, and she stated that she wanted $100.00 to have sexual relations with him. When defendant told her that he had only $75.00, she threatened to scream if he didn't come up with the other $25.00. She screamed and then bit defendant when he placed a hand over her mouth. Defendant hit her with his fist.

Defendant testified that Miss Hamilton was one of the waitresses that would tease and play around with him. The white waitresses bothered him and interfered with his work, and, according to defendant, he complained to the management that he could not do his work. Defendant's testimony indicated that he and Miss Hamilton had met on other occasions, and on one occasion they had gone to a motel in Brevard where they stayed about an hour and a half and talked. He further testified that Miss Hamilton let him into her apartment and asked him if he had $100.00. Defendant told her he had only $75.00, and she threatened to scream. Defendant stated that he put his hand over her mouth but denied placing his hands on her private parts. When she bit him, defendant said he couldn't pull loose so he hit her on the head with his hand.

Further facts pertinent to the disposition of this case are discussed in the opinion.

Attorney General Edmisten, by Associate Attorney Archie W. Anders and Associate Attorney Robert W. Kaylor for the State.

Sanders, Walker & London, by Robert G. McClure, Jr., and Robert P. Johnston, for defendant appellant.

MARTIN, Judge.

[1] Counsel for defendant earnestly argues that defendant was denied a fair trial as a result of the district attorney's appeal to racial prejudice. It appears from the record that defendant is a black male and Miss Hamilton is white.

On direct examination defendant testified that he and Miss Hamilton had previously gone to a motel in Brevard where defendant registered them in his name and his wife's name. The operator of the motel testified that he had found a registration card bearing the names of defendant and his wife but that he didn't remember Deas coming to the motel. Defendant places much emphasis on the following statement made by the district attorney during jury argument:

> "If he had seen a white woman in the car and this man was registering as man and wife, he would have remembered it because it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County."

Following the above statement, defendant objected, and the trial court stated, "Stick to the record."

It is argued that the above quote improperly evoked racial prejudice when viewed in the context of the case. The State argues that the district attorney's comment was designed to rebut defendant's assertions that he and Miss Hamilton had registered at a motel. Miss Hamilton, the State points out, denied that she had ever been to the motel with defendant, and the operator of the motel could not recall seeing defendant and a white woman.

> "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of

> the latitude that ought to be allowed to counsel in the argument of any particular case. It is only in extreme cases of the abuse of the privilege of counsel, and when this is not checked by the court, and the jury is not properly cautioned, this Court can intervene and grant a new trial." *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Bryan,* 89 N.C. 531.

See also *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974).

It should be noted that we do not have the benefit of the trial court's charge to the jury. Nevertheless, we have considered the district attorney's argument to the jury in the context of the case as it may relate to (1) provoking racial prejudice and (2) making arguments not based on the evidence. We find no abuse of discretion and no prejudicial error entitling defendant to a new trial.

[2] Before entering pleas to the charges, defendant moved to quash the bills of indictment for the reason that he had been placed in double jeopardy by being twice tried for the same offense. At the first trial defendant's counsel had requested to withdraw from the case. At that time, defendant was questioned by the trial court, and it was revealed that defendant desired to employ an attorney from Charlotte and voluntarily consented to a mistrial in order to employ other counsel. "The rule is that an order of mistrial entered upon motion of the defendant or with the defendant's consent will not support a plea of former jeopardy." *State v. Martin,* 16 N.C.App. 609, 192 S.E. 2d 596 (1972). "Even where . . . all the elements of jeopardy appear, a plea of former jeopardy will not prevail where the order of mistrial was properly entered for 'physical necessity or for necessity of doing justice.'" *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745 (1971). Defendant's assignment of error in this regard is overruled.

We have carefully considered defendant's remaining assignments of error and are of the opinion that prejudicial error does not appear.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES LANGLEY

No. 744SC962

(Filed 2 April 1975)

1. **Criminal Law § 75— coerced confession — no admissibility for impeachment**

A coerced confession may not be used for impeachment purposes.

2. **Criminal Law §§ 75, 89— confession — no finding of voluntariness — admission for impeachment error**

Where there was evidence that defendant's confession was induced by threat of physical force or fear and there was evidence of a lack of intelligence on defendant's part, the admission into evidence of the confession for the purpose of impeachment without a determination by the trial court as to its voluntariness was error entitling defendant to a new trial.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 30 May 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals on 10 February 1975.

Defendant was charged in three separate bills of indictment with assault with intent to commit rape on a female child under the age of twelve years. Two of the alleged victims were six years of age and the other alleged victim was five years of age. The charges were consolidated for trial, and defendant, through his counsel, entered a plea of not guilty to each charge.

In Case No. 74CR9523 the jury found defendant guilty of assault on a child under the age of twelve years, and in Cases Nos. 74CR9521 and 74CR9522 defendant was found guilty as charged. From judgments entered upon the verdicts, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Chambers, Stein and Ferguson, by James E. Ferguson II, for defendant appellant.

MARTIN, Judge.

At the beginning of defendant's trial, defense counsel requested a voir dire examination to determine the admissibility of an alleged confession procured from defendant shortly after his arrest. It is unnecessary to give an account of the evidence

adduced on voir dire except to say that it is conflicting in regard to whether the alleged confession was coerced and involuntary in fact. The trial court made no findings of fact but stated, "It is my opinion that because of the boy's lack of intelligence that he did not intelligently waive his right and I'm going to exclude the alleged confession. Of course, as you know, if the boy testifies, then it might be used as rebuttal." At trial defendant testified in his own behalf, and the State used the alleged confession for purposes of impeachment.

Defendant argues that he is entitled to a new trial. The main question on appeal is whether the trial judge committed error by permitting the district attorney to use defendant's prior out-of-court confession to the police for purposes of impeachment absent a judicial determination on its voluntariness where there was evidence already before the trial judge to the effect that the confession was coerced and involuntary in fact.

In *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643 (1971), the Court held that an accused's prior inconsistent statements, *which were not coerced or involuntary in fact* but were made without counsel and without waiver of rights, although inadmissible to establish the prosecution's case in chief could properly be used to impeach the accused's testimony. The rule in *Harris* was adopted in *State v. Bryant,* 280 N.C. 551, 555, 187 S.E. 2d 111, 113 (1972). *State v. Huntley,* 284 N.C. 148, 200 S.E. 2d 21 (1973). However, neither *Harris* nor *State v. Bryant, supra,* affirmatively indicates that a confession may be used to impeach a defendant if barred by pre-*Miranda* law because it was induced by force, fear or hope of reward. *See* 2 Stansbury, N. C. Evidence (Brandis Revision), § 186, p. 82. Indeed, in *Harris,* "the Court was careful to point out that there was no claim that the confession had been coerced; its further insistence that the 'trustworthiness' of an impeaching statement satisfy 'legal standards' strongly implies that it would not favor the use of statements extracted by coercion." *LaFrance v. Bohlinger,* 499 F. 2d 29 (1st Cir. 1974). Our interpretation of *Harris* finds support in a recent case decided by the Supreme Court of the United States on 19 March 1975 where the Court in applying *Harris* stated, "If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Oregon v. Hass,* (43 Law Week 4417).

[1] In the present case, if defendant's confession was coerced or involuntary in fact due to the police interrogation, then it should have been barred from evidence altogether. In our opinion a coerced confession may not be used for impeachment purposes.

Inherent in our decision is the premise that the issue of voluntariness was for the trial judge to determine—not the jury.

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' *Blackburn v. Alabama,* 361 U.S. 199, 206-207, 4 L.ed. 2d 242, 248, 80 S.Ct. 274, and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law . . . .' " *Jackson v. Denno,* 378 U.S. 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774 (1964).

If such an issue was left to the jury, then clearly there would be little deterrent to the use of coerced confessions, and a defendant would be forced to choose between remaining silent at trial or taking the stand with the possibility that a coerced confession would be placed before the jury.

[2] In the case before us there is strong evidence that defendant's confession was induced by threat of physical force or fear. Furthermore, there is evidence of a lack of intelligence on defendant's part. Considering the whole record on appeal, it appears likely that the jury considered the evidence of defendant's confession as substantive evidence of his guilt since they were not instructed to the contrary. Under the foregoing circumstances, the admission into evidence of defendant's confession without a determination by the trial court as to its voluntariness is error entitling defendant to a new trial.

New trial.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES H. ERWIN, VANCE A. CURLEY

No. 755SC11

(Filed 2 April 1975)

1. **Burglary and Unlawful Breakings § 5— break-in of pharmacy — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for breaking and entering where it tended to show that defendants and their companions broke into a pharmacy, all ran when an alarm went off in the store, the officers apprehended one defendant at the crime scene, later officers found gloves and a hatchet on a road near the pharmacy, officers observed a car in the vicinity traveling very slowly with its lights off, they stopped the car and apprehended the other defendant who was a passenger therein.

2. **Criminal Law § 42— powder from clothing of break-in suspect — admissibility**

In a prosecution for breaking and entering a drugstore where the evidence tended to show that a hole was made in the roof of the building and one defendant fell through the ceiling, the trial court did not err in allowing evidence that a powdery substance taken from one defendant's clothing at the time of his arrest was similar to the masonry and insulation powder found near the hole in the pharmacy roof.

APPEAL by defendants from *Cowper, Judge.* Judgments entered 15 August 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 March 1975.

Defendants were charged in separate bills of indictment with feloniously breaking and entering a building occupied by Henricksen's Pharmacy, Inc., at Castle Hayne, N. C., with the intent to commit larceny. They pled not guilty and were tried together. A jury found them guilty as charged, and from judgments imposing prison sentences of 10 years each, to begin at expiration of certain other sentences being served, they appealed.

Attorney General Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin, for the State.

Jay D. Hockenbury for defendant appellant Charles Erwin.

Roy C. Bain for defendant appellant Vance Curley.

BRITT, Judge.

DEFENDANT ERWIN'S APPEAL

[1] Defendant Erwin assigns as error the denial by the trial court of his motions for a directed verdict of not guilty and to set the verdict aside for insufficiency of the evidence. Evidence presented by the State, viewed in the light most favorable to it, tended to show:

Around 10:45 p.m. on 14 September 1973, Deputy Sheriffs Banker and Smith received a call to go to the Cape Fear Shopping Center on Castle Hayne Road. Traveling in a patrol car with lights off, they drove to the rear of the shopping center and heard an alarm go off at Henricksen's Pharmacy. They then saw a man jump from the roof onto a landing at the rear of the pharmacy. The officers pursued the man for some 75 yards and caught him, the culprit being defendant Curley. Officer Banker went upon the roof of the pharmacy where he found a sizeable hole; he went down through the hole and found that a large section of a false ceiling had fallen and was scattered on the pharmacy floor. A little later, on a dirt road near the pharmacy, the officers found two brown gloves and a green hatchet.

Two other police officers were called to the area and observed a car in the vicinity traveling very slowly with its lights off. They stopped the car for investigation and found that it was occupied by Annie Marie Gaffney, Nathanial Liles, and defendant Erwin. Gaffney was driving the car and defendant Erwin was riding on the right front seat.

Nathanial Liles, as a witness for the State, testified in pertinent part as follows: At the time of trial he was 17 and a resident of Charlotte. On the day preceding the break-in, he, Gaffney and defendants got together in Charlotte and decided to go to Beaufort to see Gaffney's aunt and "to steal something too". They spent the night in Beaufort and then went to Wilmington and to the shopping center in question. During the late afternoon or early evening, defendant Curley visited a supermarket and Henricksen's Pharmacy after which he told his three companions that the drug store "carried a whole bunch of money . . . and he believed he could get into the safe". Defendant Curley then went to a hardware store and another store where he bought a sledgehammer and three pairs of gloves; the

other three helped pay for the hammer and gloves. Several hours later they all went to the shopping center. Gaffney stayed with the car, Liles at first served as a lookout at the front, defendant Erwin stationed himself near a trash can at or near the back of the pharmacy, and defendant Curley proceeded onto the roof where he made a hole with various tools. Liles left his lookout position and carried the sledgehammer to defendant Curley on the roof. Liles and defendant Erwin were wearing gloves. In climbing through the hole, defendant Curley fell through the ceiling, after which an alarm went off. Liles and defendant Erwin then ran to the car where Gaffney was waiting; Liles threw his gloves into some bushes, and defendant Erwin threw his down on the path.

Neither of defendants offered evidence.

We hold that the evidence was sufficient to survive the motions, and the assignment of error is overruled.

Defendant Erwin also assigns as error the failure of the court properly to instruct the jury on aiding and abetting. We have carefully reviewed the charge and conclude that it was sufficient; therefore, the assignment of error is overruled.

DEFENDANT CURLEY'S APPEAL

[2] Defendant Curley's sole assignment of error is that the court erred in denying his motion to suppress certain evidence. When apprehended, defendant Curley had a white powdery substance on his clothing and in his hair. After he was arrested and carried to the police station, defendant Curley's clothing was swept with a vacuum, and the powdery substance was kept for analysis. The State presented expert testimony tending to show that the powdery substance found on defendant's clothing was similar to the masonry and insulation powder found near the hole in the pharmacy roof. Defendant contends that the evidence obtained from his clothing without a search warrant resulted from an illegal search and seizure and that his motion to suppress that evidence should have been sustained. We find no merit in this contention.

In *United States v. Edwards*, 415 U.S. 800, 39 L.Ed. 2d 771, 94 S.Ct. 1234 (1974), the Court held that incident to a lawful arrest, clothing of a suspect may be seized upon his arrival at the place of detention and later subjected to laboratory analysis

and the test results are admissible at the trial. The assignment of error is overruled.

We hold that defendants received a fair trial and the judgments imposed were within the limits prescribed by statute.

No error.

Judges MORRIS and ARNOLD concur.

LARRY D. LITTLE, PETITIONER v. NORTH CAROLINA STATE BOARD OF ELECTIONS; FORSYTH COUNTY BOARD OF ELECTIONS; THOMAS J. KEITH, CHAIRMAN, FORSYTH COUNTY BOARD OF ELECTIONS, RESPONDENTS

No. 7421SC1071

(Filed 2 April 1975)

Appeal and Error § 9; Elections § 14— refusal to order new primary election — mootness

Appeal from a superior court order affirming a decision of the State Board of Elections not to order a new primary election to select a Democratic Party nominee to run for the office of alderman in the North Ward of Winston-Salem in the November 1974 general election is dismissed where the general election has been held, there is slight probability that the factual situation which gave rise to the controversy will recur, and the legal questions on which decision is sought lack substantial continuing public interest.

APPEAL by petitioner from *Exum, Judge.* Judgment entered 21 October 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 March 1975.

Petitioner was a candidate for the Democratic Party nomination for the office of Alderman from the North Ward of Winston-Salem in the primary election held 7 May 1974. He lost by eight votes. Alleging election irregularities, he requested a hearing before the Forsyth County Board of Elections and asked the County Board to order a new primary election. On 11 May 1974 the County Board conducted a hearing and denied petitioner's request for a new election. Petitioner appealed to the State Board of Elections, which heard petitioner's appeal at a public hearing in Winston-Salem on 25 May 1974. At a meeting held on 13 June 1974, the State Board voted to deny petitioner's

request, and by letter dated 24 June 1974 petitioner was advised of this action.

Pursuant to Art. 33 of G.S. Chap. 143, petitioner sought judicial review of the State Board's action. By petition filed 29 July 1974 petitioner alleged that on or about 26 March 1974 the County Board had entered a challenge to the right to remain registered of approximately 400 voters in the North Ward of Winston-Salem because of asserted irregularities in connection with their registrations, and that on 29 March 1974 the County Board purged from the registration books the names of all of said persons without proper notice and without a hearing, in violation of statutory and constitutional provisions. Petitioner also alleged that on or about 29 March 1974 he and his campaign staff attempted to re-register certain of said challenged voters but these efforts were thwarted by agents of the County Board, and that at the 25 May 1974 hearing before the State Board petitioner had presented affidavits of nine persons whose names had been purged from the election registration books by the County Board in which the affiants stated that had their names not been purged, they would have voted for petitioner in the 7 May 1974 primary election. Petitioner prayed the court to order respondents to declare the primary election held on 7 May 1974 for the Democratic Party nomination for the office of Alderman from the North Ward of Winston-Salem to be invalid and to hold a new primary election for such nomination "before the general election for said office is held in November, 1974."

Responses to the petition were filed by the Forsyth County Board of Elections, by its Chairman, and by the State Board of Elections. The matter was heard at the 21 October 1974 Session of Superior Court held in Forsyth County by Judge James G. Exum, Jr. After reviewing the record, the briefs, and arguments of counsel for the parties, the court entered judgment making findings as follows:

> "That the decision of the Respondent denying the Petitioner a new primary election is supported by competent, material and substantial evidence; that the registration records were open for registration for the May 7, 1974 primary in Winston-Salem; that Petitioner presented no evidence that those persons challenged by the County Board of Elections did not register subsequent to March 29, 1974, or vote in the May 7 primary election; that Petitioner presented no evidence that any challenged applicant was denied

the right to register or vote in the said primary; that the Petitioner has failed to show that the results of the May 7 primary were altered by the action of the County Board of Elections; that the decision of the Respondent denying a new primary election is in compliance with constitutional and statutory authority, is not arbitrary or capricious, and upon the entire record, the decision that the Petitioner has failed to show sufficient reason to warrant a new primary election should be affirmed."

On these findings, the court adjudged that the decision of the respondents denying a new primary election be affirmed. To this judgment the petitioner in apt time excepted and gave notice of appeal.

David B. Hough and William G. Pfefferkorn for petitioner appellant.

Attorney General Edmisten by Deputy Attorney General James F. Bullock for North Carolina State Board of Elections, respondent appellee.

Harry H. Clendenin III and H. Miles Foy III for Forsyth County Board of Elections and Thomas J. Keith, Chairman, Forsyth County Board of Elections, respondent appellees.

PARKER, Judge.

If the legal questions on which petitioner seeks the decision of this Court were decided for him and the judgment appealed from reversed, it could avail him nothing. The only relief which he sought was that a new primary election be held to select the Democratic Party nominee to run for the office of Alderman from the North Ward in Winston-Salem in the general election held in November 1974. That general election has been held, and it is not now possible to give petitioner the relief which he sought. There is slight probability that the factual situation which gave rise to this controversy will recur, and the legal questions on which decision is sought lack substantial continuing public interest. The legal questions presented are academic. For that reason the appeal is dismissed. *Gordon v. Wallace* and *Gordon v. Page,* 233 N.C. 85, 62 S.E. 2d 495 (1950).

Appeal dismissed.

Judges HEDRICK and CLARK concur.

HARRY M. CARPENTER v. KENAN CASTEEN CARPENTER

No. 7515DC33

(Filed 2 April 1975)

Appeal and Error § 16— appeal from district court order — jurisdiction of district court pending appeal

Where the trial court entered an order determining the amount of support due defendant from plaintiff pursuant to a separation agreement between the parties, and plaintiff appealed from that order, the district court was without jurisdiction to enter further orders in the matter while plaintiff's appeal was pending.

ON writ of *certiorari* to review order entered by *Allen, Judge.* Order entered 25 November 1974 in District Court, ORANGE County. Heard in the Court of Appeals 19 March 1975.

In this divorce action the parties had entered into a separation agreement and a supplemental agreement which were referred to in the final divorce decree entered on 22 May 1969. In these agreements plaintiff husband bound himself to make certain support payments to defendant wife for her support and for the support and education of the three children. On 29 August 1972 the district court entered an order, after a hearing on a motion in the cause filed by the defendant, in which the court ordered plaintiff to make certain additional payments on account of the educational expenses of the children.

In September 1973 plaintiff filed a motion in the cause in which he alleged a change in his financial circumstances and asked for a reduction in the amounts he should be required to pay for the benefit of the children. After a hearing, the district court entered an order dated 24 June 1974 in which the court found that no substantial change in circumstances had occurred, found that plaintiff was still bound by the separation agreements and by the previous order of the court, determined that plaintiff was in arrears, and ordered him to make good the arrearage and to continue to make the payments as provided in the separation agreements and as directed in the earlier order of the court. From this order dated 24 June 1974 the plaintiff in apt time gave notice of appeal and thereafter, after obtaining appropriate extensions of time, perfected his appeal by docketing the record on appeal and filing brief in the Court of Appeals. The record on appeal was docketed in the Court of Appeals on 6 November 1974 as case No. 7415DC976.

While plaintiff's appeal was pending and on 19 November 1974, defendant filed a motion in the cause in the district court, alleging that plaintiff had failed to comply with the 24 June 1974 order in certain specified respects and asking "that the Court judicially determine the amounts due and enter its decree accordingly, and that execution issue following the judicial determination of the amounts due." On 25 November 1974 a hearing was held on defendant's motion, at which time plaintiff moved to dismiss the motion on the grounds that the district court was without jurisdiction to enter further orders in this case pending the determination of the appeal then before the Court of Appeals. The district court denied plaintiff's motion to dismiss and proceeded to determine the amounts then due and owing by plaintiff to defendant under the previous order of the court dated 29 August 1972. By order dated 25 November 1974 the district court adjudged the total amount then due to be $13,073.51, and ordered "that the plaintiff [sic] be declared a judgment creditor of the defendant [sic]" in that amount. Plaintiff gave notice of appeal from this order. Thereafter this Court issued its writ of certiorari to review the 25 November 1974 order of the district court.

Wilkinson & Vosburgh by James R. Vosburgh for plaintiff.

Haywood, Denny & Miller by George W. Miller, Jr. for defendant.

PARKER, Judge.

G.S. 1-294 provides that "[w]hen an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." Here, by entering the order of 25 November 1974 the District Court undertook to proceed upon the very matters which were embraced in and which were directly affected by the previous order appealed from which was dated 24 June 1974.

As a general rule an appeal takes the case out of the jurisdiction of the trial court, *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971); *Bowes v. Bowes,* 19 N.C. App. 373, 198 S.E. 2d 732 (1973); *Upton v. Upton,* 14 N.C. App. 107, 187 S.E. 2d 387 (1972); G.S. 1-294; and, with certain exceptions

noted in *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659 (1963) and not here applicable, pending the appeal the trial judge is *functus officio.* Therefore, the District Court in the present case had no jurisdiction to hear and pass upon defendant's motion filed on 19 November 1974 while the appeal of this case was pending in the Court of Appeals.

Accordingly, the order of the District Court dated 25 November 1974 is

Vacated.

Chief Judge BROCK and Judge ARNOLD concur.

ALTON D. MOSER v. EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, AND JENNINGS M. BRYAN AGENCY, INC., AND JENNINGS M. BRYAN, JR.

No. 7415SC1083

(Filed 2 April 1975)

Insurance § 79— insurance on mobile home — security interest in mobile home — exclusion from coverage

Where plaintiff entered into an agreement with third parties whereby plaintiff was to sell and third parties were to buy a mobile home, third parties were to take immediate possession but would not acquire title until full purchase price was paid, and plaintiff had the right to accelerate all remaining payments if third parties defaulted in their biweekly payments, there was an encumbrance on the property though no entry was ever made on the certificate of title to indicate existence of the contract; therefore, plaintiff was not entitled to recover under an automobile liability and physical damage insurance policy on the trailer when it was damaged by fire, since the policy excluded coverage if the property was subject to any encumbrance.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 8 November 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 March 1975.

This is an action to recover benefits under an insurance policy. The facts, which are not in dispute, briefly are as follows:

In January 1970, plaintiff purchased a mobile home. On 13 February 1970, plaintiff entered into a contract with Joseph D. and Ann Leigh, providing that plaintiff was to sell and the

Leighs were to buy the mobile home for $5,500.00: $65.00 down, and 130 payments of $65.00 every two weeks. The contract provided that the Leighs would take immediate possession but would not acquire title until the full purchase price had been paid. If they defaulted in their biweekly payments, plaintiff had the right to accelerate all remaining payments. If the Leighs did not pay the remaining balance within 30 days after acceleration, they would lose their rights in the mobile home, and the money they had previously paid would be forfeited to plaintiff as rent. No entry was ever made on the certificate of title to indicate the existence of this contract.

In March 1970 defendant Employers Commercial Union Insurance Company of America (ECU), through its agents, defendants Jennings M. Bryan Agency, Inc., and Jennings M. Bryan, Jr., issued to plaintiff an automobile liability and physical damage policy on the mobile home. The policy provided:

> "This Policy does not apply: . . . (k) under coverages D, E, F, G, H and I, if the automobile is or at any time becomes subject to any bailment lease, conditional sale, purchase agreement, mortgage or other encumbrance not specifically declared and described in this policy; . . . "

On 19 August 1971 the mobile home was extensively damaged by fire. Plaintiff filed a claim under the policy, and ECU, relying upon the exclusion, refused to pay. Plaintiff then brought this action, and both sides moved for summary judgment. From the order of the trial court granting plaintiff's motion and denying defendant's motion, ECU appealed to this Court.

Dalton & Long, by W. R. Dalton, Jr., for plaintiff appellee.

J. Donald Cowan, Jr., for defendant appellant.

ARNOLD, Judge.

The trial court apparently was of the opinion that, based on this Court's holding in *Gore v. Insurance Co.*, 21 N.C. App. 730, 205 S.E. 2d 579 (1974), the exclusion did not apply since no encumbrance was recorded on the certificate of title. In *Gore* an automobile was sold under a conditional sales contract, but the transaction was not noted on the certificate of title. This Court held that under *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E. 2d 511 (1970), the seller was the "owner of the auto-

mobile for insurance purposes." The rationale behind the *Gore* decision, however, is inapplicable to the case at bar. The question in this case is whether there was an encumbrance on the property within the meaning of Exclusion (k). We answer this question in the affirmative.

Ordinarily, insurance contracts are to be construed liberally in favor of the insured, but clauses requiring disclosure of the insured's interest in the property are to be construed fairly and rationally to protect the insurer from extraordinary risks. *Roberts v. Insurance Co.*, 212 N.C. 1, 192 S.E. 873 (1937). The contract between plaintiff Moser and the Leighs clearly created a security interest as between the parties. *See* G.S. 25-1-201(37); *cf. Food Service v. Balentine's*, 285 N.C. 452, 206 S.E. 2d 242 (1974). The Leighs had the right to compel Moser to transfer title upon final payment while Moser retained title as security for the purchase price. However it may be denominated, this security interest is an encumbrance on the insured property. The fact that the security interest was not perfected pursuant to G.S. 20-58 nor title or interest transferred pursuant to G.S. 20-72(b) is irrelevant. *See* G.S. 25-9-202. An encumbrance exists and coverage is explicitly excluded.

We hold that the trial court erred in granting plaintiff's motion for summary judgment and in denying defendant's motion. The judgment therefore is vacated, and the cause remanded for entry of judgment in accordance with this opinion.

Vacated and remanded.

Judges MORRIS and VAUGHN concur.

NORMA LEE SHOAF v. ROBERT LEONARD SHOAF, JR.

No. 7522DC2

(Filed 2 April 1975)

Divorce and Alimony §§ 18, 23— alimony and child support — sufficiency of evidence

Evidence was sufficient to support the trial court's award of alimony and child support.

Shoaf v. Shoaf

APPEAL by defendant from *Olive, Judge.* Judgment entered 5 August 1974 in District Court, DAVIDSON County. Heard in the Court of Appeals 14 March 1975.

Plaintiff wife brought this action against defendant husband seeking divorce from bed and board, alimony and support for the three children of the marriage. At the hearing on her request for alimony and support pendente lite, plaintiff offered evidence that defendant had assaulted her, had met secretly with other women, and had drunk excessively. In addition she offered evidence that defendant had made withdrawals of $37,450 in 1972, $48,825 in 1973, and $17,160 in the first five months of 1974, from the partnership "American Nylons" which is operated by defendant and his brother. On the basis of her accustomed standard of living, plaintiff estimated yearly expenses for herself and the children to be $14,694.

Defendant testified that he had not mistreated his wife nor had he drunk so much as to interfere with his work or normal activities. He offered testimony of two accountants for the partnership American Nylons, who testified that defendant's large withdrawals represented a depletion of business assets and not income; his share of the partnership income was only $12,351 in 1972 and $8,301 in 1973; while generating gross receipts of $2,872,758 in 1973, the business is now in a precarious financial condition, and the brothers have been advised to limit their salaries or withdrawals to $10,000 per year.

The court made findings of fact and ordered defendant to pay plaintiff $300 per month in alimony and $450 per month for child support pendente lite and $1,200 for counsel fees. Defendant appealed to this Court.

Lambeth, McMillan & Weldon, by Charles F. Lambeth, Jr., for plaintiff appellee.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for defendant appellant.

ARNOLD, Judge.

Defendant challenges the sufficiency of the evidence to support the district court's findings of fact and urges that the case be remanded for additional findings on the evidence presented. The record reveals substantial evidence in support of the court's findings with respect to defendant's marital mis-

conduct, his withdrawals of large sums from the partnership for personal use, the partnership's annual income, plaintiff's estimated living expenses prior to the separation, and services rendered by plaintiff's attorney. These findings therefore will not be disturbed on appeal. *See Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1964); *accord, Peeler v. Peeler,* 7 N.C. App. 456, 172 S.E. 2d 915 (1970). Furthermore, it is well settled that amounts of alimony pendente lite and counsel fees are determined by the court in its discretion and are not reviewable absent a showing of abuse. *Rickert v. Rickert,* 282 N.C. 373, 193 S.E. 2d 79 (1973); *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5 (1968); *Little v. Little,* 23 N.C. App. 107, 208 S.E. 2d 277 (1974). In making the award, the court clearly did so, "having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a). *See generally* Annot., 1 A.L.R. 3d 208 (1965). Since we see no abuse of discretion, we affirm the order of the district court.

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. JESSE RAY PHILLIPS

No. 758SC57

(Filed 2 April 1975)

1. **Automobiles § 3— Driver's License Record Check — failure to limit contents**

There is no merit in defendant's contention that the court erroneously failed to limit the contents of his "Drivers License Record Check" before its introduction in evidence where the record on appeal shows that only defendant's name and address and the certification by an agent of the Department of Motor Vehicles were read to the jury and that the record of defendant's prior convictions was not admitted before the jury.

2. **Automobiles § 3— driving while license revoked**

The State's evidence was sufficient for the jury in a prosecution for driving while license was revoked where it tended to show that proper notice was given to defendant of revocation of his driving privilege, that defendant acknowledged to the arresting officer that he had no driver's license, and that defendant was operating a motor vehicle on a public highway while his license was revoked.

State v. Phillips

APPEAL by defendant from *Rouse, Judge.* Judgment entered 8 October 1974 in Superior Court, GREENE County. Heard in the Court of Appeals 20 March 1975.

Defendant was charged in a warrant with the offense of operating a motor vehicle upon a public street or highway on 2 June 1974 while his operator's license was revoked (G.S. 20-28). He was convicted in district court and appealed. Upon trial *de novo* before a jury in superior court, he was found guilty.

The State's evidence tends to show that by letter dated 25 July 1973 from the North Carolina Department of Motor Vehicles, defendant was advised that his operator's license was revoked for a period of one year beginning 4 August 1973 for having been convicted of the offense of driving while under the influence of intoxicating liquor. On 2 June 1974 defendant was apprehended by a deputy sheriff while operating a GMC half-ton truck on rural paved road No. 1405 in Greene County. The officer knew defendant and knew that he had been previously arrested for driving under the influence of intoxicating liquor. Defendant stated to the officer: "No, sir, you know I don't have any license." The officer then placed defendant under arrest for driving while his operator's license was revoked.

Defendant's evidence tends to show that he had not received a notice of revocation of his operator's license.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell and Associate Attorney James Wallace, Jr., for the State.

William R. Jenkins, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the trial court erred in denying his motion to limit the contents of his "Drivers License Record Check" before its introduction into evidence. This assignment of error and argument are feckless. The record on appeal shows clearly that only the defendant's name and address and the certification by the proper agent of the Department of Motor Vehicles were read to the jury. The record of defendant's prior convictions was not admitted before the jury in the presentation of the State's case. When defendant later testified in his own behalf, he was cross-examined concerning prior convictions. This cross-examination was permissible.

[2] Defendant argues that his motion for nonsuit should have been allowed. The State's evidence tended to show notice to defendant, in accordance with G.S. 20-48, of revocation of his driving privilege; that defendant acknowledged to the officer that he had no driver's license; and that defendant was operating a motor vehicle on a public highway while his license was revoked. This assignment of error is overruled.

Defendant's remaining assignments of error have been considered and are overruled.

No error.

Judges PARKER and ARNOLD concur.

PILOT FREIGHT CARRIERS, INC. v. DAVID G. ALLEN COMPANY, INC.

No. 7410DC1070

(Filed 2 April 1975)

Carriers § 12— action to recover shipping charges — instruction proper

In an action to recover shipping charges, trial court's instruction on damages which complied with an earlier Court of Appeals decision in the case was proper.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 21 October 1974 in District Court, WAKE County. Heard in the Court of Appeals 11 March 1975.

Plaintiff instituted this action seeking to recover shipping charges for delivery of crushed stone used by defendant in construction of a floor at the Raeford Turkey Plant. The trial court entered summary judgment for plaintiff in the amount of $1,373.99. This Court affirmed as to defendant's liability on quasi-contract but remanded for determination of damages. *Freight Carriers v. Allen Co.,* 22 N.C. App. 442, 206 S.E. 2d 750 (1974). The jury returned a verdict for plaintiff in the amount of $1,373.99. From judgment entered, defendant appealed to this Court.

Smith, Hibbert & Pahl, by Carl W. Hibbert, for plaintiff appellee.

Daniel R. Dixon for defendant appellant.

ARNOLD, Judge.

In its opinion remanding this case as to the issue of damages, this Court said:

> "The only evidence in this record as to the value of the services rendered by the plaintiff and retained by the defendant is that shown on the 'Freight Waybill'; and while not conclusive, it may be considered, if shown to be consistent with the Interstate Commerce Commission's Schedule of Rates and Tariffs, together with other evidence, if any, in determining the reasonable value of such services." *Freight Carriers v. Allen,* 22 N.C. App. 442, 444-45, 206 S.E. 2d 750, 752-53 (1974).

Plaintiff, relying on the above language, presented a rate expert who testified that according to tariffs filed with the ICC the total charges for services rendered were $1,373.99. Defendant offered no evidence. The trial court instructed the jury that, if they found $1,373.99 to be reasonable and consistent with the ICC's schedule of rates and tariffs, they must render a verdict for plaintiff in that amount. In light of our prior disposition of this case, we must find no error in the instruction.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. LEROY PINKNEY

No. 7512SC37

(Filed 2 April 1975)

1. Criminal Law § 149— arrest of judgment — appeal by State

An order for arrest of judgment is based upon the insufficiency of the indictment or other defect appearing on the face of the record and is appealable by the State. G.S. 15-179.

2. **Criminal Law § 149— setting aside verdict for insufficient evidence — appeal by State**

The State may not appeal from an order setting aside the verdict in a criminal case on the ground that it is not supported by the evidence.

APPEAL by the State from *Smith, Judge.* Judgment entered 9 August 1974 in Superior Court, HOKE County. Heard in the Court of Appeals 19 March 1975.

Defendant was indicted on a charge of armed robbery. He pleaded not guilty and was tried before a jury, which found him guilty as charged. The court entered judgment imposing a prison sentence. Defendant moved to set aside the judgment on grounds that there was insufficient evidence upon which to convict. The court entered an order for arrest of judgment, and the State appealed.

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

James D. Little, Public Defender, Twelfth Judicial District, for defendant appellee.

ARNOLD, Judge.

[1, 2] An order for arrest of judgment is based upon the insufficiency of the indictment or other defect appearing on the face of the record. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Fletcher,* 279 N.C. 85, 181 S.E. 2d 405 (1971). It is appealable by the State. G.S. 15-179. A judgment of nonsuit, on the other hand, has the force and effect of verdict of not guilty. G.S. 15-173; *State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972). The State may not appeal.

Although referred to by the trial court as an order for arrest of judgment, the order appealed from is in fact an order setting aside the verdict on grounds that it is not supported by the evidence. This Court is without power to review such an order.

Appeal dismissed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. BARRY CANDLER AND MIKE MASON

No. 744SC1092

(Filed 2 April 1975)

1. **Animals § 7; Property § 4— wanton damage of realty — needlessly killing animals**

The State's evidence was sufficient for the jury in a prosecution of defendants for wantonly damaging real property in violation of G.S. 14-127 and of needlessly killing animals in violation of G.S. 14-360.

2. **Criminal Law § 112— circumstantial evidence — necessity for request for instructions**

The court is not required to instruct the jury as to how it should view circumstantial evidence absent a request for special instructions.

APPEAL by defendants from *Lanier, Judge.* Judgments entered 22 August 1974 in Superior Court, DUPLIN County. Heard in the Court of Appeals 11 March 1975.

Defendants were each convicted of willfully and wantonly damaging real property in violation of G.S. 14-127, and of needlessly killing animals in violation of G.S. 14-360. From judgments imposing prison sentences, they appealed.

Attorney General Edmisten by Associate Attorney General Jesse C. Brake for the State.

William E. Craft for defendant appellants.

PARKER, Judge.

Defendants assign as errors, first, the denial of their motions for directed verdicts of not guilty, and, second, the failure of the court "to properly instruct the jury as to the value of circumstantial evidence." We find no error in either assignment.

[1] The evidence, when viewed in the light most favorable to the State, was amply sufficient to require submission of the cases to the jury, and defendants' motions, which we treat as motions for nonsuit, *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973), were properly denied.

[2] The court correctly instructed the jury as to the burden and quantum of proof required for conviction, and absent a request for special instructions the court was not required to

instruct the jury as to how it should view circumstantial evidence. *State v. Warren,* 228 N.C. 22, 44 S.E. 2d 207 (1947); *State v. Murray,* 21 N.C. App. 573, 205 S.E. 2d 587 (1974); 3 Strong, N. C. Index 2d, Criminal Law, § 112, p. 8.

We have carefully reviewed the entire record and find

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. CHARLES W. ELLIS

No. 744SC1069

(Filed 2 April 1975)

Automobiles § 114— involuntary manslaughter — negligence by defendant and victim — instructions

Court's instruction allowing the jury to find defendant guilty of involuntary manslaughter if they believed the collision resulting in the decedent's death was caused by the concurring negligence of defendant and the decedent was not erroneous since one can be guilty of involuntary manslaughter whenever his culpable negligence is *a* proximate cause of the victim's death.

APPEAL by defendant from *Webb, Judge.* Judgments entered 24 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 March 1975.

Defendant was tried on a bill of indictment charging him with manslaughter and a warrant charging him with operating a motor vehicle upon a public highway while under the influence of intoxicants, the latter charge having been appealed from district court. The cases were consolidated for trial and defendant pleaded not guilty to both charges.

Evidence for the State tended to show: On the night of 22 June 1974, after drinking 23 or 24 beers, defendant was operating an automobile on the highway between Swansboro and Jacksonville, in Onslow County. He collided with a motorcycle being operated in the opposite direction by Albert Charles Cook who died from injuries resulting from the collision. Defendant told investigating police that he was in his left lane of the highway when the collision occurred. A breathalyzer test adminis-

tered to defendant following the collision revealed a blood alcohol content of .14 percent.

As a witness for himself, defendant testified: Before beginning his drive from Swansboro to Jacksonville, he had consumed only five beers and was sober at the time of the collision. He collided with the motorcycle for the reason that it suddenly appeared in front of him in his right lane of travel. He did not have time to avoid the collision although he swerved to the left in an effort to miss the motorcycle.

The jury found defendant guilty of involuntary manslaughter and of driving while under the influence of intoxicants. From judgment imposing prison sentence of not less than five nor more than seven years on the manslaughter charge, and judgment imposing a concurrent sentence of six months on the driving under the influence charge, defendant appealed.

Attorney General Edmisten, by Associate Attorney Archie W. Anders, for the State.

Hamilton & Sandlin, by Billy G. Sandlin, for defendant appellant.

BRITT, Judge.

In his only assignment of error, defendant contends the trial court erred in its charge to the jury "with regard to proximate cause of the collision and resulting death". He argues that the challenged instruction improperly relaxed the State's burden of proof and allowed the jury to find defendant guilty of involuntary manslaughter even if they believed that the collision was caused by the concurring negligence of defendant and Cook. The argument is not convincing. Our Supreme Court has held that one can be guilty of involuntary manslaughter whenever his culpable negligence is *a* proximate cause of the victim's death. *State v. Harrington*, 260 N.C. 663, 133 S.E. 2d 452 (1963); *State v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132 (1955).

We hold that the challenged instruction, when considered with the remainder of the charge, was free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. OTIS ODELL TURNER

No. 7520SC38

(Filed 2 April 1975)

1. **Constitutional Law § 32— failure to appoint counsel — waiver of counsel**

The trial court did not err in failing to appoint counsel to represent defendant where defendant effectively waived counsel after being fully informed by the court that he was entitled to representation, that if he could not afford a lawyer, one would be appointed for him, and that he was subject to a prison sentence if convicted.

2. **Automobiles § 3— driving while license suspended — sufficiency of evidence**

The evidence was sufficient to support a jury verdict finding defendant guilty of driving on a public highway while his license was suspended.

APPEAL by defendant from *Webb, Judge.* Judgment entered 15 August 1974 in Superior Court, MOORE County. Heard in the Court of Appeals 19 March 1975.

Defendant was tried in district court on a warrant charging him with operating a motor vehicle on a public highway while his operator's license was suspended. He was found guilty in that court and from judgment imposed, appealed to superior court where he pleaded not guilty. A jury found him guilty as charged and from judgment imposing prison term of six months, he appealed to this court.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Smith & Thigpen, by J. Stephen Gaydica III, for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the superior court erred in not appointing counsel to represent him at his trial. We find no merit in the assignment. The record clearly discloses that defendant effectively waived counsel after being fully informed by the court that he was entitled to representation, that if he could not afford a lawyer, one would be appointed for him, and that he was subject to a prison sentence if convicted.

[2] By his other assignment of error, defendant contends the evidence was insufficient to support the verdict and the judgment. This assignment has no merit. After a careful review of the testimony presented at trial, we conclude that the evidence was sufficient to support the verdict and the judgment and no worthwhile purpose would be served in relating the testimony here.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. KENNETH D. ST. JOHN

No. 7519SC7

(Filed 2 April 1975)

APPEAL by defendant from *Long, Judge.* Judgment entered 10 October 1974 in Superior Court, CABARRUS County. Heard in the Court of Appeals 17 March 1975.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

Clarence E. Horton, Jr., for the defendant.

BROCK, Chief Judge, PARKER and ARNOLD, Judges.

No error.

STATE OF NORTH CAROLINA v. JOHNNY DEE PHILSON

No. 7521SC29

(Filed 2 April 1975)

APPEAL by defendant from *Exum, Judge.* Judgments entered 25 September 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 March 1975.

Attorney General Edmisten, by Assistant Attorney General Charles R. Hassell, Jr., for the State.

Powell, Keiger, James & Parrish, by Harrell Powell, Jr., and Carl F. Parrish, for the defendant.

BROCK, Chief Judge, PARKER and ARNOLD, Judges.

No error.

WALTER E. HELLER & COMPANY OF FLORIDA v. CONCORDIA LEG APPAREL, INC., OF N. C.; ART HOSIERY, INC.; CRAFTSMEN FINISHERS, INC.; JOSEPH ADAMS; SANFORD P. BRASS; LEONARD DeVRIES; JAMES W. WALSH

No. 7519SC19

(Filed 2 April 1975)

APPEAL by defendants, Joseph Adams, Sanford P. Brass, Leonard DeVries and James W. Walsh, from *Long, Judge.* Judgment entered 5 November 1974 in Superior Court, CABARRUS County. Heard in the Court of Appeals 18 March 1975.

Williams, Willeford, Boger & Grady by Samuel F. Davis, Jr., for plaintiff appellee.

Weinstein, Sturges, Odom, Bigger & Jonas, P.A., by T. LaFontine Odom for defendant appellants.

BRITT, HEDRICK, and MARTIN, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. ARTHUR ADCOCK

No. 7528SC30

(Filed 2 April 1975)

APPEAL by defendant from *Martin (Harry C.), Judge.* Judgment entered 4 November 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 March 1975.

Attorney General Edmisten by Assistant Attorney General Myron C. Banks for the State.

Robert L. Harrell, Assistant Public Defender, for defendant appellant.

PARKER, HEDRICK, and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. HAROLD JUNIOR NUNN

— AND —

STATE OF NORTH CAROLINA v. JERRY BUMPASS

No. 7514SC64

(Filed 2 April 1975)

APPEAL by defendants from *Braswell, Judge.* Judgments entered 24 October 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 March 1975.

Attorney General Edmisten by Assistant Attorney General Myron C. Banks for the State.

Robert F. Baker for defendant appellant Nunn.

Edward G. Johnson for defendant appellant Bumpass.

BRITT, HEDRICK, and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. DAVID HOLTON BRYANT

No. 7518SC36

(Filed 2 April 1975)

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 22 August 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 19 March 1975.

Attorney General Edmisten by Associate Attorney Wilton E. Ragland, Jr., for the State.

Booth, Fish, Simpson & Harrison by H. Marshall Simpson for defendant appellant.

BROCK, Chief Judge, PARKER and ARNOLD, Judges.

No error.

STATE OF NORTH CAROLINA v. EVANS CHRISTOPHER BEAM, JR.

No. 7527SC63

(Filed 2 April 1975)

APPEAL by defendant from *Hasty, Judge.* Judgment entered 24 October 1974 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 21 March 1975.

Attorney General Edmisten, by Assistant Attorney General Myron C. Banks, for the State.

Joseph M. Wright for defendant appellant.

BRITT, HEDRICK and MARTIN, Judges.

No error.

DOUGLAS L. BUTLER v. WILLIAM T. BERKELEY AND THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, INC., A CORPORATION

No. 7426SC1099

(Filed 16 April 1975)

1. Rules of Civil Procedure § 56— motion for summary judgment — evidence considered

At the hearing on a motion for summary judgment, the court may consider the pleadings, affidavits meeting the requirements of G.S. 1A-1, Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, documentary materials, facts which are subject to judicial notice, and such presumptions as would be available upon trial.

2. Rules of Civil Procedure § 56— motion for summary judgment — burden of proof

Upon motion for summary judgment the movant has the burden of establishing that there is no genuine issue of fact remaining for determination, and if he meets that burden of proof, he is entitled to judgment as a matter of law; the party opposing the motion has no burden of coming forward with evidentiary material in support of his claim until movant has produced evidence of the necessary certitude which negatives the opposing party's claim in its entirety.

3. Physicians and Surgeons § 16— malpractice action — plastic surgery — representations and warranties — summary judgment

In a malpractice action against a plastic surgeon, the trial court erred in entering summary judgment against plaintiff on his claim based on alleged representations and warranties by defendant that upon completion of a surgical procedure plaintiff's face would be symmetrical and he would be able to open his mouth wider than before surgery; that the surgical procedure was simple and required only four or five days of hospitalization; that there would be very little post-operative discomfort, consisting primarily of a little swelling in the area of the left cheekbone; and that the surgical procedure would not adversely affect plaintiff's left eye.

4. Physicians and Surgeons § 16; Rules of Civil Procedure § 56— malpractice action — conclusions of pleader — consideration on summary judgment motion

Allegations that defendant plastic surgeon was negligent in furnishing post-operative care in that he failed to exercise the degree of skill, care, and knowledge ordinarily exercised in similar cases by other plastic surgeons in Charlotte, N. C. or in a similar community were mere conclusions of the pleader and should not be considered in determining a motion for summary judgment.

5. Rules of Civil Procedure § 56— motion for summary judgment — sufficiency of complaint

The sufficiency of the allegations of the complaint do not determine the motion for summary judgment.

6. Physicians and Surgeons § 17— malpractice action — negligence in post-operative care — summary judgment

In a malpractice action against a plastic surgeon, the trial court properly entered summary judgment against plaintiff on his claim that defendant was negligent in his post-operative care of plaintiff in that plaintiff ingested fluids by mouth with defendant's knowledge that plaintiff had removed a nasal gastric tube inserted to prevent food from contaminating the packing and that ingestion of the fluids caused the infection complained of where the evidence presented by deposition showed that if the ingestion of food was a proximate cause of the infection, and if defendant was negligent in his post-operative care, plaintiff was, nevertheless, the sole author of his own misfortune.

7. **Physicians and Surgeons § 16— malpractice action — surgery without informed consent — battery — summary judgment**

In a malpractice action against a plastic surgeon, the trial court properly denied plaintiff's motion for summary judgment and properly allowed defendant's motion for summary judgment on plaintiff's claim that the operation in question constituted a battery upon plaintiff in that defendant withheld from plaintiff information with respect to the risks and other material facts involved in the surgery and operated on plaintiff without his informed consent where there was no evidence of any representation made by defendant which was false to the knowledge of defendant or of any facts which might nullify plaintiff's consent to the surgery.

APPEAL by plaintiff from *Fountain, Judge.* Judgment entered 3 October 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1975.

This is a malpractice action brought by plaintiff, a patient of defendant Dr. William T. Berkeley, and the Charlotte-Mecklenburg Hospital Authority, Inc., which operates the Charlotte Memorial Hospital. Dr. Berkeley, a plastic surgeon, performed a surgical procedure on plaintiff's face at the Charlotte Memorial Hospital, and plaintiff was thereafter treated at the hospital and in Dr. Berkeley's office. The operation was performed on 28 November 1970, and plaintiff was released from the hospital on 10 December 1970. A pin which had been placed in plaintiff's cheek was removed on 11 January 1971 and 17 days thereafter infection in the site was apparent for the first time. Dr. Berkeley immediately prescribed antibiotics, but despite his repeated attempts to halt the infection, he was not able to control it until after the removal of (1) a silicone disc, which had been placed under the bone supporting the eye, and (2) necrotic bone, which had "died" as a result of the infection.

In his complaint, plaintiff alleged three causes of action. The first alleged a breach by Dr. Berkeley of his representations, guarantees, and warranties "that upon completion of the surgical procedure" the plaintiff's face would be symmetrical, and he "would be able to open his mouth wider than before surgery; that the surgical procedure was simple, requiring only four (4) or five (5) days hospitalization; that there would be very little post-operative discomfort, consisting primarily of a little swelling in the area of the left cheekbone; that the surgical procedure definitely would not adversely affect the plaintiff's left eye". The second cause of action alleged negligence on the part of Dr. Berkeley in the performance of the surgical procedure

"without using sterile techniques" and in his failure to remove certain bone fragments in the area of the surgery. He also alleged negligence in Dr. Berkeley's post-operative care of plaintiff. He alleged the hospital was negligent in keeping "the steel prosthetic device and the silicone implants" in an unsterile condition and in failing to follow sterile procedures in the course of the surgical procedure. The third cause of action alleged that the operation constituted and was a battery upon plaintiff for that Dr. Berkeley withheld from plaintiff information with respect to the risks and other material facts involved in the surgery and operated on plaintiff without his informed and intelligent consent.

Each defendant answered and denied any breach of any duty owed by him or it to plaintiff. The deposition of plaintiff was taken as was the deposition of Dr. Berkeley. Thereafter each defendant moved, under Rule 56, for summary judgment for that there is no issue as to any material fact and it affirmatively appears from the depositions taken that there was no breach of any duty to plaintiff. Plaintiff also moved, under Rule 56, for summary judgment for that "there is no issue as to any material fact to deny the plaintiff's claim grounded on lack of informed consent". The court entered judgment denying plaintiff's motion for summary judgment and allowing Dr. Berkeley's motion as to all three causes of action and the hospital's motion as to the second cause of action, the only one relating to the hospital. From entry of the judgment, plaintiff appealed.

Whitfield, McNeely, Norwood & Badger, by David R. Badger, for plaintiff appellant.

Carpenter, Golding, Crews & Meekins, by John G. Golding, for appellee Dr. William T. Berkeley.

Boyle, Alexander and Hord, by B. Irvin Boyle, for appellee The Charlotte-Mecklenburg Hospital Authority, Inc.

MORRIS, Judge.

At the outset, we note that plaintiff candidly concedes that he has produced no evidence to substantiate his contentions concerning unsterile procedures used by defendants. Since this was the only basis for the cause of action against the hospital, we do not discuss plaintiff's appeal from the summary judgment in favor of the hospital. It is affirmed.

Each movant supported the motion for summary judgment with the deposition of Dr. Berkeley and the deposition of plaintiff, and no party filed any affidavit in opposition to the motions made against him or it, although Dr. Berkeley did file a response to plaintiff's motion for summary judgment in which he referred to the testimony given in both depositions.

[1] At the hearing on a motion for summary judgment, the court may consider the pleadings, affidavits meeting the requirements of G.S. 1A-1, Rule 56(e), depositions, answers to interrogatories, admissions, oral testimony, documentary materials, facts which are subject to judicial notice, and such presumptions as would be available upon trial. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

> "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E. 2d 189 (1972), and cases cited therein.

[2] Although upon trial of issues raised by the pleadings the plaintiff would have the burden of proof, upon motion for summary judgment the movant has the burden of establishing that there is no genuine issue of fact remaining for determination. If he meets that burden of proof, he is entitled to judgment as a matter of law. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *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). The party opposing the motion has no burden of coming forward with evidentiary material in support of his claim until movant has produced evidence "of the necessary certitude which negatives plaintiff's claim against it in its entirety." *Whitley v. Cubberly, supra*, at 206; *Tolbert v. Tea Co., supra.*

> "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)." *Whitley v. Cubberly, supra,* at 206-207.

[3] When these principles are applied to defendant's motion for summary judgment with respect to plaintiff's first cause of action, we conclude that defendant failed to carry the burden of proof so as to entitle him to summary judgment as a matter of law.

In paragraph 7 of his complaint, plaintiff alleged:

"After examination by defendant William T. Berkeley of the scar heretofore described, defendant William T. Berkeley informed plaintiff that his left cheekbone was depressed; that defendant William T. Berkeley then specifically represented, guaranteed and warranted to plaintiff that, for a consideration, hereinafter more fully stated, defendant William T. Berkeley would raise the left cheekbone so it would exactly match the right cheekbone, in addition to removing the scar heretofore described; that the surgical procedure would improve the appearance of plaintiff's face by making the left side of plaintiff's face completely symmetrical with the right side of plaintiff's face; that defendant William T. Berkeley represented, guaranteed and warranted to the plaintiff that upon completion of the surgical procedure to make the plaintiff's face symmetrical that the plaintiff would be able to open his mouth wider than before surgery; that the surgical procedure was simple, requiring only four (4) or five (5) days hospitalization; that there would be very little post-operative discomfort, consisting primarily of a little swelling in the area of the left cheekbone; that the surgical procedure definitely would not adversely affect the plaintiff's left eye."

In his deposition defendant testified that in his first conference with plaintiff, "we pointed out that the cheekbone could be improved and elevated." Further, "[w]e explained, with the skull, we explained that it was a common procedure to elevate the cheekbone secondary to an old trauma or a depressed cheekbone or a depression of a congenital deformity, that one could open the tripart type fracture, meaning the cheekbone, elevate the cheekbone, bring it up to normal position and then to fix it in a normal position and hold it there until it became solid and fused bone and then remove the pin." Defendant testified that on the occasion of plaintiff's first visit in July, nothing

was said about involvement of plaintiff's eye. He further testified that plaintiff returned in October and that on that visit defendant again explained the surgical procedure in detail but that he does not recall whether he made any statement about the eye.

We cannot say that defendant produced evidence of the necessary certitude which negatived plaintiff's claim in the first cause of action in its entirety.

The deposition of plaintiff was taken by agreement of both parties. The record is silent as to whether it was submitted by plaintiff in opposition to defendant's motion or by defendant in support of his motion. The record indicates only that it was considered by the court. In any event, considering the deposition with plaintiff's verified complaint, and treating the complaint as an affidavit in compliance with G.S. 1A-1, Rule 56(e), containing allegation of facts admissible in evidence, and viewing all the material considered by the court in the light most favorable to plaintiff, as we are required to do, we are constrained to hold that on the present record the court committed error in granting defendant's motion for summary judgment as to the plaintiff's first cause of action. Whether plaintiff will be able to meet his burden of proof upon a trial of the issues is another question.

[4, 5] Plaintiff's second cause of action is bottomed on negligence. He alleges that the hospital kept and allowed to be used and that Dr. Berkeley did use a prosthetic device and items of silicone which were not sterile and that Dr. Berkeley failed to use sterile procedures in the insertion of the pin and the implanting of the silicone. Dr. Berkeley testified that the infection which manifested itself after the removal of the pin and the silicone did not result from the use of either, that it was a rare occurrence, and he could not say exactly what caused it but that no mistakes or "slips" occurred during the surgery and he performed the operation in accordance with the generally accepted standards and procedures for persons in the specialty of plastic surgery performing such an operation. Plaintiff candidly concedes in his brief and stated on oral argument that there is no evidence to support allegations in the complaint as to negligence. He does contend in his brief that there is a genuine issue of fact as to whether the ingestion of fluids by plaintiff was with Dr. Berkeley's concurrence and caused the infection of which plaintiff complains. He alleged in the second

cause of action that Dr. Berkeley was negligent in furnishing post-operative care "in that he failed to exercise the degree of skill, care, and knowledge ordinarily exercised in similar cases by other surgeons specializing in plastic and reconstructive surgery in the City of Charlotte, County of Mecklenburg, State of North Carolina, or in a similar community." These are mere conclusions of the pleader and not to be considered in opposition to or in support of a motion for summary judgment. *Singleton v. Stewart, supra.* Neither does plaintiff allege the respects in which the defendant was negligent in his post-operative care. However, the sufficiency of the allegations of the complaint do not determine the motion for summary judgment. 6 Moore, Federal Practice, 2d Ed. (1971), § 56.04[1], p. 2059. "If this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss." *Lindsey v. Leavy,* 149 F. 2d 899, 902 (C.A. 9th Cir. 1945), cert. denied, 326 U.S. 783, 66 S.Ct. 331, 90 L.Ed. 474 (1946). The motion pierces the bare pleadings, allegations and penetrates to the factual core of the controversy. *Singleton v. Stewart, supra.*

[6] With these principles in mind we look at the evidence presented by the two depositions before the court. Dr. Berkeley's evidence, considered in the light most favorable to plaintiff, is that the plaintiff did ingest fluids by mouth, with the knowledge of defendant that the nasal gastric tube inserted to prevent protein, milk, or food in the mouth from contaminating the packing had been removed by plaintiff; that the hospital record showed that "patient took fluids PO (by mouth) despite being advised that this was against physician's orders"; that his having taken those fluids by mouth could have conceivably introduced contamination and caused infection.

Plaintiff, by his deposition, testified that he had a tube "through my nose" and that he was fed ground-up foods through that tube; that about the tenth day, as the result of "nerves," he jerked the tube from his nose. The nurse came in and advised him that he couldn't do that because "they didn't want anything to happen because of this up in here" (referring to the incision in his mouth); that he had been swallowing "ice cubes and things like that"; that he refused to allow the nurse to put the tube back in; that he called Dr. Berkeley, told him the situation with respect to his nerves and nausea and that he agreed to leave the tube out.

" . . . [F]unctionally the theory underlying a motion for summary judgment is essentially the same as the theory underlying a motion for directed verdict. The crux of both theories is that there is no genuine issue of material fact to be determined by the trier of the facts, and that on the law applicable to the established facts the movant is entitled to judgment. As Justice Jackson stated in *Sartor v. Arkansas Natural Gas Co.* [321 U.S. 620, 624, 64 S.Ct. 724, 88 L.Ed. 967 (1944)] 'a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.' " 6 Moore, Federal Practice, 2d Ed., § 56.02[10] p. 2043.

The evidence presented by the depositions compels the conclusion that if, indeed, the ingestion of food was a proximate cause of plaintiff's damages as the result of infection, and if defendant was negligent in his post-operative care and did not exercise the standard of care other physicians would have exercised, the plaintiff was, nevertheless, the sole author of his own misfortune. Plaintiff's own evidence would require a directed verdict for defendant.

The summary judgment as to plaintiff's second cause of action was properly allowed.

[7] We turn now to the third cause of action. Here plaintiff bottoms his claim on the allegation that defendant undertook to perform surgery on plaintiff without first obtaining plaintiff's informed and intelligent consent and, therefore, committed a battery upon plaintiff, which battery directly and proximately resulted in plaintiff's injury and damage.

In support of this theory of the third cause of action, plaintiff alleges that defendant "failed to advise plaintiff of the serious nature of the proposed operation" and "to advise [him] that there was a risk of damage to plaintiff's left eye and left cheek"; that "plaintiff's consent to the performance of this surgical operation was given in reliance upon the representations that the operation was a simple procedure with no danger of post-operative complications, damage to plaintiff's left eye, or damage to plaintiff's left cheek"; that defendant "withheld the risks and material facts involved in the surgery in that defendant represented to plaintiff that said surgery was a simple procedure with no possibility of complications of any kind and

further that plaintiff's appearance would be greatly improved." There is no allegation of negligence in this third cause of action.

Plaintiff appeals from the denial of his motion for summary judgment and the allowance of defendant's motion for summary judgment.

With respect to plaintiff's motion for summary judgment, the plaintiff, of course, had the laboring oar. That he consented to the operation is not in dispute. Plaintiff has apparently sought to bring his action within the perimeters suggested by Justice Bobbitt (later C.J.) in his concurring opinion in *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762 (1955). In commenting on the fact that plaintiff there had grounded his action on the alleged negligence of defendant rather than assault and battery and, therefore, did not allege that the representations allegedly negligently made were "false to the knowledge of the defendant or other facts that might nullify his consent to the operation."

Justice Bobbitt further said:

"An unauthorized operation constitutes as assault and battery, *i.e.,* trespass to the person. As stated by Judge *Cordozo,* speaking for the Court of Appeals of New York: 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. *Pratt v. Davis,* 224 Ill. 300, 79 N.E. 562, 7 L.R.A. (N.S.) 609, 8 Ann. Cas. 197; *Mohr v. Williams,* 95 Minn. 261, 104 N.W. 12, 1 L.R.A. (N.S.) 439, 111 Am. St. Rep. 462, 6 Ann. Cas. 303. This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.' *Schloendorff v. New York Hospital,* 211 N.Y. 125, 105 N.E. 92, 52 L.R.A. (N.S.) 505, Ann. Cas. 1915C, 581. See also, *Bennan v. Parsonnet,* 83 N.J.L. 20, 83 Atl. 948; *Moos v. United States,* 118 F. Supp. 275. In *Mohr v. Williams, supra, Brown, J.,* quotes 1 Kinkead on Torts, sec. 375, viz: 'The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or

> impliedly given before a surgeon may have the right to operate.' And there is authority to the effect that consent to perform an operation is not valid if induced by representations that are false to the knowledge of the surgeon who makes them. *Birnbaum v. Siegler,* 273 App. Div. 817, 76 N.Y.S. 2d 173; *Pratt v. Davis, supra; Wall v. Brim,* 138 F. 2d 478; *Nolan v. Kechijian,* 75 R.I. 165, 64 A. 2d 866; *Robinson v. Crotwell,* 175 Ala. 194, 57 So. 23; *Wall v. Brim,* 145 F. 2d 492.
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> Whether plaintiff's evidence would be sufficient for submission to the jury had he elected to bring his action on the ground of injury resulting from an unauthorized operation is not presented for decision on this record. Suffice it to say, plaintiff did not bring such action."

Neither did plaintiff here allege that the representations were false to the knowledge of defendant. Assuming, however, that the allegations sufficiently allege a cause of action grounded on a battery and that this is the basis which plaintiff intended for the third cause of action; and noting again that the plaintiff acknowledges his actual consent to the operation, then the focus must shift from plaintiff's lack of consent to whether defendant misinformed plaintiff or misrepresented to plaintiff, by omission or otherwise, the nature of the surgery which he intended to perform on plaintiff. See for a full discussion of problems attendant upon malpractice suits based on a battery as compared with those based on negligence, Note, *Duty of Doctor to Inform Patient of Risks of Treatment: Battery or Negligence?,* 34 So. Cal. L. Rev. 217 (1961), and Shartis, *Informed Consent: Some Problems Revisited,* 51 Nebraska L. Rev., No. 4, 527 (1972). Directing our attention to the deposition of plaintiff with respect to the focal point suggested above, we find that plaintiff testified that he had received a laceration to his face in an auto collision necessitating nine stitches and resulting in a jagged scar on his cheek. He went to see defendant to determine whether there could be a revision of the scar by plastic surgery. He further testified that his face was disfigured in that one cheekbone was depressed, one ear lower than the other, and he could not open his mouth very wide. This had been true all of his life but had not resulted from any trauma. He went to defendant to "see if he could fix" the scar and defendant noticed the cheekbone depression. He first asked about the scar and then the cheekbone. "And he [defendant] said that, as far

as the cheekbone, that he could fix it and that it shouldn't be any problem as far as that goes. He said there's no problem, and he took me in his room and he had a skull, and he pointed out to me exactly where I would be cut, . . ." Defendant explained that he would make the necessary incisions inside the mouth and there would be a small scar at the outside of plaintiff's left eye and that would be gone over and "Z'd" after the cheekbone had been broken and moved into better position. Defendant told plaintiff he would have to use a pin to hold it all together. Plaintiff asked "Is that gonna hurt," and defendant replied "No, it's not going to cause any discomfort whatsoever." Plaintiff further said, "and it did not; it didn't hurt me a bit. I figured it went right through my sinus. I figured it would hurt like hell, but it didn't. I didn't even notice it." Further ". . . and I asked him emphatically, as a person would, if it would affect my eye or anything else, and he said 'No,' and I asked him about the surgery itself. He said I would incur a pretty good amount of swelling, and he said that would be the result; I mean he didn't pull no bones about that. He said there would be a medium amount of swelling, but that would be the only after effects as far as that goes, and then I asked him about opening my mouth wider, and he said I would be able to open my mouth at least as wide or wider, . . ." Plaintiff said that defendant explained to him that the pin was necessary because "you can't put a cast on your face" and that it would have to stay in place from 4 to 6 weeks, but the defendant did not say anything about the use of silicone. "I asked him a thousand questions. I mean every question imaginable as far as you would think of, and I would too on the situation. What would happen? What would be the results? I mean, what could happen to me? Everything like that. And I asked him emphatically about my eye. That was the main thing on both occasions I visited him. On July the 28th, he told me I'd have to wait for my scar to mature, and then I made another appointment October 14th, and then again we went through the same routine. He took me from one of the little offices into his own office, and explained to me again what the situation was and what would happen, and what would take forth, and what would transpire, you know, like that." Plaintiff again testified that defendant told him his eye would not be affected. "I had no idea . . . that the eye rested upon the bone itself. I thought it was a socket, you understand, I mean my layman terms and everything, and that's what he told me. He said there would be no damage whatsoever.

He said there would be a lot of swelling." The only question he didn't answer "was how my cheek was depressed and all, and he couldn't answer that, because that was something that was when I was born, and he really didn't know that, as far as that was concerned. He took me in there and he was very informative, I mean he took me in his office and he talked to me for probably half an hour when he had maybe twenty or thirty patients waiting out there to talk to him, and all, and that made me think he was very conscientious. I did have confidence in him as far as that went." When the bandage was removed while plaintiff was still in the hospitial, the eyelid was pulled down, and he was told that the doctor "will have to go back over" and "Z" the scar again and the "eye will come back up in time". "[H]e said he usually had stitched this eyelid to this eyelid when he did this operation. He said he didn't think there was any need to in my case." "Those were the exact words that he said. Obviously, I mean, or he would have done it, you know."

Plaintiff was operated on on 28 November, remained in the hospital some 12 days, and was back at work by 14 December, continuing to work until sometime in late January. The pin was removed 11 January 1971, and the infection did not evidence itself until sometime thereafter.

Defendant by deposition testified that on plaintiff's first visit, nothing was said about plaintiff's eye. He "explained with the skull, . . . that it was a common procedure to elevate the cheekbone secondary to an old trauma or a depressed cheekbone or a depression of a congenital deformity, that one could open the tripart type fracture, meaning the cheekbone, elevate the cheekbone, bring it up to normal position and then to fix it in a normal position and hold it there until it became solid and fused bone and then remove the pin." He testified that it is more difficult to repair damage of long standing than a fresh fracture because in damage of long standing the bone has to be reopened with power tools to produce a fracture. Defendant explained to plaintiff fully the purpose of the surgery on plaintiff's first visit to his office. He further testified that in explaining the procedure to plaintiff he did not feel at that time and still did not feel at the time of the deposition that explanation of possible use of a silicone disc in the floor of the orbit was of any great importance, that "occasionally it is done when you have to elevate the zygoma; in some instances you do it, and in some instances you don't do it." The eye was never involved in

plaintiff's case, "it is the eyelid that you want to know about". The defendant testified that he said nothing about the possibility of infection on either visit of plaintiff to him prior to the surgery because "we are talking about something that has happened to me two times in twenty-three years". "I didn't feel that it was a point to discuss. If you tried to discuss one hundred things that can possibly occur, you can never get your work done. It is the probability that we must be interested in, I am thinking, in order to be fair with the patient which I always want to be fair with, and the probability was not that great or is not that great". He testified that it would be fair to say that there is always a risk of infection. Defendant did not recall whether anything was said at the second visit about the plaintiff's left eye. The infection "produced fibrous tissue and scar which then contracted and caused a pull down of the lid". Defendant did not know what caused the infection, but it was a slight and unlikely risk based on his experience. The judgment decision as to the use of silicone was one made based on the appearance and location of various bones after he was already into the operation and it was used as an added precaution "for the eyeball dropping down". Neither the silicone implant nor the pin caused the infection. The "risk of there being an infection and the infection causing a pull down of the eyelid was remote enough" to make him feel, as a plastic surgeon, that he had no duty to discuss it with the patient before the operation.

Construing the depositions in the light most favorable to defendant, we find nothing which would support a finding of misinformation; or misrepresentation, by omission or otherwise. Certainly plaintiff has produced no evidence that any representation made by defendant to plaintiff was false to the knowledge of defendant nor does plaintiff produce evidence of any facts which might nullify his consent to the surgical procedure. Plaintiff failed to carry his burden of "producing evidence of the necessary certitude" required on his motion for summary judgment. *Whitley v. Cubberly, supra,* and *Tolbert v. Tea Co., supra.*

With respect to defendant's motion for summary judgment on this third cause of action, considering the evidence presented by the two depositions in the light most favorable to plaintiff we conclude that the evidence would require a directed verdict for defendant and, therefore, the court correctly allowed defendant's motion. See 6 Moore's Federal Practice, 2d Ed., § 56.02[10].

Both parties, in oral argument and by their briefs, discuss at length the informed consent doctrine. Plaintiff relies on *Canterbury v. Spence,* 464 F. 2d 772 (C.A.D.C. 1972). There plaintiff alleged a negligent failure by the defendant to disclose a risk of serious disability inherent in the operation. There the court held that defendant had a duty to disclose to plaintiff damages in the proposed treatment and risks which might ensue from the proposed surgery and from not undergoing the surgery, and further that this duty to inform the patient is not dependent on the patient's request for information and disclosure. The court noted that this is the minority view and recognized that "[t]he majority of courts dealing with the problem have made the duty depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient. If so, the physician may be held liable for an unreasonable and injurious failure to divulge, but there can be no recovery unless the omission forsakes a practice prevalent in the profession. (Citations omitted.)" *Canterbury v. Spence, supra,* at 783. See 52 A.L.R. 3d 1084-1105 annotation. "Necessity and Sufficiency of Expert Evidence to Establish Existence and Extent of Physician's Duty to Inform Patient of Risks of Proposed Treatment."

An example of the obvious difficulties inherent in applying the rule of *Canterbury* is exemplified by the *Canterbury* Court's own statement:

> "There is no bright line separating the significant from the insignificant; the answer in any case must abide a rule of reason. Some dangers—infection for example—are inherent in any operation; there is no obligation to communicate those of which persons of average sophistication are aware. Even more clearly, the physician bears no responsibility for discussion of hazards the patient has already discovered or those having no apparent materiality to patients' decision on therapy. The disclosure doctrine, like others marking lines between permissible and impermissible behavior in medical practice, is in essence a requirement of conduct prudent under the circumstances. Whenever nondisclosure of particular risk information is open to debate by reasonable-minded men, the issue is for the finder of the facts. (Citations omitted.)" *Canterbury v. Spence, supra,* at 788.

Thus, it appears that the Canterbury Court would not require Dr. Berkeley to warn plaintiff that there was, as is always the case, a risk of infection attendant in surgery.

Two cases in this jurisdiction are of help. In *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617 (1964), plaintiff sought damages for the personal injuries she alleged she suffered as the result of defendant's negligence in performing a subtotal thyroidectomy. In addition to allegations of negligence in performing the surgery, plaintiff alleged that defendant *negligently* failed to advise the plaintiff of the dangers involved in surgery and negligently failed to obtain an enlightened consent for the operation. The plaintiff there had also alleged that her surgeon had advised her that she would be hospitalized a week prior to surgery because of the seriousness of the operation and that the operation was not without risks. The Court held that she was bound by her pleading. In speaking to the question, the Court, through Justice Higgins, said:

> "Courts have expressed widely divergent views as to how far the surgeon should go in advising of dangers involved in a proposed operation. Plaintiff insists this Court should take the extreme view expressed in *Salgo v. Leland Stanford Jr. University Board of Trustees,* 154 Cal. App. 2d 560, 317 P. 2d 170: 'A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent.' See, also, 40 Minn. Law Review 876.
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> Of course, the type of risk involved should have bearing on the completeness of the disclosure required. Obviously, brain or heart surgery involves high risks. Removal of an ingrown toe-nail ordinarily does not. However, a surgeon, except in emergency, should make a reasonable disclosure of the risk involved in a proposed surgical operation if the operation involves known risk. And yet, to send a patient to the operating room nervous from fright is not often desirable. The middle ground rule is admirably stated in 75 Harvard Law Review 1445: 'The duty narrows then, in the average case, to disclosure of dangers peculiar to the treatment proposed and of which it is likely that the patient is unaware. The doctor should have little difficulty in choosing from these the risks that are sufficiently serious and likely to occur as to be essential to an intelligent decision by his patient.'

> Difficulty arises in attempting to state any hard and fast rule as to the extent of the disclosure required. The doctor's primary duty is to do what is best for the patient. Any conflict between this duty and that of a frightening disclosure ordinarily should be resolved in favor of the primary duty. And yet, the consent of the patient or of someone duly authorized to consent for him, except in emergencies, is required before the operation is undertaken. The surgeon should disclose danger of which he has knowledge and the patient does not—but should have—in order to determine whether to consent to the risk." *Watson v. Clutts, supra,* at 159.

In *Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339 (1968), the plaintiff sought damages for alleged negligence by defendant in performing an esophagoscopy. Among other allegations of *negligence,* plaintiff alleged that defendant *negligently* failed properly to prepare and instruct the plaintiff prior to the operative procedure. Justice Lake wrote for the Court and stated that the Court deemed it unwise and unnecessary to attempt "to define precisely the extent and limits of the legal duty of a physician or surgeon to make known to his patient" the possible or probable adverse effects of a proposed treatment, including surgery. The Court did say, however:

> "Where, as here, there is no contention of fraud or misrepresentation by the surgeon in order to induce the patient to undergo an unnecessary or unwise surgical procedure, and the likelihood of an adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell the patient as to possible adverse consequences. While the patient, or the person acting for him, has the right to an informed election as to whether to undergo the proposed operation, treatment or to take a prescribed drug, it must be borne in mind that the physician's or surgeon's primary concern at the time of consultation is, and should be, the treatment of the patient's illness or disability not preparation for the defense of a possible lawsuit. Obviously, an increase in the normal anxiety of one about to undergo a surgical procedure is not medically desirable. Advice, which is calculated to increase such anxiety by recounting unlikely possibilities of undesirable consequences, is not consistent with the above stated duty of the physician or surgeon to his patient. A

different situation is presented when the physician or surgeon knows, or should know, the proposed operation, treatment or drug has a high ratio of adverse reactions or complications of a serious nature, not likely to be known to the patient. See: *Sharpe v. Pugh, supra; Mitchell v. Robinson,* (Mo.) 334 S.W. 2d 11, 79 A.L.R. 2d 1017." *Starnes v. Taylor, supra,* at 393.

The Court noted that the record disclosed no evidence of any false statement or unwarranted assurance by defendant to the plaintiff.

To adopt the minority rule of *Canterbury* would result in requiring every doctor to spend much unnecessary time in going over with every patient every possible effect of any proposed treatment. The doctor should not have to practice his profession with the knowledge that every consultation with every patient with respect to future treatment contains a potential lawsuit and his advice and suggestions must necessarily be phrased with the possible defense of a lawsuit in mind. This would necessarily result in the doctor's inability to give the best interest of his patient primary importance. We think the majority rule with respect to informed consent is a much more practical one both in application and result. In the case before us, however, it appears that if the plaintiff's third cause of action had been grounded on negligent failure to disclose or inform, the court acted properly in denying plaintiff's motion for summary judgment and allowing defendant's motion. The *Canterbury* Court recognized the fact that risk of infection is something known to any person of ordinary sophistication. Plaintiff testified that he had accumulated enough semester hours to be classified as a senior in college. He is the son of a lawyer, and has two brothers and three uncles who are lawyers, so he is not from an uneducated background. Under the majority rule, plaintiff, on his motion for summary judgment, introduced no medical testimony as to the custom of physicians practicing in the community. However, as to defendant's motion, he testified that the only other incident of infection in his 23 years of practice of plastic surgery was one which occurred some 15 to 18 years previously; that the probability of infection was not so great as to warrant advising plaintiff of the possibility; that he had contacts with other plastic surgeons throughout the country and their experiences with onset of infection were as rare as his; that the risk of infection was "a slight and unlikely" risk and did not warrant

specific disclosure. This testimony was uncontradicted. Again, the evidence would have entitled defendant to a directed verdict, and the court did not err in granting his motion for summary judgment on plaintiff's third cause of action.

The result, then, is this:

As to defendant Charlotte-Mecklenburg Hospitial Authority —Affirmed.

As to plaintiff's first cause of action against defendant Berkeley—Reversed.

As to plaintiff's second cause of action against defendant Berkeley—Affirmed.

As to plaintiff's third cause of action against defendant Berkeley—Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. GARY C. LINDSEY AND MARK WELLS

No. 748SC1058

(Filed 16 April 1975)

1. **Criminal Law § 92— two defendants — consolidation of cases for trial**

The trial court may, in its discretion, consolidate for trial multiple charges against a defendant, or multiple defendants, where the charges are of the same class and so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others; the trial court properly consolidated the cases against two defendants for trial in this prosecution for conspiracy to break or enter, larceny, and receiving stolen goods, where the evidence tended to show that defendants were the operators of a filling station which they used in a conspiracy as the base of operations for the "fencing" of stolen goods. G.S. 15-152.

2. **Criminal Law §§ 34, 102— reference by district attorney to other offenses — no mistrial**

The trial court did not err in denying defendants' motion for mistrial made on the basis of the district attorney's statement made in the presence of the jury, "We had other charges that arose. For instance accessory before and accessory after the fact . . . . "

3. Conspiracy § 5; Criminal Law § 79— acts and declarations of conspirators — admissibility

It is the general rule that when evidence of a *prima facie* case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other conspirators; therefore, the trial court in a prosecution for conspiracy to break or enter, larceny, and receiving stolen goods did not err in allowing evidence of conversations which took place between the other conspirators and the defendants at the defendants' gas station on a number of separate occasions, even though some of those conversations included references to many kinds of stolen goods besides those which defendants were charged with receiving, since such evidence was relevant and admissible to prove defendants' design or *modus operandi* in the furtherance of the objectives of the conspiracies charged or the other charges of receiving stolen goods and to show intent and guilty knowledge.

4. Criminal Law § 86— plea bargains of witnesses — limitation of cumulative evidence proper

It is recognized that it is proper to test a witness as to bias concerning a promise of pardon as the result of his testimony for the State, but it is equally well established that the refusal to permit questions which would invoke merely repetitious or cumulative evidence is not error; therefore, in view of the overwhelming amount of evidence admitted regarding each witness's plea bargain and criminal proclivities, defendants were not prejudiced by the exclusion of other evidence which was generally cumulative in nature.

5. Criminal Law § 98— motion to sequester witnesses — no reason given — denial proper

Where defendant's request that two witnesses be sequestered for the remainder of the trial was made after the State had begun to present its case, and the defendant failed to explain why he wanted the witnesses sequestered, the trial court did not abuse its discretion in denying the request.

6. Criminal Law § 101— attempt to influence juror — juror excused and replaced by alternate

The trial court did not err in excusing a juror and replacing him with the alternate juror where the original juror testified that his brother called him, told him that one defendant was a friend of his, stated that he would appreciate anything the juror could do to help, called back an hour later, apologized for calling, and said that defendant had approached him at work and asked him to call which he did while defendant was there with him.

7. Criminal Law §§ 79, 101— joint trial — attempt by one defendant to influence juror — admissibility of evidence

The rule that the confession of a nontestifying codefendant in a joint trial which implicates the other defendant in the commission of a crime is inadmissible as against that defendant did not apply in this case to prohibit admission of evidence that one defendant approached the brother of a juror to see if he would call the juror and put in a

good word for him, since that activity did not necessarily amount to a confession, the other defendant was not implicated in any manner by this evidence, the court cautioned the jury not to consider the evidence as against the other defendant, and the evidence was relevant to show defendant's consciousness of his guilt or his unwillingness to rely on the soundness of his case.

ON *Certiorari* to review Order of *Lanier, Judge.* Judgments entered 28 January 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 February, 1975.

Each of the defendants pled not guilty to charges of conspiracy to break or enter, larceny from, and receiving goods stolen from (1) the Donald K. Whitley warehouse on 12 February 1973, (2) the Laughlin's Poultry Farm, Inc. warehouse on 12 February 1973, and (3) the Kemp Furniture Industries, Inc., garage on 18 February 1973, and to charges of receiving goods stolen from each of the aforesaid buildings, a total of twelve charges against each defendant.

The case for the State was based primarily on the testimony of John Robert Potter, the leader of a theft ring who participated in all of the three charged break-ins, and three of his associates who participated in one or more of the three break-ins. For his testimony Potter was given immunity from prosecution for the three break-ins and similar offenses in both Wayne and Wake Counties, and his three associates entered into plea bargains with the State. The evidence indicated that these four witnesses revealed to law officers more than a hundred break-ins and thefts in Wayne County.

The evidence for the State tended to show that defendants Lindsey and Wells operated a filling station in or near Goldsboro, where they kept a U-Haul truck, ostensibly for hire. They arranged for Potter to have a duplicate ignition key made for the truck so that he might pick up and use the truck to bring them the tires which were stolen pursuant to the break-ins. The defendants had agreed to pay Potter $33.33 each for all the tires that he brought to them. The tires had a market value of $125.00 each. The fruits of the break-ins and thefts from the three buildings as alleged in the indictments were delivered in the U-Haul truck to defendants at their filling station. They paid the agreed price to Potter, who divided the money among his associates.

The defendants did not offer evidence.

Both defendants were convicted of the three counts of conspiracy to receive stolen goods and the three charges of receiving stolen goods; they were acquitted of the counts charging conspiracy to break or enter and conspiracy to commit larceny in each of the three indictments. From judgments imposing consecutive prison terms, the defendants appealed.

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

George F. Taylor for Gary C. Lindsey and Roland C. Braswell for Mark Wells, defendants.

CLARK, Judge.

[1] The defendants objected to the consolidation for trial of the various charges against both of them. The trial court may, in its discretion, consolidate for trial multiple charges against a defendant, or multiple defendants, where the charges are of the same class and so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. G.S. 15-152; *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962); *State v. Garcia,* 16 N.C. App. 344, 192 S.E. 2d 2 (1972). Here the State's evidence tended to show that the defendants were the operators of a filling station, which they used in a conspiracy with the witness Potter and others as the base of operations for the "fencing" of stolen goods. The charges were so connected and the evidence so interrelated that the trial court was fully justified in ordering the consolidation.

[2] The defendants made motions for mistrial and continuance when Assistant District Attorney Jacobs, in the presence of the jury, made the following statement: "[W]e had other charges that arose. For instance accessory before and accessory after the fact . . . . " The statement was made in response to the argument of defense counsel, also made in the presence of jurors, in opposition to the State's motion for consolidation. The reference was to other charges against the defendants of accessory before the fact and accessory after the fact to the three break-in charges referred to in the conspiracy indictments, and it was made to inform the court that the State was not seeking to include the accessory charges in the motion for consolidation. Several minutes before this statement was made District Attorney Parker announced in open court and in the presence of

jurors that "[t]he accessory, we are not pressing; that is before and after each breaking and entering." Defendants then made no objection or request for instructions. Under the circumstances the State's attorney did not overstep the bounds of propriety and fairness which should characterize the conduct of an officer of the court. The conduct of the trial rests in the sound discretion of the trial court. *Shute v. Fisher,* 270 N.C. 247, 154 S.E. 2d 75 (1967); *State v. Dove,* 222 N.C. 162, 22 S.E. 2d 231 (1942). The ruling of the trial court in denying the motion for mistrial was sound, and we find no abuse of discretion.

[3] The State was allowed, over defendants' objection, to introduce evidence of conversations which took place between the other conspirators and the defendants. These conversations occurred at the defendants' gas station on a number of separate occasions. The defendants objected to the admission into evidence of those parts of the conversations which related to plans to steal and receive televisions, guns and other stolen goods. They assign error on the ground that the defendants were not charged with receiving or conspiring to receive such stolen goods, but were charged only with receiving stolen tires and conspiring to break in, steal, and receive stolen tires. The record reveals that their talks were not separated according to the kind of goods, but were general in scope and often a single conversation included references not only to tires but to many other kinds of goods. We find no error in the admission of such testimony nor in the testimony of the witnesses that they at various times sold goods other than tires to the defendants. It is the general rule that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other conspirators. *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969). Furthermore, the prima facie case can, in the discretion of the trial court, be established subsequently to the introduction of the declarations. *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956). In the present case there was an abundance of evidence, even some without objection, establishing a prima facie case of conspiracy. Considerable latitude is allowed in the admission of evidence offered to establish the gravamen of a conspiracy charge. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508 (1951).

Evidence of declarations and acts relative to receiving stolen goods outside the conspiracy were admissible under a well-

established exception to the general rule that evidence of distinct substantive offenses is inadmissible to prove either another crime or to show character. Such evidence is admissible where it is probative of guilty knowledge, intent, plan or design and other things that are logically relevant. *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322 (1950); 1 Stansbury, N. C. Evidence, §§ 92, 159 (Brandis rev. 1973).

Examination of the many evidentiary objections and exceptions reveals that the questioned evidence was relevant and admissible to prove defendants' design or *modus operandi* in the furtherance of the objectives of the conspiracies charged or the other charges of receiving stolen goods and to show intent and guilty knowledge.

[4] Several of the witnesses for the State were testifying pursuant to a plea bargaining arrangement. On cross-examination, counsel for the defendants sought to raise questions relating to the terms of these plea bargaining agreements, each witness's knowledge of the maximum sentence they could have received had they not plea bargained, and the details of their prison records. It is recognized that it is proper to test a witness as to bias concerning a promise of pardon as the result of his testimony for the State. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277 (1939). However, it is as equally well established that the refusal to permit questions which would invoke merely repetitious or cumulative evidence is not error. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966).

Counsel for the defendants sought to elicit answers to these questions from three separate witnesses testifying for the State. The first witness, John Robert Potter, stated that he was testifying for only one reason and that was that the State would not prosecute him for the crimes he had committed. There were an extraordinary number of pages in the record devoted to bringing out the innumerable crimes Potter had committed. He in fact stated that he did not " . . . think it would be over a hundred." He further admitted that he had previously served a number of years in jail on numerous theft charges and went into the sentences he had received for each.

The second witness, Arnold Gaitan DuBois, testified that he had plea bargained a twenty-year sentence for the crimes he had committed specifying thirty-eight or nine cases of "break-

ings, enterings, larcenies, safecrackings, armed robberies, and receiving." He understood that he could have gotten as many as seven hundred years if he had not plea bargained.

The third witness, Donald Gene Langston, testified that he had been in prison four or five times for forgery, uttering a forged document, taking a stolen car across state lines, worthless checks, and forcible trespass. He even admitted that if it would be advantageous for him to tell a lie, he would. It should also be noted that a witness, David Earl Vinson, also testified for the State to the effect that he had plea bargained a seven-year sentence for crimes he had committed as part of a theft ring operating in Wayne County. He had already served eight years in prison.

In view of the overwhelming amount of evidence admitted regarding each witness's plea bargaining and criminal proclivities, we do not feel that the defendants were prejudiced by the exclusion of other evidence which was generally cumulative in nature. While we recognize the substantial right of counsel to sift the witness on cross-examination with regard to questions of bias, we believe that in the circumstances of this case, the trial court had discretionary authority to keep the cross-examination within proper bounds and to exclude repetitious evidence. His exercise of that discretion was not abusive.

[5] At one point in the trial while John Potter was testifying, defendant Lindsey's attorney requested that witnesses Vinson and DuBois be sequestered for the remainder of the trial. It is contended that the denial of this request was error. A motion to sequester is directed to the discretion of the trial court and its ruling thereon is not reviewable on appeal except in cases of manifest abuse. *State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Jones,* 21 N.C. App. 666, 205 S.E. 2d 147 (1974). In this case, the request was made after the State had begun to present its case and the defendant failed to explain why he wanted the witnesses sequestered. We find no merit in this assignment of error.

[6] The jury, with an alternate, was empaneled on Monday, 21 January 1974. On Tuesday morning, Juror No. 6, was called to the witness stand by the court, in the absence of the other jurors, and testified that last night he had received a telephone call from his brother, Ray Malpass in Kinston, who told him that the defendant Wells was a friend of his and if there was

anything the juror could do to help, he would appreciate it; that about an hour later his brother called back, apologized for calling, and said that defendant Wells had approached him at work and asked him to call, which he did while said defendant was there with him. He did not tell anything else about the call.

The juror was excused. The other jurors were called to the courtroom, told that Juror No. 6 was discharged, and the alternate juror was told to take the No. 6 seat. Defendants objected to the removal of Juror No. 6, to his replacement by the alternate, and moved for a mistrial and continuance. The objections were overruled and the motions denied, and we find no abuse of discretion and no error in this ruling.

At trial, the State offered Ray Malpass. He testified in substance that Wells had approached him to see if he would call his brother and put in a good word for him. Ray said he would, so he called his brother with defendant Wells listening and asked him to help out Wells.

All pertinent parts of Ray Malpass's testimony were objected to and at the end of his testimony, defendant Lindsey's attorney moved for a mistrial on the grounds that this evidence was prejudicial to his client.

[7] On appeal, the defendant particularly relies upon the case of *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), wherein it was held that the confession of a nontestifying codefendant in a joint trial which implicated the other defendant in the commission of a crime was inadmissible as against that defendant under the Confrontation Clause of the Sixth Amendment. While the facts in this case do not necessarily warrant a finding that Wells' activities amounted to a "confession," in any event, we believe that the evidence was admissible in that at no place in the questioned testimony was defendant Lindsey implicated in any manner. Furthermore, cautioning instructions that the jury was not to consider this evidence as against defendant Lindsey were given by the trial court both during the examination of Malpass and in the charge to the jury. In *State v. Fox,* 274 N.C. 277, 291, 163 S.E. 2d 492, 502 (1968), the Court said, " . . . in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant."

The activity of defendant Wells in attempting to embrace a juror through Ray Malpass was obviously relevant to show his consciousness of guilt or his unwillingness to rely on the soundness of his case. See *State v. Case*, 93 N.C. 545 (1885). See also *Commonwealth v. White*, 447 Pa. 331, 290 A. 2d 246 (1972) and *Gassenheimer v. United States*, 26 App. D.C. 432 (1906).

Since defendant Lindsey was not implicated, we believe that the evidence of these activities was admissible under the language of *State v. Fox, supra,* and that *Bruton v. United States, supra,* is not applicable in any event because the attempted embracery by Wells was not a "confession" in the technical sense of the word.

The record of the case on appeal consists of 480 pages, with 428 exceptions, grouped into 12 assignments of error. We have traversed the legalistic maze created by experienced defense counsel in continuously and vigorously opposing the evidence offered in abundance by the State; we have sifted and treated these assignments of error which are sufficiently meritorious to justify comment; and we find that the trial judge throughout the long week of trial ruled patiently on all of the many and varied objections and motions, and that he conscientiously sought to give and did give to the defendants a fair trial free from prejudicial error.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. GAYLE FRANKLIN COURTNEY

No. 7526SC21

(Filed 16 April 1975)

1. **Criminal Law § 161— exceptions — requirement of separate numbering**

Rule 19(c) of the Rules of Practice of the Court of Appeals provides that all exceptions relied on shall be grouped and separately numbered.

2. **Constitutional Law § 30— denial of speedy trial — determining factors**

Four interrelated factors bear upon the question whether defendant has been denied his right to a speedy trial: the length of the delay,

the cause of the delay, waiver by the defendant, and prejudice to the defendant.

3. **Constitutional Law § 30— 10½ month delay between offense and trial — no denial of speedy trial**

Defendant was not denied his right to a speedy trial where the evidence tended to show that the offense occurred on 26 September 1973, a warrant was issued and defendant was arrested on 25 October 1973, defendant was determined to be indigent and counsel was appointed to represent him on 30 October 1973, a preliminary hearing was scheduled for 19 November 1973 and later continued by the State, without opposition from defendant, until 19 December 1973, on that date the State took a *nolle prosequi* with leave because a material State's witness was not available, on 25 March 1974 defendant filed an application that cause be shown why a writ of mandamus should not issue for the matter to be set for trial and final disposition made, on 2 April 1974 the resident judge of the district informed defendant that since the charge against him had been nol prossed, there was no charge presently existing against him, on 8 July 1974 the solicitor sent a bill of indictment to the grand jury and the grand jury returned a true bill against the defendant, defendant's case was set for trial on 11 September 1974, and during pre-arraignment proceedings on 9 September 1974 defendant moved for dismissal of the charges against him for failure of the State to grant him a speedy trial.

4. **Searches and Seizures § 1— evidence found during hospital examination — no search — admissibility of evidence**

The trial court in this prosecution for manslaughter did not err in allowing into evidence vegetable material and cigarette paper found on defendant's person while he was being examined at the hospital since these items were not the fruits of an illegal search.

5. **Automobiles § 112— manslaughter case — opportunity to observe defendant — opinion testimony as to speed admissible**

In a prosecution for manslaughter where the evidence tended to show that defendant was operating his vehicle at a high rate of speed and that he swerved and almost hit several vehicles, the trial court did not err in allowing a witness to give his opinion as to the speed of defendant's automobile immediately preceding the collision since the witness had ample opportunity to observe the defendant's automobile.

6. **Criminal Law § 52— hypothetical question — objectionable form — no answer given — no prejudice**

Defendant was not prejudiced by the asking of an unanswered hypothetical question, even if the form of the question was objectionable.

APPEAL by defendant from *Falls, Judge.* Judgment entered 11 September 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 March 1975.

Defendant was charged with manslaughter. Upon his plea of not guilty, the jury returned a verdict of guilty of involuntary manslaughter. From judgment sentencing him to imprisonment for a term of not less than 7 years nor more than 10 years, the sentence to commence at the expiration of the sentence imposed in case No. 72CR10185, defendant appealed.

Evidence for the State, considered in the light most favorable to it, tended to show that on 26 September 1973 at approximately 11:30 p.m. a light blue Ford was observed by several witnesses travelling west in the eastbound lane of Central Avenue in Charlotte at a high rate of speed; that the automobile swerved and almost hit several vehicles, and the same blue Ford automobile was later seen at the scene of an accident. Another witness was travelling down Central Avenue at approximately the same time when he observed an automobile travelling at a high rate of speed toward him in his lane of traffic; that he blinked his headlights a few times but the automobile kept coming toward him; and that he swerved to the left to avoid the oncoming car because he "could not run off the road to the right side because of the telephone poles". A Mercury automobile was behind this witness at the time, and immediately after the witness swerved to avoid the oncoming automobile, the witness testified he heard "this 'BAM' like two cars hit" and then looked around to see "steam going up". The witness further testified that following the collision, he observed the defendant seated upright under the steering wheel of the automobile he had swerved to avoid and that no other person was in that automobile at the time of the collision.

A police officer testified that upon arriving at the scene of the accident he "observed a 1973 Mercury headed into town on Central Avenue which had been wrecked" and "a 1966 Ford headed out of town which had been wrecked"; that the defendant was sitting under the wheel of the 1966 Ford and the deceased was sitting at the steering wheel of the Mercury. Another officer corroborated the police officer's description of the scene of the accident and noted that the Ford was on the wrong side of the road. The officer further testified she found the defendant in the front seat of the Ford and "noticed an odor of alcoholic beverage about his person and the car".

An employee of the Charlotte Ambulance Service, who transported the defendant to the hospital testified that in the course of disrobing the defendant for treatment, he found "a

clear plastic bag, like a baggy, that had what looked like tobacco in it". A surgical technician also testified that he was present when "a small clear plastic bag containing a green leafy substance" was found in the defendant's left-hand front pants pocket. A chemist with the Charlotte Mecklenburg Crime Laboratory later testified that he performed a chemical analysis on the substance found. He stated that in his opinion the substance was marijuana.

The Medical Examiner for Mecklenburg County, and the doctor who examined the deceased at Charlotte Memorial Hospital following the accident, testified regarding the injuries received by the deceased. Each doctor testified he had an opinion, satisfactory to himself, as to the cause of the death of the deceased.

A voluntary statement made by the defendant to police officers following the accident was introduced into evidence by the State following a voir dire. In the statement, defendant admitted he sometimes smoked marijuana and took LSD and that he had previously had two flashbacks from taking LSD. However, defendant denied smoking any marijuana, taking any LSD, drinking any alcohol or experiencing a flashback on the night of the accident. He stated that "[m]y mind is almost a complete blank from the time I turned off Arnold Dr. onto Central except I do remember doing 40 MPH and [seeing] 4 headlights after I crossed Eastway Dr." Defendant also stated that he did not remember being on the wrong side of the road.

A resident surgeon at Charlotte Memorial Hospital testified on behalf of the defendant. When he examined the defendant, the witness testified that he detected an odor of alcohol about the defendant but that the defendant was alert and answered all his questions quickly and satisfactorily. The doctor further testified that in his opinion the mental and physical faculties of the defendant were not significantly impaired.

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

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for the State.

James L. Roberts, for defendant appellant.

MORRIS, Judge.

[1] Defendant erroneously groups three exceptions under his first assignment of error. Exception No. 1 relates to the denial of defendant's motion to dismiss for failure on the part of the State to grant him a speedy trial, while exceptions No. 2 and 3 relate to the denial of his motions for judgment notwithstanding the verdict and for a new trial, respectively. These exceptions present distinct and different questions of law. " . . . This method of grouping exceptions does not conform with the Rules of Practice in this Court. Rule 19(c) provides that all exceptions relied on shall be grouped and separately numbered. In interpreting its cognate rule, our Supreme Court has held that '[t]his grouping of the exceptions assigned as error (sometimes for brevity also called "assignments of error") should bring together all of the exceptions which present a single question of law.' *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912. 'An assignment of error must present a single question of law for consideration by the court. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785. The purpose of this requirement is to bring into focus the several distinct questions of law which the appellant wishes the appellate court to consider. That purpose is defeated when, as here, appellant jumbles together in the same assignment of error a number of exceptions which undertake to raise quite distinct and different questions of law. . . ." *Duke v. Meisky,* 12 N.C. App. 329, 332, 183 S.E. 2d 292, 294 (1971). While the defendant's failure to properly group his exceptions makes our task more difficult, we have, nevertheless, carefully considered all of the questions raised by the exceptions grouped under his first assignment of error.

[3] We find no merit in defendant's contention that it was error for the trial court to deny his motion to dismiss for failure on the part of the State to grant him a speedy trial. An examination of the record shows the date of the accident was 26 September 1973; that a warrant was issued and defendant was arrested on 25 October 1973, that defendant was determined to be indigent and counsel appointed to represent him on 30 October 1973; that a preliminary hearing was scheduled for 19 November 1973, and later continued by the State, without opposition from the defendant, until 19 December 1973; that on 19 December 1973 the State took a *nolle prosequi* with leave in the case in District Court because a material State's witness was not available on that date; that on 25 March 1974 defend-

ant filed with the Clerk of Court of Mecklenburg County an application that cause be shown why a writ of mandamus should not issue for this matter to be set for trial and final disposition made; that by letter dated 2 April 1974 the Honorable Fred H. Hasty, Senior Resident Judge of the Twenty-Sixth Judicial District informed the defendant that since the charge of manslaughter against him had been nol prossed with leave in the District Court in December of 1973, and "according to the files and also according to the District Attorney's Office no charge of manslaughter is presently existing against you," a show cause hearing was unnecessary; that on 8 July 1974 the solicitor sent a bill of indictment to the grand jury and the grand jury returned a true bill against the defendant; that defendant's case was set for trial in Superior Court on 11 September 1974; that during pre-arraignment proceedings on 9 September 1974, defendant moved for dismissal of the charges against him for failure of the State to grant him a speedy trial; that the trial judge heard evidence, made findings and concluded that the defendant had not shown that delay in "the prosecution of the manslaughter case has been deliberately and unnecessarily caused for the convenience or supposed advantage of the State and that the length of the delay created a reasonable possibility of prejudice against the defendant and therefore has denied him a speedy trial." The trial judge, therefore, denied defendant's motion to dismiss; and defendant was finally arraigned and brought to trial on 9 September 1974.

On appeal defendant points to the fact that there was a delay of 10 months and 15 days from the date of his arrest on 25 October 1973 until the actual trial of his case on 9 September 1974. He contends that the State deliberately and unnecessarily caused this delay for the convenience of the State and that this delay, in itself, gives rise to a presumption of prejudice to this case. We disagree. In our opinion, defendant was not denied a speedy trial and his motion to dismiss was properly denied.

[2] Our Supreme Court has stated that "the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant." *State v. Johnson,* 275 N.C. 264, 269, 167 S.E. 2d 274, 278 (1969).

[3] In considering the length of delay in this case, we note that defendant was not tried upon the warrant issued on 25 October 1973. That charge against the defendant was nol prossed with leave in District Court on 19 December 1973, less than two months after the defendant's arrest. As we noted in *State v. Wood,* 17 N.C. App. 352, 355, 194 S.E. 2d 205, 207 (1973), citing *State v. Clayton,* 251 N.C. 261, 268, 111 S.E. 2d 299, 304 (1959), and *S. v. Thornton,* 35 N.C. 256, 257-258 (1852):

> " 'A *nolle prosequi* in criminal proceedings, is nothing but a declaration, on the part of the prosecuting officer, that he will not at that time prosecute the suit further. Its effect is to put the defendant without day—that is, he is discharged and permitted to leave the court, without entering into a recognizance to appear at any other time—(citation omitted); but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. (Citations omitted.)'
>
> After a *nolle prosequi* has been taken, the solicitor may replace the cause on the docket only with consent of the court; whereas, a *nolle prosequi* with leave implies consent of the court, and the solicitor may have the case restored for trial without additional order. 2 Strong, N. C. Index 2d, Criminal Law, § 30."

Following the *nolle prosequi* of his case in District Court no charge was pending against the defendant until 8 July 1974, when the grand jury returned a true bill of indictment against him, and his case was set for trial in Superior Court on 11 September 1974. Even when we consider the fact that there was a delay of 10 months and 15 days between defendant's arrest under the warrant and his trial under the indictment, we note that defendant did not oppose a continuance in his case until 19 December 1973. Furthermore, no action was taken by the defendant to raise the question of speedy trial until his motions to dismiss and for summary judgment on 10 June 1974. Defendant was brought to trial 91 days after this demand and 62 days after a true bill of indictment was returned by the grand jury.

Turning to a consideration of the reason for the delay, at the pre-arraignment hearing on defendant's motion to dismiss for the failure of the State to afford him a speedy trial, the State introduced evidence showing that the charge against the

defendant in District Court was nol prossed on 19 December 1973 because a material witness for the State was unavailable at that time. The solicitor also stated that there were approximately 700 cases pending in the Superior Court of Mecklenburg County since January 1974, and that there probably were carry-over cases from 1973 in the amount of 200 to 300 and probably some cases from further back than that. Additionally, according to the solicitor, the file containing the charge against the defendant was misplaced or lost, and he proceeded promptly to the grand jury when the file was located.

Since, in our opinion, the defendant has not waived his right to a speedy trial, we next proceed to a consideration of the question of prejudice resulting from the delay. We note in passing, however, that not until 10 June 1974—some eight months after his arrest—did the defendant raise the question of speedy trial. Moreover, as we already have pointed out, 91 days later defendant was brought to trial.

In his brief, defendant contends he was prejudiced by the State's delay in bringing him to trial. Yet, nowhere in his brief does the defendant explain how he was prejudiced by the delay, nor does the record disclose any prejudice. There is no evidence that the prosecution of his case was deliberately delayed or brought about by any negligent or arbitrary action on the part of the State.

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *State v. Johnson, supra.*

In our opinion defendant has failed to carry his burden of showing prejudice. Considering each of the foregoing factors, we conclude defendant was not deprived of his right to a speedy trial.

As there is plenary evidence to support the verdict, defendant's motions for judgment notwithstanding the verdict and for a new trial on grounds the evidence does not support the verdict, were properly denied. Defendant's first assignment of error is overruled.

Defendant next asserts that it was error for the trial court to permit a Charlotte police officer, while testifying on behalf of the State, to refer to the defendant as the person sitting

under the wheel of the 1966 Ford. It is defendant's contention that this was an in-court identification without proper foundation and highly prejudicial to the defendant. No authority is cited by defendant in support of his argument, and defendant fails to explain how he was prejudiced by this testimony. This assignment of error is overruled.

[4] In his third assignment of error defendant objects to the introduction into evidence of vegetable material and cigarette paper found on his person while he was being examined at the hospital on the grounds that these materials were the product of an unlawful search. Defendant also maintains the trial court erred in refusing to strike testimony concerning the materials. We disagree. As we stated in *State v. Wooten*, 18 N.C. App. 269, 196 S.E. 2d 603 (1973), cert. denied, 283 N.C. 670 (1973), "there was no search of defendant within the purview of G.S. 15-27 and Constitutional provisions forbidding unreasonable searches. Defendant was not undressed by, or at the direction of, a police officer. The purpose in undressing defendant was not to discover contraband or other illicit property or to obtain evidence to be used against her in the prosecution of a criminal action. On the contrary, she was undressed in order that a physician might determine the cause of her unconsciousness and after determining the cause, administer treatment that would save her life. Finding heroin on her person was incidental to the examination." These principles apply in the case at bar. Defendant's third assignment of error, therefore, is overruled.

[5] Defendant next contends it was error for the trial court to permit one of the State's witnesses to the accident to give his opinion as to the speed of the defendant's automobile immediately preceding the collision, without a proper foundation. This assignment of error is without merit. The record discloses that the witness had ample opportunity to observe the defendant's automobile. It is well settled that "[a] lay witness with sufficient knowledge and opportunity to observe may testify as to the speed of a vehicle." 1 Stansbury's N. C. Evidence, Brandis Revision, § 131, p. 418. "[T]he extent of his observation affects only the weight, and not the competency, of the testimony." *Miller v. Kennedy*, 22 N.C. App. 163, 165, 205 S.E. 2d 741 (1974), and cases cited therein, cert. denied 285 N.C. 661 (1974).

[6] In his final assignment of error defendant contends the trial court erred in allowing Dr. Wood to answer the State's

hypothetical question in the form presented. The hypothetical question asked whether the witness had an opinion based upon the assumptions stated, whether the injuries observed when the witness was examining the deceased could have caused the death of deceased. The witness answered "Yes, I do." The record does not show that the witness ever gave his opinion. We fail to see how defendant was prejudiced merely by the asking of an unanswered question, such as this, even if the form of the question was objectionable. The opinion asked for was never given.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIE WALLACE

No. 754SC4

(Filed 16 April 1975)

1. **Criminal Law § 127— motion in arrest of judgment**

A motion in arrest of judgment must be based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record and may be made for the first time on appeal.

2. **False Pretense § 2— sufficiency of indictment**

Indictment was sufficient to charge defendant with the crime of obtaining money by false pretense by representing that real property sold to prosecutrix was not subject to any encumbrances when defendant knew the property was subject to two deeds of trust.

3. **False Pretense § 1— elements of offense**

The elements of the crime of obtaining property by false pretense are (1) a false representation of a subsisting fact, whether in writing, by words, or by acts, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one obtains something of value from another without compensation.

4. **False Pretense § 3— representation land is free of encumbrances**

The false representation that land is free and clear of all encumbrances when knowingly made in order to effect a sale may be the subject matter of an offense of obtaining property by false pretense.

5. **False Pretense § 3— representation land is free from encumbrances — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for obtaining money by false pretense where it tended to show that

defendant, who was engaged in the construction and sale of houses, represented to prosecutrix and her husband, now deceased, that certain property was free and clear of encumbrances, that he gave them a warranty deed for the property so stating, that prosecutrix and her husband made a $1,000 cash down payment on the property and executed a purchase money deed of trust for $9,150, and that there were deeds of trust on the property securing an outstanding indebtedness of more than $9,000.

6. False Pretense § 3.5— instructions

In a prosecution for obtaining money by false pretense, the court's instruction that defendant would not be guilty if he made no false representation "or if he did but if it was not calculated to deceive and did not deceive the purchasers" did not require the jury to negate two elements of the crime in order to find defendant not guilty where the court correctly set forth each of the essential elements of the offense in the immediate prior portion of the charge.

7. False Pretense § 3.5— application of law to evidence

In a prosecution for obtaining money by false pretense, the court properly applied the evidence to the element of the offense requiring defendant to obtain something of value from another without compensation by referring to the evidence that plaintiff paid money to defendant in exchange for a deed to a lot which defendant falsely represented to be free and clear of encumbrances.

8. Criminal Law § 118— charge on contentions — necessity for objection

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 or they are deemed waived.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 6 August 1974 in Superior Court, SAMPSON County. Heard in the Court of Appeals 12 March 1975.

Criminal prosecution for obtaining money by false pretense, a violation of G.S. 14-100.

Defendant, Willie Wallace, entered a plea of not guilty to a bill of indictment wherein he was charged with obtaining $9,150.00 from Susan Gail Smith as a portion of the sale price of certain real property upon the representation that the property was not subject to any encumbrances when in fact the defendant knew the property was subject to two deeds of trust securing an outstanding indebtedness of more than $9,000.00.

The State offered the testimony of Mrs. Smith, which tended to show the following: In March of 1971 the defendant offered to sell to Mrs. Smith and her husband a house located on lot

46 in the Starmount Subdivision, Clinton, N. C. The defendant told Mrs. Smith that he owned the property "free and clear" of any outstanding mortgages or deeds of trust and that if she and her husband purchased the house he would convey it to them free of any encumbrances. Mr. and Mrs. Smith agreed to purchase the house and lot for $10,000.00. On 13 May 1971 the Smiths made a $1,000.00 cash down payment and executed a note and purchase money deed of trust in the amount of $9,150.00 to the defendant. They agreed to pay the balance due in monthly installments of $100.00. The sum of $150.00 was "figured in the total" purchase price for the purpose of obtaining a title search on the property. Defendant, in turn, executed a deed to Mr. and Mrs. Smith which included a warranty that the house and lot were free and clear of all encumbrances.

Mr. Smith died in an automobile accident on 29 May 1971 and Mrs. Smith moved into the house in June, 1971. Shortly thereafter, the defendant approached Mrs. Smith about paying off the outstanding indebtedness on the note and purchase money deed of trust which she and her husband had executed. The defendant told Mrs. Smith that the property was free of all liens and deeds of trust, that if she would pay off the balance due on the house it would be "hers," and that if she did so no one would be able to take the house from her. Following receipt of $14,000.00 from an insurance policy on her husband's life, Mrs. Smith, on 3 August 1971, paid $9,066.42 to the defendant, who cancelled the note and deed of trust for the balance due on the purchase of the house and lot. Mrs. Smith subsequently learned of three outstanding deeds of trust on the property in the amounts of $2,250.00, $5,000.00, and $8,489.40, which had been executed by the defendant prior to March, 1971. The defendant did not pay off these deeds of trust and in October 1972, Jesse Bethea foreclosed on the $2,250.00 deed of trust. The property was sold and Mrs. Smith was forced to leave the premises.

Mr. Billie Poole, an attorney, testified for the State that he was employed by the defendant to draft the warranty deed for the property in question and the note and deed of trust executed by Mr. and Mrs. Smith. Mr. Poole received $40.00 for his services and was told by the defendant not to conduct a title search of the property.

Jesse Bethea testified for the defendant that before Mr. and Mrs. Smith purchased the house he told them on at least two occasions that he had two deeds of trust on the property.

The defendant was found guilty and from a judgment imposing a prison sentence of not less than six (6) nor more than eight (8) years, he appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General Charles M. Hensey for the State.

Howard P. Satisky for defendant appellant.

HEDRICK, Judge.

[1, 2] Defendant contends that the judgment should be arrested because the bill of indictment upon which he was tried and convicted was fatally defective. A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503 (1940). A motion in arrest of judgment based upon such a defect may be made for the first time on appeal, and in the absence of a motion, the appellate court *ex mero motu* will review the record proper for such defect. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). Accordingly, we have examined the face of the record, and in particular the bill of indictment, and find that it is free from any fatal defects. See *State v. Munday,* 78 N.C. 460 (1878).

By assignments of error 4, 11, 12, 16, and 19, defendant contends the trial court erred to his prejudice with respect to certain evidentiary rulings during the course of the trial. We have reviewed each of the exceptions upon which these assignments of error are based and find no error prejudicial to the defendant. We, nevertheless, discuss two of the assignments of error individually.

By assignment of error 11, defendant argues that the court erred in sustaining an objection by the prosecutor to a question propounded to Mrs. Smith on cross-examination about what had happened to certain money allegedly borrowed by her and her husband from Jesse Bethea. As Mrs. Smith had emphatically denied knowing anything about the alleged transaction, we can discern no error in the court not allowing defendant's counsel to pursue the matter on cross-examination.

By assignment of error 19, defendant argues that it was prejudicial error for the trial court to sustain objections by the

State to two questions in which the defendant attempted to elicit from Jesse Bethea testimony to the effect that Mrs. Smith was aware that he had a deed of trust on the property. Obviously, this ruling was not error since Mr. Bethea had already testified that he told both Mr. and Mrs. Smith prior to their purchase of the house that he had two deeds of trust on the property.

Next, defendant contends that the trial court erred in overruling his motion for judgment as of nonsuit at the close of the State's evidence and in submitting the case to the jury at the close of all the evidence. Defendant did not renew his motion for judgment as of nonsuit at the conclusion of the evidence. However, pursuant to G.S. 15-173.1 we review the sufficiency of the evidence to sustain the verdict.

[3, 4] It is well settled that the elements of the crime of obtaining property by false pretense are (1) a false representation of a subsisting fact, whether in writing, by words, or by acts, (2) which is calculated to deceive and intended to deceive, (3) which does in fact deceive, and (4) by which one obtains something of value from another without compensation. *State v. Banks,* 24 N.C. App. 604, 211 S.E. 2d 860 (1975); *State v. Houston,* 4 N.C. App. 484, 166 S.E. 2d 881 (1969). It has also been held that the false representation that land is free and clear of all encumbrances when knowingly made in order to effect a sale may be the subject matter of this offense. *State v. Munday, supra; State v. Banks, supra.*

[5] In the present case, defendant contends that there was not sufficient evidence to submit the case to the jury primarily because (1) the evidence does not disclose whether the defendant made a false representation to Mr. Smith with respect to the existence of deeds of trust on the property and (2) the evidence does not show that Mr. and Mrs. Smith purchased the property in reliance upon any false representation by him. We do not agree. Although Mr. Smith died prior to defendant's trial, uncontradicted evidence was introduced showing that the defendant, who was engaged in the trade of the construction and sale of houses, represented to both Mr. and Mrs. Smith that the property in question was free and clear from any and all encumbrances. The warranty in the deed so stated. The conclusion that this representation was false, in light of the existence of the deeds of trust on the property at the time of the purchase, also is clearly justified. Furthermore, without stating all the evidence showing that Mr. and Mrs. Smith relied upon

the representation of the defendant in purchasing the property, we note that Mr. and Mrs. Smith made a $1,000.00 cash down payment and executed a purchase money deed of trust for $9,150.00 in return for a warranty deed on the house and lot. When all the evidence introduced at the trial is viewed in the light most favorable to the State, resolving any uncertainties and discrepancies in its favor and giving the State the benefit of all legitimate inferences which might be drawn from the evidence, we are of the opinion that there was sufficient evidence introduced as to each of the elements of the crime to require submission of the case to the jury and to support the verdict. See *State v. Banks, supra.*

Defendant's remaining assignments of error all relate to the trial court's charge to the jury.

[6] By assignment of error 30, defendant contends the trial judge erred when he stated:

> "On the other hand, if he made no false representation to them, of course, he would not be guilty, or if he did but if it was not calculated to deceive *and* did not deceive the purchasers, then, of course, he could not be guilty." [Emphasis ours.]

However, upon a reading of the entire charge, it is perfectly obvious that the trial judge was not requiring the jury to negate two elements of the crime of false pretense before it could find the defendant not guilty. The trial judge correctly set forth each of the essential elements of the crime immediately prior to the portion of the charge objected to and thereafter clearly instructed the jury as follows:

> "If he did make a false statement and it was not for the purpose of deceiving them, he would not be guilty. *Or* if he made a false representation to them for the purpose of deceiving them but, if in fact, it did not deceive them, he would not be guilty." [Emphasis ours.]

This assignment of error is overruled.

[7] By assignments of error 28, 29, 31 and 34, defendant contends that the court failed to properly apply the evidence to the fourth essential element of the crime of false pretense, which requires that the defendant obtain something of value from another without compensation. We do not agree. The court on several occasions in its instructions to the jury enumerated the

four essential elements of the crime charged. On each occasion the trial judge correctly stated that one of the essential elements was that the defendant receive something of value without compensation. Furthermore, the court applied the evidence of the case to this element of the offense on each occasion by referring to the evidence that Mr. and Mrs. Smith paid money to the defendant in exchange for the deed to the lot which the defendant represented to be free and clear of any encumbrances.

[8] Based on six exceptions noted in the record, defendant next contends the trial court erred to his prejudice in the portion of the charge in which it allegedly stated the contentions of the parties in that the "contentions" were not supported by the evidence. The general rule is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). Defendant in the instant case admits that he did not object to the remarks of the trial judge, and we are of the opinion that the statements objected to are of such a nature as to call for application of the general rule stated above. These assignments of error are overruled.

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

Defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

FRED J. GRIBBLE AND WIFE, DESSIE J. GRIBBLE v. CLOYCE GRIBBLE

No. 7430SC867

(Filed 16 April 1975)

1. Fraud § 3— unfulfilled promise — no intent to perform

In general, an unfulfilled promise will not support an action for fraud; if, however, at the time the promise is made the promisor has

no intention to perform and the promisee reasonably relies on the promise to act to his injury, the promise may constitute a misrepresentation of a material fact such as to support an action for fraud since the state of mind of the promisor is a subsisting fact which has been falsely represented.

2. **Evidence § 11— dead man's statute — action against surviving tenant by entirety**

A surviving tenant by the entirety is the "survivor of a deceased person" within the meaning of G.S. 8-51 in an action which attacks the validity of the deed by which the tenancy by the entirety was created; therefore, G.S. 8-51 applied to exclude testimony by male plaintiff concerning any personal transactions or communications between him and defendant's deceased husband in plaintiffs' action to rescind a deed to defendant and her deceased husband based on allegedly fraudulent representations by decedent that he would build a house on the property, reside there with his family, and help take care of plaintiffs.

3. **Evidence § 11— dead man's statute — communications with deceased agent**

In a breach of contract action in which plaintiffs contended that defendant's deceased husband acted for himself and as agent for defendant in promising to build a house on land conveyed to defendant and her husband, to reside on the land and to render assistance to plaintiffs, G.S. 8-51 applied to exclude testimony by plaintiffs concerning personal transactions between them and the deceased agent since plaintiffs' claim was based upon a theory that defendant's deceased husband was personally liable in respect of the alleged cause of action.

4. **Cancellation and Rescission of Instruments § 10— promise to build on land and take care of plaintiffs — insufficiency of evidence**

Defendant's motion for directed verdict was properly allowed in an action to set aside a deed to defendant and her deceased husband and for breach of contract based on alleged false representations by defendant's husband that he would build a house on the property and that he and his family would reside on the land and render assistance to plaintiffs where the evidence tended to show only that on occasions after plaintiffs executed the deed, defendant's husband, who was plaintiffs' nephew, stated that he intended to build a home on the property and to move on the property and take care of plaintiffs.

5. **Fiduciaries; Cancellation and Rescission of Instruments § 2— family relationship — no presumption of fraud**

A family relationship does not raise a presumption of fraud or undue influence.

APPEAL by plaintiffs from *Copeland, Judge.* Judgment entered 25 June 1974 in Superior Court, CLAY County. Heard in the Court of Appeals 15 January 1975.

Civil action to rescind a deed or alternatively to recover damages.

In October 1966 plaintiffs, reserving life estates, conveyed the remainder interest in their 352-acre homeplace in Clay County to defendant and her husband, Perry E. Gribble. Perry, who was plaintiff Fred J. Gribble's nephew, died in July 1971. This action was commenced 1 March 1973 against defendant as the surviving tenant by the entirety to set aside the deed or in the alternative to recover damages.

In their complaint, plaintiffs alleged: Early in 1966 they received offers of $27,000.00 and $36,000.00 from persons who wanted to buy their property. They sought advice from nephew Perry, who then lived in Maryland, where he was engaged in the real estate business. Perry advised that the offered prices were too low and requested that they cease negotiations for a sale until he could come to North Carolina to discuss the matter. Perry made several trips to visit plaintiffs and told them he wanted to move back to North Carolina and to purchase the property himself but that he was unable to pay the full market value. Perry told plaintiffs that if they would sell the property to him at a bargain figure, he would then have sufficient funds to build a residence on the property for himself and his family where they would live and be available to give assistance to plaintiffs should this be required. He also advised plaintiffs that they should reserve life estates in the property. Plaintiffs were attracted to this offer because of their desire to have a family member nearby to care for them in their advanced years. Because of Perry's "continued promises that he and his family intended to permanently reside on the property and to be available to plaintiffs in event of their need, plaintiffs finally succumbed to the offers and representations," and agreed to convey the property to Perry and the defendant.

Perry and defendant paid nothing down for the property but executed a note and deed of trust in the amount of $15,000.00 payable in 15 equal annual installments of $1,000.00 each without interest, the first payment being due on 10 January 1967. They paid the annual installments which fell due on 10 January 1967, 1968, 1969 and 1970 and received a further credit of $2,000.00 by reason of transfer of some cattle, making total payments of $6,000.00. Perry did move his family to Clay County and rented a residence until construction of the home which they promised plaintiffs they would build on the property could be completed. Perry employed a contractor, who excavated a houseplace, put in roads, and prepared the site for building.

Perry also made arrangements for telephone and electric service. Plaintiffs alleged that Perry and defendant had no real intention of actually constructing a home, either at the time of their negotiations with plaintiffs or thereafter, that all of the preliminary construction work was done solely for the purpose of misleading plaintiffs, and that on 21 June 1971 Perry and defendant purchased a home in Hayesville and thereafter discontinued all pretense of building.

Plaintiffs, alleging that the deed had been obtained from them by the fraudulent misrepresentations of Perry and defendant concerning their true intentions as to building a house on the property, offered to refund the $6,000.00 with interest and asked that their deed be declared void, or, in the alternative, that they recover of defendant damages in the amount by which the fair market value of the property in 1966 exceeded $15,000.00.

Defendant filed answer in which she denied that she had made any promises whatever to plaintiffs and denied that the deed had been executed as a result of any promises or persuasions of the defendant or of her deceased husband.

At the trial, the court excluded the testimony of plaintiff Fred Gribble as to his conversations and negotiations with his deceased nephew. At the close of plaintiffs' evidence the court allowed defendant's motion for a directed verdict, and from judgment dismissing the action, plaintiffs appealed.

Jones, Jones & Key, P.A. by R. S. Jones, Jr., for plaintiff appellants.

Leonard W. Lloyd for defendant appellee.

PARKER, Judge.

[1] In general, an unfulfilled promise will not support an action for fraud. If, however, at the time the promise is made the promisor has no intention to perform and the promisee reasonably relies on the promise to act to his injury, the promise may constitute a misrepresentation of a material fact such as to support an action for fraud. This is so because the state of mind of the promisor is a subsisting fact which has been falsely represented. *Gadsden v. Johnson,* 261 N.C. 743, 136 S.E. 2d 74 (1964); *Davis v. Davis,* 236 N.C. 208, 72 S.E. 2d 414 (1952). Plaintiffs here have alleged such a case. The question is whether they have supported their allegations with competent evidence.

No evidence was offered to show that defendant herself made any promise or representation whatever, and, apart from the tendered but excluded testimony of plaintiff Fred Gribble concerning conversations with defendant's deceased husband, there was no evidence to show that at the time plaintiffs executed their deed, defendant's husband fraudulently misrepresented his intention as to building a house and residing upon the property. Thus, the question presented by this appeal becomes narrowed to whether plaintiff Fred Gribble's testimony was properly excluded. We hold that it was.

[2] Insofar as pertinent to this appeal, G.S. 8-51 provides that "[u]pon the trial of an action . . . a party . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person. . . . " The estate of defendant's deceased husband is not a party to this action, and this action is not against the executor or administrator of a deceased person. Nor does defendant derive her title "from, through or under" her deceased husband; her title comes directly from plaintiffs. She is, however, a surviving tenant by the entirety and we hold that as such she is the "survivor of a deceased person" within the meaning of G.S. 8-51 in an action, such as the present one, which attacks the validity of the deed by which the tenancy by the entirety was created. We hold, therefore, that G.S. 8-51 applied and operated to exclude testimony by plaintiff Fred Gribble concerning any personal transactions or communications between him and defendant's deceased husband in plaintiffs' equitable action to rescind the deed for fraud.

[3] Plaintiffs' alternative claim for relief to recover damages for breach of contract rests upon their allegations that defendant and her husband contracted with plaintiffs to build a house, reside on the land, and render assistance to plaintiffs, that they failed to perform these agreements, and that plaintiffs are entitled to recover damages resulting from the breach. As above noted, there was no evidence that defendant herself promised anything or made any agreement with plaintiffs other than as contained in the $15,000.00 purchase money note and deed of trust which she signed. Plaintiffs alleged that defendant "was well aware of the negotiations, promises and persuasions made

by Perry E. Gribble on behalf of himself and his wife to plaintiffs," and apparently plaintiffs hoped to recover from defendant on the theory that her deceased husband acted not only for himself but as agent for her. If so, G.S. 8-51 still operates to exclude testimony by plaintiffs concerning any personal transactions or communications between them and the deceased agent. Although our Supreme Court has held that G.S. 8-51 does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent, "this rule has been applied only in factual situations where the deceased agent was not personally liable in respect of the alleged cause of action." *Tharpe v. Newman,* 257 N.C. 71, 76, 125 S.E. 2d 315, 319 (1962). Here, plaintiffs' claim for damages for breach of contract was based entirely upon the theory that defendant's deceased husband, allegedly her agent, was personally liable in respect to the alleged cause of action.

We hold, therefore, that G.S. 8-51 was applicable both to plaintiffs' alleged claim for damages for breach of contract as well as to their claim for rescission of the deed for fraud. Examination of the record discloses that the trial judge correctly applied the statute in each instance in which objections by defendant's counsel to questions directed to plaintiff Fred Gribble were sustained, and plaintiffs' assignments of error directed to application of the statute are overruled.

[4, 5] We also find that defendant's motion for a directed verdict was properly allowed. The testimony of independent witnesses that on various occasions after plaintiffs had executed the deed to Perry Gribble and the defendant, Perry had stated that he intended to build a home on the property and "was going to move up there to where he could be handy to help Fred out" and that he was going to "take care of Uncle Fred and Aunt Dessie," falls short of showing a binding contract to do so. Furthermore, the evidence shows a family relationship, not a fiduciary one, and a family relationship does not raise a presumption of fraud or undue influence. *Davis v. Davis, supra; Cornatzer v. Nicks,* 14 N.C. App. 152, 187 S.E. 2d 385 (1972), *cert. denied,* 281 N.C. 154, 188 S.E. 2d 365 (1972).

The judgment appealed from is

Affirmed.

Judges MORRIS and HEDRICK concur.

WILLIAM R. ANDREWS ASSOCIATES v. SODIBAR SYSTEMS OF D. C., INC.

No. 7415DC934

(Filed 16 April 1975)

Process § 9— foreign corporation — no contacts with this State — no in personam jurisdiction

The N. C. court did not acquire *in personam* jurisdiction by virtue of G.S. 1-75.4(5)d over defendant corporation which was organized under the laws of Delaware and had its office and principal place of business in Washington, D. C., since defendant had no place of business, agent, or representative in N. C., and this action related solely to goods purchased by plaintiff from defendant at defendant's place of business in Washington, D. C., and shipped at plaintiff's direction from Washington to customers of plaintiff in Florida via a trucking line hired by plaintiff.

APPEAL by defendant from *Allen, Judge.* Judgment entered 30 July 1974 in District Court, ORANGE County. Heard in the Court of Appeals 22 January 1975.

This is a civil action to recover damages for breach of an implied warranty in the sale of goods made by defendant, a foreign corporation. The sole question is whether the court acquired jurisdiction over the defendant.

Plaintiff is a business association owned by William and Bernetta Andrews, who are residents of North Carolina. Plaintiff maintains its principal place of business in Chapel Hill, N. C., and is engaged in the business of selling aluminum CO_2 cylinders. Defendant is a corporation organized and existing under the laws of the State of Delaware. It has its office and principal place of business in Washington, D. C. and is engaged in business as a wholesale seller of soda fountain supplies in Washington, D. C., and the surrounding metropolitan area. Defendant is not domesticated in North Carolina and has no place of business, agent, or representative in North Carolina.

In complaint filed 15 May 1974, plaintiff in substance alleged: On 1 November 1973 William Andrews visited defendant's place of business in Washington, D. C., and offered to sell to defendant aluminum CO_2 cylinders at a unit price of $30.75 and to buy from defendant certain used steel CO_2 cylinders at a unit price of $37.50. Defendant represented that the steel cylinders were the same as samples then shown to plaintiff. On

1 November 1973 the parties entered into a contract by which plaintiff agreed to purchase and defendant agreed to sell 150 steel cylinders as per the samples shown at a unit price of $37.50. On the same date defendant agreed to purchase from plaintiff 150 new aluminum cylinders at a unit price of $30.75. On 12 November 1973 plaintiff shipped from its warehouse near Durham, N. C., and delivered to defendant at its place of business the 150 new aluminum cylinders as agreed, and defendant accepted delivery of these cylinders. Thereafter, and on 25 November 1973, defendant shipped to customers of plaintiff, as instructed by plaintiff, 150 used steel cylinders. Plaintiff's customers refused to accept or pay plaintiff for the steel cylinders, and upon inspection it was found that the steel cylinders were inferior to the samples shown and were unusable according to governmental regulations. Plaintiff offered to return the steel cylinders to defendant, but defendant refused to receive them or to return the purchase price. Defendant was aware of the purpose for which the steel cylinders were intended to be used, to wit: dispensing soft drinks, and impliedly warranted they were fit for that purpose. Had they been as warranted, they would have had a value of $5,625.00. They were actually of a value of no more than $1,185.00. Plaintiff has incurred further damages for storage, shipment and repair. By reason of defendant's breach, plaintiff has been damaged in the amount of $4,999.00, for which plaintiff prayed judgment.

On 30 May 1974 plaintiff's attorney filed an affidavit showing the mailing of a copy of the summons and complaint by registered mail addressed to defendant at its Washington, D. C. address pursuant to Rule 4(j) (9)b of the North Carolina Rules of Civil Procedure. On 12 June 1974 defendant filed a motion pursuant to Rule 12(b) to quash the service of process upon it and to dismiss the action for lack of jurisdiction over the defendant, subsequently supporting this motion by an affidavit of defendant's president. In this affidavit defendant's president stated that defendant has never had any office or place of business or any agent or employee in the State of North Carolina, has never advertised or solicited any business in the State of North Carolina, and, except for the transaction which is the subject of this suit, neither the defendant corporation nor any officer, director, agent or employee of the corporation has ever had any contact of any kind with the State of North Carolina or with any person, firm or corporation of the State of North Carolina, for any purpose connected with any business or cor-

porate purpose of the company. The affiant further stated that the first contact of any kind which defendant had with any representative of plaintiff was on or about 26 July 1973 when Mr. Andrews came to the offices of defendant corporation in Washington, D. C., and solicited an order for aluminum CO_2 cylinders, that these were shipped by Mr. Andrews to the defendant on or about 2 August 1973, that on or before 2 November 1973 Mr. Andrews "arranged with the defendant company to ship to the defendant company an additional 150 aluminum cylinders and to pick up from the defendant 150 50-pound used cylinders to ship to St. Petersburg, Florida. . . . That the plaintiff arranged for Ryder Truck Lines, Inc., to ship to the defendant the aluminum cylinders and to pick up the 50-pound used cylinder [sic] for shipment to St. Petersburg, Florida, and William R. Andrews was billed directly by Ryder Truck Lines."

On 30 July 1974 the court signed an order denying defendant's motion, finding among other matters "[t]hat this action relates to goods and merchandise of value shipped from North Carolina by the plaintiff to the defendant at the defendant's order and direction," from which the court concluded "[t]hat the District Court of Orange County has jurisdiction of this action under authority conferred by G.S. 1-175.4(5)d [sic]." From this order, defendant appealed.

Epting & Hackney by Joe Hackney for plaintiff appellee.

Bryant, Lipton, Bryant & Battle, P.A., by James B. Maxwell for defendant appellant.

PARKER, Judge.

The sole question presented is whether the court acquired in personam jurisdiction over defendant corporation under our "long arm" statute, G.S. 1-75.1, *et seq.* Plaintiff contends that G.S. 1-75.4(5)d is applicable and that the North Carolina court did acquire jurisdiction over the defendant under that provision of the statute. Defendant contends that the cited section of the statute is not applicable to this case and, if applied to the facts in this case, is unconstitutional. The statute provides as follows:

> "G.S. 1-75.4. *Personal jurisdiction, grounds for generally.*—A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an

action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

* * * * *

"(5) Local Services, Goods or Contracts.—In any action which:

* * * * *

"d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction. . . . "

We agree with the defendant that the present action does not in any way relate to goods or other things of value "shipped from this State by the plaintiff to the defendant on his order or direction." It relates solely to goods purchased by plaintiff from defendant at defendant's place of business in Washington, D. C., and shipped at plaintiff's direction from Washington, D. C. to customers of plaintiff in the State of Florida via a trucking line hired by plaintiff. Plaintiff's complaint makes mention of aluminum cylinders shipped by plaintiff from North Carolina to defendant in Washington, D. C., but all allegations relating to these are surplusage insofar as the claim which plaintiff seeks to assert against defendant is concerned. That claim is based entirely on plaintiff's allegations as to defects in the steel cylinders sold by defendant to plaintiff in Washington, D. C. and shipped from there to Florida. Plaintiff asserts no claim which in any way relates to the aluminum cylinders shipped from North Carolina. The trial court's finding that this action "relates to goods and merchandise of value shipped from North Carolina by the plaintiff" is unsupported by the allegations of the complaint or by any other evidence in this record. The only goods shipped from this State were the aluminum cylinders, the quality of which is uncontested by this action and in connection with which plaintiff makes no claim.

Holding as we do that the present case does not come within the statute, it is not necessary for us to consider defendant's additional contentions made on constitutional grounds. For the reason stated, the order apepaled from is

Reversed.

Judges MORRIS and HEDRICK concur.

DICK PRUITT AND WIFE, STERLING PRUITT v. ARDEL WILLIAMS AND WIFE, MRS. ARDEL WILLIAMS

No. 7425SC1077

(Filed 16 April 1975)

1. **Injunctions § 12; Rules of Civil Procedure §§ 52, 65— preliminary injunction — statement of reasons for issuance — failure to request findings of fact and conclusions of law**

The trial court complied with the pertinent provisions of G.S. 1A-1, Rule 65(d), by clearly stating the reasons for the issuance of the preliminary injunction; however, the court was not required to make detailed findings of fact and conclusions of law pursuant to G.S. 1A-1, Rule 52(a)(2), where defendants made no request therefor.

2. **Injunctions § 12— preliminary injunction — probable cause of establishing right — reasonable apprehension of irreparable loss**

Ordinarily, to justify the issuance of a preliminary injunction, it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during litigation.

3. **Injunctions § 13— obstructing roadway — sufficiency of evidence to support preliminary injunction**

The trial court did not err in granting a preliminary injunction restraining defendants from obstructing a roadway over lands of defendants in which plaintiffs claimed a right-of-way by prescription where the evidence tended to show that the road in question had been used continuously since 1939 as the primary, and until recently the only means of ingress and egress to and from the home which the plaintiffs owned, defendants and their predecessors in title had never exerted control over the road, the road was in existence for a substantial period of time before defendants built their home on or near the road, while plaintiffs had built a new road into their property, it was impassable in inclement weather, plaintiffs had been unable to obtain carrier contracts guaranteeing delivery to their bakery in inclement weather over the new road, if an emergency should arise, the quickest and safest way to plaintiffs' home was the old road, and reopening the road would not greatly inconvenience defendants pending final litigation.

Judge MORRIS dissenting.

APPEAL by defendants from *Thornburg, Judge.* Order entered 25 September 1974 in Superior Court, CALDWELL County. Heard in the Court of Appeals 13 March 1975.

Plaintiffs instituted this action on 22 August 1974 seeking a permanent injunction restraining defendants from obstructing

a roadway over lands of defendants in which plaintiffs claim a right-of-way by prescription.

In their complaint, plaintiffs allege in pertinent part as follows: By virtue of a conveyance dated 20 September 1973, plaintiffs became the owners of a 13.4 acre tract of land in Caldwell County. A portion of the property is farmland, and it also contains a residence where plaintiffs reside, and a bakery business operated by plaintiffs. A roadway extends from plaintiffs' property, across defendants' land for approximately 200 feet, and into another road. The road through defendants' land has existed for many years and has been used by plaintiffs, their predecessors in title, and the general public for more than twenty years, providing the sole, practical access to plaintiffs' property. If said road is not a public road, plaintiffs have the right to use the road by prescription. On or about 3 July 1974, defendants blocked the use of that part of the road adjoining their land by placing debris on the road. Plaintiffs ask for temporary and permanent injunctive relief.

A temporary restraining order was issued on 23 August 1974 and was extended on 28 August and 5 September 1974. Defendants filed answer on 10 September 1974 denying all material allegations of plaintiffs' complaint.

Following a hearing, at which oral testimony and affidavits were introduced by plaintiffs, (defendants offering no evidence), and a viewing of the premises by the court, an order granting plaintiffs a preliminary injunction was entered. The order recited that plaintiffs had exhibited a good cause of action and are entitled to have proper issues submitted for determination of the matters set forth in the complaint and affidavits; that there is reasonable certainty that plaintiffs are entitled to the equitable relief sought; that the status quo "consists of the open and unobstructed use of the road in question . . . and that the failure to restore said status quo would cause immediate and irreparable injury to the plaintiffs"; and "to require that the defendants open the road heretofore blocked and to leave said road open and passable pending the outcome of this action would not greatly inconvenience or damage the defendants, but to allow said road to remain blocked pending the outcome of this action would greatly inconvenience and damage the plaintiffs". The order required defendants to remove all obstructions which they had placed, or caused to be placed, in the road and restrained them from "in any way blocking access across said road to

plaintiffs or other members of the public pending the final determination of this action".

Defendants appealed.

West & Groome, by Michael P. Baumberger, for plaintiff appellees.

Wilson, Palmer & Simmons, by G. C. Simmons III, for the defendant appellants.

BRITT, Judge.

By their first and second assignments of error, defendants contend the court erred in failing to make specific findings of fact based upon the evidence and in failing to make conclusions of law based upon the findings of fact. We find no merit in the assignments.

G.S. 1A-1, Rule 65(d), provides, among other things, that every order granting an injunction shall set forth the "reasons for its issuance". Rule 52(a)(2) provides, among other things, that " . . . findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party". We note the difference between our Rule 52 and Federal Rule 52(a) which specifically requires that " . . . in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action". 5A Moore's Fed. Prac. § 52, at 2601 (1974).

[1] In this case, the court clearly stated the reasons for the issuance of the preliminary injunction, thus complying with the pertinent provisions of Rule 65(d). As to compliance with Rule 52(a)(2), the record does not disclose that defendants requested the court to make detailed findings of fact and conclusions of law; and, our research has failed to reveal a statute that requires the court to make findings of fact and conclusions of law in granting or denying a *preliminary* injunction. Hence, absent a request by a party that the court make findings of fact and conclusions of law, the court is required to state only the "reasons for its issuance".

By their third and fourth assignments of error, defendants contend the trial court erred "in granting the preliminary in-

junction based upon the evidence" offered and in signing the order. We find no merit in these assignments.

[2] Ordinarily, to justify the issuance of a preliminary injunction, it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. *Setzer v. Annas,* 286 N.C. 534, 212 S.E. 2d 154 (1975); *Resources, Inc. v. Insurance Company,* 15 N.C. App. 634, 190 S.E. 2d 729 (1972).

At the hearing, the burden was on plaintiffs to establish their right to a preliminary injunction. G.S. 1A-1, Rule 65(b); *Board of Elders v. Jones,* 273 N.C. 174, 182, 159 S.E. 2d 545 (1968). Plaintiffs contend, and we agree, that they successfully met the two requirements stated above.

[3] We think plaintiffs offered evidence sufficient to show probable cause that they will be able to establish a right which they assert, namely, a right-of-way by prescription over the roadway in question. Their evidence tended to show: The road has been used continuously since 1939 as the primary, and until recently the only, means of ingress and egress to and from the home which the plaintiffs now own. Defendants and their predecessors in title have never exerted control over the road. The road was in existence for a substantial period of time before defendants built their home on or near the road. Telephone and power lines have been built along the side of the road and the meter reader for the local power company has used the road. On one occasion the prior owner from whom plaintiffs purchased their property placed a cable across the road and blocked its use for a period of three to four months. No one ever asked or received permission to use the road until approximately 1973. The road was used by the prior families who owned plaintiffs' property and their guests, invitees, and business associates. The road has been used by automobiles, tractors, trucks and other vehicular traffic and plaintiffs put gravel on the road on one occasion. While there was evidence tending to show permissive use, this would raise an issue for determination at a trial on the merits.

Our holding finds support in *Dickinson v. Pake,* 284 N.C. 576, 201 S.E. 2d 897 (1974), and *Dulin v. Faires,* 266 N.C. 257, 145 S.E. 2d 873 (1966).

On the question of irreparable loss, plaintiffs' evidence tended to show that while they built a new road into their property, it is impassable in inclement weather due to its steep incline; that they have been unable to obtain carrier contracts guaranteeing delivery to their bakery in inclement weather over the new road; that if an emergency should arise, the quickest and safest way to their home is the old road. The trial judge viewed the premises and determined that reopening the road would not greatly inconvenience defendants pending final litigation but, not to reopen it would greatly inconvenience plaintiffs. We hold that the evidence was sufficient to show a reasonable apprehension of irreparable loss.

For the reasons stated, the order appealed from is

Affirmed.

Judge ARNOLD concurs.

Judge MORRIS dissents.

Judge MORRIS dissenting.

In addition to the evidence recapitulated in the majority opinion, the plaintiffs themselves testified by their affidavit that prior to purchasing the property, they approached defendants and offered "to purchase a written right-of-way across said road which offer was necessitated by the Federal Land Bank in order to obtain a loan for the purchase of their property, and that at that time the defendant, Ardel Williams, stated, 'You can use the road all you want to, but I ain't signing nothing.'"

> "The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement. (Citations omitted.) The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. (Citations omitted.) *Dickinson v. Pake,* 284 N.C. 576, 580, 201 S.E. 2d 897, 900 (1973).

I am of the opinion that plaintiffs, by their own evidence, buttressed the presumption of permissive use and did not present evidence sufficient to overcome the presumption or show use which was adverse, hostile, or under a claim of right.

I vote to reverse.

STATE OF NORTH CAROLINA v. JERRY ELLIOTT AND MELVIN WARREN

No. 7425SC1100

(Filed 16 April 1975)

1. **Criminal Law § 91— absence of prosecuting witness — recess proper**

Where the prosecuting witness was examined but did not return after the lunch recess and did not leave word where he could be found, the trial court did not err in granting a recess for the afternoon rather than a mistrial.

2. **Criminal Law § 86— offense by prison inmates — findings of guilt of violations of prison rules — admission erroneous**

In a prosecution for crime against nature allegedly occurring while defendants were in prison, the trial court erred in allowing the State to cross-examine defendants about convictions or findings of guilty for violation of prison rules and the imposition of disciplinary action by prison authority.

APPEAL by defendants from *Martin (Harry C.), Judge.* Judgment entered 17 October 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 11 March 1975.

Both defendants pled not guilty to separate charges of crime against nature with Leonard Shumate.

According to the testimony of the victim Shumate, age 17, on Sunday, 17 March 1974, he was an inmate on the sixth floor of the Western Correctional Center at Morganton. He was in the Day Room at about 2:00 p.m. when he was approached by the defendants who asked him to go the bathroom and talk with them. He went to the bathroom as requested and there defendant Warren, age 17, asked Shumate to "let him have it." After refusing, Shumate started to walk out of the bathroom whereupon defendant Elliott, age 18, grabbed him and pulled him back in. Elliott then told him that if he would not submit, he would "take it and . . . let everybody else get it. . . . " The defendants then took Shumate down to his room where defendant Elliott went inside with Shumate while Warren remained outside. Elliott began undressing Shumate who then unzipped and dropped his pants. Elliott pushed him face down into the bed and "screwed me in the ass" for about three or four minutes. Elliott left; Warren came into the room and did the same thing. He did not yell or scream though other inmates were nearby in the Day Room. He tried to get up but they held him down by

the shoulders. He was afraid of them. Fifteen minutes after Warren left, a third man came in his room and homosexually assaulted him, after which Shumate went to the bathroom and then to the Day Room where he watched television with other inmates. Four days later Shumate was called to the office of Sergeant Pendley and asked about the attacks, and he told the officer about them. Warrants were issued immediately.

The State then offered the testimony of the doctor who examined Shumate on March 21. He testified that he saw no lacerations or any fisca around the anus and that he was unable to find any positive signs of an assault per anus, and it was his opinion that there would be lacerations if one was raped.

Defendant Elliott took the stand in his own behalf. He testified that during the period that Shumate claims the crime occurred, he was visiting with his mother, his father, his uncle, and his brother and sister down on the first floor. Captain Phillips of the Western Correctional Center stated that there were entries in the visitors log for the afternoon of March 17, listing the parents and uncle of defendant Elliott. Elliott further denied having committed the crime against nature with Shumate.

Defendant Warren testified that he did not see Shumate on the day in question.

The jury returned verdicts of guilty against both defendants, and from judgments imposing terms of imprisonment, the defendants appealed.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

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

Byrd, Byrd, Ervin & Blanton, P.A., by Thomas R. Blanton III for defendant Elliott; and Robert B. Byrd for defendant Warren.

CLARK, Judge.

[1] The direct examination of the prosecuting witness Shumate was conducted before noon, and the court then recessed for lunch. After lunch, Shumate did not appear to testify and could not be found. As a consequence, the trial judge ordered a recess

until 9:30 a.m. the following day. Defendants objected and moved to dismiss, but the motions were denied. Motions for mistrial were made the next morning, but were again denied. Shumate testified on cross-examination that he went home.

The same rules applicable to continuance should logically apply to the granting of recesses during the course of trial. *State v. Hailstock,* 15 N.C. App. 556, 190 S.E. 2d 376 (1972). It is established that rulings on motions to continue ordinarily rest in the sound discretion of the trial judge. *State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168 (1968). This same discretion carries over to the trial where it is recognized that " . . . the paramount duty of the trial judge is to conduct the course of a trial so as to prevent injustice to any party. In the exercise of this duty he possesses broad discretionary powers." *State v. Britt,* 285 N.C. 256, 271-72, 204 S.E. 2d 817, 828 (1974). Further, "[t]rial judges must be given sufficient discretion to meet the circumstances of each case." *State v. Bass,* 280 N.C. 435, 454, 186 S.E. 2d 384, 397 (1972).

In circumstances like those in the present case where a State's chief witness just takes the afternoon off without a word to anyone as to where he has gone or where he will be, we believe that the trial court in granting a recess for that afternoon rather than a mistrial did not abuse its discretion where defendants fail to show prejudice. We find no error in this action.

[2] During the defendants' presentation of their case, the State was allowed, over objection by counsel, to cross-examine each defendant relative to specific acts of misconduct and violations of prison rules while they were inmates in the custody of the Department of Corrections, and relative to guilty pleas on some of the charged violations. Generally, the cross-examination related to refusals to obey lawful orders, rioting, fighting, and the use of abusive and profane language toward prison officials. Such acts and conduct evince a lack of respect for authority, and a rebellious attitude. The good faith of the State was not questioned, it appearing that the District Attorney was basing the cross-examination on records provided by prison authorities.

It is established in this State that for purposes of impeachment a witness may be cross-examined about specific criminal acts or reprehensible conduct. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams,* 279 N.C. 663,

185 S.E. 2d 174 (1971). The scope of the examination may be broad, and limited only to a good faith basis for the question, to the control of the trial judge over questions that tend only to annoy or harass the witness, and to the witness's privilege against self-incrimination. 1 Stansbury, N. C. Evidence, Section 111 (Brandis rev. 1973).

Too, a plea of guilty on a former trial may be admitted against the defendant as an admission. *State v. Ingram,* 204 N.C. 557, 168 S.E. 837 (1933); *State v. Libby,* 209 N.C. 363, 183 S.E. 414 (1936). Though the violation of a prison rule by an inmate may not be a crime in the usual sense of the word, a plea of guilty to a charged violation of a prison rule is an admission by the defendant that he did in fact commit the alleged act, and, if relevant for the purpose of impeachment, it is admissible.

But the State went further and extended the scope of its cross-examination in asking both defendants about convictions or findings of guilty for violations of prison rules and the imposition of disciplinary action by prison authority. For example, the defendant Elliott was asked if he was found guilty of sticking his penis into another inmate's cell; and the defendant Warren was asked if he was convicted of getting into a fight and into a race riot. The trial judge overruled objections to both questions. In each instance the defendant replied that he was convicted or found guilty but did not commit the alleged acts.

In *State v. Williams, supra,* the Court details the nature and purposes of a bill of indictment, particularly criticizing it as "purely hearsay" and "based on ex parte evidence." While we recognize that certain incidents of due process are followed in a prison disciplinary hearing, it is obvious that such hearings do not have the standards of due process which we have in our trial courts.

We infer from *State v. Williams, supra,* that prior "convictions" are admissible because the protections that are afforded a defendant in a traditional trial assure him that his guilt has been fairly proved beyond a reasonable doubt. Indictments and warrant accusations, being findings not afforded these traditional protections, were held to be inadmissible. The solemnity of a trial assures one of a certain standard of proof, one sufficiently high that a finding of guilt is admissible in a later trial. A finding of guilt by prison officials in a disciplinary hearing

is not of such solemnity and verity. Consequently, we find that it was error to permit cross-examination of the defendants relative to convictions by a prison disciplinary board.

Under some circumstances the impeachment of a defendant witness by cross-examination relative to convictions by a prison disciplinary board may not constitute reversible error, but here the case for the State was based entirely on the unsupported testimony of the prosecuting witness that both defendants had committed the crime charged; both defendants testified and claimed innocence. Thus, credibility, a matter for the jury, was crucial, and there was a real danger that the testimony of the defendants was destroyed by evidence of "convictions" in a prison disciplinary board hearing where the standards of due process do not approximate those in a court of law.

The judgments as to both defendants are vacated and the causes remanded for

New trial.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. SHARON DEVON DAVIS

No. 748SC942

(Filed 16 April 1975)

1. **Criminal Law § 10; Robbery § 2— robbery indictment — accessory before fact as lesser included offense**

   Since the charge of being an accessory before the fact to a felony is included in the charge of the principal crime, an armed robbery indictment supported a verdict of accessory before the fact of armed robbery.

2. **Criminal Law § 92— consolidation of charges against defendant**

   The trial court did not err in consolidating for trial three charges against defendant for armed robbery of two motels and a supermarket on three different dates.

3. **Conspiracy § 5; Criminal Law § 79— statements by defendant and others in planning crimes — no opportunity to cross-examine others**

   Testimony concerning statements made by the witness, defendant and others which tended to show that each member of the group planned or consented to the commission of the crimes with which defendant

was charged was admissible to show defendant's knowledge of the intent of her companions to commit the crimes and to show her state of mind although defendant did not have the opportunity to cross-examine the persons to whom the statements were attributed.

4. **Criminal Law § 66— in-court identification — admissibility**

The evidence supported the findings of the court that a robbery victim's in-court identification of defendant was based upon his observation of defendant when she entered the store on an occasion prior to the robbery by her companions.

5. **Criminal Law § 75— admissibility of in-custody statements**

The trial court properly admitted in evidence statements made by defendant to police officers and to a deputy sheriff where the court found upon supporting evidence that the statements were voluntarily made after defendant voluntarily, knowingly and understandingly waived her rights to remain silent and to counsel.

6. **Robbery § 4— armed robbery — accessory before fact to armed robbery — sufficiency of evidence**

The State's evidence was sufficient for the jury on issues of defendant's guilt of armed robbery of two motels and of accessory before the fact to the armed robbery of a supermarket where it tended to show that defendant knew of and agreed to each robbery, she was present in the getaway car before, during and after the robberies at both motels, she agreed with her companions to inspect the supermarket to determine how much money could be taken therefrom, she later agreed with her companions that the supermarket would be robbed on the group's next trip to the town in which it was located, and the supermarket was thereafter robbed by two of her companions.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 18 July 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 22 January 1975.

Defendant was charged in separate indictments with committing three separate armed robberies. She pled not guilty to each charge and the cases were consolidated for trial over her objection.

In Case No. 74CR5305 she was charged with the armed robbery of M. A. Fritz on 28 March 1974. The testimony of a State's witness, Leo Davis, who was unrelated to defendant, tended to show: In the early evening of 28 March 1974 Davis, Dorothy Sheppard, and defendant rode from Kinston to Goldsboro in a car driven by James R. Holmes. While driving past a Quik Pik convenience grocery store, Holmes stated that the store would be a good place to rob. Defendant assented to this statement. At approximately 10:00 p.m. Holmes drove past the

Downtowner Motel in Goldsboro and stated that it too would be a good place to rob. Defendant again concurred. Davis and Sheppard entered the motel lobby, where Davis pointed a .25 caliber pistol at the desk clerk, Fritz, and forcibly took approximately $170.00 from a drawer in the desk counter. Davis and Sheppard returned to the car where Holmes and defendant waited and Holmes drove the group to a restaurant parking lot where the money was divided among the four. Defendant's share was approximately $30.00.

In Case No. 74CR5306 defendant was charged with the armed robbery of of Mrs. Arthur Cummings on 30 March 1974. Leo Davis's testimony tended to show: On that date, Davis, Sheppard, and defendant rode to Goldsboro from Kinston in a taxicab driven by one Morris Thompson. At approximately 11:00 p.m. Thompson drove the group past the Irish Inn Motel on N. C. Highway 70. Davis and Sheppard stated that it would be a good location to rob. Defendant and Thompson agreed. Davis entered the motel lobby, pointed his pistol at the desk clerk, Mrs. Cummings, and forcibly took approximately $400.00 from a drawer in the counter. Davis returned to the taxi and the group returned to Kinston.

In the third bill of indictment defendant was charged in Case No. 74CR5360 with the armed robbery of C. W. Merritt, Sr. on 1 April 1974. Davis's testimony tended to show: On 31 March 1974 Holmes drove Davis, Sheppard, and defendant from Kinston to Goldsboro. All four talked about robbing the Convenient Food Mart in Goldsboro. Then Holmes drove to Merritt's Supermarket in the same vicinity. Sheppard and Holmes stated that it was a good place to rob and defendant went inside to purchase cigarettes in order that she might determine the amount of money in the cash register. She returned and reported to her companions that the register contained approximately $80.00. The group decided too many persons were in the store at that time and returned to Kinston, having agreed to rob Merrit's Supermarket on the next trip to Goldsboro. At approximately 10:00 p.m. on 1 April 1974 Davis and Holmes returned to this store. Davis entered the store, pointed his pistol at Merritt, who was at the cash register, and forcibly took all the money out of the register.

At the close of the State's evidence, the trial court denied defendant's motions for nonsuit in Cases No. 74CR5305 and No. 74CR5306. In the third case, No. 74CR5360, the court allowed

defendant's motion for nonsuit as to the charge of armed robbery but submitted that case to the jury on the lesser included offense of being an accessory before the fact of the armed robbery of C. W. Merritt, Sr.

Defendant offered no evidence. In each case the jury found defendant guilty of the offense of being an accessory before the fact to armed robbery.

From judgments imposing prison sentences in each case, defendant appealed.

Attorney General Edmisten by Associate Attorney Robert W. Kaylor for the State.

Dees, Dees, Smith, Powell & Jarrett by Tommy W. Jarrett for defendant appellant.

PARKER, Judge.

[1] The charge of being an accessory before the fact to a felony is included in the charge of the principal crime. *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961); *State v. Simons,* 179 N.C. 700, 103 S.E. 5 (1920); *State v. Bryson,* 173 N.C. 803, 92 S.E. 698 (1917); *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972); *see* Note, 41 N.C.L. Rev. 118 (1962). Therefore, the judgments appealed from are supported by the indictments.

[2] The trial court did not abuse its discretion in consolidating for trial the three cases against defendant. The offenses charged were of the same class and were not so separate in time or place or so distinct in circumstances as to render consolidation prejudicial. G.S. 15-152; *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972); *State v. White,* 256 N.C. 244, 123 S.E. 2d 483 (1962).

[3] Leo Davis testified over defendant's objection concerning statements made by himself, Sheppard, Holmes, Morris, and defendant. These statements as recounted at trial by Davis tended to show that each member of the group planned or consented to the commission of the crimes with which defendant was charged. The admissibility of Davis's testimony concerning these statements was not, as defendant now contends, predicated upon her being allowed to cross-examine the persons to whom the statements were attributed. Defendant's knowledge of the intent of her companions to commit the crimes charged "may be

proved . . . by statements made to [her] by other persons . . . and by various circumstances from which an inference of knowledge might reasonably be drawn." 1 Stansbury's N. C. Evidence, § 83, p. 259 (Brandis Rev.). Moreover, the "declarations of one person are frequently admitted to evidence a particular state of mind of another person who heard or read them." *Id.* § 141, pp. 469-70. There was no error in the trial court's admitting this testimony into evidence.

[4] There was likewise no error in the determination by the trial court that the in-court identification of defendant by Merritt was based upon Merritt's observing defendant when she entered his store on 31 March 1974. The findings of the trial court in this regard being supported by competent evidence are conclusive on this appeal. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972).

[5] Defendant next assigns error to the admission into evidence of statements which defendant made to police officers on two separate occasions. After conducting a voir dire hearing, the trial court concluded that any statement defendant made to Officers Weaver and Potter of the Goldsboro Police Department was made "voluntarily, knowingly and understandingly" and that she freely and voluntarily waived her rights to remain silent and to counsel. The record reveals that competent evidence supported these findings, and they in turn supported the court's conclusions. We also find no prejudicial error in the trial court's admitting the testimony of Wayne County Deputy Sheriff Davis. In that instance the trial court also conducted a voir dire, made findings of fact supported by competent evidence, and concluded that defendant's waiver of her rights was voluntarily, knowingly and understandingly made.

[6] Examination of the record discloses evidence sufficient to withstand defendant's motions for nonsuit in all cases. Viewed in the light most favorable to the State, the evidence tended to show that defendant knew and agreed to each robbery. She was present in the automobile before, during, and after the robberies at both motels. She further agreed with Davis, Sheppard, and Holmes to inspect Merritt's Supermarket in order to determine how much money could be taken from that store. She later agreed with the other members of the group that Merritt's Supermarket would be robbed on the group's next trip to Goldsboro. This evidence was sufficient to support a jury's finding defend-

ant guilty of at least accessory before the fact to armed robbery, a lesser included offense to the one charged in the indictment.

We have carefully considered defendant's remaining assignments of error and find no prejudicial error therein. The trial court's instructions to the jury, read contextually, conformed to the mandate imposed by G.S. 1-180 to explain the law arising on the evidence. Nor was there error in denying defendant's requested special instructions.

We find defendant's trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

CHARLES R. CARDWELL, ADMINISTRATOR OF THE ESTATE OF LUCINDA EVELYN CARDWELL, DECEASED v. WANDA WELCH AND DAVID WELCH

No. 7418SC915

(Filed 16 April 1975)

Death § 3— child en ventre sa mere — no person within meaning of wrongful death act

The Court construes the word "person" in the N. C. wrongful death statute, G.S. 28-173, to mean one who has become recognized as a person by having been born alive; therefore, the trial court properly allowed defendants' motion to dismiss in an action to recover damages for the wrongful death of a viable unborn seven month old fetus allegedly caused by defendants' negligence in a motor vehicle collision.

APPEAL by plaintiff from *Kivett, Judge.* Judgment entered 5 August 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 January 1975.

Action to recover damages for the wrongful death of a viable unborn child. Plaintiff alleged that on 6 September 1971 the child was a viable child *en ventre sa mere,* having been conceived approximately seven months prior thereto, that the child was delivered stillborn on 7 September 1971, and that the child's death was caused by placental separation resulting from trauma to her mother's umbilicus sustained on 6 September 1971 in a motor vehicle collision which was caused by defendants' negligence.

The trial court, being of the opinion that the child was not a "person" within the meaning of the wrongful death statute, G.S. 28-173, allowed defendants' motion to dismiss filed under Rule 12(b) (6) and (c). From the judgment of dismissal, plaintiff appealed.

Floyd & Baker by Walter W. Baker, Jr., for plaintiff appellant.

Perry C. Henson and Richard L. Vanore for defendant appellees.

PARKER, Judge.

In *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425 (1966), which involved an action such as the present one, our Supreme Court held that the defendant's demurrer to the complaint should have been sustained and the action dismissed on the ground that in such case there can be no evidence from which to infer "pecuniary injury resulting from" the death. At the time that case was decided G.S. 28-174 limited the plaintiff's recovery in a wrongful death action to "such damages as are fair and just compensation for the pecuniary injury resulting from such death." In basing its decision on the ground stated, our Supreme Court expressly held that it was not necessary for it to decide in that case "the debatable question as to whether a viable child *en ventre sa mere,* who is born dead, is a person within the meaning of our wrongful death act." 266 N.C. at 402, 146 S.E. 2d at 431. Because of the extensive 1969 legislative rewritng of G.S. 28-174, *see Bowen v. Rental Co.,* 283 N.C. 395, 196 S.E. 2d 789 (1973), it is now necessary for us to decide that question.

Our basic wrongful death statute, G.S. 28-173, as presently and as long heretofore in effect in this State, provides:

> "When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable . . . shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent. . . ."

This State now recognizes, as do virtually all American jurisdictions, a right of action in a child to recover for its prenatal injuries caused by the tortious act of another, and had

the child in the present case lived, it would have been entitled to maintain an action after its birth to recover damages for any prenatal injuries caused it by defendants' actionable negligence. *Stetson v. Easterling,* 274 N.C. 152, 161 S.E. 2d 531 (1968); Annot., 40 A.L.R. 3d 1222 (1971). This, however, does not solve the problem now before us of whether a viable unborn child whose death is caused while still in its mother's womb is properly to be considered a "person" within the meaning of our wrongful death act so that an action may be maintained by an administrator to recover damages for its wrongful death. We agree with the trial court that it may not.

It is, of course, apparent that to state the problem, as we have, in terms of whether a viable unborn fetus is or is not a "person" is of but slight assistance in arriving at a decision of the real problem here presented, i.e., whether an action should be held to lie under the statute for the wrongful death of an unborn child. To decide that such a fetus is or is not a "person" within the meaning of the statute amounts to little more than to announce a decision already arrived at largely by consideration of other factors. Nevertheless, as has been often observed, the action for wrongful death is solely a creature of statute, and of necessity we must begin with consideration of the words employed in the statute.

The wrongful death statute was enacted in this State in 1855. Chap. 39, Session Laws of 1854-1855. We think it highly unlikely that the Legislature which enacted it, or any which has been concerned with it since, intended to create a cause of action for the death of an unborn fetus. Had such an intention existed, it could easily have been clearly expressed. The greater probability is that by speaking of the death of a "person" and by creating a cause of action to be brought by "the executor, administrator or collector of the decedent," the Legislature was thinking solely in terms of and intended to create a cause of action only for the wrongful death of one who by live birth had attained a recognized individual identity so as to have become a "person" as that word is commonly understood. Certainly, in common understanding a "person" is one who has a separate identity as such, and to become a "decedent" one must first have been born.

Practical considerations also favor this construction. It is true, of course, that the parents of an unborn child may suffer intense anguish if through the tortious act of another the child

is stillborn. To say, however, as some courts have, that an action lies for the death if the child was viable at the time of its injury and death but that no action lies if the child was not yet capable of existing apart from its mother's womb does not solve but merely relocates the problem. From the moment of conception onward there must be some cutoff point, and to place this at the moment of live birth has at least the merit of providing some degree of certainty to an otherwise highly speculative situation.

In making our decision we have not been concerned with the question of when human life begins from a biological or theological point of view. We have simply been called on to construe a statute. Furthermore, in making our decision we have not been insensitive to the rights of the unborn. In appropriate circumstances the law recognizes such rights and at times even requires that a guardian be appointed to protect them. We point out, however, that no wrongful death statute can ever operate to benefit the deceased; it can only operate to benefit others by granting a cause of action where none previously existed.

Accordingly, we construe the word "person" in our wrongful death statute to mean one who has become recognized as a person by having been born alive. If it be deemed desirable that a cause of action exist to recover for the wrongful death of an unborn fetus, that result would be accomplished more appropriately by legislative action than by strained judicial construction of an ancient statute.

Courts of other jurisdictions which have considered the question here decided are divided. Our decision is supported by opinions in the following cases, which we find particularly persuasive: *Stokes v. Liberty Mutual Insurance Company,* 213 So. 2d 695 (Fla. 1968); *McKillip v. Zimmerman,* 191 N.W. 2d 706 (Iowa 1971); *Leccese v. McDonough,* 279 N.E. 2d 339 (Mass. 1972); *Drabbels v. Skelly Oil Co.,* 155 Neb. 17, 50 N.W. 2d 229 (1951); *Graf v. Taggert,* 43 N.J. 303, 204 A. 2d 140 (1964); *Endresz v. Friedberg,* 24 N.Y. 2d 478, 248 N.E. 2d 901 (1969); *Carroll v. Skloff,* 415 Pa. 47, 202 A. 2d 9 (1964); *Hogan v. McDaniel,* 204 Tenn. 235, 319 S.W. 2d 221 (1958); *Lawrence v. Craven Tire Co.,* 210 Va. 138, 169 S.E. 2d 440 (1969).

For decisions *contra,* see cases cited in § 2 of Annot., 15 A.L.R. 3d 992 (1967).

Affirmed.

Judges BRITT and HEDRICK concur.

O. H. LEAK, ROBERT GOODEN, W. T. AMAKER, LEWIS W. NELSON, BENJAMIN BROCKMAN, CHARLES RAMSEUR, ORIGINAL PLAINTIFFS AND LEAGUE OF PROFESSIONAL POLICE OF HIGH POINT, INC., INTERVENING PLAINTIFFS v. THE HIGH POINT CITY COUNCIL: PAUL W. CLAPP, MAYOR: FRANK H. WOOD, ROBERT O. WELLS, HENRY SHAVITZ, ARNOLD KOONCE, JR., O. A. KIRKMAN, MRS. RACHEL GRAY, ROY B. CULLER, JR., SAM BURFORD, INDIVIDUALLY AND AS MEMRERS OF THE HIGH POINT CITY COUNCIL, DEFENDANTS

No. 7418SC1094

(Filed 16 April 1975)

1. **Appeal and Error § 9— moot question — matter of public interest — no dismissal of appeal**

The general rule that an appeal presenting a moot question will be dismissed is inapplicable where the question involved is a matter of public interest.

2. **Municipal Corporations § 6— investigative hearing by city council — live radio and television coverage**

A city council conducting hearings investigating corruption in the police department pursuant to G.S. 160A-80 has authority to adopt rules providing not only for press coverage but also for live radio and television coverage. G.S. 160A-81.

APPEAL by defendants from *Rousseau, Judge.* Judgment entered 3 October 1974, Superior Court, GUILFORD County. Heard in the Court of Appeals 11 March 1975.

The original plaintiffs, individual members of the High Point Police Department, and intervening plaintiff, League of Professional Police of High Point, Inc., composed of 110 members of the Police Department, brought this action against the High Point City Council to enjoin the Council from holding scheduled hearings investigating corruption in the police department; or alternatively, that proper standards of due process be observed in the hearings.

A temporary restraining order prohibiting defendants from holding the hearings was issued on that day and the hearings were stopped. The order directed that the parties appear before Judge Rousseau on 30 September 1974, to determine if a preliminary injunction should issue.

At this hearing it appeared that the Council had found that there had been a public disclosure of a theft ring operating within the department; that morale was low, and that efficiency was low, and, therefore, the City Council constituted itself an investigative body, pursuant to G.S. 160A-80, "to determine the facts and the whole truth about the continuing problems within our police department." The mayor appointed three council members to the Police Investigating Committee, but the entire Council sat for the hearings.

Hearings were scheduled to begin and did begin on 23 September 1974, and were carried live by two radio stations, and three television stations had coverage and recording equipment present until the proceeding was interrupted by the restraining order.

Judge Rousseau found that the committee had subpoenaed more than a hundred witnesses, most of whom had been interviewed by committee counsel; that the witnesses had implicated some 30 officers; and that there was a reasonable probability that the witnesses would testify that certain officers had committed criminal offenses. The court further found the following: ". . . that as an investigative body, there is no necessity to have live radio and television coverage of the proceedings; that said live coverage is likely to prejudice some of the officers involved."

The court ordered that the committee give two days' notice to police officers who may be subjected to accusations of criminal activity by any witness; that the police officers have the right of cross-examination, and that "[t]he hearings shall remain open to the public and news media; however, there shall be no live radio or television coverage of the hearings and there shall be no voice or television recording devices in the hearing room, except for the recordings made by the official court reporter."

The defendants excepted only to that portion of Judge Rousseau's order which directs that "there shall be no live radio or television coverage of the hearings and there shall be no voice

or television recording devices in the hearing room"; and defendants appealed.

Chambers, Stein & Ferguson by Adam Stein, for original plaintiffs.

Morgan, Byerly, Post & Herring by W. B. Byerly, Jr., for intervening plaintiff.

Tharrington, Smith & Hargrove by Wade H. Hargrove, Roger W. Smith and Peter E. Powell for defendants.

CLARK, Judge.

On 3 February 1975, after this cause had been docketed and briefs filed, the original plaintiffs filed in this Court a motion to dismiss the appeal as moot.

The defendants with their response to said motion to dismiss filed a certified copy of selected excerpts from the minutes of Council meeting on 23 October 1974, wherein the hearings were "recessed" by the Chairman, who made the following statement: ". . . I feel that it would be some time before each of us might be able to digest the information that we might have. And I feel that maybe there's a possibility that maybe we might want to come back and ask further questions after digesting these notes. And now, I'm going to recess these hearings until further notice, and then we will have a statement to make."

The original plaintiffs with their motion to dismiss filed a certified copy of the minutes of the Council meeting on 27 November 1974, wherein it appeared that the Council met to receive the report of the Police Investigating Committee. The report contained detailed findings of negligence, misconduct and favoritism within the police department and noted that "we believe the City Manager's recent action in dismissing Chief Pritchett was justified." The meeting concluded with the statement by Mayor Clapp that "the Committee will not disband and will make their recommendations at a future time."

The defendants' response to the motion to dismiss as moot was filed in this Court on 27 February 1975. We assume that if the Committee had conducted an investigative hearing after making its report on 27 November 1974, the counsel for defendants would have with this response appropriately informed this Court of such hearing.

It appears that the question involved in this appeal may be moot for that the Police Investigating Committee of the City Council of High Point has probably concluded its investigative hearings, though it may still exist for the purpose of making recommendation based on its hearings.

[1] However, we do not deem it necessary to make a determination of whether the controversy has ceased to exist either from the record before us or after remanding to the Superior Court for further findings. The general rule that an appeal presenting a moot question will be dismissed is subject to some exceptions, one of which is that where the question involved is a matter of public interest the court has the duty to make a determination. 5 C.J.S., Appeal and Error, § 1354(1) (1958).

This case involves the right of city councils to "investigate the affairs of the city," to subpoena witnesses and compel the production of evidence to carry out that function as provided by G.S. 160A-80; and further involves the right of the city councils to "adopt reasonable rules" for the conduct of such investigative hearings as provided by G.S. 160A-81. The statutes were enacted in the 1971 Session of the General Assembly. The case is the first involving this enactment to reach us, and the determination of the issues involved is of public interest, unquestionably beneficial to the municipalities as a guide in the exercise of the investigative authority delegated by the legislature.

[2] On appeal, the plaintiffs do not contend that the said statutes are unconstitutional, nor that the rules of procedure adopted by the City Council of High Point relating to media coverage violate any of their constitutional rights. Therefore, we confine the issue before us to the authority of a city council in conducting investigative hearings to adopt rules providing not only for press but also for radio and television coverage.

Where the legislature makes a proper delegation of power to a municipality, the Courts may not interfere with the exercise of that power without a showing of manifest abuse. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325 (1968); *Jones v. Hospital,* 1 N.C. App. 33, 159 S.E. 2d 252 (1968). There has been no showing by the plaintiffs that radio and television coverage would disrupt the hearings, would violate any constitutional rights of the plaintiffs, or would in any other way constitute a manifest abuse of this discretionary power delegated to the municipality.

Though radio and television coverage may not be necessary to the conduct of investigative hearings by municipalities, it does not follow that it is unreasonable to permit such coverage; conversely, radio and television coverage is reasonably consistent with the concept of a fully informed public, a concept which is receiving ever increasing support as the public becomes more fully informed.

The order of the Superior Court provides for press coverage and apparently bases its prohibition of radio and television coverage on the finding that "live coverage is likely to prejudice some of the officers involved." Different treatment of competing forms of communication is hardly justified by this finding.

We vacate the following portion of the preliminary injunction of 3 October 1974: "(1) [T]here shall be no live radio or television coverage of the hearings and there shall be no voice or television recording devices in the hearing room." And this cause is remanded to the Superior Court.

Vacated in part and remanded.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM FRANKLIN WHITE

No. 7412SC1081

(Filed 16 April 1975)

1. Arrest and Bail § 3; Searches and Seizures § 2— arrest without warrant — search of vehicle with permission — admissibility of items in plain view

Evidence was sufficient to support the trial court's findings and conclusions that the sheriff had probable cause to detain defendant and search his automobile where that evidence tended to show that employees of an ABC store were robbed at gunpoint, an officer arrived on the scene within minutes, the victims described the robber to him, the officer and a store employee set out to look for the robber, a bystander called them over and stated that she had seen a 1970 dark green Chevrolet with a vinyl top stopped near the store, a short, stocky, black male had stayed with the car, a black male wearing a floppy hat and a flowered shirt had come on foot from the direction of the store, entered the car on the driver's side, and driven off toward Fayetteville, the sheriff headed toward Fayetteville at a high speed, he sighted a dark green Chevrolet with a vinyl top and drove up be-

side it with his blue light flashing, the sheriff stopped the car and ordered the two occupants out, the officer observed in the car a flowered shirt and sunglasses similar to those described by the victims, the officer asked permission to search the car, was denied permission, after considerable discussion was given permission, and found a sizeable amount of money wadded up under the front seat.

2. **Criminal Law § 66— inability to identify defendant on highway — in-court identification proper**

The trial court did not err in admitting identification evidence concerning defendant by one of the victims though the victim was unable to identify defendant as he and the sheriff drove alongside defendant's car on the highway, since the victim was highly excited at the time following a very high speed chase of defendant, and defendant was not wearing the flowered shirt or sunglasses which he had worn during the robbery when the sheriff overtook him.

APPEAL by defendant from *Smith, Judge.* Judgment entered 9 August 1974 in Superior Court, HOKE County. Heard in the Court of Appeals 13 March 1975.

By indictment proper in form, defendant was charged with the armed robbery of Ervin Wilkes and Wayne Ashburn, employees of a Hoke County ABC store, and taking from them the sum of $586. The offense allegedly occurred on 6 June 1974.

Defendant pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of not less than 20 nor more than 25 years, he appealed.

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

Faircloth & Fleishman, by Neill H. Fleishman, for defendant appellant.

VAUGHN, Judge.

By his first and second assignments of error, defendant contends the trial court erred in concluding, following a voir dire hearing, (1) that items found in defendant's automobile were in plain view and admitting testimony concerning said items, and (2) that there was probable cause to detain defendant and search his automobile. Testimony presented at the voir dire hearing tended to show:

On 6 June 1974, Ervin Wilkes and Wayne Ashburn were employees of an ABC store in Raeford. Around 4:35 p.m. on that date, as they were working, a young black male, (later

identified as the defendant), approximately 6 feet 1 or 2 inches tall and of slim build, wearing a wide brimmed hat, a flowered silk-type shirt and blue-lensed sunglasses, entered the store. After staying in the store for several minutes and making two separate purchases, he drew a large pistol on Wilkes and Ashburn and demanded the money in the two cash registers. After getting the money, the robber left the store and went around the corner in the direction of a side street. Hoke County Sheriff Barrington was called and arrived at the store within seven minutes. The victims quickly described the robber to the sheriff and Ashburn agreed to accompany the sheriff in looking for the robber.

As Sheriff Barrington and Ashburn proceeded from the store in the sheriff's car toward Highway 401, a Mrs. Maxwell, who was at her home a short distance back of the ABC store, signaled the sheriff to stop. She told him that she had observed a 1970 dark green Chevrolet with a vinyl top stopped near the store; that a short, stocky, black male had stayed with the car; that a black male wearing a floppy hat and a flowered shirt had come on foot from the direction of the ABC store, had gotten in the car on the driver's side, and had driven off toward Highway 401 and Fayetteville.

The sheriff proceeded to and on 401 toward Fayetteville, driving at times up to 130 m.p.h As he neared the Cumberland County line—some 10 miles from Raeford—he sighted a 1970 or 1971 dark green Chevrolet with a vinyl top proceeding toward Fayetteville. The sheriff, with his blue light flashing, drove up beside the Chevrolet, observed that it was being operated by a young black male, (later identified as defendant), accompanied by a smaller black male; the sheriff motioned the driver of the Chevrolet to pull off on the shoulder of the road. Sheriff Barrington stopped in front of the Chevrolet, alighted from his car, drew his gun and ordered the Chevrolet accupants to get out of the car. After considerable argument, they got out of their car and Sheriff Barrington held them "at bay" until other officers arrived.

The driver of the Chevrolet (hereinafter referred to as defendant) was wearing a dark "tank" shirt (similar to an undershirt), a wide brimmed hat, but no sunglasses. As he and his companion got out of the Chevrolet, they locked the doors. Sheriff Barrington observed a flowered shirt and blue-lensed sun-

glasses in the Chevrolet and after other officers arrived he asked defendant for permission to search the car. At first, defendant refused permission but, after considerable conversation in which the sheriff threatened to call for a wrecker to have the car towed back to Raeford, defendant consented to the search and opened one of the doors with the aid of a tire tool. The sheriff proceeded to search the car and found a sizeable amount of money wadded up under the front seat. Defendant and his companion, later identified as Leroy Pinkney, were carried back to Raeford. When the sheriff first approached and drove along side of the Chevrolet, Ashburn was unable to identify the driver as being the robber but thereafter positively identified him as the robber. Later on at the sheriff's office, Wilkes was shown a folder containing eight photographs of black males including a photograph of defendant, and identified defendant's photograph as that of the person who robbed the store.

After finding facts substantially as set out above, the trial court concluded that probable cause existed for the detention of defendant by Sheriff Barrington; that the viewing of the sunglasses and shirt in the Chevrolet was not the result of any search since said items were in plain view of all persons; that at the time of the search of the Chevrolet Sheriff Barrington had probable cause for the search which was valid, legal and constitutional in all respects, considering the circumstances, including the mobility of the vehicle and the likelihood of the disposable evidence; that the identification of defendant by the witness Ashburn and the identification of a photograph of defendant by the witness Wilkes did not result from any unreasonable, unconstitutional, illegal or invalid viewing, or any "unreasonable suggestive procedures", but was in fact based on and resulted from observations of defendant in the ABC store at approximately 4:35 p.m. on 6 June 1974. Based on the findings and conclusions, the court admitted the in-court identification of defendant by Wilkes and Ashburn and also admitted evidence offered as a result of the search of the Chevrolet.

We consider, first, authorities relating to the question of defendant's detention by Sheriff Barrington. G.S. 15-41 clearly authorizes a peace officer, without a warrant, to arrest a person when the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody. In *State v. Shore,* 285

N.C. 328, 335, 204 S.E. 2d 682 (1974), opinion by Justice Huskins, we find:

> . . . A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. *McCray v. Illinois*, 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056 (1967). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." 5 Am. Jur. 2d, Arrest § 44 (1962) ; *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971).

We consider next authorities relating to the question of the search of defendant's automobile. In *State v. Ratliff*, 281 N.C. 397, 403-4, 189 S.E. 2d 179 (1972), opinion by Justice Huskins, we find:

> In recognition of the mobility of automobiles, a search of an automobile without a warrant is constitutionally permissible *if there is probable cause to make the search.* (Citations omitted.) The search of an automobile *on probable cause* proceeds on a theory entirely different from that justifying the search *incident to an arrest.* "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." (Citation omitted). "Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office (citations omitted). The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search." (Citation omitted.)
>
> If there is probable cause to search an automobile, the officer may either seize and hold the vehicle before present-

ing the probable cause issue to a magistrate, or he may carry out an immediate search without a warrant. "For constitutional purposes we see no difference between the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." (Citations omitted.)

[1] We hold that the evidence presented at the voir dire hearing in the instant case was sufficient to support the trial court's findings and conclusions that the sunglasses and shirt in the Chevrolet were in plain view, and that Sheriff Barrington had probable cause to detain defendant and to search the automobile. We further hold that the court did not err in admitting the evidence found in the automobile. The assignments of error are overruled.

[2] By his third assignment of error, defendant contends the trial court erred in admitting identification evidence concerning defendant by the witness Ashburn. This assignment has no merit. Defendant's argument on this question is based primarily on the evidence that Ashburn was unable to identify defendant as he and Sheriff Barrington drove along side of defendant's car on the highway. The trial court properly considered the fact that Ashburn was highly excited at the time, following a very high speed ride, and that defendant was not wearing the flowered shirt or sunglasses when overtaken. Other evidence by Ashburn with respect to his identification was plenary to support the finding that his identification of defendant was based upon his observation of defendant in the ABC store.

By his fourth and final assignment of error, defendant contends the trial court erred in admitting identification evidence concerning defendant by the witness Wilkes. This assignment has no merit. The photographic identification of defendant by Wilkes was shown to be proper and the evidence was plenary to support the finding that Wilkes' identification of defendant was based upon his observation of defendant in the ABC store.

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

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. CEATRICE HARRIS, NORMAN J. HARRIS, AND CARL HARRIS

No. 7515SC5

(Filed 16 April 1975)

1. **Searches and Seizures § 3— voir dire on motion to suppress — search warrant — attack on credibility of affiant or informant**

Where a search warrant is valid on its face, and the sworn allegations are sufficient to establish probable cause, the defendant may not dispute and attack the allegations or the credibility of the affiant or his informant on the *voir dire* hearing on defendant's motion to suppress the evidence seized by law officers pursuant to the search warrant.

2. **Narcotics §§ 1, 5— possession with intent to manufacture and sell — possession as lesser included offense — conviction of both offenses**

Since possession of heroin is a lesser included offense within a charge of possession of heroin with intent to manufacture and sell, defendants could not properly be convicted of both offenses, and their conviction of simple possession must be set aside.

Chief Judge BROCK concurring in the disapproval of obiter language of prior cases.

APPEAL by defendants Norman Harris and Carl Harris from *Brewer, Judge.* Judgments entered 19 October 1974, in Superior Court, ORANGE County. Heard in the Court of Appeals 12 March 1975.

The defendants were charged in separate bills of indictment with (1) possession of heroin and (2) possession of heroin with intent to manufacture and sell, heroin being a controlled substance under Schedule I of the North Carolina Controlled Substances Act. The defendants pled not guilty to the charges.

The evidence for the State tended to show that on or about 8 February 1974, Officer Don Tripp of the Chapel Hill Police Department appeared before Orange County Magistrate J. C. Merritt for the purpose of obtaining a search warrant for illegally possessed drugs. A search warrant was thereafter issued on the basis of the affidavit of Officer Tripp in which he alleged that his informer was reliable and that his information in the past had resulted in more than two convictions.

Upon obtaining the warrant, Officer Tripp, along with a number of other police officers, went to 613 Northampton Plaza. Upon arriving at the apartment, Officer Tripp knocked on the

door which was answered by the defendant Carl Harris. After the door had been opened, Tripp observed several persons, including the other defendant, positioned around a table in the kitchen. He read the search warrant to Carl Harris, who lived in the apartment and then entered. He and the other officers observed a large quantity of a brownish-looking powdered substance, some playing cards, a small sifter and some glassine bags on the table. A photograph was immediately taken of the table with the articles upon it. All this evidence was seized and taken to the Chapel Hill Police Department where it was packaged and taken to the SBI Laboratory in Raleigh. The evidence was turned over to Leslie Lytle, a chemist with the SBI, who analyzed the powder and testified that it was heroin in combination with other noncontrolled substances.

After the State rested, the defendants' motions for judgment as of nonsuit were denied. The defendants offered no evidence and renewed their motions which were again denied. The case was submitted to the jury, whereupon Carl Harris was found guilty of possession and possession with intent to manufacture and sell and Norman J. Harris was found guilty of possession. From judgments sentencing the defendants to terms of imprisonment, they appealed.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Attorney General Edmisten by Assistant Attorney General Walter E. Ricks III for the State.

Pearson, Malone, Johnson, DeJarmon & Spaulding by C. C. Malone, Jr., and W. G. Pearson II for defendants.

CLARK, Judge.

After the jury had been empaneled but before any evidence had been introduced, the defendants made a motion to suppress all evidence seized at the Northampton Plaza. A voir dire was conducted in the absence of the jury. At the voir dire, Officer Tripp testified and on cross-examination was asked questions relating to the two prior convictions to which the informer's information had presumably led. These questions were asked with the obvious hope of impeaching the affiant with regard to his statements concerning the previous reliability of the informer. Objections to these questions were sustained, and defendants excepted.

The initial application for a search warrant, required by G.S. 15-26(b) to be in the form of an affidavit, is submitted to a magistrate. The affidavit alone, or the affidavit and supplementary sworn testimony, must allege underlying circumstances from which (1) the informant concluded the thing sought was where he claimed it was, and (2) from which the affiant concluded the informant was credible or his information reliable. *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). The magistrate must be neutral and detached. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). In making his determination of probable cause the magistrate "must judge for himself the persuasiveness of the facts relied on by a complaining officer." *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503, 1509 (1958). His determination should be paid great respect by a reviewing court. *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). In making the determination the magistrate considers and passes upon the alleged circumstances, the credibility of the informant and the credibility of the affiant. The policy of the Fourth Amendment to protect against unreasonable searches and seizures is adequately served by those standards. To permit a defendant to challenge the truth or accuracy of the factual averments of the affidavit, or the credibility of the informant or the affiant, would open at trial an issue or issues, theretofore judicially determined, collateral to that of guilt or innocence.

[1] We adopt the majority rule that where the search warrant is valid on its face, and the sworn allegations are sufficient to establish probable cause, the defendant may not dispute and attack the allegations, or the credibility of the affiant or his informant, in the voir dire hearing on the defendant's motion to suppress the evidence seized by law officers pursuant to the search warrant. *State v. Salem,* 17 N.C. App. 269, 193 S.E. 2d 755 (1973), *cert. denied,* 283 N.C. 259, 195 S.E. 2d 692 (1973). See also Annot., 5 A.L.R. 2d 394 (1949).

In other decisions this court has used obiter language which is at variance with the majority view. We refer specifically to such language in *State v. Wooten,* 20 N.C. App. 139, 201 S.E. 2d 89 (1973) and *State v. Logan,* 18 N.C. App. 557, 197 S.E. 2d 238 (1973), and we disapprove this language insofar as it indicates that a defendant may attack the allegations of the search warrant, or the credibility of the affiant or informer;

but we approve the language in both cases to the effect that if the facts set out in the affidavit are sufficient within themselves to justify the finding of probable cause, the affidavit is a sufficient showing on voir dire.

This rule of law should not be so broadly interpreted as to infer that under no circumstances can a defendant attack the validity of a search warrant which is valid on its face, or valid when the affidavit is adequately supported by a sworn statement. For example, one ground for attacking its validity is that the magistrate failed to properly perform a judicial function in finding probable cause, as in *State v. Miller,* 16 N.C. App. 1, 190 S.E. 2d 888 (1972), *modified,* 282 N.C. 633, 194 S.E. 2d 353 (1973), where the magistrate issued the search warrant without reading it.

[2] The defendant Carl Harris was convicted on both charges of possession and possession with intent to manufacture and sell. In the case of *State v. Aiken,* 286 N.C. 202, 206, 209 S.E. 2d 763, 766 (1974), the court said, "[P]ossession 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." The crime of possession being a lesser included offense and an element of the crime of possession with intent to manufacture and sell, we find error in submitting the case to the jury on both charges. We reverse the conviction of Carl Harris below with regard to the charge of possession and affirm the conviction of possession with intent to manufacture and sell.

Affirmed in part.

Reversed in part.

Judges PARKER and HEDRICK concur.

Chief Judge BROCK also concurs as follows:

I concur in the disapproval of the obiter language of *State v. Logan,* 18 N.C. App. 557, 558, 197 S.E. 2d 238, 240 (1973), and *State v. Wooten,* 20 N.C. App. 139, 141, 201 S.E. 2d 89, 90 (1973).

THOMAS DALE LARUE, EMPLOYEE v. AUSTIN-BERRYHILL, INC., EMPLOYER; UNITED STATES FIDELITY AND GUARANTY COMPANY, INSURER

No. 7518IC61

(Filed 16 April 1975)

1. **Master and Servant § 96— workmen's compensation — findings of Industrial Commission — conclusiveness**

Findings of fact by the Industrial Commission which are non-jurisdictional are conclusive on appeal when supported by competent evidence, even though there is evidence that would support findings to the contrary.

2. **Master and Servant § 60— employee engaged in personal mission — no accident arising out of and in course of employment**

The evidence supported the Industrial Commission's finding that plaintiff's accident, injuries, and resulting disability did not arise out of and in the course of his employment where such evidence tended to show that plaintiff lived in Greensboro but was working on a job site in Wallace when his accident occurred, plaintiff worked a full day for his employer, spent time playing cards with his friends, then left the area at 10:30 or 11:00 to return to Greensboro, plaintiff did not intend to work the next day but had asked and been given permission to be off so that he might be in traffic court in Greensboro to answer a charge of speeding, and plaintiff was operating his own car at his own expense for his own personal business at the time of the accident.

APPEAL by plaintiff from the North Carolina Industrial Commission. Order entered 31 October 1974. Heard in the Court of Appeals 21 March 1975.

This is an appeal from an order of the North Carolina Industrial Commission denying compensation to an injured and disabled employee. The Commission made the following pertinent findings of fact:

"3. Defendant employer's employees fall into the categories of office, shop and field employees.

4. The shop employees manufacture defendant employer's product. The field employees install defendant employer's product.

5. Defendant employer enters into contracts which causes the field employees to travel to the sites of installation throughout North Carolina and sometimes Virginia.

6. During December 1969 claimant was hired by defendant employer as a field employee at a wage of $2.25 per hour for a 40-hour workweek.

7. Claimant quit work during June 1970. He was rehired three or four weeks later at a wage of $3.00 per hour.

8. Prior to September 1969 defendant employer paid $2.00 daily for expenses when the job site was within 50 miles of Greensboro. When the job site was 50 miles distance or more from Greensboro employees received as travel expenses reimbursement for motel bill and two meals a day. Reimbursement for travel expenses ceased in September 1969 because the field employees were abusing the motel bill and two meals per day arrangement. An across-the-board raise was granted when defendant employer ceased to pay travel expenses.

9. Field employees of defendant employer worked ten hours daily four days a week. The field employees were paid full wages while traveling to the job site on Monday morning and from the job site on Thursday afternoon. They were paid full wages when traveling from job site to job site during the week.

10. On Monday mornings eight or ten field employees left defendant employer's place of business in Greensboro en route to the job site. Some of the employees rode on the company pickup truck. The others rode in privately owned vehicles.

11. As a general rule claimant drove his privately owned vehicle to and from the job site. One or more employees would ride with him.

12. Claimant lives in Greensboro and while employed by defendant employer he traveled to job sites located in Lumberton, Burlington, Mebane, Asheboro, Liberty, Wallace and on one occasion the State of Virginia.

13. Claimant was working at a job site located in Wallace, North Carolina the week beginning November 30, 1970 and had been working there for three or four weeks.

14. Claimant acquired permission from his supervisor to be absent from work on December 3, 1970 in order that

he might appear in traffic court to defend an allegation of speeding.

15. Claimant worked all day December 2, 1970 and received salary therefor. Claimant did not work December 3, 1970 and did not receive salary therefor.

16. After work on December 2, 1970 claimant had dinner and played cards with co-employees. Claimant drank a couple of beers while playing cards.

17. At 10:00 or 10:30 p.m. on December 2, 1970 claimant departed from Rose Hill in the most direct route of travel for Greensboro, some 170 miles distant.

18. Subsequent to departure from Rose Hill and while traveling west on Highway 421 near Sanford claimant's vehicle left the highway in a medium to sharp curve, turned over, and traveled 327 feet before coming to rest. Claimant heard a bang prior to leaving the highway.

19. At about 4:45 a.m. on December 3, 1970 the Sanford Rescue Squad was alerted. Claimant was found unconscious outside a 1960 Volkswagen. He was placed on an orthopedic stretcher and taken to the Lee County Hospital. He was transferred to Duke Hospital on December 3, 1970.

20. At 4:50 a.m. on December 3, 1970 State Highway Patrolman Tadlock investigated the one vehicular accident. The 1960 Volkswagen was badly mangled. Two beer cans were found near the vehicle.

21. At the time of his accident claimant was driving his own motor vehicle at his own expense and for his own personal business. Defendant employer did not pay claimant for such transportation nor furnish him such transportation.

22. Claimant did not, at the time complained of, sustain an injury by accident arising out of and in the course of his employment.

23. Claimant's accident resulted in fracture-dislocation of T-3 with paraplegia."

From an order concluding that plaintiff's injuries did not arise out of and in the course of his employment and denying compensation, plaintiff appealed.

J. B. Winecoff and Wade C. Euliss for plaintiff appellant.

Horton, Conely & Michaels by Walter L. Horton, Jr., Richard B. Conely, and Robert L. Savage for defendant appellee.

HEDRICK, Judge.

Plaintiff contends that finding of fact No. 21 "is not only contrary to the evidence but is unsupported by any competent evidence; moreover, it is inconsistent and wholly incompatible with Findings of Facts Nos. 8, 9, 10 and 11, in that Findings Nos. 8, 9, 10 and 11 show the method through which the employer was making payment for traveling." Plaintiff further contends that the Industrial Commission erred in concluding that plaintiff's injuries did not arise out of and in the course of his employment.

[1] Findings of fact by the Industrial Commission which are nonjurisdictional are conclusive on appeal when supported by competent evidence, even though there is evidence that would support findings to the contrary. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); *Priddy v. Cab Co.*, 9 N.C. App. 291, 176 S.E. 2d 26 (1970).

[2] Finding of Fact No. 8 is of no legal significance in determining the issue of whether plaintiff's injuries arose out of and in the course of his employment. Findings 9, 10, and 11 describe how the field employees, including plaintiff, worked ten hours a day for four days (Monday through Thursday) to make a forty-hour week and how their travel time to the job site on Monday morning and from the job site on Thursday afternoon was included in the ten-hour day. These findings do not compel a conclusion that the plaintiff was being paid in any way for the trip from the job site to Greensboro on Wednesday night, December 2, or early Thursday morning, December 3. Finding No. 21 specifically and unequivocally states that plaintiff at the time of the accident "was driving his own motor vehicle at his own expense and for his own personal business." There is plenary competent evidence in the record to support this finding. Indeed, plaintiff himself testified:

> "My testimony is that I left Rose Hill at around 10:00 o'clock in the evening to go to Greensboro. I was coming home; that is, I intended to go to my house whenever I got home and spend the night. And then I was going to be in

Court the next day. That trip had nothing to do with my work, only the fact that I had to get off work to make it. I explained to my foreman that I did have to be in Court and he told me that if I had to be in Court I would just have to go, and go on, and he let me off to go to Court. * * * I was expecting that I would not be paid for the Thursday that I didn't work, I didn't expect I was going to be paid for Thursday, being off from work to go to Court. Because I worked by the hour. We worked a ten hour day and four day week and got in 40 hours altogether maybe, including travel time."

We are of the opinion and so hold that finding of fact No. 21 supports the conclusion that plaintiff's tragic accident, injuries, and resulting disability did not arise out of and in the course of his employment. See, *Humphrey v. Laundry,* 251 N.C. 47, 110 S.E. 2d 467 (1959); *Alford v. Chevrolet Co.,* 246 N.C. 214, 97 S.E. 2d 869 (1957); *Ridout v. Rose's Stores, Inc.,* 205 N.C. 423, 171 S.E. 642 (1933); *Hunt v. State,* 201 N.C. 707, 161 S.E. 203 (1931); *Gay v. Supply Co.,* 15 N.C. App. 240, 189 S.E. 2d 582 (1972), cert. denied, 281 N.C. 756, 191 S.E. 2d 354 (1972).

The order appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. TONY MARTIN BAILEY

No. 7426SC1039

(Filed 16 April 1975)

1. **Larceny § 1— element of trespass**

An act of trespass is an essential element in the crime of larceny.

2. **Larceny § 7— furniture in trailer — defendant in lawful possession — no trespass — nonsuit proper**

The trial court erred in denying defendant's motion for nonsuit in a prosecution for larceny of furniture where the evidence tended to show that defendant rented a trailer furnished by the landlord for six months, the furniture was in the trailer for defendant's use and enjoyment, defendant had complete access as well as control over it

by virtue of his tenancy even though title remained in the landlord, and defendant therefore was in lawful possession of the furniture at the time of the taking.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 7 August 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 February 1975.

Defendant was tried on a bill of indictment charging him with the larceny of certain goods valued at $398.00 and belonging to W. A. Myers, Jr.; to wit, one two-piece living room suite, one five-piece dinette suite, three tables, one box spring and mattress set, and one bed frame.

At trial the State presented evidence tending to show that Mae Myers and her husband, W. A. Myers, Jr., were the owners of a mobile home park. On 11 October 1973, Mrs. Myers rented a mobile home to defendant and Sherry Hager for $32.00 per week, payable each week in advance. The mobile home in question was referred to as "trailer #5" and described as furnished with a mattress and box springs in each bedroom; a couch, chair, and three tables in the living room; and a dinette set consisting of a table and four chairs in the kitchen area. Each mobile home in the park was furnished, and Mr. Myers bought the furniture contained in trailer # 5. On or about 26 April 1974, Mrs. Myers visited trailer #5 to see about the rent which had not been paid in two weeks. According to Mrs. Myers, all of the furniture which was in the trailer when it was rented in October of 1973 was still there on April 26. At that time she discussed the rent with Sherry Hager but did not receive it. Mrs. Myers testified that she just asked for the rent and did not tell them to move out or to remove themselves from the premises. Neither Mrs. Myers nor her husband gave defendant permission to take the furniture, and, according to them, the furniture was not taken from the trailer until 28 April 1974.

Around 1:30 a.m. on 28 April 1974, Barbara Solesby, who lived in a trailer next to defendant's, heard some noises and saw defendant along with some other boys come out of trailer #5 carrying a bed, box springs, mattress and frame, a living room suite, a dining room suite, and tables. Later that morning she told Mrs. Myers that the neighbors had moved out, taking the furniture. Mrs. Myers returned to the trailer on 28 April and discovered that the furniture was gone with the exception of one bed.

Charles Collins, a member of the Mecklenburg County Police Department, questioned defendant about the furniture, and defendant told him there was a possibility that he could have taken some items belonging to Mr. Myers.

Evidence for defendant tended to show that in October 1973 Claud A. Bailey sold defendant some furniture and delivered it to defendant's trailer. Bailey testified that he helped to move this furniture into the trailer and that he, Mrs. Myers, and defendant then placed the Myers' furniture on a truck owned by Clarence Keller and delivered it to a small storage house some one hundred yards from defendant's trailer. To the same effect was testimony from Sherry Hager. Clarence Keller testified that defendant borrowed his truck in late October 1973 for the purpose of moving furniture.

The jury found defendant guilty of larceny of property valued more than $200.00, and from a judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten, by Associate Attorney Jesse C. Brake, for the State.

David R. Badger, for defendant appellant.

MARTIN, Judge.

The bill of indictment clearly charged defendant with the offense of larceny. It was necessary, therefore, for the State to establish the elements of larceny by sufficient competent evidence.

Defendant contends that the evidence, considered in a light most favorable to the State, might sustain a conviction under G.S. 14-168.1 for misdemeanor conversion of property by a tenant but that such evidence does not support a conviction for felonious larceny. This is so, he argues, because there is no evidence of a taking by trespass.

G.S. 14-168.1 provides that "[e]very person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a misdemeanor."

[1] "Larceny is a common law offense, defined as the felonious taking by trespass and carrying away by any person of the goods or personal property *of another,* without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739 (1965)." *State v. Wooten,* 18 N.C. App. 652, 197 S.E. 2d 614 (1973). "Every larceny includes a trespass; and if there be no trespass in taking the goods, there can be no felony committed in carrying them away." *State v. Webb,* 87 N.C. 558. An act of trespass, therefore, is an essential element in the crime of larceny. Indeed, it was because of this requirement that embezzlement statutes were enacted. Thus, it has been said that "[t]he only difference . . . between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary." *State v. McDonald,* 133 N.C. 680, 45 S.E. 582 (1903). At the risk of belaboring the distinction, we find it stated in the following succinct manner:

> "Ordinarily, a basic distinction between the two offenses is that in embezzlement the property comes lawfully into the possession of the offender, and is subsequently unlawfully appropriated by him, whereas in larceny the offender, instead of having prior lawful possession of the property, takes it unlawfully in the first instance, thereby committing a trespass against another's possession." Annot., 146 A.L.R. 532, 541 (1943).

In response to defendant's contention that no trespass was committed in the taking, the State argues that defendant's lawful possession of the furniture ended with his abandonment of the leasehold so that a trespass was committed at the time of the taking. In the present case, the State's argument beclouds the issue. The issue is whether defendant was in lawful possession of the furniture at the time it was allegedly taken and carried away by him. If he was in lawful possession then there was no trespass in the taking and, hence, no larceny at common law.

[2] It is all too clear that defendant was in lawful possession of the furniture at the time of the taking. As distinguished from legal or lawful possession, it is stated that one having the mere custody of personal property of another may be found guilty of larceny where he feloniously appropriates the property to his own use. Annot., 125 A.L.R. 367 (1940). However, here the

furniture was in the trailer for defendant's use and enjoyment, and he had complete access as well as control over it by virtue of his tenancy even though title remained in the landlord. Defendant's possession lasted over six months, and it cannot be said that he only had mere custody of the furniture. There is no evidence that defendant initially acquired possession of the furniture with the intent to convert it to his own uses. "Generally one who lawfully acquired possession of the goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, . . . , cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it." 52A C.J.S., Larceny, § 31, p. 458.

There being no evidence of a taking by trespass, the defendant's motion for nonsuit of the charge of larceny should have been allowed.

Reversed.

Chief Judge BROCK and Judge VAUGHN concur.

MARTHA S. BLAIR (H. NEAL BLAIR) v. ALBERT FAIRCHILDS AND WIFE, NELL FAIRCHILDS, RUBY TRIVETTE AND JOE WILLIAMS

No. 7424SC987

(Filed 16 April 1975)

1. **Boundaries § 8— boundary only in dispute — processioning proceeding**

Where the parties stipulated that boundary only was involved, the controversy became in effect a processioning proceeding, and it was therefore the duty of the judge to determine what constituted the divisional line and where it was actually located on the premises.

2. **Trial § 6— stipulations — binding effect**

Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury; a stipulation is a judicial admission, and as such, is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact.

3. **Boundaries §§ 14, 15— court survey contrary to stipulated boundary — judgment based on court survey erroneous**

Where the parties stipulated the beginning point of a boundary line and stipulated the location of the line by metes and bounds, the

trial court erred in admitting testimony by a court appointed surveyor as to a completely different boundary line than that stipulated by the parties and in fixing a boundary line which had been excluded from consideration of the court by the parties' stipulation and one which was contrary to the judicial admission of the parties.

APPEAL by defendants from *Fountain, Judge.* Judgment entered 13 June 1974 in Superior Court, WATAUGA County. Heard in the Court of Appeals 12 February 1975.

Plaintiff instituted this action on the 3rd day of October 1969 claiming ownership of certain lands and that defendants wrongfully and unlawfully trespassed on same and damaged said lands of plaintiff.

The title of said lands was disputed by the defendants. Several motions were made and orders issued in the cause at different terms of court prior to the trial date.

At the June term 1970, the parties entered into a stipulation as to the true boundary line between the lands of the parties, the pertinent part is as follows:

"STIPULATIONS AND ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding this the 8th day of June, 1970 term of the Superior Court. It appearing to the Court from the allegation set forth in the pleadings that the plaintiff alleges sole ownership of the tract of land described in paragraph 3 of the complaint. That the defendants allege sole ownership of a tract of land described in paragraph 1 of the further answer and defense.

It is now therefore stipulated and agreed by the parties that the two tracts of land aforementioned adjoin along the following line:

Beginning at a white oak on a stone knoll in the forks of the river, thence north 13 degrees east 66 poles crossing the east fork of the river to a white oak, thence north 60 degrees east 64 poles to a black oak, thence north 40 degrees east 70 poles to a white oak, thence, north 5 degrees west 28 poles to a stake in Norton's line.

It is further stipulated and agreed that the location of this line upon the grounds is in dispute. And that in order to determine the true dividing line between the parties, that

a surveyor should be appointed by the Court to go upon the land and make all necessary surveys in accordance with the contentions of the parties to determine the true dividing line upon the grounds.

It is further stipulated and agreed that the surveyor so appointed shall make all necessary maps and plats for a full determination of the issue of the location of the dividing line between the parties. It is further stipulated and decreed that the issue of trespass and damage alleged by the plaintiff shall be delayed until the issue of the location of the true dividing line between the lands of the parties shall have been determined.

Upon the foregoing stipulations it is now therefore ordered that Riddle Engineering Company be appointed to go upon the land and make the survey in accordance with the contentions of the parties, prepare and file with the Court the necessary plats and maps."

The cause was tried as to the issue of the true location of the boundary line before the judge without a jury, and after hearing the evidence judgment was entered in favor of the plaintiff. From said judgment defendants appealed.

Louis H. Smith and Larry S. Moore, for plaintiff appellee.

Holshouser & Lamm, by J. E. Holshouser, Sr., and Eggers & Eggers, by Stacy C. Eggers, Jr., for defendant appellants.

MARTIN, Judge.

[1] The controversy, by stipulation of the parties that boundary only was involved, became in effect a processioning proceeding. *Harrill v. Taylor,* 247 N.C. 748, 102 S.E. 2d 223 (1958); *Welborn v. Lumber Co.,* 238 N.C. 238, 77 S.E. 2d 612 (1953); *Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630 (1953); *Clegg v. Canady,* 217 N.C. 433, 8 S.E. 2d 246 (1940); *Napoli v. Philbrick,* 8 N.C. App. 9, 173 S.E. 2d 574 (1970). It was therefore the duty of the judge to determine what constitutes the divisional line, and also as the trier of the facts, to say where it is actually located on the premises. *Coley v. Telephone Co.,* 267 N.C. 701, 149 S.E. 2d 14 (1966); *Andrews v. Andrews,* 252 N.C. 97, 113 S.E. 2d 47 (1960); *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311 (1956); *McCanless v. Ballard,* 222 N.C. 701, 24 S.E. 2d 525 (1943); *Napoli v. Philbrick, supra.* In a pro-

cessioning proceeding title is not involved. The line dividing the properties should be located. *Green v. Barker*, 254 N.C. 603, 119 S.E. 2d 456 (1961); *Welborn v. Lumber Co., supra.*

Referring to a map prepared by the court appointed surveyor, the trial court found that a red line located thereon represented the true boundary line between the property of plaintiff and that of defendants. However, according to the testimony of the court appointed surveyor, the red line commenced at a point contended for by plaintiff but was not run according to the calls in the stipulation.

Defendants argue that the court erred in admitting testimony as to a completely different boundary line than that stipulated by the parties and in finding and decreeing in the judgment a boundary line altogether different from that stipulated by the parties. Plaintiff contends otherwise and further argues that the stipulation merely eliminated the necessity of offering proof of title to the respective tracts of land owned by the parties. According to plaintiff, the sole legal effect of the stipulation was to convert the action into a processioning proceeding and to mandate the preparation of maps by the court appointed surveyor.

[2] Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury. A stipulation is a judicial admission. As such, it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to established the admitted fact. *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966).

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966).

The plaintiff may have inadvertently stipulated to facts that in effect concede what constitutes the true dividing line. However, plaintiff has made no effort to seek relief from the stipulation. In *R. R. Co. v. Horton* and *R. R. Co. v. Oakley*, 3 N.C. App. 383, 165 S.E. 2d 6 (1969), this Court said:

> " 'A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to

set aside the stipulation in the court in which the action is pending, on notice to the opposite party.' 83 C.J.S., Stipulations, § 36, p. 93. 'Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto.' 83 C.J.S., Stipulations, § 36, p. 94."

[3] The stipulation of the parties limited the issue in this controversy to a determination of the correct location of the line which begins "at a white oak on a stone knoll in the forks of the river, thence north 13 degrees east 66 poles crossing the east fork of the river to a white oak, thence north 60 degrees east 64 poles to a black oak, thence north 40 degrees east 70 poles to a white oak, thence, north 5 degrees west 28 poles to a stake in Norton's line." The court made no findings or conclusions as to the location of the *stipulated* beginning point. Nor did the court make any findings or conclusions as to the location of the *stipulated* line. Instead, the court found facts from evidence which tended to establish and locate a line entirely different from that agreed upon in the stipulation.

The judgment fixed a boundary line which had been excluded from consideration of the court by the stipulation and one which was contrary to the judicial admission of the parties. This was error.

The judgment is reversed with directions to adjudicate the controversy consistent with the stipulation.

Reversed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. CASPER CROWE AND ALEX BUCHANAN

No. 7424SC957

(Filed 16 April 1975)

1. Burglary and Unlawful Breakings § 7; Larceny § 8— failure to instruct on lesser included offenses — no error

In a prosecution for felonious breaking or entering and felonious larceny where the evidence tended to show that the door of a service station was open when officers arrived, the two defendants were seen coming out of the doorway, one defendant threw down a box contain-

ing goods taken from the store, the other defendant was apprehended with cartons of cigarettes in his arms, and a tire tool and gloves were found in the store, such evidence was sufficient to support a finding of felonious breaking or entering and larceny of property committed pursuant to a breaking or entering, and the trial court did not err in failing to submit lesser included offenses to the jury.

2. **Constitutional Law § 30— delays due to defendants — no denial of speedy trial**

Defendants failed to show that they were denied a speedy trial due to the neglect or wilfulness of the prosecution where there were no allegations to that effect, where one defendant requested and received a continuance on three occasions, and where the other defendant failed to appear in court on one occasion, resulting in the issuance of an *instanter capias*.

ON writ of *certiorari* to review proceedings before *Thornburg, Judge*. Judgment entered 2 May 1974 in Superior Court, AVERY County. Heard in the Court of Appeals 12 March 1975.

Each defendant was indicted for felonious breaking or entering and felonious larceny. Each pleaded not guilty. The jury returned guilty verdicts on all charges against the defendants, and sentences were imposed.

This prosecution arose out of a break-in of Joe's American Service Station, on Highway 194 in Avery County, on 22 August 1971. The store had been padlocked at the end of the business day. Later that night Howard Daniels, sheriff of Avery County, received a radio message to proceed to the service station. He was accompanied by two deputies. When they pulled into the yard of the service station, Daniels saw two men coming out of the door of the station. One was Alex Buchanan, but the other was not immediately recognizable. The unidentifed man was standing about two feet from the door when Daniels first saw him. Buchanan was standing in the doorway holding a box of cigarettes, candy, and cigars, which he threw down. The two men went in different directions when the officers arrived, but they soon were apprehended. The unidentified man was Casper Crowe.

On investigating the station, the officers found that the door of the station had been pried open, and the hasp for the padlock had been broken. They found a tire tool and pair of gloves lying on a counter in the store. Candy, cigarettes, and other items had been pulled off the counter and were lying on the floor. Ownership of the tire tool was never determined. The

officers earlier had noticed a car parked some distance from the store. When defendant Crowe was apprehended, he was heading in the direction of the car.

Defendant Alex Buchanan testified that he and Crowe had been looking for Crowe's car, which had been stolen earlier that night, when they saw a shadow at the corner of the service station. They went to the store but saw no one. Buchanan noticed that the door of the station was open and looked inside. He saw no one, and as he turned to leave, he tripped over a box of cigarettes, candy, and cigars. Buchanan had just picked them up when he heard one of the officers shout, "Get Alex!" He went to the corner of the building where he was apprehended.

Defendant Crowe gave a similar account of the events that led to his arrest at the store. Crowe stated that he had tried to call the sheriff's department several times, without success, about his car. Then he and Buchanan had gone to look for the car when they saw something at the station. Crowe testified that he had $800.00 of his own money on him when he was arrested.

Attorney General Edmisten, by Associate Attorneys W. A. Raney, Jr., and James E. Delaney, for the State.

Kelly Johnson, for the defendants-appellant.

BROCK, Chief Judge.

[1] Defendants contend that the instructions to the jury were erroneous. The crux of their argument is that the instructions failed to contain a charge on the lesser included offenses of nonfelonious breaking or entering and nonfelonious larceny. The necessity of charging on lesser included offenses arises only when there is evidence upon which the jury could find that a lesser included offense was committed. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

The State's evidence tends to show that when the officers arrived, the door to the service station was open, and the two defendants were seen coming out of the doorway. One deputy sheriff testified that both defendants were inside the store at the time the officers arrived. Defendant Buchanan threw down a box containing goods taken from the store, and defendant Crowe was apprehended with cartons of cigarettes in his arms. A tire tool and gloves were found in the store. In our opinion

this evidence supports a finding of a felonious breaking or entering, not a lesser crime. It also supports a finding of larceny of property committed pursuant to a breaking or entering (G.S. 14-72[b][2]), not a lesser offense.

According to defendants' versions of the occurrence, they neither broke nor entered the building and did not steal anything. Their versions would support findings of not guilty only. There was no evidence from which the jury could have found defendants guilty of lesser included offenses. This assignment of error is overruled.

[2] In their second argument, defendants contend that the trial court erred when it denied their motion to dismiss for failure to get a speedy trial. Defendants, in support of this contention, note that the warrants were issued on 23 August 1971 and that the trial began on 29 April 1974.

"The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time." *State v. Spencer,* 281 N.C. 121, 124, 187 S.E. 2d 779 (1972). In *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969), the Supreme Court stated that undue delay cannot be defined in terms of days, months, or years. The length of the delay, the cause of the delay, waiver by the defendant, and prejudice to him are factors to be considered in determining whether the delay is unreasonable. However, "[t]he burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution." *State v. Johnson, supra* at 269, 167 S.E. 2d at 278.

In our opinion defendants have failed to carry their burden. There are no allegations that any part of the delay was the result of the State's wilfulness or neglect. On three occasions one of the defendants requested and received a continuance. On one occasion defendant Buchanan failed to appear in court, resulting in the issuance of an *instanter capias.* We think it clear that "[a] defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State v. Johnson, supra* at 269, 167 S.E. 2d at 278. This argument has no merit.

Defendants' assignment of error which contends that the manner of polling the jury was improper is fleckless. The record on appeal, as settled by the trial judge, shows clearly that the jury was polled in the approved manner.

We have considered defendants' remaining assignment of error and have found it to be without merit. In our opinion defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

THE NORTHWESTERN BANK, TRUSTEE OF INTER VIVOS TRUST CREATED BY REUBEN B. ROBERTSON, DECEASED, PETITIONER v. LOGAN T. ROBERTSON, INDIVIDUALLY AND AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF REUBEN B. ROBERTSON, DECEASED; AMERETTE ROBBERTSON, A MINOR; LAURA LEE SAFFORD; RUFUS LASHER SAFFORD; RUFUS BRADFORD SAFFORD, A MINOR; GEORGE SCOTT SAFFORD, A MINOR; LILLIAN ROBERTSON SHINNICK; JOSEPH N. SHINNICK; ROBERTSON WILLIAM SHINNICK, A MINOR; LAURA ELIZABETH SHINNICK, A MINOR; LOGAN T. ROBERTSON, JR.; MARY NORBURN ROBERTSON; SCOTT A. ROBERTSON, A MINOR; ASHLEY NICHOLETTE ROBERTSON, A MINOR; HOPE T. NORBURN; RICHARD A. FARMER; LAURA LEE FARMER, A MINOR; CYNTHIA ANN FARMER, A MINOR; RICHARD R. FARMER, A MINOR; CHARLES R. NORBURN; RUSSELL L. NORBURN, JR.; HELEN H. NORBURN; ROBERT E. NORBURN, A MINOR; CHRISTOPHER S. NORBURN, A MINOR; REUBEN B. ROBERTSON III; DANIEL H. ROBERTSON; SARAH HOPE ROBERTSON, A MINOR; PETER T. ROBERTSON; MARGARET ROBERTSON WHITE LAFORCE; RICHARD LAFORCE, JR.; LAURENS T. WHITE, A MINOR; LOUISA H. ROBERTSON; GEORGE W. ROBERTSON; AND MAY HOLTZCLAW, RESPONDENTS

No. 7528SC55

(Filed 16 April 1975)

Rules of Civil Procedure § 24— auction sale — motion to enjoin conveyance — right of successful bidder to intervene

The successful bidder at an auction sale could intervene to contest a motion to enjoin conveyance of the property which was the subject of the auction sale. G.S. 1A-1, Rule 24.

APPEAL by prospective intervenors from *McLean, Judge.* Order entered 24 October 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 20 March 1975.

This action originated on 4 May 1973 when the Northwestern Bank filed a petition for a declaratory judgment as to its rights and duties as trustee under an inter vivos trust created by Reuben B. Robertson. Respondents, some of them minors, were descendants of the settlor. Guardians ad litem were duly appointed. On 20 September 1974 a consent order was entered permitting the bank, as empowered and authorized by the trust instruments, to sell trust assets known as the "Doctor's Park" condominium complex. On 21 September 1974 the property was sold at public auction for $364,000.00 to Steven I. Goldstein, agent.

On 11 October 1974 certain respondents moved to enjoin the sale, alleging that the price was inadequate. Goldstein moved on 17 October 1974 to intervene in opposition to the injunction. Also on 17 October 1974 Victor W. Buchanan requested permission to withdraw as guardian ad litem for two minor respondents because of a possible future conflict of interest. Hearing these three matters on 17 October 1974, the court found that Goldstein and Buchanan were members of the same law firm, and concluded that a conflict of interest existed and that Goldstein's bid was unlawful and improper. On 24 October 1974 the court entered an order which allowed Buchanan to withdraw as guardian ad litem, denied Goldstein's motion to intervene, declared the auction sale null and void, and ordered the trustee not to issue any deed pursuant to the sale. Also on 24 October 1974 the court heard and denied in a separate order the motion of John W. Girard to intervene as one of Goldstein's principals and the real purchaser at the sale. The petitioner bank and prospective intervenors Goldstein and Girard appealed. The bank later withdrew its appeal.

Morris, Golding, Blue & Phillips, by William C. Morris, and Bennett, Kelly & Cagle, P.A., by E. Glenn Kelly, for prospective intervenor appellants.

Walter L. Currie for respondent appellees Logan T. Robertson, Jr., and Mary Norburn Robertson.

Roberts and Cogburn, by Max O. Cogburn, for respondent appellees Scott A. Robertson and Ashley Nicholette Robertson.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., by O. E. Starnes, Jr., for respondent appellees Reuben B. Robertson III, Clark Norburn, et al.

Fairley, Hamrick, Monteith & Cobb, by James D. Monteith, for respondent appellee Amerette Robertson.

ARNOLD, Judge.

The only question presented by this appeal is whether the successful bidder at an auction sale may intervene to contest a motion to enjoin conveyance of the property which was the subject of the auction sale. We answer that question "yes".

As the purported purchasers of the property in question the appellants are entitled to intervene under G.S. 1A-1, Rule 24, which provides in part:

> "(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:
>
> . . . .
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The North Carolina Supreme Court has said that additional parties must have a legal interest in the subject matter of the litigation of such direct and immediate character that they will gain or lose by direct operation of the judgment. *Griffin & Vose, Inc. v. Minerals Corp.*, 225 N.C. 434, 35 S.E. 2d 247 (1945). *See also Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968); 1 McIntosh, N. C. Practice 2d, § 724 (Phillips Supp. 1970). In the case at bar, appellants' bid was accepted by the auctioneer and they entered into a contract with the trustee. Having an interest in both the property and the transaction, they were certain to be affected by a proceeding to enjoin the trustee from executing the deed. *Cf. Keathly v. Branch*, 84 N.C. 202 (1881). *See also Construction Co. v. Board of Education*, 278 N.C. 633, 180 S.E. 2d 818 (1971), where it was held that the successful bidder on a construction contract was a necessary party under Rule 19(a) in a proceeding by an unsuccessful bidder for a declaratory judgment that the contract award was invalid.

Appellees contend that both motions to intervene were not timely made and that Girard's motion was not accompanied by a pleading as required by Rule 24(c). Goldstein's motion, made before the hearing on respondents' motion for preliminary injunction, was not untimely under the circumstances. As for

Girard, his interest is so closely related to that of Goldstein as to require that both become parties.

Without expressing any opinion as to the merits involved in this case the order of the trial court is vacated and the matter is remanded so that both appellants may be made parties to the proceeding.

Error and remanded.

Chief Judge BROCK and Judge PARKER concur.

AYDIN CORPORATION v. INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

No. 7410SC1096

(Filed 16 April 1975)

Landlord and Tenant § 13— exercise of option to occupy all of premises — no forfeiture of general right of termination

Where a contract between plaintiff lessee and defendant sublessee provided that both could terminate upon 90 days notice, but, upon notice of termination by lessee, sublessee could elect to occupy the entire premises and thereafter neither party could terminate the lease, and where the contract provided sublessee was given the option to occupy the entire premises, which was independent of any prior notice of termination by lessee, sublessee in exercising this option did not forfeit the general right of termination given to both parties.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 16 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 14 March 1975.

Plaintiff instituted this action seeking to recover damages for anticipatory breach of a sublease agreement by defendant.

Aydin Corporation is the lessee, under a Master Lease, of certain property located in Wake County. On 16 June 1972, Aydin, with the approval of its lessor, subleased to International Telephone & Telegraph Corporation (ITT) a portion of the premises. The sublease contained the following pertinent provisions:

"2. This sublease shall be for a term of approximately 111½ months (subject to the renewal provisions of the Master Lease) commencing on the 16th day of June, 1972

and terminating on the 30th day of August, 1981, or on such earlier date upon which said term may expire or be cancelled or terminated pursuant to any of the provisions of this Sublease. Either party may terminate this Sublease at any time after June 16, 1973 upon ninety (90) days prior written notice, except as hereinafter provided.

In the event the Landlord shall give any such termination notice, such notice shall be deemed null and void if Tenant, within sixty (60) days after the date of receipt of such notice, shall exercise its option, in accordance with the terms of this Sublease, to sublease the remaining portion of the premises described in the Master Lease, or shall exercise the option, in accordance with the terms of the Master Lease, to purchase said entire premises described in the Master Lease under numbered paragraph 18 thereof. If Tenant shall exercise either of said options, Tenant shall also pay to Landlord the additional rent provided in numbered paragraph 6 of this Sublease for the remaining portion of the premises described in the Master Lease, which additional rent shall be payable from the date the Landlord delivers possession of such remaining portion of the premises to the Tenant, subject to subleases, if any. Rent under any sublease existing at that time shall be apportioned between Landlord and Tenant. The parties hereto agree that, on and after the date of any such election by the Tenant, neither the Landlord nor the Tenant shall thereafter have any right to terminate this Sublease upon the aforesaid ninety (90) days prior written notice.

. . . .

6. Subject to any prior tenancy created where Tenant did not exercise its right of first refusal as set forth in numbered paragraph 5 of this Sublease, Tenant shall have the option at any time of subleasing the entire remainder (including any portion thereof which may then be sublet to another tenant) of the premises demised by the Master Lease on the same terms and conditions set forth in this Sublease, except that the rent for such entire remainder shall be $13,030.40 annually. If Tenant shall exercise this option, Landlord shall assign to Tenant any sublease of such remainder, or any portion thereof, of the premises demised by the Master Lease."

On 16 November 1972, ITT exercised its option to sublease the remainder of the premises. On 14 February 1974, ITT notified Aydin that it was terminating the sublease, effective 90 days later. Aydin then brought suit, and defendant ITT moved to dismiss the complaint for failure to state a claim for relief. From the order granting defendant's motion, plaintiff appealed to this Court.

Smith, Anderson, Blount & Mitchell, by Michael E. Weddington and James D. Blount, Jr., for plaintiff appellant.

Clark, Tanner & Williams, by David M. Clark and P. Trevor Sharp, for defendant appellee.

ARNOLD, Judge.

The sole question presented by this appeal is whether, on the basis of the complaint and attached sublease, the plaintiff has stated a claim upon which the trial court can grant relief. G.S. 1A-1, Rule 12(b)(6). *See Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). The entire contract must be given meaning and provisions in apparent conflict must be reconciled if possible. *Dixie Container Corp. v. Dale,* 273 N.C. 624, 160 S.E. 2d 708 (1968); *Bank v. Insurance Co.,* 265 N.C. 86, 143 S.E. 2d 270 (1965). *See also* 17 Am. Jur. 2d, Contracts, §§ 258, 267; 2 Strong, N. C. Index 2d, Contracts § 12, pp. 315-16. Construing the sublease in accordance with these general principles of contract construction, we are of the opinion that the court was correct in dismissing the complaint.

Under paragraph 2, both the lessee and the sublessee are given the right to terminate upon 90 days notice. The single exception to this right arises when the lessee has given notice of termination. Then the sublessee may elect to occupy the entire premises, and thereafter neither party may terminate the sublease. Paragraph 2 further provides that "on and after the date of any such election" neither party shall have the right to terminate. The words "any such election" refer only to the election available to the sublessee in the event the lessee gives notice of termination: the election to occupy all rather than none of the leased premises.

Under paragraph 6, the sublessee is given an option to occupy the entire premises which is independent of any prior notice of termination by the lessee. Having exercised this option,

the sublessee has not forfeited the general right of termination given to both parties in paragraph 2. Thus, from a reading of the contract, which is made part of the complaint, it is clear that defendant sublessee was within its rights in terminating the sublease.

The order of the trial court is

Affirmed.

Judges BRITT and MORRIS concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF THE ESTATE OF WILLIAM STAFFORD FOSTER, SR., PETITIONER v. HAZEL HOWARD FOSTER; WILLIAM STAFFORD FOSTER, JR.; SUSAN GAYLE FOSTER; WILLIAM STAFFORD FOSTER III; MARGARET JOAN FOSTER YOUNG; LAURA LATANE STEVENS; PAUL STEVENS II; MARTHA JEAN FOSTER NUCKLES; RONALD CLIFTON NUCKLES, JR.; ELIZABETH ANN NUCKLES; DAVID ALLEN NUCKLES; MARTHA JEAN NUCKLES; THE UNBORN ISSUE OF ANY OF THE ABOVE NAMED PERSONS OTHER THAN HAZEL HOWARD FOSTER; THE GOVERNING BODY OF THE DAVIS STREET METHODIST CHURCH; THE TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY; AND STEVENS COLLEGE, COLUMBIA, MISSOURI, RESPONDENTS

No. 7415SC978

(Filed 16 April 1975)

Trusts § 10; Wills § 60— renunciation of trust benefits — acceleration of distribution

Where testator's will established a marital deduction trust and a residuary trust, authorized trustee to make expenditures from the residuary trust income and principal for emergencies of the widow, required the residuary trust estate to be divided into shares for his children as of the date of testator's death, and provided for distribution of the residuary trust principal after the widow's death by payment of portions of each child's share to such child when it attained the ages of 35, 40 and 45, the provisions for the widow in the residuary trust were solely for her benefit and were not intended as another method of delaying the time when the children could take free of the trust, and the widow could properly renounce the gift in the residuary trust and accelerate distribution of the residuary trust principal to the children.

Bank v. Foster

APPEAL by respondent, guardian ad litem for minor and unborn issue of William Stafford Foster, Jr., Margaret Joan Foster Young and Martha Jean Foster Nuckles from *Wells, Judge.* Judgment entered 14 August 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 February 1975.

This proceeding was started by the executor of the will of William Stafford Foster, Sr. under the Declaratory Judgment Act to resolve questions that had arisen concerning interpretation of the will and administration of the estate.

Pertinent stipulations are as follows:

"III. Testator left a substantial estate (total gross estate of $3,267,831.22 as per United States Estate Tax Return Exhibit) to be administered in accordance with his will, which established a 'marital deduction trust' and a 'residuary trust' after certain specific gifts and bequests and payment of administration expenses.

IV. The first of these trusts, as set forth in Paragraph VII of decedent's will, was titled the 'marital trust,' and was created for the maintenance and support of Hazel Howard Foster, widow of the testator. Pursuant to the provisions of this trust, the trustee was to make periodic payments of the trust income to her. Furthermore, the trustee was empowered to make payments from the principal of the trust as it determined necessary in its discretion for the health, maintenance and support of testator's wife; and Hazel Howard Foster was given the absolute non-cumulative right each year to draw not more than five thousand dollars from the principal of this trust. In addition, she was granted during her life 'the power to appoint or give to or for the benefit of our heirs so much of the corpus of the marital trust as in her sole discretion she may direct. . . ' In the last provision of the 'marital trust,' the widow was granted the 'general power of appointment' over this trust principal, which was to be exercised at the time of her death; however, if she failed to effectively exercise such power, in whole or in part, the part not disposed of by said power was to pass as a part of the remainder of William S. Foster's Residuary Estate and be disposed of in accordance with the provisions of Article IX of his will, as if he had died on the date of his wife's death.

V. The second trust established by the will, as designated in paragraph IX, was referred to as 'residuary trust'. It is the provisions of this trust with which the specific issues before the court primarily relate.

VI. In Paragraph IX of decedent's will, the trustee was authorized, during the continuance of testator's wife's life, to use so much of the income and principal of the trust estate as in its (trustee's) absolute discretion was necessary to provide for the education, support and maintenance of such of his issue who survived him, after taking into consideration such issues' other means of support and sources of income. *He further provided that the trustee was authorized, in its discretion, to make expenditures from the income or principal of the Residuary Trust Estate in order to take care of any emergency or emergencies affecting the life, health or reputation of his wife or any of his issue before the wife's death.* (Emphasis added.)

VII. The terms and provisions of Article X of the will relating to the 'residuary trust' are as follows:

> 'Effective as of my death, the residuary trust estate or [sic] my estate, shall be divided into as many shares as there are children of myself then surviving, plus a share for the issue then surviving of each deceased child, all such shares to be equal and to be held and disposed of as follows:
>
> (a) I give to each of my children who is 45 years old, or older, at the effective division date (defined later in this Article as 'the date of my death or the death of my wife, whichever is last'), one share.'

VIII. As to his children under 45 years of age at the effective division date, the trustee was given one share for such child, to use so much of the income and principal as it (trustee) considered necessary for support and maintenance of such child, after considering such child's other means of support and sources of income. The principal of such child's share was to be delivered to that child as follows: one-third at age 35, one-half of the balance at age 40, and the balance at age 45. If any of his children died before the 'said effective division date' leaving issue surviving at 'said effective division date,' one share was given to the issue of each such deceased child, each such share to be

divided, *per stirpes,* among such issue of such deceased child.

IX. As to any of his children not 45 at 'said effective division date,' who died after said 'effective date' but before that child's trust was terminated, that child's trust share was to be divided to his surviving issue, but if none of his issue survive, his trust share was to be divided in equal shares, *per stirpes,* among testator's other surviving children and the surviving issue of any deceased child subject to the trust.

X. As to any grandchildren under the age of 21 who should take by virtue of any provision of this trust, the trustee was to hold that share until such issue attained age 21, using so much of the income and principal as, in the trustee's discretion, was necessary for such issue's support, maintenance and education, after taking into consideration such issue's other means of support and sources of income.

XI. The testator further provided in Article X of his will that if all his children and their issue should have died before the 'effective division date,' the assets of the residuary trust were to be distributed to certain charitable institutions.

XII. The widow, Hazel Howard Foster, signed an agreement dated May 19, 1972, to which William Stafford Foster, Jr., Margaret Joan Foster Young, Martha Jean Foster Nuckles and the petitioner, First Union National Bank of North Carolina, were parties. It is alleged that Mrs. Foster by this document purports to waive or renounce all of her interest in the residuary trust. The three children of the testator, each having attained age 40, have called upon the executor to distribute to them two-thirds of their respective alleged interest in the residuary trust principal."

The following paragraph appears in the agreement signed by the widow:

" 'Mrs. Foster hereby waives any right, title, property and interest which she may have in and to the principal and income of the residuary trust or trusts established under paragraph IX of the Will of W. S. Foster, Sr. for the

benefit of his children to the end that she shall retain no right thereunder which would in anywise delay distribution thereof to said children if otherwise authorized by law.' "

All of testator's three children are now living and are over 40. He is also survived by his widow and several grandchildren.

In essence, the purpose of the action is to determine whether the widow's renunciation was effective, and if so, whether the children can take two-thirds of their shares now or must wait until the death of the widow. The court made extensive findings of fact and conclusions of law, the upshot of which is that testator's children can take two-thirds of their shares of the trust immediately.

The guardian ad litem for the grandchildren, born and unborn, appealed.

Allen, Allen & Bateman, by Louis C. Allen, Jr., and J. Kent Washburn, for petitioner appellee.

Norman B. Smith, for respondent appellees Margaret Joan Foster Young and Martha Jean Foster Nuckles, and Smith, Moore, Smith, Schell & Hunter, by Ben F. Tennille, for respondent appellee William Stafford Foster, Jr.

Sanders, Holt, Spencer & Longest, by Frank A. Longest, Jr., for respondent appellant.

VAUGHN, Judge.

Since few wills are alike, neither further reproduction here of the lengthy document in question nor a recital of the familiar rules of construction would provide substantial guidance in future cases.

It appears testator intended that each child's share of the "residuary trust" should vest at testator's death with only the right to distribution and full enjoyment being postponed until their attainment of ages 35, 40 and 45.

The question seems to be whether the provisions in the "residuary trust" for the widow were solely for her benefit or were also intended to be another method of delaying the time when the children could take free of the trust. The latter possibility is highly unlikely in view of the uncertainty of how long

the widow, or anyone else, might live and the certainty of the method which testator expressly employed to delay distribution until the children attained the specified ages. The provisions were solely for the benefit of the widow.

The provisions for the widow in the "residuary trust" constitute a gift entirely separate from that given her under the "marital trust." The widow could properly renounce or decline the gift in the "residuary trust" and the document she executed is sufficient for that purpose. Consideration of the entire will leads us to the conclusion that acceleration of the distribution of the children's interest in the "residuary trust" will not be contrary to the intentions of the testator. The judgment is affirmed.

Affirmed.

Judges MARTIN and ARNOLD concur.

EDWARD C. HUDSON AND WIFE, NELLIE L. HUDSON v. BOARD OF TRANSPORTATION (SUBSTITUTED DEFENDANT FOR STATE HIGHWAY COMMISSION)

No. 758SC42

(Filed 16 April 1975)

Eminent Domain § 2; Highways § 5— highway interchange ramp — denial of access — no "taking"

The trial court did not err in concluding (1) that plaintiffs were not entitled to compensation on the ground that they were denied direct access to a ramp adjoining their property which connected two major highways and (2) that the erection of a fence by the defendant between the ramp and plaintiffs' property was not an additional "taking" within the meaning of the law.

APPEAL by plaintiffs from *Browning, Judge.* Judgment entered 4 November 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 19 March 1975.

The facts of this case are not in dispute. In 1955 John M., Ella, Earl, and Sarah E. Davis were the owners of a tract of land in Wayne County. On 16 August 1955 they granted defendant a right-of-way over a portion of this tract. The right-of-way agreement was recorded in the office of the Wayne County

Register of Deeds, together with a map of the property. The map showed a road to be constructed on the right-of-way connecting N. C. Highway 102 (now U. S. Highway 13) and U. S. Highway 70, and the road was marked "PROP. RAMP", meaning proposed ramp. In 1960 John M. Davis subdivided the remaining portion of his property located east of the proposed ramp. Lots 11 and 12 of the subdivision were sold to Arnold and Dorothy Holloman and sold by the Hollomans to plaintiffs in 1963. Lots 11 and 12 were immediately adjacent to the right-of-way over which a ramp was constructed.

Plaintiffs offered evidence tending to show that in 1963 their property adjoined a two-way "road" that ran alongside of U. S. Highway 70. Cars could reach their property by way of this road from either Highway 70 or Highway 13. The road intersected with Highway 70 about a half a mile to the south and east of their property and intersected with Highway 13 about 140 feet to the north and west of the property.

In 1973 the ramp was made a one-way ramp and a fence was built between the ramp and Lots 11 and 12, making plaintiff's property inaccessible. Plaintiffs brought this proceeding seeking damages for the taking of their right of access to the ramp. After a hearing, the trial court made findings and conclusions and entered a judgment for defendant declaring that plaintiffs had no right of access to the ramp and were not entitled to any compensation because of the defendant's erection of a fence along the right-of-way between the ramp and plaintiffs' property.

Plaintiffs appealed.

Dees, Dees, Smith, Powell and Jarrett by William L. Powell, Jr., and William A. Dees, Jr., for plaintiff appellants.

Attorney General Edmisten by Assistant Attorney General Claude W. Harris and Associate Attorney Robert W. Kaylor for defendant appellee.

HEDRICK, Judge.

By their one assignment of error, plaintiffs contend the court erred in concluding that they have no direct access to the "ramp" constructed on the right-of-way abutting their property.

Since plaintiffs' two lots were a part of a larger undivided tract of land when John M. Davis and his wife granted the right-of-way to the defendant over which the ramp was constructed, plaintiffs' rights of access to the ramp, if any, obviously are controlled by the right-of-way agreement. Recorded with the right-of-way agreement is plaintiffs' Exhibit A, which is a map showing a proposed ramp ("PROP. RAMP") extending from the northern side of U. S. Highway 70 (a proposed four-lane highway) to the eastern side of N. C. 102 (now U. S. Highway 13). Exhibit A also shows a proposed service road ("PROP. SERV. RD.") on the north side of and parallel with U. S. Highway 70. This exhibit together with plaintiffs' Exhibit 3 (the map of the subdivision of the John M. Davis property) indicates that the proposed service road would intersect with the proposed ramp, approximately 134 feet south of plaintiffs' property. Exhibit 3 indicates that plaintiffs' property has a frontage of 155 feet along the eastern side of the proposed ramp and is separated on the north from U. S. Highway 13 approximately 140 feet by a lot owned by Earl Davis. Plaintiffs' property is separated from the proposed service road on the south by Lot 13 and a "grave plot". Plaintiffs' Exhibit 4 ("Right-of-Way Plans, State Highway Commission") filed in Wayne County Register of Deeds Office 4 June 1974, indicates that the proposed service road has been rerouted in such a manner that it does not intersect with the proposed ramp but runs in a general northerly direction through the Davis subdivision.

The pertinent provision of the right-of-way agreement (Exhibit 2) is as follows:

> "It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right-of-way except by way of ramps constructed or to be constructed at intersection Sta. 253+85."

In holding as a matter of law under an essentially identical provision in a right-of-way agreement that an adjoining property owner is not entitled to direct access to a ramp, Justice Moore, speaking for our Supreme Court, *Abdalla v. Highway Commission,* 261 N.C. 114, 120, 134 S.E. 2d 81, 85 (1964), said:

> It [a ramp] is not established for the accommodation of abutting landowners; it is for the interchange of traffic between two heavily travelled highways (one overpassing the

other). It is indeed the junction or joinder of the two highways. For all practical purposes it is a part of the main highway within the meaning of the word "highway" as set out in the "Right of Way Agreement."

Apparently recognizing that the holding in *Abdalla,* supra, represented a formidable obstacle to their claim, plaintiffs argue that when the right-of-way agreement was executed in 1955, the parties intended that the ramp to be constructed on the right-of-way should function not only as a ramp but also as a service road and that as such, any butting property owner would be entitled to unlimited direct access.

Plaintiffs' interpretation of the intention of the parties, based at least in part on the conduct of the parties after the execution of the agreement, disregards the plain meaning of the agreement which, coupled with the map (Exhibit A), manifests defendant's intention to construct over the right-of-way acquired from John and Ella Davis a portion of a four-lane controlled access highway including a ramp connecting the two lanes reserved for west bound traffic on U. S. Highway 70 with U. S. Highway 13. Evidence that the plaintiffs and others were permitted by the defendant to use the proposed ramp and proposed service road for two-way traffic pending the completion of the entire project did not vest in plaintiffs or anyone else any rights not reserved by the grantors in the original agreement nor did it deprive the defendant of its rights to use the property for the purpose for which it was acquired. Thus, the trial court's conclusion that the plaintiffs are not entitled to additional compensation on the ground that they have been denied direct access to the ramp adjoining their property and that the erection of a fence by the defendant between the ramp and plaintiffs' property is not an additional "taking" within the meaning of the law is

Affirmed.

Judges BRITT and MARTIN concur.

THE EVERGREENS, INC., a/k/a EVERGREENS NURSING HOME v. GENERAL LINEN SERVICE, INC. AND RALEIGH LINEN SERVICE, INC.

No. 7418SC1066

(Filed 16 April 1975)

Contracts § 12— linen service — option for resale of linens — no obligation to resell

Where plaintiff and one defendant entered into a contract whereby defendant was to provide linen service for plaintiff, plaintiff was to sell the linens it owned to defendant, and plaintiff was to buy back all linen sold if the contract was terminated, such contract imposed no obligation on the other defendant, who had bought the first defendant's business, to sell linen to plaintiff, since the provision in question was included in the contract at the insistence of the first defendant, and the effect of the provision was to provide defendant with the option of requiring plaintiff to repurchase certain linens.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 17 October 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 March 1975.

This action was instituted to recover monetary damages for breach of contract and was heard by the court without a jury. The undisputed evidence, together with admissions in the pleadings, and stipulations, tended to show:

Prior to 29 July 1972, plaintiff owned the linens used in the operation of its nursing home. On that date it entered into a contract with defendant General Linen Service, Inc., (General) whereby General would furnish linen service to plaintiff at an agreed price. Paragraph 5 of the contract contained the following provision (General being referred to as the company and plaintiff as the customer):

> . . . The company agrees to purchase from the customer all usable linens at fifty percent (50%) of invoice price, and new linens at one hundred percent (100%) of invoice price. The company agrees to deduct from the customer's bill at the end of the first month fifty percent (50%) of the cost of linens, and fifty percent (50%) at the end of the second month's bill. *If this contract is terminated by either the the customer of* [*sic*] *the company the customer will buy back all linen purchased from them on the same basis that the company bought from the customer.* . . . (Emphasis added.)

Subsequent to the execution of the contract, plaintiff delivered to General a considerable inventory of sheets, pillowcases and other "linens". On 1 August 1972, defendant Raleigh Linen Service, Inc., (Raleigh Linen) purchased the assets of General and assumed its obligations. At the instance of plaintiff, the contract was terminated as of 8 July 1973.

Thereafter, plaintiff demanded that defendant Raleigh Linen resell to plaintiff a quantity of linen equal to that plaintiff sold to General and on the same price basis. Plaintiff based its demand on the provisions of Paragraph 5 of the contract quoted (with emphasis) above. Raleigh Linen rejected the demand and plaintiff proceeded to purchase the linens on the open market. Plaintiff contends it was damaged $5,559.75 by the breach of contract.

At trial, C. J. Blanchard, Jr., an employee of plaintiff, testified in pertinent part as follows:

> As to what was the purpose of our selling the linens to General Linen Service, this is sort of a routine type of thing. When you go from owning your linens to going to a a rental type of agreement, the nursing home or hospital or whatever type of facility it is that has these things inventoried and there is no purpose in them sitting there in the inventory, nor being used, so it's a routine type of thing, this type of provision in the contract. *At the time we were negotiating the contract, Mr. Henry Reece, the gentleman that signed the contract on behalf of the previous company, wanted to insure that they would not be stuck with linens that they could not use at the end of the contract and it was at his insistence that this was in, this repurchase clause was put in.* (Emphasis ours.)

At the conclusion of the evidence the court made findings of fact and concluded that the agreement between plaintiff and General imposed no duty upon defendants to sell linens to plaintiff. From the entry of judgment dismissing its action, plaintiff appealed.

Younce, Wall and Suggs, by Robert V. Suggs and Peter F. Chastain, for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by Michael E. Weddington, for defendant appellee.

BRITT, Judge.

Plaintiff contends that the trial court erred in concluding as a matter of law that the agreement between plaintiff and defendant General imposed no duty upon the defendants to sell certain linens to the plaintiff. We agree with the trial court.

In *Lane v. Scarborough,* 284 N.C. 407, 409-10, 200 S.E. 2d 622 (1973), we find:

> . . . Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution. (Citations.)
>
> "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. (Citation.) . . . "

In the case at bar, the language in the contract is that the " . . . customer (plaintiff) will buy back all linen purchased. . . . " There is no language in the contract imposing a duty on the company (defendants) to sell the linen back to the customer. Plaintiff's employee, as its witness, explained that the provision in question was included in the contract at the insistence of defendant General. The effect of the provision was to provide General with the *option* of requiring plaintiff to repurchase certain linens.

In 1A Corbin, Contracts § 266, at 544-46 (1963), we find:

> It is very common, in contracts for the purchase and sale of corporate shares or other property, for the purchaser to be given an option to sell it back to the seller or for the seller to be given an option to buy it back from the purchaser. Where the option is to sell back, consideration for the seller's promise to repurchase at the buyer's option is the price paid by the buyer; that price is the agreed exchange for two things—the property transferred and the power to accept the standing offer of the seller. . . .

See 1 Williston, Contracts §§ 61A-D (Jaeger ed. 1957).

In *Trogden v. Williams,* 144 N.C. 192, 199, 56 S.E. 865 (1907), in defining "option", the court said:

> . . . The term is well defined in the case of *Black v. Maddox,* 104 Ga., 157, as "the obligation by which one binds himself

> to sell [or buy] and leaves it discretionary with the other party to buy [or sell], which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy [or sell] the property at a fixed price within a certain time." The agreement is, of course, invalid unless supported by a valuable consideration. . . .

Accord, Douglass v. Brooks, 242 N.C. 178, 87 S.E. 2d 258 (1955); *Winders v. Kenan,* 161 N.C. 628, 77 S.E. 687 (1913); *Rogers v. Burr,* 105 Ga. 432, 31 S.E. 438 (1898).

We conclude that the contract imposed no obligation on defendants to sell linen to plaintiff.

In their other assignment of error, plaintiff contends the trial judge erred in finding as a fact that linens sold to defendants were not physically in existence at the time plaintiff requested defendant to sell certain linens. Assuming that the court did err, in view of our conclusion above stated, plaintiff is not prejudiced by the finding.

Affirmed.

Judges MORRIS and ARNOLD concur.

IN RE: VINCENT LEGRANDE CARTER

No. 7415DC888

(Filed 16 April 1975)

1. **Appeal and Error § 9— commitment to mental health care facility — appeal from order — mootness**

Though respondent in this proceeding for involuntary commitment to a mental health facility was unconditionally discharged some five months before her appeal from the order committing her to a hospital was heard in the Court of Appeals, her appeal was not moot since potentially adverse collateral consequences might continue so long as the judgment of involuntary commitment remained unchallenged.

2. **Insane Persons § 1— commitment to mental health care facility — findings required**

Statutory mandate requires as a condition to a valid commitment order that the district court find two distinct facts: first, that the respondent is mentally ill or inebriate as those words are defined in G.S. 122-36; and second, that the respondent is "imminently dangerous to himself or others." G.S. 122-58.1, .2.

In re Carter

3. Insane Persons § 1— failure to find respondent dangerous to herself or danger imminent — commitment improper

Where there was no finding by the trial court that respondent was dangerous to herself as defined in G.S. 122-58.2(1) or that the danger was imminent, it was error for the court to enter an order that respondent be committed to a mental health care facility.

APPEAL by respondent from *Peele, Judge.* Judgment entered 8 July 1974 in District Court, ORANGE County. Heard in the Court of Appeals 16 January 1975.

This is a proceeding for involuntary commitment to a mental health facility pursuant to Chap. 122, Article 5A of the General Statutes.

On 28 June 1974 respondent's mother submitted a sworn petition to the District Court alleging that her daughter, Vincent LeGrande Carter, respondent herein, was mentally ill and imminently dangerous to herself or others. Pursuant to the petitioner's request, respondent was taken into custody and examined 28 June 1974 at John Umstead Hospital, Butner, by a medical doctor who recommended that respondent be hospitalized.

On 8 July 1974 a hearing was held on the petition. After receiving evidence from the petitioner and respondent, the district court made findings of fact and upon these findings ordered that respondent be committed to Umstead Hospital for a period not to exceed 28 days.

Notice of appeal was given in open court. Respondent was unconditionally discharged from Umstead Hospital on 2 August 1974 upon the certification of the medical director that she was no longer in need of hospitalization in the facility.

Attorney General Edmisten by Assistant Attorney General Parks H. Icenhour for the petitioner appellee.

Jerry P. Davenport for respondent appellant.

PARKER, Judge.

[1] Though respondent has been released, her appeal is not moot. So long as the judgment of involuntary commitment remains unchallenged, potentially adverse collateral consequences may continue. For example, the record discloses a controversy between respondent and her husband over custody of their child,

and the judgment here appealed from may well affect the determination of that controversy. Furthermore, the statute expressly provides that appeal may be had from a judgment of involuntary commitment in the district court to this court, as in civil cases. G.S. 122-58.9. Since the statute also directs that the initial period of commitment may not exceed 90 days, G.S. 122-58.8(b), there would be little reason to provide a right of appeal if the appeal must be considered moot solely because the period of commitment expires before the appeal can be heard and determined in this court. Accordingly, we consider this appeal on its merits.

Chapter 122, Article 5A of the General Statutes, which became effective 12 June 1974, provides:

> "§ 122-58.1. *Declaration of policy.*—It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others . . . . "
>
> "§ 122-58.2 *Definitions.*—As used in this Article:
>
> "(1) The phrase 'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter;
>
> "(2) The words 'inebriety' and 'mental illness' have the same meaning as they are given in G.S. 122-36. . . . "

The statute provides for a hearing in the district court upon a petition for involuntary commitment. G.S. 122-58.7. Subsection (i) of that section is as follows:

> G.S. 122-58.7(i) : "To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and imminently dangerous to himself or others. The court shall record the facts which support its findings."

[2] Thus, statutory mandate requires as a condition to a valid commitment order that the district court find two distinct facts: first, that the respondent is mentally ill or inebriate, as those words are defined in G.S. 122-36; and second, that the respondent is "imminently dangerous to himself or others." The application of this dual requirement is the sole question on this appeal.

In the order appealed from, findings of fact 8, 9 and 10 are as follows:

"8. She [the respondent] is mentally ill.

"9. She is unable to take care of her personal needs for food, clothing and shelter by reason of mental illness aggravated by overdose of LSD and other drugs, violent temper, serious lack of insight and insufficient appreciation of the needs of others, and suspiciousness;

"10. Except to the extent indicated in finding No. 9, she is not of imminent danger to herself or others; that is, not imminently dangerous as to commission of physical violence upon herself or others."

[3] Finding of fact No. 8 is not challenged and satisfies the first of the two requirements of the statute. There is, however, no finding sufficient to satisfy the second requirement. If Finding No. 9 be considered sufficient to show a determination by the court that respondent was dangerous to herself as defined in G.S. 122-58.2(1), yet there was no finding that the danger was imminent. Furthermore, the evidence in this case would not have supported such a finding.

For lack of all the findings required by statute for its validity, the judgment appealed from is

Reversed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES EARNEST KEARNS

No. 7520SC43

(Filed 16 April 1975)

1. Criminal Law § 75— confession — consideration in entirety

A confession should be considered in its entirety, and if the State introduces into evidence only part of an alleged confession, a defendant is entitled to introduce the remainder of what was said to and by him, including any exculpatory statements which would bear upon the matter in controversy; furthermore, where an accused has been interrupted or otherwise prevented from completing his confession, the confession is not admissible in evidence.

2. **Criminal Law § 75— testimony concerning confession — failure of witness to hear or remember entire confession**

A witness is not incompetent to testify as to an alleged confession merely because he failed to hear or remember the entire conversation containing the confession; rather, the witness is generally allowed to testify as to what he heard, and the fact that he did not hear the entire conversation or remember all that was said does not render his testimony inadmissible.

3. **Criminal Law § 75— confession — witness out of room for five minutes — competency of testimony**

The trial court did not err in allowing an SBI agent to testify concerning a confession made by defendant, though the agent was out of the room for approximately five minutes while defendant continued his confession.

APPEAL by defendant from *Chess, Judge.* Judgment entered 29 October 1974 in Superior Court, ANSON County. Heard in the Court of Appeals 19 March 1975.

This is a criminal prosecution wherein the defendant, James Earnest Kearns, was charged in a bill of indictment, proper in form, with armed robbery. Defendant pleaded not guilty and the State offered evidence tending to show that at approximately 9:30 p.m. on 25 July 1974 the defendant and a companion, who was armed with a pistol, robbed the Deese Variety Store in Anson County of about $1,100.00. Defendant testified in his own behalf that he did not participate in the robbery and that at the time it was committed he was in Winston-Salem.

The jury returned a verdict of guilty and the trial court sentenced the defendant to a prison term of not less than ten (10) nor more than fifteen (15) years. Defendant appealed.

Attorney General Edmisten by Associate Attorney David S. Crump for the State.

Joe P. McCollum, Jr., for defendant appellant.

HEDRICK, Judge.

The sole question argued by defendant on this appeal is whether the trial court erred in allowing an SBI agent to testify for the State as to an alleged confession made by the defendant in view of the fact that the agent was not present during the entire interrogation during which the defendant purportedly confessed to the crime charged.

Upon defendant's objection the trial court conducted a voir dire hearing in the absence of the jury to determine the admissibility of any statements made by the defendant to Special SBI Agent Ronald Hawley. Hawley testified on voir dire that he and another SBI Agent, Jack Richardson, questioned the defendant on 27 July 1974 with respect to the robbery of the Deese Variety Store. After he was advised of his constitutional rights, the defendant signed a "waiver of rights" form and agreed to answer the agents' questions. Hawley and Richardson thereafter interrogated the defendant for twenty or thirty minutes. At some point during the interview, Agent Hawley went out of the room for approximately five minutes. During his absence, Agent Richardson continued to talk with the defendant. Upon Hawley's return, the two agents questioned the defendant for several minutes until the defendant had completed his statement. Hawley further testified that Agent Richardson was in Connecticut in connection with another case and was therefore unable to be present at the defendant's trial. Defendant offered no evidence on voir dire. At the conclusion of the voir dire examination, the court made findings of fact and concluded that the defendant's statement was "made freely, voluntarily and understandingly . . . . " The court then allowed Agent Hawley to testify before the jury as to the defendant's alleged confession.

[1] A confession should be considered in its entirety; and if the State introduces into evidence only part of an alleged confession, a defendant is entitled to introduce the remainder of what was said to and by him, including any exculpatory statements which would bear upon the matter in controversy. *State v. Marsh,* 234 N.C. 101, 66 S.E. 2d 684 (1951); *State v. Edwards,* 211 N.C. 555, 191 S.E. 1 (1937); *State v. Barnwell,* 17 N.C. App. 299, 194 S.E. 2d 63 (1973); 29 Am. Jur. 2d Evidence § 535 (1967). Furthermore, where an accused has been interrupted or otherwise prevented from completing his confession, the confession is not admissible into evidence. Annot., 2 A.L.R. 1017, 1037 (1919); 29 Am. Jur. 2d, supra.

[2] It is well-settled, however, that a witness is not incompetent to testify as to an alleged confession merely because he failed to hear or remember the entire conversation containing the confession. In such event the witness is generally allowed to testify as to what he heard and the fact that he did not hear the entire conversation or remember all that was said does not render his testimony inadmissible. *State v. Pratt,* 88 N.C. 639

(1883); 2 Stansbury, N. C. Evidence § 187 (Brandis Revision 1973); Annot., 2 A.L.R. 1017, 1030 (1919); 29 Am. Jur. 2d Evidence § 593 (1967).

[3] In the instant case, Agent Hawley was out of the room for only five minutes during the interrogation of the defendant. Hawley was able to remember what the defendant had said while in his presence and the statements which he attributed to the defendant amount to a full and complete confession of the crime charged. The agents in no way prevented the defendant from completing his statement and he was perfectly free to offer evidence both on voir dire and before the jury as to what transpired during Hawley's absence, including any exculpatory statements he may have made to Agent Richardson. The defendant, however, neither offered any evidence on voir dire nor attempted to supplement Agent Hawley's testimony when he testified in his own behalf before the jury. We are of the opinion and so hold that the trial court did not err in allowing Agent Hawley to testify as to the alleged confession made by the defendant in his presence on 27 July 1974.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

JANINE M. JOHNSON v. DAVID A. JOHNSON

No. 7410DC1049

(Filed 16 April 1975)

Divorce and Alimony § 21— deed of trust to secure temporary alimony payments — right of wife to foreclosure sale proceeds

A court order requiring defendant to secure the payment of temporary alimony by means of a deed of trust did not give to plaintiff a fixed or permanent interest as *cestui que trust* or any right to the entire proceeds of a foreclosure sale under the deed of trust; therefore, it was not error for the trial court to direct that part of the foreclosure sale proceeds pay a fee to defendant's attorney and part pay a judgment lien.

APPEAL by plaintiff from *Winborne, Judge.* Judgment entered 23 August 1974 in District Court, WAKE County. Heard in the Court of Appeals 20 February 1975.

The subject of this appeal arises out of a court ordered disposition of proceeds following a foreclosure sale. In an order dated 29 January 1968, the Wake County Superior Court, upon motion of the plaintiff, ordered the defendant to execute a deed of trust to Blanchard as Trustee for the plaintiff on two parcels of land in Wake County, the purpose being to secure defendant's compliance with court orders relating *inter alia* to alimony *pendente lite*. A deed of trust was so executed on 26 February 1970. On 22 February 1972, an order was filed awarding the plaintiff permanent alimony, an absolute divorce having been granted in 1971, and no reference was made to the deed of trust.

On 1 June 1973, Judge Winborne filed an order pursuant to plaintiff's motion seeking arrearages in alimony and tax payments which the defendant had caused by his failure to abide by prior orders of the court. In this order, the trustee under the deed of trust was directed to proceed with foreclosure on one of the two parcels of land and " . . . to pay the Clerk of Court the amounts by which defendant had been adjudged indebted to plaintiff by prior orders of the Court, and to retain any balance of such proceeds pending further orders of the Court; . . . " It was further ordered that " . . . from the proceeds of the sale . . . (which sale will be subject to a first and prior deed of trust . . . and also be subject to any prior liens, assessments, unpaid taxes and encumbrances), the Trustee distribute $5,444.79 to plaintiff in payment of the arrearages found and computed . . . and $700.00 to plaintiff's attorneys as a reasonable fee for services rendered to date to plaintiff."

Then on 28 August 1974, after the sale had been completed and the proceeds paid into the Clerk of Court, Judge Winborne directed the Clerk to pay $9,600.00 in alimony arrearages to Janine Johnson, a fee to her attorney, and tax liens. It was also ordered that the Clerk pay $6,516.05 to defendant's attorney for his services from 27 August 1970 through 19 July 1974, $4,000.00 to satisfy a judgment, half of the remainder to a trustee for plaintiff to secure future alimony payments, and the other half to the defendant. Plaintiff excepted to the provision in the order for payment of the fee to defendant's attorney and for payment of the judgment lien.

Deborah G. Mailman for the plaintiff.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for the defendant.

CLARK, Judge.

In the original order of the superior court in 1968, it was expressly avowed that the purpose for the execution of the deed of trust was to secure, *inter alia,* alimony *pendente lite* payments. When the district court in June 1973 ordered foreclosure on one of the two parcels secured by the deed of trust, it did so with the express purpose of computing " . . . *arrearages* which defendant [had] caused . . . " by his failure to abide by the orders of the court. [Our emphasis.]

The court, in its order of 28 August 1974, computed these arrearages through August 1974, which arrearages obviously included amounts for permanent alimony. However, the defendant did not contest the payment of a part of the foreclosure proceeds to the plaintiff for permanent alimony arrearages on the grounds that the order awarding permanent alimony did not refer to the deed of trust as security for payments.

G.S. 50-16.7 provides that "The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a . . . deed of trust . . . . " and G.S. 50-16.9 provides that "An order . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . . . "

The court order requiring the defendant to secure the payment of temporary alimony by means of the deed of trust did not give to the plaintiff a fixed or permanent interest as *cestui que trust,* or any right to the entire proceeds of the foreclosure sale under the deed of trust; the orders simply provided a means of securing payment of alimony, and the court was not required to find a change of circumstances as a basis for ordering the payment of a part of the proceeds of foreclosure sale to satisfy a judgment lien against defendant or to pay the fee of defendant's attorney.

It is noted that the plaintiff made no objection to that portion of the order which divided equally the residuary proceeds between the defendant and the trustee for the plaintiff as security for future alimony payments. Nor did the defendant make any objection to any of the provisions of the order.

The order of the district court is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JIMBO OLSEN

No. 743SC1085

(Filed 16 April 1975)

1. **Criminal Law § 15; Jury § 7— pretrial publicity — motion for change of venue denied — challenges of jurors denied**

The trial court did not abuse its discretion in denying defendant's motion for a change of venue or in denying defendant's challenges of jurors for cause on the ground of unfavorable pretrial publicity where the newspaper articles complained of were not inflammatory or prejudicial and jurors stated that they could render a fair and impartial verdict even though they had read the articles.

2. **Criminal Law § 75— statements by defendant — no Miranda warnings — admissibility**

Testimony of an undercover agent concerning statements made to him by defendant were admissible in a prosecution for sale and possession with intent to sell amphetamines, though defendant had not been given *Miranda* warnings, since, at the time the statements were made, defendant was not in custody and no crime had been committed.

3. **Criminal Law § 42— admissibility of amphetamines — chain of custody established**

The trial court in a prosecution for sale of amphetamines did not err in admitting evidence with respect to tablets sold to an undercover agent, the containers in which they were kept, and their transportation to and from the SBI laboratory where officers who handled the drugs positively identified the exhibits and accounted for every link in the chain of possession.

APPEAL by defendant from *Copeland, Judge.* Judgment entered 12 September 1974 in Superior Court, CARTERET County. Heard in the Court of Appeals 13 March 1975.

Defendant was charged in separate bills of indictment with sale and delivery of amphetamines and possession with intent to manufacture, sell and deliver amphetamines, in violation of Schedule II of the North Carolina Controlled Substances Act. He pleaded not guilty and was tried before a jury.

The State's evidence tended to show that on the night of 26 January 1974, Rick Myers, an undercover agent for the Carteret County Sheriff's Department, went to the John Bar. There he approached defendant and asked him where he could get something "for the head." Defendant replied that there were "some meth tabs going around." Defendant then spoke to a man standing beside the juke box and told Myers to go into the

rest room. Defendant followed and handed Myers a small cellophane packet, containing approximately 100 white tablets, in exchange for $25.00. The tablets were turned over to an SBI chemist whose analysis revealed them to contain amphetamine.

Defendant offered no evidence. The trial court charged the jury on simple possession and sale and delivery of amphetamine. The jury found defendant guilty of both offenses. From judgment imposing a prison sentence, he appealed to this Court.

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

McCotter & Mayo, by Charles K. McCotter, Jr. and Hiram J. Mayo, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in denying his motion for change of venue and his challenges for cause on the ground of unfavorable pretrial publicity. Both of these matters are addressed to the sound discretion of the trial court, and its rulings on them are not reviewable absent a showing of abuse. *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967).

Defendant has submitted copies of newspaper articles about the closing of the John Bar and the prosecution of persons arrested there. We do not consider these articles to be inflammatory or prejudicial. The court, having advised defendant that he would be allowed to question prospective jurors about prejudice arising out of publicity, concluded that defendant could receive a fair trial in Carteret County. All the jurors then stated that they could render a fair and impartial verdict even though they had read the newspaper articles. We find here no abuse of discretion on the part of the trial court.

[2] Defendant next contends that the court committed error in admitting testimony of the undercover agent Rick Myers concerning statements made by defendant without his having been given the *Miranda* warnings. These warnings, of course, apply only to custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966); *State v. Fletcher,* 279 N.C. 85, 181 S.E. 2d 405 (1971). When defendant talked to Myers he was not in custody; no crime had been committed. His statements clearly were admissible.

[3] Defendant objects to the admission of evidence with respect to the tablets sold to agent Myers, the containers in which they were kept, and their transportation to and from the SBI laboratory. His contentions are without merit. *Compare State v. Jordan,* 14 N.C. App. 453, 188 S.E. 2d 701 (1972); *and State v. Bell,* 24 N.C. App. 430, 210 S.E. 2d 905 (1975). Officials who handled the drugs positively identified the exhibits and accounted for every link in the chain of possession. This evidence, along with Myers' testimony, was more than enough to take the case to the jury on every element of the offenses charged. *See State v. Splawn,* 23 N.C. App. 14, 208 S.E. 2d 242 (1974). *See generally* 5 Strong, N. C. Index 2d, Narcotics § 4, p. 726. Defendant's motion for a directed verdict of not guilty was properly denied.

Assignments of error relating to the charge and to the sentence imposed are too strained to merit discussion. Defendant has received a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. SPENCER LILLY

No. 7529SC48

(Filed 16 April 1975)

1. Larceny § 7— doctrine of possession of recently stolen property — sufficiency of evidence

Evidence was sufficient for the doctrine of possession of recently stolen property to apply in this prosecution for felonious larceny where such evidence tended to show that officers requested permission from defendant's brother to search the brother's apartment two days after the break-in and larceny were reported, the brother gave his permission and accompanied officers to the apartment, they found the stolen property in the apartment, the property had not been there when the brother left his apartment for work that morning, defendant was the only person other than the brother who had a key to the apartment, and on that same day defendant admitted that he had the stolen merchandise in his possession, and the trial court properly submitted the evidence to the jury.

2. Larceny § 7— evidence of felonious larceny insufficient — verdict of guilty of misdemeanor larceny

Where the jury acquitted defendant of felonious breaking and entering and the trial court failed to instruct the jury to fix the value of the property taken in order to determine whether the value was in excess of $200, the burden of proof as to value in excess of $200 being upon the State as an essential element of the crime of felonious larceny where defendant was not found guilty of felonious breaking and entering as a part of the same occurrence, the verdict must be treated as a verdict of guilty of misdemeanor larceny.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 8 November 1974 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 20 March 1975.

Defendant was charged with felonious breaking and entering and felonious larceny. Upon his pleas of not guilty to both charges, the jury returned a verdict of not guilty as to felonious breaking and entering and guilty as to felonious larceny. From judgment sentencing him to imprisonment for a term of five years, defendant appealed.

State's evidence tended to show that on 21 August 1974 Annie Mae Roberts Allen found that someone had broken into her home and taken a camera, four watches, five rings and some change; that on 23 August 1974, in connection with the investigation of the breaking and entering and larceny, police officers requested permission from Donald Lilly, defendant's brother, to search the brother's apartment; that defendant's brother gave the officers permission to search his apartment and accompanied them there; that the defendant's brother and the officers found the stolen property in the apartment; that the property had not been there when Donald Lilly left his apartment for work that morning; and that defendant was the only person other than Donald Lilly who had a key to the apartment.

Other evidence introduced by the State tended to show that on the morning of 23 August 1974 defendant was arrested on another charge, later given the *Miranda* warnings and then questioned concerning the breaking and entering of the Allen house and the larceny of her property; and that defendant admitted that he had the stolen merchandise in his possession, but denied that he had broken into the Allen house and taken the items.

Defendant offered no evidence.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

Robert L. Harris for defendant appellant.

MORRIS, Judge.

[1] Defendant has abandoned his first two assignments of error. His remaining assignment of error relates to the denial of his motions for nonsuit at the close of the State's evidence and at the close of all the evidence. The State relied entirely upon the doctrine of possession of recently stolen property to overcome defendant's motions for judgment as of nonsuit. Defendant first contends the evidence in this case is insufficient for the doctrine to apply. We disagree. As was stated in *State v. Foster,* 268 N.C. 480, 487, 151 S.E. 2d 62, 67 (1966),

> "[i]t 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. 52 C.J.S., Larceny, § 107; 32 Am. Jur., Larceny, § 140; 1 Wharton's Criminal Evidence, 12th Ed. by Anderson, Presumptions and Inferences, § 135. This Court said in *S. v. Harrington,* 176 N.C. 716, 96 S.E. 892: 'The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. "It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence." *S. v. Johnson,* 60 N.C. 237.' "

[2] Defendant next argues that his motions for nonsuit should have been granted because there is no evidence that the stolen property was worth more than $200, and without such evidence a conviction for felonious larceny cannot be sustained. The State admits that the defendant's conviction for felonious larceny cannot be sustained where, as here, the jury acquitted the defendant of felonious breaking and entering and the trial court failed to instruct the jury to fix the value of the property taken in order to determine whether the value was in excess of $200, the burden of proof as to value in excess of $200 being upon the State as an essential element of the crime of felonious larceny where defendant is not charged with or found guilty of felonious

breaking or entering as a part of the same occurrence. It is the State's contention, however, that the verdict in this case must be treated as a verdict of guilty of misdemeanor larceny, and the case remanded for resentencing. We agree. When faced with a similar problem in *State v. Jones,* 275 N.C. 432, 439, 168 S.E. 2d 380, 385 (1969), our Supreme Court made the following statement:

> "Our conclusion on this appeal is as follows: The jury having failed to find that the larceny of which defendant was convicted related to property of a value of more than two hundred dollars, the verdict must be considered a verdict of guilty of larceny of personal property of a value of two hundred dollars or less. This being a misdemeanor, the judgment imposed a sentence in excess of the legal maximum. Hence, although the verdict will not be disturbed, the judgment is vacated; and this decision will be certified to the Court of Appeals with direction to remand the case to the Superior Court of Guilford County for the pronouncement of a judgment herein as upon a verdict of guilty of misdemeanor-larceny."

On the basis of the foregoing authority, defendant's case is hereby remanded for entry of a sentence consistent with a verdict of guilty of misdemeanor larceny.

Remanded for resentencing.

Judges VAUGHN and CLARK concur.

OLIVE CORINNE REID AND HUSBAND, QUINTON REID; WILLIAM PUGH, JR., UNMARRIED; MILLICENT YVONNE P. MYERS AND HUSBAND, ROBERT H. MYERS v. RAYMOND MIDGETT

No. 741SC968

(Filed 16 April 1975)

1. Rules of Civil Procedure § 41— trial by judge without jury —motions for involuntary dismissal improper

The fact that the parties moved for involuntary dismissal under G.S. 1A-1, Rule 41(b) in an action tried by the judge without a jury and that the judge ruled on those motions is without consequence where the court thereafter rendered a judgment on the merits by making findings as provided in G.S. 1A-1, Rule 52(a).

2. Boundaries § 11— dispute over line — admissibility of decedent's declarations

In order to render hearsay evidence or declarations as to boundary competent it must appear that the declarant is now dead, that he was disinterested at the time when he made them, and that the declarations were made *ante litem motam;* these requirements were met in the admission of declarations by a deceased person concerning the boundary line in question.

APPEAL by defendant from *James, Judge.* Judgment entered 4 June 1974 in Superior Court, DARE County. Heard in the Court of Appeals on 10 February 1975.

This action to recover the sum of $50,000 from defendant and to enjoin defendant from trespassing upon the premises was instituted 13 August 1973, by the heirs of K. R. Pugh, deceased. Plaintiffs alleged that they were the owners and in possession of a certain described tract of land in Kennekeet Township, Dare County, North Carolina; that the defendant or his agent, without lawful authority, had gone upon the lands of the plaintiffs and bulldozed trees and shrubs and attempted to clear the land and place mobile homes or trailers thereon and has otherwise trespassed on plaintiffs' lands and permanently damaged the same in the sum of $50,000.00. In an amended complaint, the plaintiffs realleged the description of the property and further alleged that plaintiffs and their predecessors in title have been in open and adverse possession under known and visible lines and boundaries and under color of title to said lands for more than twenty-one years next preceding the commencement of this action.

Defendant, answering, denied the material allegations of the complaint but admitted that he had refused to move said trailers or mobile homes from the premises. Further answering, defendant alleged that he is the owner of the premises described in the complaint or a part thereof; that plaintiffs are not entitled to possession and that title to said premises was and is now in the defendant; that defendant or those under whom he claims possessed the property, or a portion thereof, under known or visible lines or boundaries adversely to all other persons for more than twenty years next preceding the commencement of this action. Defendant prayed judgment that he be declared the owner in fee simple of the parcel of land in question; that plaintiffs recover nothing of defendant and the action be dismissed.

By stipulation it was agreed that the only lands in controversy in this lawsuit are those described on a court map and encompassed by the points "B", "C", "3", and "4" on said map and that other lands shown on said plat are not in controversy and the ownership of such other lands is not to be determined.

Not having demanded a trial by jury, the matter was therefore tried by the court. At the conclusion of plaintiffs' evidence defendant's motion for an involuntary dismissal under Rule 41(b) was denied. Defendant then introduced evidence, at the close of which plaintiffs moved for the involuntary dismissal of defendant's claim pursuant to Rule 41(b) and (c) of the North Carolina Rules of Civil Procedure which was allowed.

Judgment was entered declaring the plaintiffs were the owners in fee simple and entitled to the possession of the lands in controversy. From that judgment, defendant appealed.

Twiford, Abbott & Seawell, by Christopher L. Seawell, for plaintiff appellees.

G. Irvin Aldridge, for defendant appellant.

MARTIN, Judge.

[1] Defendant assigns as error the failure of the court to grant defendant's motion for involuntary dismissal at the close of all the evidence under Rule 41(b) of the Rules of Civil Procedure and the granting of plaintiffs' motion for involuntary dismissal at the close of all the evidence. It is apparent from the record and briefs that the trial court was sitting without a jury. The anomaly of requesting an involuntary dismissal under Rule 41(b) at the close of all the evidence is illustrated in defendant's brief where he asks this Court to reverse for failure of the trial court to consider the issues sitting as a jury. Rule 41(b) does not provide for a motion for involuntary dismissal made at the close of all the evidence. The fact that the parties made such motions at the close of all the evidence and that the trial judge ruled on those motions is of no consequence for thereafter the court rendered a judgment on the merits by making findings as provided in Rule 52(a) of the Rules of Civil Procedure. See *Castle v. Yates Co.*, 18 N.C. App. 632, 197 S.E. 2d 611 (1973). The facts, as found, supported the conclusions of law and the judgment, and we find no error therein.

[2] Finally, defendant argues that the trial court erred in admitting into evidence declarations by the late Cordugan Gray concerning the boundary line. In our opinion the requirements for admission of such evidence were met. In order to render hearsay evidence or declarations as to boundary competent it must appear that the declarant is now dead, that he was disinterested at the time when he made them, and that the declaration was made *ante litem motam. White v. Price,* 237 N.C. 347, 75 S.E. 2d 244 (1953); *Corbett v. Hawes,* 187 N.C. 653, 122 S.E. 478 (1924); *Yow v. Hamilton,* 136 N.C. 357, 48 S.E. 782 (1904). Furthermore, it appears that evidence of a similar nature was thereafter admitted without objection. In addition, it is well settled in this jurisdiction that in a trial or hearing by the court the rules of evidence are not so strictly enforced as in a jury trial and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby. *Hinson v. Hinson,* 17 N.C. App. 505, 195 S.E. 2d 98 (1973). This assignment of error is overruled.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. TIMOTHY ANDREW EVANS

No. 7518SC47

(Filed 16 April 1975)

1. **Robbery § 4— robbery with firearm — testimony as to gun — sufficiency of evidence**

Where the victim of a robbery and defendant's companion in the robbery repeatedly referred to the gun used in the robbery, and there was no evidence that it was not a gun or that it was incapable of discharging a missile, evidence was sufficient to carry the case to the jury on the charge of robbery with a firearm.

2. **Robbery § 5— robbery with firearm — failure to submit lesser included offenses — no error**

The trial court in a prosecution for robbery by use of a firearm did not err in failing to submit lesser included offenses to the jury.

3. Criminal Law § 79— statements by defendant's companion — testimony of officer admissible

In a prosecution for robbery with a firearm where the evidence tended to show that defendant remained in the getaway vehicle while his companion held up a convenience store employee, the trial court did not err in allowing a police officer to testify for corroborative purposes concerning statements made to him by defendant's companion.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 9 October 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 19 March 1975.

Defendant was tried on a bill of indictment charging him with robbery by use of a firearm. He entered a plea of not guilty. The State introduced evidence tending to show that on 7 August 1974 Kathleen Baird was working at a Seven-Eleven store on South Elm Street in Greensboro. Shortly before closing, a young man came into the store and ordered cigarettes. He then reached under his shirt and pulled out a gun. As he pulled out the gun, it broke open, requiring him to replace the bullets and close the gun back together. Arthur Lee Braswell testified that he and defendant rode around in a car and talked about robbing a gas station. Later that evening, they arrived at the Seven-Eleven store on South Elm Street. Since the car belonged to defendant, it was agreed that defendant would drive. Defendant remained with the car and watched while Braswell went into the store with a gun and held up the employee. Braswell took the money and turned to leave when two police officers, who were stationed in a back room of the store, confronted Braswell and placed him under arrest. One of the officers observed a car drive away but was unable to see its occupant.

Defendant offered no evidence. He was found guilty as charged, and from judgment imposed on the verdict defendant appealed.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

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

MARTIN, Judge.

[1] At the close of the State's evidence the trial court denied defendant's motion for nonsuit. The jury was instructed that they could find defendant guilty of armed robbery or not guilty.

Defendant contends the trial court erred in denying his motion for judgment as of nonsuit to the charge of robbery with a firearm because the State failed to prove that the object allegedly used in the crime was a firearm. For the same reason, it is argued that the court should have instructed the jury on common law robbery and further that the court should have defined what constitutes a firearm.

State's witness, Kathleen Baird, identified State's Exhibit Number One as the "gun" used in the robbery. Arthur Lee Braswell also referred to the object used in the holdup as a "gun". Both of these witnesses repeatedly called it a "gun" without objection. There was no evidence that it was not a gun or that it was incapable of discharging a missile. Under these circumstances the evidence was sufficient to carry the case to the jury on the charge of robbery with firearm. See *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849 (1961).

[2] An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906 (1955).

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

Unlike *State v. Faulkner,* 5 N.C. App. 113, 168 S.E. 2d 9 (1969), the present case contains no evidence tending to show the commission of common law robbery. It follows that the court did not err in failing to instruct the jury on common law robbery. Nor do we think the court's failure to define what constitutes a firearm was error.

[3] For corroborative purposes, K. W. Brady of the Greensboro police was allowed to testify over objection concerning statements made to him by Arthur Braswell about the robbery. Defendant contends that this testimony was inadmissible where Braswell never testified that he made any statements to Brady. We disagree. In the first place, it does not appear necessary that Braswell testify as to having made statements to Brady.

State v. McLawhorn, 270 N.C. 622, 155 S.E. 2d 198 (1967). Secondly, Braswell had testified previously that he talked to officers on several occasions about the robbery. This assignment of error is overruled.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CHARLES JOHNSON

No. 7426SC1068

(Filed 16 April 1975)

Criminal Law §§ 23, 181—post-conviction hearing — burden on petitioner to prove denial of constitutional right

In a post-conviction review proceeding the burden is upon the petitioner to show a denial of some right guaranteed to him by the Constitution of N. C. or by the Constitution of the U. S. in the trial resulting in his conviction; therefore, the case is remanded for further hearing and consideration where the trial court apparently placed upon the State the burden of showing that petitioner's guilty plea was entered with an understanding of its consequences.

ON writ of *certiorari* to review the order of *Snepp, Judge.* Order entered 20 June 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 12 March 1975.

By order dated 15 April 1974 petitioner Charles Johnson was granted a hearing under the Post-Conviction Hearing Act to review his trial at the 1 December 1958 Criminal Session of Superior Court in Mecklenburg County. Based upon the evidence presented at the hearing, the trial court made findings of fact and concluded as a matter of law that petitioner's pleas of guilty tendered at his original trial were not freely, voluntarily, and understandingly made and that petitioner was not afforded due process of law at his trial. Petitioner was awarded a new trial, and this Court granted the State's petition for writ of certiorari.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Logan D. Howell, for defendant appellee.

MARTIN, Judge.

In the present case petitioner Charles Johnson sought and obtained a post-conviction review of a trial held in 1958. At this earlier trial, he pleaded guilty to charges of first degree burglary and received life sentences. In the post-conviction review, Judge Snepp heard the testimony of Johnson and John G. Plumides, petitioner's attorney at the original trial. Based upon the evidence the court made findings of fact and concluded that petitioner's pleas of guilty at his trial were not freely, voluntarily, and understandingly made and that petitioner was not afforded due process of law. In reaching its conclusion, the court cited *Bailey v. MacDougall,* 392 F. 2d 155 (4th Cir. 1968), *cert. denied,* 393 U.S. 847, 21 L.Ed. 2d 118, 89 S.Ct. 133, for the proposition that the State has the burden of proving that a guilty plea was entered with an understanding of its consequences.

In a post-conviction review proceeding the burden is upon the petitioner to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States in the trial resulting in his conviction. *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343 (1967). In our opinion petitioner Johnson had such a burden in the present case. *Bailey v. MacDougall, supra,* is not controlling, and is distinguishable. *See United States Ex. Rel. Grays v. Rundle,* 428 F. 2d 1401 (3rd Cir. 1970).

In discussing the problem of where the burden of proof lies when a claim is made that a plea of guilty in a state court was not knowingly entered and the record is either silent or inadequate as to an inquiry by the judge concerning the defendant's knowledge of the charge and the consequences of his acknowledgment of guilt, Judge Freedman, concurring in *United States Ex. Rel. Grays v. Rundle, supra,* stated:

> "If the burden of proof is placed on the state it will have the evidence of the prosecutor and the judge, if they are still available, but they can hardly be expected to recall the facts in any one of numerous long past cases. And if the state should call the defendant, he will obviously be a hostile witness. If on the other hand the burden of proof is placed on the defendant, it would appear to be easier for him to bear it."

The judgment is reversed. The case is remanded for further hearing and consideration consistent with this opinion.

Reversed and remanded.

Chief Judge BROCK and Judge VAUGHN concur.

SYLVESTER DIGGS AND WIFE, CHARLOTTE DIGGS v. THE CITY OF WILSON AND KENNETH GAY, BUILDING INSPECTOR

No. 747SC967

(Filed 16 April 1975)

Municipal Corporations § 30— zoning — nonconforming use — close of business for remodeling — no discontinuance of use

Where a city issued a building permit for the remodeling of an existing restaurant building which constituted a nonconforming use in an area zoned for residential use, and there was no limitation as to when the remodeling had to be completed, the closing of the restaurant business to the general public while the remodeling process was being completed did not constitute, as a matter of law, a "discontinuance" of the nonconforming use within the meaning of the zoning ordinance.

APPEAL by plaintiffs from *Rouse, Judge.* Judgment entered 12 June 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 10 February 1975.

For a number of years prior to 1961 plaintiffs operated a restaurant on property owned by them in the City of Wilson. In 1961 the city adopted a zoning ordinance designating the area in which the restaurant is located as a residential zone.

The ordinance has a section providing that the lawful use of a building existing at the time of adoption of the ordinance is not to be affected by the ordinance even though the use does not conform to the provisions of the ordinance. The section further provides: "If such nonconforming use is discontinued for a continuous period of more than one hundred and eighty (180) days, any future use of said land shall be in conformity with the provisions of this ordinance."

On 14 October 1970, the building inspector of the city issued a permit for the alteration and remodeling of the restaurant building. The permit did not specify any time limit within which

the project was required to have been completed. After the issuance of the permit plaintiffs began to remodel the building. Plaintiffs purchased building material and incurred other expenses in an effort to complete the project. Much of the work has been done on weekends because some of the people employed had other jobs. Plaintiffs closed the business to the public in October, 1970 in order to remodel the building.

On 23 September 1971, the building inspector for the city advised plaintiffs that the building permit previously issued was revoked and ordered plaintiffs to cease and desist from any further construction. Remodeling was still going on at that time. Since 23 September 1971, the city has refused to issue any further permits to workmen and others to connect the building with city sewer, water, gas and electrical systems.

Plaintiffs started this action in January, 1972 and seek, among other things, mandamus to compel the city to issue the necessary permits to enable them to complete the project.

At the close of plaintiffs' evidence the court granted defendants' motion for directed verdict and dismissed the action.

Herbert B. Hulse, and George F. Taylor, for plaintiff appellants.

Lucas, Rand, Rose, Meyer, Jones and Orcutt, by R. Michael Jones, for defendant appellees.

VAUGHN, Judge.

The directed verdict against plaintiffs was apparently granted for the reason that plaintiffs' evidence disclosed that the building had been closed for a continuous period of more than 180 days.

Where, as here, the city specifically authorized and issued a permit to alter and remodel an existing building with no limitation as to when the remodeling must be completed, the mere closing of the business to the general public while the remodeling process was being completed did not constitute, as a matter of law, a "discontinuance" of the nonconforming use within the meaning of the ordinance. The judgment directing the verdict against plaintiffs and dismissing the action is reversed.

Reversed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. MARVIN ROOSEVELT PARRISH

No. 7515SC14

(Filed 16 April 1975)

Criminal Law § 86— cross-examination as to prior offense — no error

In a prosecution for operating a motor vehicle without a valid operator's license, operating a motor vehicle with improper registration, and resisting arrest, the trial court did not err in allowing the prosecuting attorney to cross-examine defendant with respect to his having killed a person several years prior to the offenses in question.

APPEAL by defendant from *Brewer, Judge.* Judgments entered 8 October 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 18 March 1975.

By warrants proper in form, defendant was charged with (1) operating a motor vehicle without a valid operator's license, (2) operating a motor vehicle with improper registration, and (3) resisting arrest. He was found guilty of all charges in district court and appealed to superior court where he pleaded not guilty and was tried *de novo.*

A jury found him guilty of charges (1) and (3) and from judgments imposed on the verdicts, defendant appealed.

Attorney General Edmisten, by Associate Attorney Wilton E. Ragland, Jr., for the State.

Robert J. Wishart for defendant appellant.

BRITT, Judge.

By his first assignment of error, defendant contends the trial court erred in permitting the prosecuting attorney to cross-examine him with respect to defendant's killing a person several years prior to the offenses in question. We find no merit in the assignment.

The record discloses: In cross-examining defendant, the prosecuting attorney asked defendant if he had killed a man; over objection, defendant answered that he had. Defendant was then asked for details of the killing, his counsel objected, the objection was overruled, but the answer was not responsive to the question. Later on, defendant was asked how he killed the man "several years ago"; defendant's answer was that he shot him.

On redirect examination defendant testified that he was tried for killing a man but was acquitted by the jury.

In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), our Supreme Court overruled numerous prior decisions and held that, for purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than for which he is then on trial. The court further held, p. 672: "A *fortiori*, we hold that, *for purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused*, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense." However, on page 675 of the opinion we find:

> It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

See also, *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972).

In the case at bar, the prosecuting attorney did not ask defendant any question prohibited by *Williams*. On the contrary, we think the questions were of the type declared permissible in *Williams*. The evidence as to defendant having been charged and tried for the killing was brought out by him. The assignment of error is overruled.

Defendant's two remaining assignments of error relate to the trial court's instructions to the jury. We have carefully reviewed the challenged instructions but find that they are free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

MARCIA STONE SAULS v. WILLIAM GLENN SAULS

No. 7410DC895

(Filed 16 April 1975)

Divorce and Alimony § 8— abandonment without justification — sufficiency of evidence

The trial court's finding of abandonment without justification in this divorce and alimony action was supported by the evidence when it tended to show that defendant's misconduct and his further involvement with another woman induced plaintiff to consent to her husband's departure from the home and thereby to accept a *fait accompli* even though she "tried to make it work."

Judge VAUGHN dissents.

APPEAL by defendant from *Winborne, Judge.* Judgment entered 9 August 1974 in District Court, WAKE County. Heard in the Court of Appeals on 16 January 1975.

Plaintiff brought this action against her husband seeking a divorce from bed and board, child custody and support, alimony pendente lite and alimony, counsel fees pendente lite and counsel fees.

Judgment was entered granting plaintiff alimony without divorce, and a separate order required that defendant pay plaintiff $100.00 per month as alimony and $400.00 in attorney fees. A subsequent order awarded custody of the children to plaintiff and directed that defendant pay $200.00 per month for the support and maintenance of the minor children. Defendant appealed.

W. Arnold Smith, for plaintiff appellee.

George R. Barrett, for defendant appellant.

MARTIN, Judge.

In the present case the trial court found *inter alia:*

"(5) That plaintiff was abandoned by the defendant without justification in that defendant did leave the common residence of plaintiff and defendant and taking with him all his personal belongings, and has for a period of nine months failed to resume residence at common residence;

(6) Plaintiff was a dutiful wife to the defendant and did not bring about defendant's departure;"

Defendant contends that the above findings were not supported by evidence. In particular, it is argued that plaintiff consented to defendant's departure, and, thus, the abandonment was not without justification. It is true that there is no abandonment when the separation is by mutual agreement. *Lemons v. Lemons*, 22 N.C. App. 303, 206 S.E. 2d 327 (1974). However, where the supporting spouse induces such consent by his or her misconduct and thereby causes the dependent spouse to accept the inevitable, it does not follow that the separation is by mutual consent so as to preclude recovery of alimony. In the present case counsel for both parties stipulated that certain statements would constitute the evidence on appeal. While their rendition of the evidence is rather sparse, it indicates that defendant's misconduct and his further involvement with another woman induced plaintiff to consent to her husband's departure from the home and thereby to accept a *fait accompli* even though she tried "to make it work". We think the trial court's finding of abandonment without justification was supported by the evidence before us.

Finally, defendant contends that the trial court's judgment concluding that plaintiff was entitled to alimony without divorce was entered without the necessary finding that plaintiff was a dependent spouse and defendant was a supporting spouse. An order awarding alimony and attorney fees was entered on the same day as the judgment and this order contained the findings which defendant contends were necessary for the judgment. Viewing these together, there were sufficient findings to support the judgment.

Affirmed.

Judge ARNOLD concurs.

Judge VAUGHN dissents.

IN THE MATTER OF THE APPEAL OF SEASHELL COMPANY FROM THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE NORTH CAROLINA REVIEW BOARD FOR DREDGE AND FILL APPLICATIONS

No. 753SC17

(Filed 16 April 1975)

Waters and Watercourses § 7— dredge permit — effect on marine fisheries

Application for a permit to dredge a boat basin and canal on Bogue Banks is remanded for a new hearing where the superior court did not rule on the Review Board's conclusion that the applicant had "failed to carry the burden of proving that there will not be significant adverse effects on wildlife and marine and estuarine fisheries." G.S. 113-229(e) and (g)(5).

APPEAL by the State from *Martin (Perry), Judge.* Judgment entered 8 November 1974 in Superior Court, CARTERET County. Heard in the Court of Appeals 17 March 1975.

On 27 July 1973 petitioner Seashell Company submitted to the Department of Conservation and Development an application for a permit to dredge a boat basin and canal on Bogue Banks in Carteret County. The Department denied the application and, pursuant to G.S. 113-229(f) as it was written in 1973, Seashell requested a hearing before the Review Board for Dredge and Fill Applications. Evidence was offered at the hearing and the Review Board affirmed the Department's decision to deny the permit.

Seashell petitioned for judicial review pursuant to G.S. 113-229(f) and G.S. 143-309. The Superior Court considered the entire record and reversed the Board's decision, holding

> "that the conclusion of law of the Review Board that the dredge and fill project proposed by the Petitioner will have a significant adverse effect on wildlife and estuarine and marine fisheries is unsupported by competent, material and substantial evidence; and that the Review Board was required by the mandatory provisions of Sec. 113-229(e) of the General Statutes of North Carolina to grant the permit applied for by Seashell Company."

The court ordered the Department to issue Seashell a dredging permit. The State appealed to this Court.

Attorney General Edmisten, by Associate Attorney W. A. Raney, Jr., for respondent appellant.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., Henry A. Mitchell, Jr., and Michael E. Weddington, for petititioner appellee.

ARNOLD, Judge.

The question presented by this appeal is whether the trial court erred in concluding as a matter of law that the Review Board was required to issue Seashell a dredge and fill permit. The statute under which the proceeding was conducted provides that the "Department may deny an application for a dredge or fill permit upon finding: . . . (5) that there will be significant adverse effect on wildlife, or fresh water, estuarine or marine fisheries." G.S. 113-229(e). Otherwise, the permit "shall be granted." *Id.* The statute further provides that the "burden of proof at any hearing shall be upon the person or agency . . . at whose instance the hearing is being held." G.S. 113-229(g)(5).

The trial court did not rule on the Review Board's conclusion that petitioner Seashell had "failed to carry the burden of proving that there will not be significant adverse effects on wildlife and marine and estuarine fisheries." Since the record on appeal contains no narrative statement or transcript of the evidence offered before the Board, its conclusion is presumed to be correct. *See Electric Membership Corp. v. Alexander,* 282 N.C. 402, 192 S.E. 2d 811 (1972); *Equipment Company v. Johnson, Comr. of Revenue,* 261 N.C. 269, 134 S.E. 2d 327 (1964). The order of the trial court therefore must be vacated and the cause remanded for a new hearing on the record as a whole.

Vacated and remanded.

Chief Judge BROCK and Judge PARKER concur.

BERTHA G. SIMS, ADMINISTRATRIX OF THE ESTATE OF GAYHEART ALONZO SIMS, DECEASED v. REA CONSTRUCTION COMPANY

No. 7426SC995

(Filed 16 April 1975)

1. **Death § 3— wrongful death action — foreign administrator — running of statute of limitations after institution of action**

In N. C. an administrator appointed by the court of another state may not maintain an action for wrongful death occurring in N. C., and the commencement of a wrongful death action by a foreign administrator in N. C. will not operate to bar the running of the applicable two-year statute of limitations set forth in G.S. 1-53, such action being a nullity and subject to dismissal.

2. **Death § 4; Executors and Administrators § 3— action for wrongful death — nonresident administrator — action barred by statute of limitations**

Where a nonresident administratrix instituted an action for wrongful death in N. C. and no attempt was made to qualify a resident administrator until after the expiration of the statute of limitations, the trial court properly refused to substitute the resident administrator as party plaintiff and properly dismissed the action.

APPEAL by plaintiff from *Falls, Judge*. Order entered 27 August 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 12 February 1975.

The complaint alleges that plaintiff's intestate died on 3 July 1972 as a result of injuries sustained in an automobile accident in North Carolina. Plaintiff qualified as administratrix of decedent's estate in South Carolina and instituted the present action for wrongful death in the Superior Court of Mecklenburg County. On 25 July 1974, defendant filed a motion to dismiss under G.S. 1A-1, Rule 12(b)(6), and moved for summary judgment under G.S. 1A-1, Rule 56, for the reason that plaintiff is a foreign administratrix and, as such, she is not entitled to maintain a wrongful death action in North Carolina. On 22 August 1974, Keith M. Stroud was issued ancillary letters of administration by the Clerk of Superior Court of Mecklenburg County. By motion filed 23 August 1974, plaintiff asked that Keith M. Stroud be joined or substituted as party plaintiff.

The trial court denied plaintiff's motion and allowed defendant's motions for dismissal and for summary judgment. Plaintiff appealed.

Seegers and Kilgore, by Samuel R. Kilgore, Jr., for plaintiff appellant.

Jones, Hewson & Woolard, by William L. Woolard, for defendant appellee.

MARTIN, Judge.

There is no dispute that plaintiff Bertha G. Sims, the South Carolina administratrix of the estate of Gayheart Alonzo Sims, is not the proper party to maintain the present action. In addition, it was more than two years after the death of Gayheart Alonzo Sims that a North Carolina administrator was appointed and plaintiff sought to substitute the resident administrator as party plaintiff.

[1] The right of action for wrongful death is purely statutory. *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761 (1963). In North Carolina, an administrator appointed by the court of another state may not maintain an action for wrongful death occurring in North Carolina. *Monfils v. Hazlewood,* 218 N.C. 215, 10 S.E. 2d 673 (1940), *cert. denied* 312 U.S. 684. The commencement of a wrongful death action by a foreign administrator in North Carolina will not operate to bar the running of the applicable two-year statute of limitations set forth in G.S. 1-53, such action being a nullity and subject to dismissal. *Merchants Distributors v. Hutchinson* and *Lewis v. Hutchinson,* 16 N.C. App. 655, 193 S.E. 2d 436 (1972).

[2] Since no attempt was made to qualify a resident administrator until after expiration of the statute of limitations set forth in G.S. 1-53(4), substitution of the resident administrator would not relate back and validate the present unauthorized action. *Johnson v. Trust Co.,* 22 N.C. App. 8, 205 S.E. 2d 353 (1974). It follows that the trial court did not err in refusing to substitute the resident administrator as party plaintiff and did not err in granting defendant's motion for summary judgment and for dismissal.

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID HOKE LINDER

No. 7420SC1080

(Filed 16 April 1975)

Criminal Law § 113— definition of terms — request for instructions required

In the absence of a request, the trial court was not required to define the terms "corroboration" and "substantive evidence."

ON *Certiorari* to review convictions of defendant and judgments of *Martin, (Robert M.), Judge.* Judgment entered 4 February 1974 in Superior Court, UNION County. Heard in the Court of Appeals 10 March 1975.

The defendant was charged in three bills of indictment with (1) assault with a deadly weapon with intent to kill inflicting serious injury, (2) assault with intent to commit rape, and (3) kidnapping. The defendant pled not guilty to all charges.

The jury returned verdicts of guilty as charged under the first and third offenses listed above and guilty of assault on a female under the second. From sentences of imprisonment, the defendant seeks a review.

Attorney General Edmisten by Associate Attorney W. A. Raney, Jr., for the State.

Charles V. Bell for the defendant.

CLARK, Judge.

The only assignment of error brought forward is that the trial court erred in failing to instruct the jury as to the meaning of the terms "corroboration" and "substantive evidence". However, in the absence of a request, the trial court is not required to define these terms, and since there was no request here we discern no prejudice to the defendant. *State v. Mitchell,* 7 N.C. App. 49, 171 S.E. 2d 31 (1969) and *State v. Hardee,* 6 N.C. App. 147, 169 S.E. 2d 533 (1969). Having further reviewed the face of the record for errors, we find none.

No error.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA ON RELATION OF GEORGE JOHNNIE WILLIAMS, JR., ADMINISTRATOR OF GEORGE JOHNNIE WILLIAMS, DECEASED v. W. I. ADAMS, L. R. COBB, GEORGE PEELE, C. BOLTINHOUSE AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, INC.

No. 758SC118

(Filed 16 April 1975)

Public Officers § 9; Sheriff and Constables— neglect of prisoner by sheriff — statute of limitations

An action against a sheriff for neglect of plaintiff's intestate while he was in jail in the sheriff's custody is an action against a public officer for a trespass under color of his office and must be instituted within one year after the cause of action accrues. G.S. 1-54(1).

APPEAL by plaintiff from *Snepp, Judge.* Judgment entered 18 November 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 11 April 1975.

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

Smith, Anderson, Blount & Mitchell, by John H. Anderson, for defendant appellees.

VAUGHN, Judge.

The complaint alleges tortious neglect of plaintiff's intestate while he was in jail in defendant Sheriff's custody.

G.S. 1-54(1) requires that actions against a public officer for a trespass under color of his office be started within one year after the cause of action accrues.

A sheriff is a public officer and negligence in the performance of his duties as custodian of one confined in the county jail is a trespass under color of his office. It appears on the face of the complaint that this suit was started more than one year after the cause of action accrued. It was, therefore, proper to grant defendants' motion for judgment on the pleading because the claim was barred by G.S. 1-54(1), the applicable statute of limitation.

Affirmed.

Judges PARKER and CLARK concur.

ROBERT LEE AYERS v. B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF ARCHIE MERRELL CREEF, JR., DECEASED

No. 7419SC1089

(Filed 16 April 1975)

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 1 August 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 March 1975.

This is one of four civil actions growing out of an automobile collision. All of the cases were consolidated for trial over plaintiff's objection. The jury answered the issue of negligence in favor of plaintiff and the issue of contributory negligence against him, and plaintiff appealed.

Ottway Burton for plaintiff appellant.

Smith and Casper, by Archie L. Smith, for defendant appellee.

MORRIS, Judge.

This case presents no question not answered by this Court in *Wood v. Brown, Administrator,* 25 N.C. App. 241, 212 S.E. 2d 690 (1975). Decision there is controlling here, and no useful purpose would be served by discussing each assignment of error. On authority of *Wood v. Brown, supra,* all assignments of error are overruled.

No error.

Judges BRITT and ARNOLD concur.

JAMES CREED SOLESBEE, JR. v. B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF ARCHIE MERRELL CREEF, JR., DECEASED

No. 7419SC1086

(Filed 16 April 1975)

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 1 August 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 10 March 1975.

This is one of four civil actions arising out of an automobile collision. All four cases were consolidated for trial over plaintiff's objection. The jury answered the issue of negligence in favor of plaintiff and the issue of contributory negligence against him. Plaintiff appealed separately from the judgment below.

Ottway Burton for the plaintiff.

Smith and Casper by Archie L. Smith for the defendant.

CLARK, Judge.

This case presents no question not answered by this Court in *Wood v. Brown,* 25 N.C. App. 241 (1975) filed 2 April 1975. The decision there is controlling here and no useful purpose would be served by reiterating each assignment of error. All assignments of error are, therefore, overruled.

No error.

Judges PARKER and HEDRICK concur.

APPROVED PERSONNEL SERVICE, INC. v. LORIENE A. KOSIER

No. 7418SC1050

(Filed 16 April 1975)

APPEAL by defendant from *Wood, Judge.* Judgment entered 20 September 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 February 1975.

William Zuckerman, for plaintiff appellee.

Walter L. Hannah and Michael H. Godwin, for defendant appellant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

For the reasons stated in *Wilmar, Inc. v. Corsillo,* 24 N.C. App. 271, 210 S.E. 2d 427, the judgment is affirmed.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER v. JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA; NORTH CAROLINA REINSURANCE FACILITY; JOSEPH T. WILLIAMS; AND WILLIAM S. GODFREY, RESPONDENTS

No. 7510SC87

(Filed 16 April 1975)

APPEAL by respondent John Randolph Ingram, Commissioner of Insurance from *Bailey, Judge.* Judgment entered 31 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 8 April 1975.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for appellant.

Young, Moore & Henderson, by Charles R. Young and R. M. Strickland, for appellee.

MORRIS, VAUGHN and CLARK, Judges.

Appellee's motion to dismiss the appeal is allowed.

Appeal dismissed.

IN THE MATTER OF: KIMBERLY SMITH

No. 7518DC46

(Filed 16 April 1975)

APPEAL by petitioner from *Washington, Judge.* Judgment entered 5 November 1974 in District Court, GUILFORD County. Heard in the Court of Appeals 20 March 1975.

Jeffrey P. Farran, for petitioner appellant.

No counsel contra.

MORRIS, VAUGHN and CLARK, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. PHILLIP COLLYMORE

No. 754SC116

(Filed 16 April 1975)

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 April 1975.

Attroney General Edmisten, by Assistant Attorney General Myron C. Banks, for the State.

Edward G. Bailey, for defendant appellant.

PARKER, VAUGHN and CLARK, Judges.

No error.

PATRICIA A. BOTT v. KENNETH F. BOTT, JR.

No. 7415DC986

(Filed 16 April 1975)

APPEAL by defendant from *Allen, Judge.* Judgment entered 11 July 1974 in District Court, ORANGE County. Heard in the Court of Appeals 12 February 1975.

W. Paul Pulley, Jr., P.A., by W. Paul Pulley, Jr., and Elisabeth S. Petersen, for plaintiff appellee.

Winston, Coleman and Bernholz, by Barry T. Winston and Roger B. Bernholz, for defendant appellant.

VAUGHN, MARTIN and ARNOLD, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. DAVEY LOCKLEAR AND JOHN H. BULLARD

No. 7416SC979

(Filed 16 April 1975)

APPEAL by defendants from *Clark, Judge.* Judgment entered 2 August 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 February 1975.

Attorney General Edmisten, by Assistant Attorney General Norman L. Sloan, for the State.

Johnson, Hedgpeth, Biggs & Campbell, by John Wishart Campbell, for defendant appellant Davey Locklear; Lee and Lee, by W. Osborne Lee, Jr., and Franklin V. Adams, for defendant appellant John H. Bullard.

VAUGHN, MARTIN and ARNOLD, Judges.

No error.

STATE OF NORTH CAROLINA v. PAUL JUNIOR WELLMAN

No. 7519SC100

(Filed 16 April 1975)

APPEAL by defendant from *Seay, Judge.* Judgment entered 17 September 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 9 April 1975.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Pope, McMillan & Bender, by Harold J. Bender, for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. GEORGE JORDAN

No. 757SC77

(Filed 16 April 1975)

APPEAL by defendant from *Peel, Judge.* Judgments entered 26 August 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 8 April 1975.

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

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

MORRIS, VAUGHN and CLARK, Judges.

No error.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ANDREW CURRIE CHANTOS

No. 7510SC3

(Filed 7 May 1975)

1. **Insurance § 87— permission to drive from original permitee — driver in lawful possession of vehicle**

Absent other extenuating circumstances, a person driving an automobile only with the permission of a permittee is not considered as using the automobile with either the express or implied permission of the owner so as to create omnibus clause coverage; however, where the original permittee, the son of insureds, gave defendant express permission to use the vehicle, defendant was thereby made a person in "lawful possession" under G.S. 20-279.21(b)(2).

2. **Insurance § 112— reimbursement of insurer — "insured's" demand for coverage under policy — summary judgment improper**

For the plaintiff to be able to invoke the reimbursement provision of an automobile liability insurance policy against defendant who was the "insured" referred to in the policy, it would be necessary that the defendant actively and positively seek protection under the policy; the trial court erred in granting summary judgment for defendant in plaintiff's action to recover under the reimbursement provision of the policy where a genuine issue existed relative to defendant's demand upon plaintiff for coverage under the policy.

3. **Infants § 2— contractual obligations — disaffirmance eight months after majority — summary judgment improper**

The trial court erred in entering summary judgment for plaintiff where a genuine issue existed relative to defendant's disaffirmance of any contractual obligations he may have incurred during his minority by accepting benefits under an automobile liability policy, since defendant did not expressly disaffirm the obligations until eight months after reaching his majority, and the determination of the reasonableness of the eight month period was a question for the jury.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 10 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 13 March 1975.

On 19 February 1973, plaintiff filed this action seeking to recover from the defendant the sum of $9,581.25, plus interest, for reimbursement under a policy of automobile liability insurance issued by plaintiff to Mr. and Mrs. David E. Williams. Plaintiff alleges that on 30 January 1971, Mrs. Williams entrusted her 1965 Mustang automobile to her minor son, who in turn gave the defendant, another minor, permission to use the car. While operating the car, the defendant, through his

negligence, collided with an automobile being driven by Charles E. McDonald, causing him severe injuries. McDonald subsequently made a claim to recover for bodily injuries against the defendant, and the defendant sought coverage and protection under plaintiff's policy in favor of the Williamses. Plaintiff notified defendant that he did not have the permission of the named insureds under the policy to drive the automobile and further notified him that it was reserving all rights and defenses under the various provisions of its policy. Plaintiff proceeded in good faith to handle and settle McDonald's claim against the defendant for the sum of $9,581.25. A release which discharged the defendant from further liability was executed by McDonald on 5 April 1972. Plaintiff further alleges that while the defendant was not driving the automobile with either the express or implied permission of the named insureds, Mr. and Mrs. Williams, he was, nevertheless, in lawful possession under G.S. 20-279.21(b)(2).

The policy contained the following provision:

"Financial Responsibility Laws

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in the policy. The Insured agrees to reimburse the Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph."

By virtue of this provision, plaintiff claims that it is entitled to reimbursement from the defendant, since it was required to cover the defendant solely and exclusively because of the financial responsibility laws, and not under the omnibus clause of its policy.

In answer, the defendant admitted that he was in lawful possession of the automobile under G.S. 20-279.21(b)(2); that plaintiff was the primary liability insurance carrier; and that plaintiff was legally obligated to afford coverage and protec-

tion to the defendant. He denied all other pertinent parts of the complaint and alleged in defense that on the date of the alleged settlement between plaintiff and McDonald, defendant was a minor; that at no time has defendant entered into any agreement with plaintiff; that if plaintiff contends that defendant entered into any agreement, defendant repudiates such agreement or contract on the grounds that the defendant, at the time any alleged agreement or contract was entered into, was a minor, and that he has not ratified but has denied any such agreements or contracts upon reaching his majority. Defendant further contends that he was not a party to the contract of insurance between the Williamses and plaintiff; that he never entered into any binding agreements with respect to said policy; that he never entered into any binding agreement with plaintiff with respect to plaintiff's obligations under said policy; that he never entered into any agreements with plaintiff with respect to any alleged settlement of claims between plaintiff and McDonald; and that since defendant never entered into any agreements with plaintiff he is not liable to plaintiff under plaintiff's contract of insurance issued to the Williamses.

Plaintiff filed a reply alleging that defendant, during his minority and after attaining his majority, accepted the benefits of the release previously referred to and did not repudiate the release. Having enjoyed the benefits thereof, he ratified the release and is estopped to deny the same.

On 4 April 1973, defendant filed a motion for summary judgment, together with the defendant's affidavit. Plaintiff responded filing one affidavit and various other documents, including the deposition of the defendant. All parts of the aforementioned affidavits and papers which are pertinent to the disposition of this case will be discussed in the opinion.

The trial court after hearing granted defendant's motion for summary judgment. The plaintiff excepted and appealed.

Ragsdale and Liggett by George R. Ragsdale and Robert R. Gardner for plaintiff.

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

CLARK, Judge.

Summary judgment may ". . . be rendered . . . if the pleadings, depositions, answers to interrogatories, and admis-

sions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). This remedy is an extreme one and should be awarded only where the truth is quite clear. *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970). The rule does not contemplate that the court is to decide an issue of fact, but rather it impels the court to determine whether a real issue of fact exists. *Keith v. Reddick, Inc.,* 15 N.C. App. 94, 189 S.E. 2d 775 (1972). Lastly, summary judgment ". . . should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. [Citations omitted.] And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. [Citations omitted.]." *Stevens v. Howard D. Johnson Co.,* 181 F. 2d 390, 394 (4th Cir. 1950). Before applying these principles to the facts in the present case, we are of the opinion that the means by which liability may attach should be discussed, that question under these facts being a novel one in this State.

Prior to 1967, G.S. 20-279.21(b)(2) provided, *inter alia:*

"(b) Such owner's policy of liability insurance:

* * *

(2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle . . . with the express or implied permission of such named insured. . . ."

In 1967, an amendment added the following language to the above subsection:

". . . or any other persons in lawful possession. . . ." Chapter 1162, § 1, 1967 Session Laws of North Carolina.

Under the above statutory scheme, the plaintiff issued its policy of automobile liability insurance to the Williamses on 22 January 1971. In the omnibus clause of the liability section of that policy, "persons insured" were defined as follows:

"Persons Insured

The following are Insureds under Part II:

(a) with respect to the owned automobile,

(1) the Named Insured and any resident of the same household,

(2) any other person using such automobile with the permission of the Named Insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an Insured under (a) (1) or (2) above;"

The effects of the above omnibus clause, the provisions of G.S. 20-279.21(b)(2), and the reimbursement provisions referred to previously upon the status of the present defendant become of critical importance in determining the precise nature of the liability alleged. For instance, if it is found as an undisputed fact that the defendant is a permissive user under section (a)(2) of the omnibus clause, then he is an insured under the express provisions of that policy, and the provisions relating to the Financial Responsiblity Laws are inapplicable. However, if it is found as a matter of law upon undisputed facts that the defendant did not have the express or implied permission of the named insureds, Mr. and Mrs. Williams, then the question turns to whether he was nevertheless in "lawful possession" so as to impose upon the insurer the obligation of providing protection under G.S. 20-279.21(b)(2).

[1] The facts as disclosed in the affidavits and documents filed with the motion for summary judgment indicate unequivocally and without dispute that the defendant was driving the car with the express and exclusive permission of the *son* of the named insureds. In that circumstance, it is well established that absent other extenuating circumstances which are not present here, such a person, driving only with the permission of a permittee, is not considered as using the automobile with either the express or implied permission of the owner so as to create omnibus clause coverage. See *Truelove v. Insurance Co.*, 5 N.C. App. 272, 168 S.E. 2d 59 (1969). However, the *original permittee—son* gave the defendant express permission, and this makes him a person in "lawful possession" under G.S. 20-279.21(b)(2). See *Jernigan v. Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972). The case of *Insurance Co. v. Broughton*, 283 N.C. 309,

196 S.E. 2d 243 (1973), is factually distinct, for in that case, the original permittee had been expressly instructed by the owner pursuant to a car rental agreement not to lend the car to a person under the age of 21 years. There were no similar instructions here. In *Jernigan v. Insurance Co., supra,* at 52, this Court stated that " . . . permission of the named insured *or of the original permittee* is essential to extend coverage to a second permittee" under G.S. 20-279.21(b)(2) (emphasis added). Absent circumstances similar to those in *Insurance Co. v. Broughton, supra,* it is our opinion that permission expressly granted by the original permittee is sufficient for purposes of the statute to place the second permittee in "lawful possession". Consequently, the defendant in the present case was in lawful possession of the Williamses' automobile. For a discussion of the owner-original permittee-second permittee relationship after *Broughton* and *Jernigan,* see Note, 52 N.C.L. Rev. 809 (1974).

The effect of our holding the defendant to be in lawful possession of the insured automobile, but without the express or implied permission of the named insureds, is to extend coverage to the defendant solely by virtue of (1) the Financial Responsibility Laws and (2) the insurer's concomitant obligation to provide coverage pursuant thereto. However, even though the plaintiff becomes legally obligated to cover defendant, an entirely separate question in contract arises, to wit, how does the defendant become obligated, if at all, to reimburse the plaintiff under the reimbursement provisions of the policy? Problems are suggested in that it is not at all clear who is the "Insured" in the reimbursement provision and it is not suggested how persons other than those in privity to the insurance contract could be bound by such a provision.

In *Employers &c. Ins. Co. v. Byers,* 99 N.H. 455, 457, 114 A. 2d 888, 890 (1955), "[t]he issue to be decided [was] what is meant by 'the insured' in that clause of the policy which provides that for any payment made solely because of the requirements of a financial responsibility law 'the insured' shall reimburse the company." The lawsuit in that case was actually against a named insured under the policy for reimbursement for sums paid out by the company as the result of an accident caused by an additional insured. While such is not the case here, that court stated that the reimbursement provisions " . . . were only meant to apply, in fact, they only have sensible meaning, when the assured is a defendant and when the insurer

has assumed the defence." 99 N.H. at 457. They concluded that " . . . the parties intended that only the insured who invokes the protection of the policy should have the obligation to reimburse the company under the clause in question." 99 N.H. at 457.

[2] In this case, a sensible reading of the reimbursement provision leads to the conclusion that the defendant was the "insured" referred to in the policy. He was in fact the one being afforded protection thereunder. See generally 5 Federation of Insurance Counsel Quarterly 52 (1954). However, for the plaintiff to be able to invoke the reimbursement provision against this defendant, it would be necessary that the defendant actively and positively seek protection under the policy. If in fact the defendant did seek such protection, it would be our opinion that he could not take the benefits afforded him by the policy without assuming the obligations applicable to him therein. Having established that a cause of action may lie for the plaintiff in this case as a matter of law, we are presented with the first of two essential questions, to wit, is there a genuine issue as to whether the defendant actively sought the protection of the policy in question?

As is disclosed above, the pleadings by the defendant categorically deny that he sought or entered into any agreement with the plaintiff relative to coverage under the policy. In defendant's affidavit filed with his motion for summary judgment, he again denies ever having entered into any agreement relating to McDonald's alleged claim against him, plaintiff's alleged claim for reimbursement under the applicable policy provisions, or plaintiff's settlement of any alleged claims McDonald might have had against him. Defendant also denies that any claim, demand or civil action had been filed against him by McDonald.

In response, plaintiff filed the affidavit of one of plaintiff's district claims managers who stated that he had personally advised the defendant by letter dated 5 November 1971 that the plaintiff was attempting to negotiate a settlement with McDonald as a result of defendant's accident. In another previous letter to the defendant dated 26 April 1971, it was disclosed that a claim had been filed against defendant and that plaintiff understood that defendant was seeking protection under its policy. In that same letter, plaintiff denied defendant coverage

under its policy. Thereafter on 15 June 1971, defendant's attorney forwarded to plaintiff some of defendant's medical bills "pursuant to the medical pay provisions of your insured's policy".

In the defendant's deposition taken on 15 May 1974, he stated that he did talk to an adjuster of the plaintiff relating to the accident, but denies ever having made a demand for coverage under the policy. He further admitted that he realized some two months after the accident that McDonald might file suit against him. This was about the time his parents hired an attorney to handle the criminal case against him. In reference to the letter of 26 April 1971, defendant acknowledged having understood that a claim had been filed against him arising out of his accident, that plaintiff was reserving their rights against him and that he recalled receiving and reading the letter. Thereafter, he stated vaguely that he believed his attorneys replied to the letter and knew now that they actually had. Lastly, dedefendant denied that plaintiff had ever asked him if he wanted protection under the policy or that he had agreed to any of plaintiff's courses of action and that he had never been furnished or even read the policy in question.

Upon these facts, we are of the opinion that a genuine issue exists relative to defendant's demand upon plaintiff for coverage under the policy. There are certain matters which are inconsistent with defendant's denial of such a claim. While the facts in support of plaintiff's position are not necessarily compelling, they are of probative of their position. There is some dispute as to defendant's actual knowledge and actions relative to the events surrounding plaintiff's undertaking to provide him with coverage, and differing inferences may be deduced from the facts. In any event, the credibility of the defendant and witnesses for plaintiff play a vital role in the case. Under these circumstances and on this question, summary judgment was erroneously granted.

[3] The second essential question presented on the facts is whether a genuine issue exists relative to defendant's disaffirmance of any contractual obligations he may have incurred during his minority. Under G.S. 48A-2, effective upon ratification on 17 June 1971, a minor is any person who has not reached the age of 18 years. In G.S. 20-309.1, any person 18 years of age or over is competent to contract for automobile insurance of any kind. Under the first section and by negative implica-

tion of the second, a person under the age of 18 is a minor for purposes of his contracts relating to automobile liability insurance. As such, if the contract of a minor for automobile liability insurance is not considered a necessity, it "may be avoided by him at any time before he reaches his majority or within a reasonable time thereafter." 3 R. Lee, N. C. Family Law, § 273 at 298-99 (1963).

Under the pleadings, it is alleged by the plaintiff that the defendant, having sought coverage under the policy and having continued to accept the benefits of McDonald's release after he attained his majority, is estopped by his ratification to deny that he did not seek plaintiff's protection under the policy in executing the release. In his answer and in his affidavit filed with the motion, defendant expressly disaffirmed any alleged agreement he may have made with plaintiff relative to McDonald's claim against him. Defendant's answer was filed on 21 March 1973 in response to plaintiff's complaint filed 19 February 1973. The facts in the case affirmatively disclose that the defendant became 18 years of age on 25 July 1972. As a consequence, the defendant's silence or acquiescence for eight months after reaching majority may work as an implied ratification, that determination depending upon whether his failure to disaffirm within that eight-month period was within a reasonable time under the general rule previously stated. And what is a reasonable time depends upon the circumstances of each case, no hard-and-fast rule regarding precise time limits being capable of definition. See generally Annot. 5 A.L.R. 2d 7 (1949).

In conclusion, what is a "reasonable time" when the facts are undisputed and different inferences cannot reasonably be drawn from the facts is generally a question of law. "This is one of those general rules, however, which is sometimes difficult of application, and results in the question being left to the jury when it is near the borderline." *Alsam Holding Co. v. Consolidated Taxpayer's Mut. Ins. Co.*, 167 Misc. 732, 4 N.Y.S. 2d 498, 505-06 (1938). Without intimating that this case is or is not near the borderline on what is a "reasonable time," we are of the opinion that that question depends upon the relevant circumstances in the case and is an inquiry in which reasonable men could indulge different inferences from the facts. Consequently, we hold that summary judgment was improvidently granted, and the judgment is reversed and the cause remanded.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

CARDING SPECIALISTS (CANADA), LTD., AND CROSROL CARDING DEVELOPMENT, INC. v. GUNTER & COOKE, INC.

No. 7514SC24

(Filed 7 May 1975)

Patents § 2— patent infringement — settlement contract — defenses of invalid patent and no infringement — counterclaim for royalties paid

In an action to recover under a contract settling plaintiffs' claims against defendant for patent infringement, defendant may not properly raise the defenses that the patent is not valid or was not infringed, nor may defendant assert a counterclaim for royalties it has actually paid under the settlement contract on the grounds that the patent is invalid or was not infringed.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 14 November 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 March 1975.

This matter was previously before us on appeal by Crosrol Carding Development, Inc., (hereinafter referred to as "Crosrol") and defendant Gunter & Cooke, Inc., (hereinafter referred to as "Gunter & Cooke"). We affirmed the trial court's denial of defendant's motion to dismiss on the ground that plaintiff was not the real party in interest and the court's order requiring Carding Specialists (Canada), Ltd., (hereinafter referred to as "Carding") to be made a party plaintiff to the litigation. Carding became a party plaintiff, and amended complaint was filed. Plaintiffs seek damages for the alleged breach of contract by defendant. The contract sued on was executed 23 February 1968 and constituted a compromise agreement between defendant and Carding for patent infringement by defendant. Defendant agreed to pay Carding $110,000 as general damages for infringement of U. S. Letters Patent No. 3,003,195. The sum was to be paid by applying to the $110,000 the purchase price of certain equipment to be purchased by Carding or Crosrol from Gunter & Cooke at the lowest mill price applicable to bulk sales in effect from time to time less a 10% O.E.M. discount. Defendant filed answer in which, by way of further answer and defense, it

averred that plaintiffs and defendant entered into an overall agreement evidenced by two separate documents whereby all disputes between them with respect to the patent were compromised and settled: (1) the document attached to the amended complaint providing for payment of compromised damages for infringement, and (2) the document attached to the answer constituting an agreement for the payment of future royalties to be paid by defendant to Carding. By way of a second further answer and defense, the defendant averred that both the agreements are unenforceable "[b]y reason of estoppel arising from the decision of the United States District Court for the Middle District of Georgia in *Carding Specialists (Canada) Limited v. Lummus Cotton Gin Company,* 234 F. Supp. 444 (1964), in which claims 1, 2, and 3 of United States Letters Patent No. 3,003,195 underlying said agreements were declared invalid". Other reasons for invalidity of the patent were averred. Defendant further averred that because of the unenforceability of the agreements, it was entitled to recover from plaintiffs by way of counterclaim the payments it had made to plaintiffs, or either of them, in the amount of $51,456.43, with interest.

Plaintiff filed a motion, under Rule 12(b)(6), to dismiss the allegations of the counterclaim inserted in the second further answer and defense for failure to state a claim upon which relief can be granted on the ground that alleged invalidity "and/or noninfringement of a licensed patent affords no legal basis for the recovery of royalties actually paid by a patent licensee", and a motion, under Rule 12(f), to strike paragraphs 1 and 2 of the second further answer and defense "as immaterial matter attempting to set forth an insufficient defense, on the ground that patent invalidity, non-infringement and unenforceability do not constitute defenses to the causes of action set forth in the Amended Complaint." The court entered an order granting the motions and dismissing the counterclaim and striking paragraphs 1 and 2 of the second further answer and defense. Defendant appealed.

Smith, Moore, Smith, Schell and Hunter, by Beverly C. Moore and H. Miles Foy, for plaintiff appellees.

Nye, Mitchell & Bugg, by R. Roy Mitchell, Jr., and Richards, Shefte & Pinckney, P.A., by Channing L. Richards, for defendant appellant.

MORRIS, Judge.

This appeal presents two related questions. The first is: In an action to recover under a contract entered into between plaintiffs and defendant, the purpose of which was to settle all claims of plaintiffs for patent infringement against defendant, may defendant validly raise the defenses that the patent infringed was not valid or was not actually infringed? The second question is necessarily answered when the first question is answered. It is: May the defendant assert a counterclaim for royalties it has actually paid under the compromise agreement on the ground that the patent which is the subject of the agreement upon which suit is brought is invalid or was not actually infringed?

At the time the parties entered into the 1968 agreement compromising the alleged liability of defendant for patent infringement, claims 1, 2 and 3 of the underlying Patent No. 3,003,195 had been declared invalid by the United States District Court for the Middle District of Georgia. See *Carding Specialists (Canada) Limited v. Lummus Cotton Gin Company,* 234 F. Supp. 444 (1964).

North Carolina has long recognized and adhered to the logic of the legal principle that where a party knowingly accepts consideration in full settlement of a disputed claim, the compromise agreement is valid, binding, and conclusive and will not be set aside or disturbed for mistakes of law. 2 Strong, N. C. Index 2d, Compromise and Settlement, § 1, p. 160; *Keith v. Glenn,* 262 N.C. 284, 136 S.E. 2d 665 (1964), and cases there cited; *McGill v. Freight,* 245 N.C. 469, 96 S.E. 2d 438 (1957); *Dixie Lines v. Grannick,* 238 N.C. 552, 78 S.E. 2d 410 (1953); *Askew's, Inc. v. Cherry,* 11 N.C. App. 369, 181 S.E. 2d 201 (1971), where plaintiff sued on an open account and defendants denied the debt, pled an accord and satisfaction as an affirmative defense, and also filed a third party action against Red Carpet Inn to recover any amount obtained by Askew in its action against them. Red Carpet Inn answered and pled a settlement agreement between it and defendants, third party plaintiffs, setting out the agreement in its verified answer. Red Carpet then moved for summary judgment and filed a supporting affidavit setting out in detail payments made under the settlement. The court granted the motion for summary judgment finding that there was no genuine issue of material fact. We affirmed on appeal.

In *Fisher v. Lumber Co.*, 183 N.C. 486, 111 S.E. 857 (1922), plaintiff brought an action for breach of contract for support. Plaintiff's evidence was that he was in the employ of defendant company at one of its lumber mills in 1908 and was a strong and vigorous young man. He received serious and permanent injury as the result of an accident in the course of his employment. After his hospitalization had ended, he was preparing to bring a suit when he was called to defendant's office by one of its foremen and was told that if he would not enter suit the company would give him employment for the rest of his life at some work he could perform in his crippled condition and pay him a living wage sufficient to support him and his family. Plaintiff agreed and continued in the employ of the company for some 12 years receiving wages adequate to support his family. However, by 1920, due to the rising cost of living, his wages were no longer adequate to keep his family from want. He had an interview with a company representative and reminded him of the agreement. The company refused to increase his wages and plaintiff was forced to seek employment elsewhere. The company denied negligence, pled the statute of limitations to bar recovery on that ground, denied the existence of an agreement and averred that if an agreement were made, it was made by one without authority to bind the company, was too vague to be enforceable and was without consideration. The jury found plaintiff was injured by defendant's negligence, that plaintiff was not contributorily negligent, that there was a contract between plaintiff and defendant, that defendant wrongfully breached it, that plaintiff did not waive it, that the cause of action was not barred by the statute of limitations, and awarded damages. On appeal the Supreme Court found no error, holding that the contract was by way of compromise and adjustment of a bona fide claim of plaintiff against the company and such an adjustment would furnish the consideration for the agreement regardless of whether the claim was well grounded. The Court said:

> " 'It is well settled that the law favors compromises, when made in good faith, whereby disputed claims are settled, and especially is this true when related to family controversies; and a promise, when thus made, in extingishment of a doubtful claim, furnishes sufficient consideration to support a valid contract. While it is not necessary that the contention which forms the basis of such a compromise shall be meritorious in order to support the promise, yet it

is essential in order to furnish a consideration therefor, that the contention be made in good faith and be honestly believed in.' " *Fisher v. Lumber Co., supra,* at p. 525, citing *Dickerson v. Dickerson,* 19 Ga. App. 269.

There is no question that a bona fide dispute existed between plaintiffs and defendant over patent validity and infringement of the patent prior to 23 February 1968. The agreement is, therefore, binding on the parties thereto. Defendant, by entering the agreement, compromised any dispute it had with plaintiffs with respect to past infringement, patent validity, and enforcement and gave up its right to take those matters to court. Neither plaintiff in this action claims any rights against defendant on the basis of the separate licensing agreement allegedly entered into by the parties.

We conclude that unless the federal patent policy prevails over the general policy of this State favoring the settlement of disputes, the judgment of the trial court should be affirmed. We are of the opinion that no federal policy exists which requires a reversal.

Defendant urges that the principles enunciated in *Lear v. Adkins,* 395 U.S. 653, 89 S.Ct. 1902, 23 L.Ed. 2d 610 (1969), holding unsatisfied license obligations could not be enforced if it were shown that the licensed patent was invalid, and *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed. 2d 788 (1971), holding that a patentee whose patent is held invalid in his suit against one alleged infringer may be precluded, under the doctrine of collateral estoppel, from asserting the validity of the patent in suit against a different alleged infringer, should be applied to the case before us and that by doing so, it becomes apparent that the court erred in striking defendant's further answer and defense and dismissing the counterclaim. We do not agree.

In *Ransburg Electro-Coating Corp. v. Spiller & Spiller, Inc.,* 489 F. 2d 974 (7th Cir. 1973), there had been an agreement executed in settlement of a 1965 patent infringement suit brought by Ransburg against Spiller, and the suit was dismissed. Under the agreement Spiller was to pay Ransburg $70,000 in 60 monthly installments as compensation for infringement of certain specified Ransburg patents. There was a separate agreement between the parties with respect to future licensing of Spiller's use of certain equipment involved in the dispute. Spiller

paid Ransburg for 1966, 1967 and the first half of 1968 at which time the Fourth Circuit reversed the Maryland District Court and held that the equipment involved in the dispute between Ransburg and Spiller did not infringe Ransburg's patents. Very shortly thereafter, Spiller notified Ransburg that it would make no further payments under the settlement agreement. Ransburg brought suit to collect the balance due, but did not seek to enforce the licensing agreement. Spiller counterclaimed for all amounts paid under the settlement agreement. The district court, by way of summary judgment, denied Spiller's counterclaim. On appeal, that judgment was affirmed. Chief Judge Swygert noted that the district court judge had found support in *Lear* and *Blonder-Tongue* for concluding that Spiller should not prevail on his counterclaim. The district court judge had written:

> "The remaining issue as between Ransburg and Spiller is whether Spiller should be permitted to prevail on its counterclaim and thereby recover all sums previously paid pursuant to the settlement agreement. In this regard Spiller relies on a statement in *Lear* that the licensee would be permitted to avoid the payment of all royalties accruing after Adkins' 1960 patent issued if he could prove the patent was invalid. The context in which the statement was made, however, demonstrates that it was not intended to create in a patent licensee the unfettered right to recover all royalties paid under a patent later declared invalid. The only thing decided in *Lear* was that a licensee in that situation would be relieved from the liability of paying royalties during the time he is challenging the validity of the patent. My reading of *Lear* on this point is buttressed by language appearing in the Supreme Court's opinion in *Blonder-Tongue*. There the court said '*Lear* permits an accused infringer to accept a license, pay royalties for a time, and cease paying when financially able to litigate validity, secure in the knowledge that invalidity may be urged when the patentee-licensor sues for unpaid royalties.' *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 346, 91 S.Ct. 1434, 1451, 28 L.Ed 2d 788. I find no expression in either *Lear* or *Blonder-Tongue* which would create an independent cause of action in a licensee permitting the recovery of royalties paid on a patent which is subsequently held invalid. Therefore, with respect to its counterclaim, defendant Spiller's motion for

summary judgment is denied and the countertclaim is ordered dismissed and judgment entered for Ransburg."

In affirming the district court in allowing the summary judgment with reference to the counterclaim, Judge Swygert said:

"We recognize that enforcement of the settlement contract will result in the payment of damages, in part, for the use of a device that has judicially been determined to be outside of the scope of Ransburg's patents and part of the 'prior art.' Nonetheless, it is well established that the good faith compromise of a bona fide claim is a valid consideration to support a settlement contract, *Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co.*, 105 F. 2d 943 (7th Cir. 1939); *Koelmel v. Kaelin*, 374 Ill. 204, 29 N.E. 2d 106 (1940); and that

> . . . where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties. *Chicago & N.W. Ry. Co. v. Wilcox*, 116 F. 913, 915 (8th Cir. 1902).

It cannot be gainsaid that in general settlements are judicially encouraged and favored as a matter of sound public policy. *Williams v. First National Bank*, 216 U.S. 582, 30 S.Ct. 441, 54 L.Ed. 625 (1910)."

With respect to the question of overriding federal policy the court said:

"Spiller urges, however, that the federal patent policy, as enunciated in *Lear*, that 'all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent,' prevails over the policy favoring settlement of disputes. Although the federal patent policy prevails over 'the technical requirements of contract doctrine' (395 U.S. at 670, 89 S.Ct. at 1911), we believe that such policy must occupy a subsidiary position to the fundamental policy favoring the expedient and orderly settlement of disputes and the fostering of judicial economy. To allow a subversion of the deeply instilled policy of settlement of legitimate dis-

putes by applying the federal patent policy as enunciated in *Lear* would effectively strip good faith settlements of any meaning. The vehicle of settlement would be a useless item if contracts, such as the one here, were subject to invalidation after they were consummated. We think the federal patent policy should not be carried so far. Indeed, in our decision in *Maxon Premix Burner Co., Inc. v. Eclipse Fuel Eng. Co.*, 471 F. 2d 308 (7th Cir. 1972), we were faced with a choice between the public policy encouraging tests of patent validity and the public policy favoring conservation of judicial time and limtiations on expensive litigation. We held the policy favoring judicial economy to be more significant. To allow Spiller to reopen this settlement contract would be contrary to the avowed need for judicial economy declared in *Blonder-Tongue, Labs., Inc. v. University Foundation,* 402 U.S. 313, 334-49, 91 S.Ct. 1434, 28 L.Ed. 2d 788 (1971), and hardly consonant with our decision in *Maxon.*

Moreover, if we were to allow the successful challenge of the instant settlement contract, we would do little toward furthering the collateral policy declared in *Lear* favoring the expeditious and early challenge to the validity of the underlying patent. 395 U.S. at 673, 674, 89 S.Ct. 1902. *See also Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 465 F. 2d 1253, 1257 (6th Cir. 1972)."

In *Kraly v. National Distillers and Chemical Corporation,* 502 F. 2d 1366 (7th Cir. 1974), the court, approved the principle set out in *Ransburg* and said:

"In *Ransburg,* the court was confronted with the issue of the extent to which a prior settlement of an infringement action is enforceable once noninfringement has been established. There, as here, the settlement agreement included both a payment for past infringement and a prospective licensing agreement. With respect to the payment for past infringement described in the opinion as the 'settlement contract,' the court allowed the plaintiff to recover the balance due on the basis that the agreement was 'a promise . . . to pay liquidated damages for past infringements in return for a dismissal of the infringement suit.' 489 F. 2d at 977. The court properly recognized the difference between the consideration supporting a 'release from past wrongdoing' and a 'license to do rightfully the same thing

in the future.' The enforcement of the settlement contract, unlike prospective enforcement of a licensing agreement, does not represent a demand for royalties for use of an idea within the public domain but rather a demand for the *quid pro quo* of a 'good faith compromise of a bona fide claim.' *Id.* at 976-978. It was for this reason that the court concluded,

> Although the federal patent policy prevails over 'the technical requirements of contract doctrine' . . . we believe that such policy must occupy a subsidiary position to the fundamental policy favoring the expedient and orderly settlement of disputes and the fostering of judicial economy. . . . The vehicle of settlement would be a useless item if contracts such as the one here, were subject to invalidation after they were consummated. We think the federal patent policy should not be carried so far. 489 F. 2d at 978.

Furthermore, the court reasoned that a failure to enforce the settlement contract would not effectuate the policy of encouraging early tests of patent validity enunciated in *Lear,* inasmuch as it would allow the alleged infringer to settle at a time when he had an opportunity to litigate validity secure in the knowledge that the settlement would cost nothing in the event the patent was subsequently declared invalid. *Id.*

In this case, the defendant has not counterclaimed for a refund of the monies paid for past infringement. The decision in *Ransburg* does not support Kraly's position because the policy considerations are expressly grounded on the distinction between 'settlement contracts' and licensing agreements."

For the reasons stated in this opinion, we reach the conclusion that the trial court properly allowed the motion to strike the second further answer and defense and the motion to dismiss the counterclaim for any amounts paid on the settlement agreement involving past infringement.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHNNY JACOBS

No. 7415SC1026

(Filed 7 May 1975)

1. **Indictment and Warrant § 12— amendment of warrant — offense charged not changed**

The trial court did not err in allowing the solicitor to amend a warrant charging that defendant attempted to obtain money by making threatening phone calls where the amendment added nothing to the original allegations and did not change the offense charged.

2. **Criminal Law § 107; Telephone and Telegraph Companies § 5— threat made by defendant — variance between allegation and proof not fatal**

Variance between the State's allegations and proof was not fatal where the warrant charged that defendant threatened his victim by telling him he would take his life but the evidence showed that defendant threatened only to beat his victim, since either threat would fall within the proscription of G.S. 14-196(a)(2) against using in telephonic communication language "threatening to inflict bodily harm."

3. **Criminal Law § 126; Jury § 1— juror unable to hear — unanimity of verdict**

Where the record showed that the jurors returned to the courtroom before reaching a verdict, the foreman asked if he could accept the vote of a juror who had been unable to hear all of the testimony, and the court sent the jury back to deliberate without answering the question, the trial court did not err in denying defendant's motion for mistrial made on the ground that in effect only eleven jurors decided the case, since the record showed that the verdict as finally rendered was the unanimous verdict of all twelve jurors and that each assented thereto.

ON writ of *certiorari* to review trial before *Hall, Judge.* Judgment entered 14 December 1973 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 February 1975.

On 28 August 1973 defendant was brought to trial before Judge Horton in the District Court on a warrant which charged that on 17 August 1973 he

> "did unlawfully, wilfully, ~~and feloniously did make an assault on Donald K. Marlow, and~~ put ~~him~~ Donald K. Marlow in bodily fear and in danger of his life by making a threatening telephone call to Donald K. Marlow demanding two hundred dollars in cash and did unlawfully, wilfully, threaten the said Donald K. Marlowe [sic] by telling him he would take his life if he did not put the two hundred in a bottle back of the Airport Road Mini Mart.

"The offense charged here was committed against the peace and dignity of the State and in violation of law. ~~G.S. 14-87~~ G.S. 14-196(2) [sic]."

The warrant was issued on 17 August 1973. As originally issued it did not contain the words underlined above nor were the words in the warrant stricken through as indicated above. The warrant was amended on 28 August 1973, the day defendant was tried in District Court, by the Assistant District Attorney striking through the portions as above indicated and adding by interlineation the words shown as underlined above. The following notation appears on the margin of the complaint portion of the warrant:

"Granted by leave of Judge Horton to charge violation of G.S. 14-196(2) [sic].

W. Lunsford Long
Asst. Solicitor
28 Aug. 73."

Defendant, represented by counsel, pled not guilty in the District Court, was found guilty, and from judgment imposing an active sentence, appealed to the Superior Court. In the Superior Court he was represented by the same counsel who had represented him in the District Court. He again pled not guilty and was tried de novo before a jury.

The State's evidence showed that on 15 and 16 August 1973 defendant telephoned Donald K. Marlow, then age 15 and a schoolmate of defendant's, and demanded money. In these phone conversations defendant told Donald to put $200.00 in a bottle behind the Mini Mart Food Store, and defendant threatened to beat Donald if he did not get the money for him. Donald's father learned of these calls and reported them to the police. On 17 August defendant again telephoned to Donald and demanded the money on threat of beating Donald if he didn't get it. A tap had been placed on the Marlow phone, and the phone call made on 17 August was traced. Within a few minutes after the call was made, defendant was arrested at the premises from which the call originated. The arresting officer found defendant sitting in front of the telephone.

Defendant testified and admitted that in telephone conversations he had asked Donald for money, but he denied making any threats. He testified that he had asked Donald to loan him

$200.00 and that Donald told him he would lend him the money and would put it in back of the Mini Mart. Defendant admitted that he had asked Donald to bring the money to him at night at the Mini Mart and that once before Donald had left $20.00 there for him.

The jury found defendant guilty as charged. Judgment was entered on the verdict sentencing defendant to prison as a committed youthful offender. Defendant's trial counsel gave notice of appeal, but the appeal was not perfected in apt time. On 31 October 1974 the Superior Court appointed defendant's present counsel to represent him, and subsequently this Court granted petition for writ of certiorari to permit perfection of the late appeal.

Attorney General Edmisten by Assistant Attorney General James L. Blackburn for the State.

Haywood, Denny & Miller by Emery B. Denny, Jr. and William N. Farrell, Jr. for defendant.

PARKER, Judge.

[1] Defendant contends that the warrant as originally drawn charged him with an attempt to commit common law robbery and that it could not be lawfully amended so as to charge him with the entirely different offense of violating G.S. 14-196(a)(2). That statute makes it unlawful for any person "[t]o use in telephonic communications any words or language threatening to inflict bodily harm to any person or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person." It is true, of course, that an attempt to commit common law robbery, which our Supreme Court held in *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956) to be an infamous crime punishable as a felony by virtue of G.S. 14-3(b), is an entirely different crime from the misdemeanor offense created by G.S. 14-196(a)(2). Therefore, if the warrant as originally drawn and the amendment thereto had the effect which defendant now contends they had, a serious question would be presented. As we read the original warrant, however, despite the reference therein to G.S. 14-87, it did not charge an attempt to commit robbery. "Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." *State v. McNeely, supra,* at 741. This

definition necessarily carries with it the concept that the offense can only be committed in the presence of the victim. Here, while the warrant as originally drawn referred to an "assault" on Donald Marlow, the factual averments in the warrant made it clear that this occurred only "by making a threatening telephone call to Donald K. Marlow." This explicit factual averment necessarily excludes the idea that defendant was charged with having done anything in Donald's presence and thus one of the essential elements of the crime of robbery was expressly negated by the language of the warrant as originally drawn. Whatever the draftsman of the original warrant had in mind, he failed to charge defendant with robbery or with an attempt to commit robbery. On the other hand, the warrant as originally drawn did contain sufficient factual averments to charge defendant with a violation of G.S. 14-196(a)(2). The amendment did not add anything to those essential allegations and in our opinion did not change the offense charged. The record shows no objection or exception to the amendment entered by defendant's trial counsel, either in the District or in the Superior Court, and his counsel on this appeal does not contend that defendant was in any way taken by surprise by the amendment made. Defendant's assignment of error addressed to the amendment to the warrant is overruled.

[2] Defendant assigns error to the denial of his motions for nonsuit, contending that these should have been allowed because of a variance in the State's allegations and its proof. In this connection he points out that the warrant charged that he threatened Donald "by telling him he would take his life," whereas the State's evidence showed that he threatened only to beat Donald. We do not consider the variance fatal. Either threat would fall within the statute's proscription against using in telephonic communication language "threatening to inflict bodily harm." Defendant, though admitting the phone calls, denied making threats of any character, and he could not have been taken by surprise by any variance between the State's allegation and its proof as to the exact nature of the threats made. This assignment of error is overruled.

[3] Finally, defendant contends that his motion for mistrial should have been granted because of the following events at the trial. The record shows that after the case had been submitted

to the jury, the jury returned to the courtroom and the following colloquy occurred:

"COURT: Who is the foreman?

FOREMAN: I am, sir. Sir, we have a question for the Court.

COURT: Very well.

FOREMAN: Sir, it seems Mr. Chavious, the gentleman next to the last on the end, has had trouble hearing the testimony in this case. And we are in question as to whether or not to bring the verdict of the jury in since, you know, he changed his vote, and then he related to us how he had not heard all the testimony.

COURT: I doubt that I can help you. You have to take your own recollection of whatever you heard, your own recollection of the evidence. I doubt and don't believe I can help you with your question.

FOREMAN: That was our question to the Court. He has changed his vote, but is it proper for me as foreman to accept the changed vote, since he relates that he did not hear.

COURT: Whatever his final verdict is.

FOREMAN: Yes, sir. And you want now his final vote?

COURT: You haven't reached a verdict apparently. Go back and when you return, the verdict must be a unanimous finding, as I told you in the charge. As soon as you have agreed on a verdict, let me know."

The jury again retired, and when it later returned to the courtroom, the record shows the following:

"COURT: Would you take the verdict, Madam Clerk?

CLERK: Have you agreed upon a verdict, members of the jury?

FOREMAN: Yes, we have.

CLERK: How do you find the defendant Johnny Jacobs, guilty as charged or not guilty?

FOREMAN: We find the defendant guilty as charged.

CLERK: This is your verdict, so say you all?

FOREMAN: Yes.

MR. MOORE: If Your Honor pleases, may we have the jury polled?

COURT: Yes, sir.

(At this time the jury was polled by the Clerk, and each answered that this was their verdict, and that each still assented thereto.)"

Defendant contends that the foregoing portions of the record demonstrate that in effect only eleven jurors decided this case and that he was thereby denied his constitutional right to have his case determined by a jury of twelve. We do not so read the record. On the contrary, whatever may have occurred in the jury room, the record makes clear that verdict as finally rendered was the unanimous verdict of all twelve jurors and that each assented thereto. Defendant's motion for mistrial was properly denied.

In defendant's trial and in the judgment imposed we find

No error.

Judges HEDRICK and CLARK concur.

ADA GRANSON WILLIAMS v. PILOT LIFE INSURANCE COMPANY

No. 7414DC1022

(Filed 7 May 1975)

Insurance § 50— accident policy — death resulting from accidental bodily injury — fall in kitchen

The evidence supported the trial court's determination that insured suffered "an accidental fall" and that her death "was solely as a direct result thereof and independent of all other causes" within the meaning of an accident policy in this action wherein it was not disputed that the death of the insured was caused by a blow to her head sustained when she fell in the kitchen of her home, plaintiff's evidence tended to show that insured fell when her foot slipped on the recently mopped floor, and defendant's evidence tended to show that insured fell as a result of a seizure which caused her suddenly to become stiff.

Judge HEDRICK concurring.

Judge CLARK dissents.

APPEAL by defendant from *Moore, Judge.* Judgment entered 5 September 1974 in District Court, DURHAM County. Heard in the Court of Appeals 18 February 1975.

Civil action to recover under a policy of accident insurance. The case was submitted to the court without a jury, and the parties stipulated that the sole issue to be determined was whether the insured died "solely as a direct result, and independent of all other causes, of accidental bodily injury," as set forth in the policy. There is no dispute that the death of the insured was caused by a blow to her head which she sustained when she fell in the kitchen of her home. The only dispute is over what caused the fall. Plaintiff's evidence tended to show that the insured fell as a result of her foot slipping on the kitchen floor, which had only shortly before been mopped. Defendant's evidence tended to show that the insured fell as a result of a seizure which caused her to become suddenly stiff.

The court entered judgment making findings of fact, including the following:

> "That upon the hearing of the evidence, the Court further finds as a fact that the insured suffered an accidental fall in her home on April 3, 1973, and as a result of said fall died on April 5, 1973. That said death was solely as a direct result thereof and independent of all other causes, which resulted in accidental bodily injury and death of the insured. . . . "

From judgment that plaintiff recover the amount payable under the policy for the death of the insured, defendant appealed.

Eugene C. Brooks III for plaintiff appellee.

W. O. King and R. Hayes Hofler III for defendant appellant.

PARKER, Judge.

When judgment was announced, defendant made and the court denied the following motion:

> "That the Court make specific findings of facts as to whether the decedent had (a) slipped and fallen or (b) became suddenly stiff and fallen or (c) the court was concluding that the fall was accidental regardless of whether decedent slipped and fell or suddenly became stiff and fell."

Defendant concedes that if (a) is true, plaintiff is entitled to recover, but contends that if (b) is true, plaintiff is not, and if (c) is true, the court erred and defendant is entitled to a new trial in which the court must specifically find whether (a) or (b) is true. Defendant further contends that the judgment does not make it clear on which basis the court proceeded. The trial court did expressly find, however, that the insured suffered "an accidental fall" and that her death "was solely as a direct result thereof and independent of all other causes." In my opinion these findings are fully supported by any view of the evidence and in turn support the judgment for plaintiff entered thereon.

The policy provided that defendant insurance company would pay death benefits if the insured's death occurred "solely as a direct result, and independent of all other causes, of accidental bodily injury" sustained while the policy was in effect. All of the evidence shows that the insured's death occurred solely as a result of the blow to her head which she received when she fell, and in its brief defendant concedes that "[t]here is no dispute in this case that the death of the insured was caused by a blow she sustained as a result of a fall." Thus, there was here neither evidence nor contention that death was due to a seizure or to illness or to any bodily infirmity whatever other than the injury caused directly by the blow to the insured's head. The question presented, therefore, is whether the injury so caused was an "accidental bodily injury," as those words are used in the policy, even though the fall which resulted in the blow to the head might itself have been caused by a sudden seizure. I hold that it was.

When confronted with a case involving a policy of accident insurance, the courts should interpret the policy words "accident" and "accidental" as those words are commonly understood in ordinary popular usage, for that is the sense in which they are understood by those who purchase such policies. If those words are to have a more restricted meaning, the burden of making that clear should be upon the insurance company which drafts the policy and sells it to the public. In common usage the words "accident" and "accidental" are used to describe some sudden, untoward event, happening apparently by chance, taking place unexpectedly, and not according to the usual course of events. I submit that in common understanding one whose head is bashed against some hard object because he "suddenly became stiff and fell" has suffered an "accident" no less than

one who suffers the same injury because his foot slipped and he fell. Even if the fall was caused by some sudden seizure or illness, it was completely fortuitous that the decedent would fall in such a manner as to strike her head violently upon the floor. In the present case the policy had been in effect for more than ten years. There was no evidence that prior to her fatal injury the insured had ever fallen or had ever suffered any seizure of any nature. In my opinion she suffered an "accidental bodily injury" within the meaning of the policy, whether she slipped and fell or suddenly became stiff and fell. Since there is no dispute that her death ensued "solely as a direct result, and independent of all other causes," of the bodily injury which she received in the fall, plaintiff is entitled to recover.

This holding is supported by the decision in *Salisbury v. John Hancock Mut. Life,* 259 Or. 453, 486 P. 2d 1279 (1971), in which the Supreme Court of Oregon expressly overruled one of its prior decisions in order to sustain recovery under an accident insurance policy which extended coverage for "death resulting directly and solely from * * * [a]n accidental injury" in a case in which the insured had a preexisting infirmity or disease which was a cause of the accident, but death was caused solely as the result of injuries suffered in the accident and not by virtue of the disease or infirmity itself. In the opinion in that case the Court said:

> "If it was the intention of the defendant that the policy not cover death caused solely as the result of injuries suffered in an accident where a cause of the accident is infirmity or disease, it should have more clearly expressed such intention. Ambiguous policies are construed against the company which draws them." 259 Or. at 456.

Although decided against the background of differing factual situations and varying policy language, other cases which support the decision here are: *Manufacturers' Accident Indemnity Co. v. Dorgan,* 58 F. 945 (6th Cir. 1893), 22 L.R.A. 620 (1905) (opinion by Taft, Circuit Judge, later Chief Justice of the United States Supreme Court); *Fairclough v. Fidelity & Casualty Co.,* 297 F. 681 (D.C. Cir. 1924); *Wells v. Prudential Insurance Co.,* 3 Mich. App. 220, 142 N.W. 2d 57 (1966).

Cases cited and relied on by defendant are distinguishable. In *Skillman v. Insurance Co.,* 258 N.C. 1, 127 S.E. 2d 789 (1962), the insured's automobile was seen to leave the highway and run

down the bank and into the river. The autopsy disclosed that the insured died from a heart attack and not from drowning or traumatic injuries. The jury returned verdict finding the insured's death was not caused by accidental means, and on plaintiff's appeal from judgment on the verdict, our Supreme Court found no error. In *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40 (1966), the injured was seen suddenly to jump straight backwards, striking his head on a cement floor. The accident indemnity portion of the policy involved in that case provided for payment upon proof that the insured sustained bodily injury resulting in death "through external, violent and accidental means, death being the direct result thereof and independent of all other causes" and excluded coverage if death occurred "from disease or from bodily or mental infirmity in any form." 268 N.C. at 99. In holding that nonsuit should have been granted as to plaintiff's claim for recovery under the accident indemnity portion of the policy, the opinion of our Supreme Court pointed out:

> "If he jumped backwards voluntarily, the fall was not through accidental means. . . . If he jumped backwards involuntarily as a result of a stroke brought on by hypertension, delirium tremens, or some other disease, mental or physical infirmity, the fall was not the sole cause of his death, and insured's death is not covered by the policy." 268 N.C. at 104.

It should be noted that, unlike the case now before us, the controlling policy language in both *Chesson* and *Skillman*, provided coverage only for death caused by "accidental means," and the opinion of the Court in each case recognized the distinction between the terms "accidental death" and death by "accidental means." Although I am reluctant to enter upon the "Serbonian Bog" which the maintenance of that distinction creates in this branch of the law, *see* Annot., 166 A.L.R. 469, 476 (1947), it is a distinction still recognized by our Supreme Court and serves as one basis for distinguishing those cases from the one now before us.

The judgment appealed from is

Affirmed.

Judge HEDRICK concurs.

Judge CLARK dissents.

Judge HEDRICK concurring:

In my opinion *Chesson v. Insurance Co., supra,* insofar as it relates to the decision in this case, simply stands for the proposition that there was no competent evidence in the record to support the jury's finding that Chesson's "fall was accidental" and hence that his death was "caused by accidental means." Since all parties agreed here that the insured's death "was caused by a blow she sustained as a result of a fall," the only question before the trial judge was whether the fall was "accidental." Unlike *Chesson* where the matter was "left to conjecture," there is competent evidence in the record before us that the insured fell as a result of her foot slipping on the kitchen floor, which had only shortly before been mopped. Thus, there is competent evidence in the record to support Judge Moore's finding that Mrs. Williams "suffered an accidental fall" and this finding supports the judgment.

MARY S. PRUNEAU v. CHARLES R. SANDERS, JR.

No. 7510DC65

(Filed 7 May 1975)

1. Divorce and Alimony § 23— separation agreement — agreement to use alimony for child support

Where, in a separation agreement entered by the parties, defendant agreed to pay plaintiff alimony of $15,000 per year until her remarriage and $5,000 per year after her remarriage, and plaintiff agreed to use the benefits received under the agreement for the support of the two children of the parties, plaintiff is obligated to apply toward support of the children the amount remaining after taxes of the $5,000 she is now receiving annually from defendant.

2. Divorce and Alimony § 23— modification of child support — changed circumstances

There was sufficient showing of changed circumstances to support an increase in the amount of child support ordered by a Virginia decree where plaintiff's evidence tended to show that plaintiff and her children moved from a house in Virginia in which plaintiff owned a life estate to a house in this State which plaintiff has purchased and on which she is making mortgage payments of $260 per month, that money she receives under a separation agreement has decreased, and that the costs of the children's food, clothes and other needs have increased.

3. Divorce and Alimony § 22— jurisdiction to modify foreign child custody order

By virtue of the physical presence of children within this State, the district court had jurisdiction, upon a proper showing, to modify a Virginia child custody decree. G.S. 50-13.5(c)(2); G.S. 50-13.7(b).

4. Divorce and Alimony § 24— modification of child visitation privileges

The trial court did not err in modifying a Virginia child custody decree which established no visitation schedule for the father by providing for the time, place and conditions under which the father's visitation privileges may be exercised.

APPEAL by defendant from *Winborne, Judge.* Judgment entered 4 September 1974 in District Court, WAKE County. Heard in the Court of Appeals on 21 March 1975.

This is a civil action instituted by plaintiff, a former wife of defendant, asking the court to (1) modify the provisions of a divorce decree and a custody and visitation order entered by courts of Virginia, and (2) "enter an order providing for the full and adequate support" of two minor children of the parties. Defendant answered praying for specific performance by plaintiff of various particulars specified in a separation agreement entered into by the parties prior to their divorce; for periodic accounting of funds placed in plaintiff's hands by defendant in trust for the minor children; and for a more definitive visitation schedule.

Plaintiff and defendant were married 7 September 1957. Two children were born of the marriage—the older son was born on 17 May 1960, and the younger son was born on 31 August 1962. Plaintiff and defendant were divorced on 28 May 1971, and custody of the minor children was awarded to the plaintiff.

Prior to the entry of the divorce decree, plaintiff and defendant entered into a separation agreement which is made a part of the complaint, pertinent parts of which will be referred to in the opinion.

By its final divorce decree of 28 May 1971, the Circuit Court of Halifax County, Virginia, ratified, approved, and made a part of the decree the terms and conditions of the separation agreement, and directed the parties to abide by the terms thereof. On 22 July 1972, defendant remarried and is now living with his present wife in St. Augustine, Florida.

On 31 May 1973, the Juvenile and Domestic Relations Court for the County of Halifax, Virginia, entered an order providing defendant with certain visitation rights.

On 8 June 1973, plaintiff remarried and is now living with her present husband in Raleigh, North Carolina.

On 4 September 1974, the trial court entered an order modifying previous orders with respect to defendant's visitation privileges, and requiring defendant to pay into the office of the Clerk of Superior Court of Wake County the sum of $650.00 per month, said funds to be disbursed to, and used by, plaintiff for the support and maintenance of the children.

Defendant appealed.

Bernard A. Harrell, for plaintiff appellee.

Maupin, Taylor & Ellis, by Richard C. Titus, for defendant appellant.

MARTIN, Judge.

Defendant assigns as error the following conclusion of law:

> "That the amounts currently being paid to the plaintiff under a separation agreement executed by the parties are, by the wording of the agreement and by treatment of the parties, alimony payments and the plaintiff is not obliged as such to apply the same to the support of the minor children. Conversely, the defendant cannot contract away his obligation to support his minor children, and, to the extent the agreement seeks to foreclose the courts from consideration of child support, it is unenforceable."

We think the assignment has merit.

In *Lane v. Scarborough,* 284 N.C. 407, 409, 200 S.E. 2d 622 (1973), the Court said:

> "Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution. (Citations omitted.)"

The heart of a contract is the intention of the parties. This intention is to be gathered from the entire instrument, viewing it from its four corners. *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946).

The deed of separation involved in the instant case provides in pertinent part:

> "7. The party of the first part agrees to pay to the party of the second part as alimony the sum of Fifteen Thousand Dollars ($15,000.00) per year until she re-marries, or until the aforesaid date of August 31, 1980, whichever shall first occur. In the event of re-marriage by the party of the second part before August 31, 1980, the party of the first part shall pay to the party of the second part alimony in the amount of Five Thousand Dollars ($5,000.00) per year until August 31, 1980. The party of the first part shall not be required to pay any alimony after August 31, 1980.
>
> 8. The sum of Twenty Thousand Dollars ($20,000.00) has been made available to the party of the second part by the party of the first part as a fund to provide for the college education of the children born to the parties hereto. Said childlren are Drury C. Sanders born May 17, 1960 and Robert D. Sanders born August 31, 1962. Said sum of $20,000.00 is to be invested by the party of the second part in bonds or other safe securities, and is to be used for the sole and single purpose of providing for the college education of said children, with one-half thereof being held for the benefit of each child. If either child fails to use his Ten Thousand Dollars and the income therefrom, for such educational purposes, the balance shall be paid to him upon his 23rd birthday.
>
> 9. The party of the second part has withdrawn the sum of Fifteen Thousand Dollars ($15,000.00) from funds belonging to the party of the first part, which sum she shall be permitted to retain and use as she desires.
>
> 10. The party of the first part has a contractual arrangement with Memphis State University, under which he expects to receive the sum of approximately Thirty Thousand Dollars ($30,000.00) on or about July 1, 1971. He will retain 3/4 of the aforesaid amount paid under said contract,

and will have 1/4 thereof paid to the party of the second part, which payment shall be in addition to the alimony paid for this year, and which amount will be kept and invested by her as she deems best to be used by her for future needs.

11. The party of the first part has a contractual arrangement with the Tampa Public Library under which he is entitled to receive approximately Twenty Thousand Dollars ($20,000.00) upon receipt of the amount due under said contract, he will retain 1/2 for himself, and will give 1/2 thereof to the party of the second part in addition to any alimony paid in any year, which amount will be kept and invested by her as she deems best to be used by her for future needs.

* * *

15. The party of the second part agrees to use the benefits that she receives under this contract, or so much thereof as is necessary or needful, for the support, maintenance, and education of the said two children born to the parties hereto and she agrees that with the alimony and other benefits that she receives under the terms of this contract she will provide all of the support, maintenance and education that may be needed or proper for said children without contribution from the party of the first part, and in consideration of the terms and provisions of this contract, the party of the second part hereby agrees to indemnify and save the party of the first part harmless from liability . . . responsibility for the support, maintenance and education of said children, except for . . . obligations assumed under this contract. If the party of the second part fails to comply with the terms of this paragraph of this contract, from and after the time of such failure there shall be no further obligation on the part of the party of the first part under . . . contract."

[1] It appears to be undisputed that defendant is paying plaintiff $5,000.00 per year as provided in Paragraph 7 of the agreement. The court found that the amount necessary to cover the reasonable monthly needs of the children for food, school, allowances, dental and medical expenses, clothing, laundry and cleaning, utilities, transportation, shelter ($100.00), recreation, and miscellaneous is $650.00 and ordered defendant to pay that

amount. While we agree with the court's conclusion that defendant cannot contract away his obligation to support his children, and by an agreement cannot foreclose the courts from consideration of child support, we disagree with the conclusion that plaintiff is not obligated to contribute, from the $5,000.00 paid her annually by defendant, to the support of the children.

In 2 Lee, N. C. Family Law, § 188, page 393, we find: "Although the law imposes upon the husband a legal obligation to support his wife, the majority view is that it is not contrary to public policy for a separation agreement, otherwise valid, to provide that the wife releases all her rights to support other than as expressly provided for in the agreement. This is also the law of North Carolina."

In executing the separation agreement, plaintiff released all her rights of support from defendant except as provided in the agreement. Now that she has remarried, we think she is obligated by the agreement to apply all of the $5,000.00 received annually from defendant, except as hereinafter stated, to the support and maintenance of the children. In the event she has to pay income tax on the $5,000.00, then the portion over and above the tax should be applied to the support of the children.

[2] Next, defendant contends the court erred in holding that there had occurred substantial changes in the circumstances affecting the welfare of the minor children which would warrant modifying the Virginia order of 28 May 1971 by increasing defendant's payments to plaintiff. We disagree. G.S. 50-13.7(b) provides:

> "When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifes or supersedes such order for custody or support."

The evidence for the plaintiff tends to show that since the date of the separation agreement the plaintiff and children have moved from their home in Halifax, Virginia, a house in which plaintiff owned a life estate, to a house in Raleigh which plaintiff has purchased and on which she is making mortgage payments of $260.00 per month exclusive of taxes and insurance; that the money she received from the separation agreement has

decreased; and that costs of their food, clothes and other needs have increased.

We hold that there was a sufficient showing of changed conditions for the trial court to modify previous orders.

Finally, defendant assigns as error the court's order regarding visitation rights. He argues that the court erred in concluding that the best interest of the minor children warranted substantial reduction of defendant's visitation rights accorded him by the Virginia order of 31 May 1973.

[3] By virtue of the physical presence of the children within the boundaries of this State, the district court has jurisdiction, upon a proper showing, to modify the Virginia decree as it pertains to the custody of the children. G.S. 50-13.5(c)(2) and G.S. 50-13.7(b). Of course, a change in circumstances must be shown before an order relating to custody, support or alimony may be modified. *Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E. 2d 140 (1969). The welfare of the children in controversies involving custody is the polar star by which the courts must be guided in awarding custody.

We realize that custody cases often involve difficult decisions. However, it is necessary that the trial judge be given wide discretion in making his determination for "the trial judge has the opportunity to see the parties in person and to hear the witnesses." *Greer v. Greer,* 5 N.C. App. 160, 167 S.E. 2d 782 (1969). "If the evidence supports the findings of fact by the trial court and those findings of fact form a valid basis for the conclusions of law, the judgment entered will not be disturbed on appeal." *Paschall v. Paschall,* 21 N.C. App. 120, 203 S.E. 2d 337 (1974).

[4] In the present case the trial court concluded that since the entry of the Virginia order relating to custody "there have been substantial changes in the circumstances which materially affect the welfare of the minor boys and in particular relating to the visitation by the defendant". The court did not find that the father by his conduct had forfeited his right of visitation, but instead it established the time, place, and conditions under which the father's visitation rights may be exercised. It is evident that the absence in the Virginia decree of an established visitation schedule intensified the divisiveness between the parents. The trial court's findings of fact in this respect were sup-

ported by the evidence and formed a valid basis for its conclusions and order.

For the reasons stated, that portion of the order requiring defendant to pay $650.00 per month beginning 1 October 1974 for the support of the children, and that portion requiring him to pay $1,300.00 for June and July 1974, are vacated, and this cause is remanded for further proceedings on the question of support for the children. Since the trial court has determined that the children reasonably need $650.00 per month for their support and maintenance, no further findings on that point will be necessary. The court will determine the amount of income tax, if any, that plaintiff is required to pay on the $5,000.00 which she receives from defendant annually. The court will then enter its order for support of the children, giving defendant credit for that part of the $5,000.00 paid plaintiff annually and remaining after payment of income tax thereon.

With respect to defendant's visitation privileges, the order is affirmed.

Remanded.

Judges BRITT and HEDRICK concur.

WAFF BROS., INC. v. BANK OF NORTH CAROLINA, N.A.; DAVIS SAWYER, SHERIFF OF PASQUOTANK COUNTY; CAROLINA-ALBEMARLE CORPORATION; VACATION PROPERTIES, INC.; AND SPENCER BERGER

No. 751SC28

(Filed 7 May 1975)

1. **Injunctions § 12— preliminary injunction — showing required**

At a hearing for a preliminary injunction pending the final hearing on the merits, the burden is on the party seeking injunctive relief to establish (1) that there is probable cause to believe that the party will ultimately prevail in a final determination of the case, and (2) that irreparable harm will be suffered by the party if the injunctive relief is not granted.

2. **Injunctions § 12— preliminary injunction to restrain execution sale — no showing of irreparable damage**

Plaintiff who held a lien on 48.672 acres for labor and materials furnished was not entitled to a preliminary injunction restraining

an execution sale of the property to satisfy a judgment obtained by a prior lienholder where plaintiff offered no evidence as to the value of the 48.672 acres, no evidence that the prior lienholder's judgment and plaintiff's judgment could not both be satisfied in full by a sale of the 48.672 acres, and no evidence that plaintiff would be irreparably damaged if injunctive relief was not granted.

APPEAL by plaintiff from *Lanier, Judge.* Judgment entered 5 November 1974 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 19 March 1975.

The following appear to be undisputed facts as gathered from the pleadings, affidavits, and exhibits included in the record on appeal.

On 26 March 1970 James and wife conveyed to Vacation Properties, Inc. (Vacation), a Virginia corporation, approximately 500 acres of land in Pasquotank County, North Carolina. The 500 acres contain the 48.672 acres which are involved in this controversy.Vacation executed a note to James and wife for the balance of the purchase price ($135,877.50) and, as security, executed a purchase money deed of trust dated 6 April 1970 conveying the 500 acres, with the exception of the 48.672 acres involved in this controversy.

On 9 June 1970 Vacation borrowed $600,000.00 from United Virginia Bank/Seaboard National and executed a deed of trust dated 9 June 1970 conveying a portion of the 500 acres to secure payment of the note.

On 18 December 1970 Quible & Associates (Quible) filed a claim of lien against the 500 acres for labor and materials furnished from 28 February 1970 to 30 October 1970. On 18 December 1970 Waff Brothers (Waff) filed a claim of lien against the 500 acres for labor and materials furnished from 9 April 1970 to 15 November 1970.

On 30 March 1971 Spencer Berger (Berger) acquired all of the stock of Vacation.

On 26 May 1972 judgment was rendered in Superior Court, Pasquotank County (file No. 71CVS270), in favor of Waff and against Vacation for the sum of $193,987.62, with a lien on the 500 acres effective 9 April 1970. On the same day (26 May 1972) judgment was rendered in Superior Court, Pasquotank County (file No. 71CVS271), in favor of Quible and

against Vacation for the sum of $63,182.91, with a lien on the 500 acres effective 28 February 1970.

In approximately May 1972, by reason of default by Vacation in payment of the purchase money note for the 500 acres, foreclosure proceedings were commenced by the trustee in the purchase money deed of trust. The 500 acres, excepting the 48.672 acres which had been excepted from the deed of trust, were advertised for sale.

By instruments dated 13 July 1972 Berger received from James and wife an assignment of the purchase money note and deed of trust and executed to the Bank of North Carolina, N.A. (Bank), an authorization for it to demand foreclosure of the deed of trust in the event Berger failed to pay his note to Bank for $137,673.53 borrowed to obtain the assignment of the purchase money note and deed of trust. On or about 20 November 1972 Berger paid his personal note to Bank and about the same date executed an instrument naming Frank B. Aycock, Jr. (Aycock), trustee in the place of the original trustee named in the purchase money deed of trust.

Articles of incorporation of Carolina-Albemarle Corporation (Carolina) were executed on 19 April 1973 and filed with the Secretary of State, State of North Carolina, on 25 April 1973. The original incorporators were Berger, Henderson Reeves, Jr., and Aycock.

By deed acknowledged on 25 April 1973 by Berger as president, Vacation conveyed to Carolina the 500 acres of land, including the 48.672 acres which are involved in this controversy. Following foreclosure proceedings on 30 July 1973 by Aycock, substitute trustee, under the original purchase money deed of trust (which had been assigned to Berger), Aycock, substitute trustee, by deed dated 29 August 1973, conveyed the 500 acres, excepting the 48.672 acres which are involved in this controversy, to Carolina. This conveyance by the substitute trustee was upon a high bid by Berger, which bid Berger assigned to Carolina.

On 27 August 1973 United Virginia Bank/Seaboard National assigned its $600,000.00 note from Vacation dated 9 June 1970 and the deed of trust conveying a portion of the 500 acres to secure the note to Bank (defendant Bank of North Carolina, N.A.).

On 28 August 1973 Carolina executed a deed of trust conveying the 500 acres, excepting the 48.672 acres involved in this controversy, to secure its note to Bank for the sum of $500,000.00.

By instruments dated 13 November 1973 Quible assigned its judgment to Carolina, and Carolina assigned the Quible judgment to Bank. By instruments dated 22 October 1973 Bank released to Carolina 27,980 acres of the land described in the 28 August 1973 deed of trust from Carolina to secure its note to Bank. Carolina in turn executed a deed of trust conveying the same 27.980 acres to secure its note for the balance owed Quible for the assignment of the Quible judgment.

In early 1974 Bank caused execution to issue upon the Quible judgment, which it holds under assignment from Carolina, and the sheriff of Pasquotank County advertised the sale under execution to be held on 4 March 1974. Waff instituted this action of 26 February 1974, wherein it seeks (1) to restrain the execution sale under the Quible judgment, (2) to have the Quible judgment declared extinguished by payment, and (3) in the alternative, to require defendant Bank to exhaust its other security before proceeding under the Quible judgment. On 27 February 1974 a temporary restraining order was entered in Superior Court, Pasquotank County, temporarily restraining the execution sale under the Quible judgment. After a hearing on the pleadings, affidavits, and exhibits, Judge Lanier, by order dated 5 November 1974, denied a preliminary injunction and dissolved the temporary restraining order.

Waff gave notice of appeal, and Judge Lanier, on 14 November 1974, restored the temporary restraining order pending appellate disposition of Waff's appeal.

White, Hall, Mullen & Brumsey, by Gerald F. White and William Brumsey III, for the plaintiff.

Ellis, Hooper, Warlick, Waters & Morgan, by John D. Warlick, Jr., and Harold L. Waters, for defendant Bank of North Carolina, N.A.

Frank B. Aycock, Jr., for defendants Carolina-Albemarle Corporation, Vacation Properties, Inc., and Spencer Berger.

BROCK, Chief Judge.

Plaintiff argues that the trial judge committed error in dissolving the temporary restraining order and further committed error in refusing to issue a preliminary injunction pending trial of this action on the merits.

[1] At a hearing on motion for a preliminary injunction pending the final hearing on the merits *(See* G.S. 1A-1, Rule 65[b]), the burden is on the party seeking the injunctive relief to establish (1) that there is probable cause to believe that the party will ultimately prevail in a final determination of the case, and (2) that irreparable harm will be suffered by the party if the injunctive relief is not granted. A failure to establish either of the two requirements will justify denial of the injunctive relief. *Mason v. Apt., Inc.,* 10 N.C. App. 131, 177 S.E. 2d 733 (1970).

[2] We are impressed at the outset with the complete failure of a showing by plaintiff that it will be irreparably damaged if injunctive relief is not granted. Plaintiff offered no evidence of the value of the 48.672 acres. Plaintiff has offered no evidence to suggest that the Quible judgment and plaintiff's judgment cannot be satisfied in full by a sale of the 48.672 acres. We are aware that the total of the two judgments is $257,170.53, but that tells us nothing of the value of the property. Plaintiff does not even argue in its brief that a sale of the property would not satisfy both judgments. Maybe a sale will satisfy both, or maybe it will not. The plaintiff's evidence is silent upon the question.

There is some inference from defendants' evidence that the property has been substantially developed for vacation property, that streets have been opened, lots divided, bulkheads constructed on the Albemarle Sound, and some work done on a golf course, tennis courts, and a recreation center. There is also some inference from defendants' evidence that lots were selling for $8,000.00 each and that 65 of the lots within the 48.672 acres were under sales contracts totaling $467,206.50, including interest.

We do not need to decide whether plaintiff has established probable cause to believe that it will prevail in the final determination of this case because the failure to establish the probability of irreparable harm is sufficient to support the denial of injunctive relief.

Plaintiff is joined by defendants in seeking a determination by this Court of the merits of plaintiff's claim that the Quible judgment was extinguished by its assignment to Carolina. The present posture of the case does not permit such a determination. There are no stipulations of fact, and there are no findings of fact by the trial judge or a jury. Whether plaintiff can establish an extinguishment or can establish conduct between Vacation, Berger, Carolina, and Bank that amounts to wrongful conduct *(See Henderson v. Finance Co.,* 273 N.C. 253, 160 S.E. 2d 39 [1968]) is a matter of conjecture at this point. The resolution of these and the other pertinent facts must be left for a trial on the merits.

Although the appellate courts can make their own findings of fact to determine the propriety of temporary injunctive relief, *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971); *Realty Corp. v. Kalman,* 272 N.C. 201, 159 S.E. 2d 193 (1967), the resolution of the facts on the merits of the case is the function of the trial court.

Affirmed.

Judges PARKER and ARNOLD concur.

FIRST-CITIZENS BANK AND TRUST COMPANY v. ADOLFAS AKELAITIS

No. 7410SC984

(Filed 7 May 1975)

Guaranty — action against guarantor — striking of defenses

In a bank's action against the guarantor of a loan made by the bank, the trial court erred in striking defendant guarantor's defenses (1) that the bank acted fraudulently in that it knew or had reason to know that defendant was being misled or was induced to enter into the guaranty agreement in ignorance of facts materially increasing his risk and failed to inform him of such facts, (2) that the loan was in truth a cash settlement of prior lawsuits by the principal debtors against the bank and that plaintiff never expected to be repaid any part of the loan except that amount guaranteed by defendant, and (3) that the guaranty agreement was not supported by consideration since the loan was a settlement of prior lawsuits; however, the trial court properly struck defendant's defenses (1) that unsound banking practices in making the loan bar plaintiff's action, (2) that the loan

violated federal and state statutes and was contrary to public policy, and (3) that plaintiff failed to take timely action against the principal debtors.

Judge VAUGHN dissents.

APPEAL by defendant from *Bailey, Judge.* Orders entered 21 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals on 11 February 1975.

Plaintiff instituted this action to recover the sum of $50,000 plus interest pursuant to a guaranty agreement executed by defendant.

In summary the complaint alleges: The plaintiff is a corporation organized under the laws of this State with a principal office in Wake County, North Carolina. Defendant is a citizen and resident of the State of New Jersey. On or about 26 April 1973, defendant executed a written guaranty agreement whereby the defendant guaranteed payment of $50,000.00 of a promissory note in the amount of $175,000.00 and dated 26 April 1973. The promissory note was executed by the Oaks Management Company by W. David Temel, its president, and W. David Temel and Cornelia A. Temel, individually. The makers of the note have defaulted in payment. On or about 7 December 1973 plaintiff made written demand, through its counsel, for payment under the guaranty agreement, and defendant refused same.

Defendant's answer raises the following defenses. He admits executing the purported guaranty agreement and further admits upon information and belief that the promissory note is in default and that plaintiff's written demand for payment was refused. However, he denies owing $50,000.00 for the reason that his signature on the guaranty agreement was procured by fraud and collusion on the part of plaintiff bank and one or more of its agents with W. David Temel. In his second defense the following allegations are made. On or about 6 October 1972, plaintiff imposed a "collected basis" limitation on certain checking accounts of W. David Temel and Temel-Peck Enterprises Co., because plaintiff bank thought Temel was depositing items into the accounts which were not supported by funds and then writing checks on the accounts. Thereafter, on 8 December 1972, W. David Temel and Temel-Peck Enterprises Co. sued the plaintiff bank and one of its vice-presidents for $30 million, alleging damage to reputation and credit. On 24 April 1973 the $30 million lawsuits were dismissed by consent of counsel. Prior

thereto, negotiations had taken place among plaintiff bank, the bank's senior vice-president E. P. Bodenheimer, Temel, and one Jack Brown in connection with the application for a loan of $175,000 from the bank to a corporation owned by Temel and Jack Brown and known as Oaks Management Company. As part of the loan the bank demanded various security, including the guaranty of defendant Akelaitis. The $175,000.00 loan, which underlies the present action, was made to Oaks Management Company only two days after the $30 million lawsuits were dismissed. Believing that he was to guarantee a bona fide loan arising out of a legitimate business transaction and that Temel and Oaks Management Company were in sound financial condition, and acting without knowledge of the prior $30 million lawsuits and the negotiations leading to the $175,000.00 loan, defendant Akelaitis executed a guaranty agreement covering part of the loan. Defendant alleges that plaintiff bank had a duty to disclose such facts as were material to the risk assumed by defendant and that, failing in this duty, plaintiff fraudulently conspired with Temel to induce defendant to execute a guaranty on the loan. Consequently, plaintiff is barred from enforcing the guaranty agreement.

Defendant's third defense alleges that the loan was in truth a cash settlement of the prior lawsuits against plaintiff bank and that plaintiff never expected or intended to be repaid any part of the loan except that $50,000 portion which defendant guaranteed. This, alleges defendant, also constitutes a bar to the present action.

Defendant, by his fourth defense, alleges that unsound banking practices in making the loan bar plaintiff's action.

As a fifth defense, he alleges that the loan was a misappropriation of funds in violation of certain federal and state statutes so that enforcement of defendant's guaranty is contrary to public policy.

Since he alleges that the loan was actually a cash settlement of prior lawsuits against plaintiff, defendant, through his sixth defense, claims that his guaranty agreement is unenforceable due to a lack of consideration.

The seventh and final defense alleges that the note was in default after 1 August 1973, and on or about 17 November 1973, W. David Temel and Cornelia A. Temel, makers on the note,

disappeared. By failing to take timely action against the Temels and to protect its other security, defendant alleges that plaintiff bank has caused defendant's rights as guarantor to be destroyed so that defendant is entitled to be exonerated from his obligation as guarantor.

In addition to the foregoing defenses, defendant counterclaimed, alleging that the fraudulent conduct of plaintiff caused defendant to be damaged in the amount of $50,000.00 plus attorney fees.

The trial court allowed plaintiff's motion to strike defendant's second, third, fourth, fifth, sixth, and seventh defenses and further allowed plaintiff's motion to dismiss defendant's counterclaim for failure to state a claim upon which relief can be granted. In addition, the trial court denied defendant's motion to join F. P. Bodenheimer as a third-party defendant. From these orders defendant appealed.

Jordan, Morris and Hoke, by Charles B. Morris, Jr., for plaintiff appellee.

Hall and Scales, by Archibald H. Scales III, for defendant appellant.

MARTIN, Judge.

Under Rule 12(f), Rules of Civil Procedure, the trial court may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter. "As the motion to dismiss under 12(b)(6) is the device to test the fundamental sufficiency of a complaint, so the motion to strike under Rule 12(f) is the device to test the legal sufficiency of an affirmative defense." 1 McIntosh, N. C. Practice and Procedure, § 970.65 (Phillips Supp. 1970). The trial court has ordered stricken from the answer defendant's second through his seventh defenses. In our opinion, and we so hold, the trial court's order striking defendant's second, third, and sixth defenses was improper. We affirm the trial court with regard to the fourth, fifth, and seventh defenses.

The absence of an allegation that plaintiff made any misrepresentations to defendant was not fatal to the second and third defenses. Where there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation. *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962).

Clearly, defendant sought to plead fraud based upon the silence of the bank. Furthermore, we cannot say at this stage of the case whether plaintiff bank had a duty to make disclosures to defendant. Plaintiff's reliance on *Sparks v. Trust Co.*, 256 N.C. 478, 124 S.E. 2d 365 (1962), is misplaced. Here, defendant was not simply a member of the general public in need of information concerning a customer of the bank. Defendant was a guarantor of payment of a loan made by the bank.

"If the creditor 'knows, or has good grounds for believing that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good and fair dealing demand that he should make such disclosure to him; and if he accepts the contract without doing so, the surety may afterwards avoid it.' " 10 Williston, Contracts, § 1249 (3d ed. 1967). In *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962), the Court, quoting from an earlier edition of Williston's treatise, states, " 'A surety is in general a friend of the principal debtor, acting at his request, and not at that of the creditor; and, in ordinary cases, it may be assumed that the surety obtains from the principal all of the information which he requires.' This is the rule applicable unless there is some fact, which the creditor knows the surety probably will not discover, of such vital importance to the risk that the creditor must have been aware that the non-disclosure would in effect amount to a contrary representation to the surety."

While recognizing that a distinction is often made between a contract of guaranty and a contract of suretyship, we find no reason to draw such a distinction under the present circumstances. Hence, the foregoing rules are applicable.

In the present case it appears that the trial judge prematurely decided the question of plaintiff's duty to disclose. Defendant has been precluded from discovering whether the bank knew or had reason to know that defendant was being misled or that he was induced to enter into the contract in ignorance of facts materially increasing his risk of which the bank had an opportunity to inform him.

Defendant's sixth defense was also improperly stricken from the pleadings. Even though defendant characterized the trans-

action as a cash settlement, in contrast to other averments in which he called it a loan, this was not fatal. A party may state as many defenses as he has regardless of consistency. G.S. 1A-1, Rule 8(e)(2).

Defendant's fourth, fifth, and seventh defenses were properly stricken as legally insufficient. With regard to the seventh defense, it is necessary to point out that under the terms of the guaranty agreement defendant's liability was direct and not conditional upon the pursuit of any remedies against any other person or security.

From what has been said with regard to the second and third defenses, it follows that the court should not have dismissed defendant's counterclaim for fraud. Furthermore, defendant should have been allowed leave to serve a summons and complaint upon F. P. Bodenheimer as third-party defendant.

Reversed in part.

Affirmed in part.

Judge ARNOLD concurs.

Judge VAUGHN dissents and would affirm the orders.

JUSTINE WILLIAMS NEWTON v. SANFORD ELLIS WILLIAMS

No. 7410DC1097

(Filed 7 May 1975)

1. **Husband and Wife § 12— separation agreement — resumption of marital relations — agreement terminated**

Where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose insofar as it remains executory.

2. **Husband and Wife § 12— separation agreement — resumption of marital relations — jury question**

In an action to enforce the provision of a separation and property settlement agreement requiring transfer of certain property, the trial court erred in entering summary judgment where the question as to whether the parties became reconciled and renewed their marital re-

lations, thereby terminating the agreement, presented a question of fact to be determined at a trial of the action.

APPEAL by defendant from *Barnette, Judge.* Judgment entered 25 September 1974 in District Court, WAKE County. Heard in the Court of Appeals 14 March 1975.

Plaintiff and defendant were married to each other on 29 April 1952 and lived together as husband and wife until 13 March 1970, at which time they separated and began living apart. On 3 April 1970 they entered into a written "Separation and Property Settlement Agreement" wherein they agreed, among other things, to live separate and apart and to make certain property transfers. Paragraph 12 of the agreement provides:

> 12. REAL ESTATE. Husband agrees to quitclaim all right, title and interest in the house in Raleigh, North Carolina, described as Lot 28, Bertie Drive Section, Longview Gardens Subdivision, Book of Maps 1954, Page 71, Wake County Registry. Wife agrees to quitclaim all right, title and interst in the property located at Cayce, South Carolina, described as Lot 14, Blk L, Churchill Heights, Cayce, South Carolina. Husband and wife agree to deed their respective interests in the aforesaid property by quitclaim deeds.

On 24 April 1972 plaintiff was granted an absolute divorce from defendant.

On 10 October 1972 plaintiff instituted this action asking for specific performance of the above agreement, or, in the alternative and pursuant to G.S. 1A-1, Rule 70, that the court divest defendant of title to the Wake County property described in paragraph 12 and vest title in plaintiff.

Defendant answered on 13 December 1972, alleging as one defense "[t]hat the resumption of marital cohabitation and conjugal relations rendered void all executory provisions of the written Separation Agreement. . . ."

Both parties then made motions for summary judgment and filed supporting affidavits. They stipulated certain facts including the following:

> A. For the period between September, 1970 and February, 1972, the defendant would spend five (5) consecu-

tive week nights and one (1) weekend with the plaintiff during each month. At such times the plaintiff and defendant would share the same bedroom and would engage in sexual intercourse. The only exception to this routine would be when the defendant would have to work late and would arrive at the residence after the plaintiff had retired for the night. On such occasions, which the defendant believes to have been six or eight times, the defendant would sleep in a separate room. This entire period coincided with the period during which the plaintiff was on call at the hospital at which she worked, and when the plaintiff would be called to the hospital, the defendant would remain alone with their daughter, Gail, until the plaintiff's return.

B. The defendant stayed with the plaintiff for approximately two (2) weeks during the latter part of November 1971. During this period, plaintiff's brother, a former patient at Cherry Hospital and of questionable mental stability, also resided with the plaintiff. The decision that the defendant should stay with the plaintiff during this period was a mutual one which took into consideration the potential danger of the plaintiff's brother to the plaintiff and their daughter, Gail. During this two-week period, the defendant moved a partial wardrobe into the plaintiff's home together with a sufficient number of personal belongings so that he could dress and prepare for work from the plaintiff's home. During this time the plaintiff and the defendant shared the same bedroom and engaged in sexual relations.

The parties further stipulated that in June of 1970, December of 1970, and April of 1971, they spent three nights together at various beach resorts where they registered in motels as husband and wife and engaged in sexual relations; that in July of 1971 they arranged for their vacations to coincide and spent three nights together at Myrtle Beach where they registered in a motel as husband and wife and engaged in sexual relations.

In an affidavit filed 26 August 1974, plaintiff asserted that at no time subsequent to 3 April 1970 did she intend to resume "a full marital relationship with defendant on a permanent basis"; that she did not resolve her difficulties with defendant nor intend to reestablish the marital home or reside with defendant on a permanent basis; that at all times subsequent to 3 April 1970, she represented to the world that she and defendant

were separated and living apart and they intended to remain that way.

In an affidavit filed 6 September 1974, defendant asserted that while he removed his clothing from the marital residence after 3 April 1970, that thereafter he and plaintiff resumed marital relations as set forth in the stipulation; that up until February of 1972 he attempted to resolve their marital difficulties; and "[t]hat in November, 1971, the defendant moved his personal belongings into the residence of the plaintiff with the plaintiff's knowledge and consent and at her request which the defendant believed would be a permanent reconciliation, and with the intent to remain with the plaintiff on a permanent basis."

Following a hearing, the trial court entered judgment in which it concluded that plaintiff was entitled to summary judgment as a matter of law, divested defendant of all title and interest in the subject property, and vested title in plaintiff. Defendant appealed.

Jordan, Morris and Hoke, by Joseph E. Wall, for the plaintiff appellee.

Brady, Gardner and Wynne, by T. Alfred Gardner, for the defendant appellant.

BRITT, Judge.

G.S. 1A-1, Rule 56, provides for the rendition of summary judgment ". . . 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. . . ." We disagree with the trial court's conclusion in the instant case that no genuine issue as to any material fact was shown and that plaintiff is entitled to judgment as a matter of law.

[1] As stated in plaintiff's brief, we are not concerned in this case with the question of what conduct invalidates a separation and bars a divorce on ground of one-year separation; our inquiry is with respect to conduct that will invalidate the provisions of a separation and *property settlement* agreement. While the court was confronted with an executed contract in *Jones v. Lewis,* 243 N.C. 259, 90 S.E. 2d 547 (1955), we think

the following statement from the opinion by Justice (later Chief Justice) Denny, page 261, is appropriate here:

> It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory. *Archbell v. Archbell,* 158 N.C. 408, 74 S.E. 327, Ann. Cas. 1913D, 261; *Moore v. Moore,* 185 N.C. 332, 117 S.E. 12; *S. v. Gossett,* 203 N.C. 641, 166 S.E. 754; *Reynolds v. Reynolds,* 210 N.C. 554, 187 S.E. 768; *Campbell v. Campbell,* 234 N.C. 188, 66 S.E. 2d 672.

Without question, the provisions of the agreement which plaintiff seeks to enforce are executory. The question then arises as to whether the parties became reconciled and renewed their marital relations. The effect of the judgment appealed from is to say that the pleadings, affidavits and stipulations established *as a matter of law* that the parties did not become reconciled and renew their marital relations.

[2] Under the pleadings, affidavits and stipulations offered, we think the question as to whether the parties became reconciled and renewed their marital relations presented a question of fact to be determined at a trial of the action. In 1 Lee, N. C. Family Law (3d ed. 1963), § 35, at 152-53, while the author discusses reconciliation and a resumption of cohabitation in the context of terminating a divorce from bed and board, we think our holding finds support in the following statements:

> . . . There may be a reconciliation and resumption of cohabitation with an intention that it shall be a normal and permanent relationship, even though, despite the intention, the relationship lasts only a short time. . . . Mere proof that isolated acts of sexual intercourse have taken place between the parties is not conclusive evidence of a reconciliation and resumption of cohabitation. There must ordinarily appear that the parties have established a home and that they are living in it in the normal relationship of husband and wife.

Although the parties stipulated to the acts in question, they disagree with respect to their intention. Plaintiff indicates in her affidavit and by stipulation that they were done for her convenience and that she never had any intention of permanently

resuming the marital relationship. On the other hand, defendant indicates in his affidavit that he was attempting to resolve their marital difficulties and spent many days and nights with plaintiff believing there would be a permanent reconciliation. The issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation. Since the evidence is clearly in conflict as to this intent, summary judgment was premature and therefore improper. *See generally Coulbourn v. Armstrong,* 243 N.C. 663, 91 S.E. 2d 912 (1956); *Hudson v. Fatolitis,* 289 So. 2d 41 (Fla. App. 1974); 42 C.J.S., Husband and Wife, § 601 (1944); 24 Am. Jur. 2d, Divorce and Separation, § 916 (1966); 1 R. Lee, N. C. Family Law, §§ 35, 200 (3d ed. 1963); Annot., 35 A.L.R. 2d 707 (1954).

For the reasons stated, we hold that the trial court erred in allowing plaintiff's motion for summary judgment.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

SAMUEL M. LONGIOTTI AND MELVIN M. STEIN, D/B/A SUMPTER SQUARE ASSOCIATES, A PARTNERSHIP v. WACHOVIA BANK & TRUST COMPANY, INC. N.A.

No. 7421SC1014

(Filed 7 May 1975)

1. **Damages § 7— change in permanent lender — loss to construction lender — charge of liquidated damages proper**

The trial court properly granted defendant's motion for summary judgment in an action by plaintiff to recover a $27,000 payment made to defendant where defendant was the construction lender, Aetna Life Insurance Company was the long-term lender, and plaintiff was the borrower; plaintiff made arrangements with another permanent lender and requested that defendant, who had an agreement with Aetna to service Aetna's long-term loan, terminate plaintiff's obligations with Aetna; defendant did make arrangements with Aetna for its pay-off; and defendant also charged plaintiff an additional $27,000 for "liquidated damages" for loss of servicing the permanent loan of Aetna.

2. **Contracts § 27; Duress— contract signed under duress — insufficiency of evidence**

Where plaintiff stood to lose $70,000 in a standby fee with a prospective permanent lender unless defendant construction lender

gave up its interest in the transaction between plaintiff and its original permanent lender, requirement by defendant that plaintiff pay it $27,000 in liquidated damages before defendant would release such interest did not amount to economic duress.

APPEAL by plaintiffs from *Exum, Judge.* Judgment entered 29 August 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 February 1975.

Plaintiffs brought this action seeking to recover a $27,000 payment made to defendant. For the most part, the facts are undisputed. Sumpter Square, Inc., a North Carolina corporation, was formed for the purpose of building an apartment project known as "Sumpter Square Apartments." The estimated cost of the project was $3.1 million. Being unable to fund such an undertaking, Sumpter Square, Inc., sought to borrow money for construction and permanent financing. Negotiations ensued and ultimately led to execution of the following documents.

A letter of commitment, dated 15 October 1969, was issued by Aetna Life Insurance Company (Aetna) whereby Aetna approved a first mortgage loan in the maximum amount of $2.7 million for a term of 26 years with interest at 9.75% per annum. In order to fill the gap between $2.7 million and $3.1 million, additional financing of approximately $400,000.00 was obtained from Westinghouse Credit Corporation. (The $400,000.00 loan is not pertinent to this case except for the fact that the construction lender required such financing prior to any disbursements of the construction loan.) On 14 January 1970, Sumpter Square, Inc., through Samuel Longiotti, accepted a letter from Wachovia Bank & Trust Company (Wachovia) as its commitment for a construction loan. Thereafter, on 2 February 1970 a "Buy and Sell Agreement" was executed by Wachovia, Aetna and Sumpter Square, Inc. This agreement provided in summary and in part that:

(1) The construction loan would be represented by a deed of trust note of the borrower (Sumpter Square, Inc.), secured by a first deed of trust;

(2) Upon receipt of the purchase price, Wachovia would endorse the deed of trust note to Aetna;

(3) Prior to the expiration of the Aetna commitment, Wachovia would not release any part of the security or accept payment or prepayment thereof or accelerate the maturity unless Sumpter Square, Inc. should default;

(4) Aetna would purchase the deed of trust note from Wachovia on or after 10 October 1971, but before expiration of Aetna's commitment, and subject to certain requirements being met such as completion of the project;

(5) Aetna would be guaranteed payment of a standby fee of $54,000.00 in the event the loan did not close in accordance with Aetna's letter of commitment—$27,000.00 of this amount to be released by Aetna upon the initial disbursement of construction money by Wachovia and the remaining $27,000.00 to be released in the event the loan closed to Aetna;

(6) Sumpter Square, Inc. would accept the construction loan and the permanent loan and would not "pay or prepay said construction loan in whole or in part or accept a permanent first mortgage loan from any lender other than Company (Aetna) during the term of this agreement or any extension thereof. . . ." (Parenthetical information added.)

Sumpter Square, Inc., then executed a deed of trust note to Wachovia in the amount of $2.7 million with interest at 14% per annum, payable on the first day of each month to and including 1 November 1971. After 1 November 1971 the note would bear interest at 9¾% per annum with payments of $23,846.40 on 1 December 1971 and a like amount on the first day of each month until 1 November 1997 at which time the remaining principal and interest would be due. Additional payments on the principal could be made as follows:

"Beginning twelve years from the date of the first level monthly repayment of principal and interest as called for herein, the entire balance hereof may be prepaid on sixty (60) days prior written notice upon payment of a surrender charge of three percent (3%) of the principal balance then owing, said surrender charge to diminish one-half of one per cent per year until sixteen years after the first level monthly repayment; thereafter, the entire balance may be paid in full or paid in part upon payment of a surrender charge of one per cent (1%) of the amount so paid."

Subsequently, the property involved was conveyed to plaintiffs doing business as Sumpter Square Associates. As construction of the apartment project proceeded, it became apparent to

plaintiffs that their loan commitments would be insufficient. By a letter dated 10 February 1971, Mr. Longiotti, on behalf of Sumpter Square Associates, notified Wachovia that the project warranted a loan of approximately $3.5 million due to various economic factors. (At this time the permanent loan commitments totaled about $3.1 million.) He asked Wachovia to explore the possibility of an increased loan and to pursue whatever was necessary in that regard with the permanent lender. Since Aetna was reluctant to commit additional funds, plaintiffs sought financing from another source—Western Savings Society of Philadelphia (Western).

On 12 April 1971, Western issued its letter of commitment for a loan of $3.5 million at an interest rate of 8¾% and for a term of 27 years. Western conditioned its commitment upon receiving a first lien on the property—a requirement which meant that plaintiffs had to secure a release from the permanent loan commitment with Aetna and had to satisfy the construction loan obligation with Wachovia. In a letter dated 25 May 1971, plaintiffs informed Wachovia that they were making arrangements with another permanent lender (Western) and requested that their obligations to Aetna be terminated. Plaintiffs also indicated their readiness to pay off the construction loan. Wachovia wrote to plaintiffs, stating that a 1% fee of $27,000.00 would have to be paid to Aetna (see the standby fee in the "Buy and Sell Agreement") and that an additional $27,000.00 must be paid to Wachovia as "liquidated damages" for the loss of servicing the permanent loan of Aetna. (Wachovia had an arrangement with Aetna whereby it would service the long-term Aetna loan to Sumpter Square, Inc.) Aetna received its $27,000.00 standby fee and released plaintiffs from the permanent loan agreement with Aetna. However, it was also necessary for plaintiffs to pay off the construction loan of Wachovia and cancel the existing deed of trust because Western required a first lien. Furthermore, since Western's commitment expired 6 November 1971 and entailed the loss of a $70,000.00 standby fee in the event that the loan with Western failed to close before this date, plaintiffs' need to free the property of existing encumbrances became more urgent. Plaintiffs satisfied the construction loan and paid Wachovia the $27,000.00 premium under protest, feeling that Wachovia was not entitled to same. They secured their loan of $3.5 million from Western and brought this action to recover the $27,000.00 payment made to Wachovia.

Both parties moved for summary judgment. Being of the opinion that there was no genuine issue as to the material and operative facts and that from these facts it appeared that the $27,000.00 was received by Wachovia in consideration of the relinquishment of valuable contract rights and that it was not paid by plaintiffs under duress, the trial court denied plaintiffs' motion and allowed defendant Wachovia's motion for summary judgment. Plaintiffs appealed.

Midgette, Page, Higgins & Niles, by Robert J. Page, for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by Grady Barnhill, Jr., and Ralph K. Frasier, for defendant appellee.

MARTIN, Judge.

Plaintiffs contend that Wachovia had no legal right to the added payment of $27,000.00 in return for relinquishing its rights and the deed of trust. Their contention is based upon two arguments. First, it is argued that a "thorough examination of the documents executed by Aetna, Wachovia and Appellants reveals no provision for liquidated damages, or any other payment to Wachovia if the permanent loan did not close with Aetna." Secondly, they argue that the money was paid to Wachovia under conditions which amounted to economic duress.

The present case is comprised of a complex financial arrangement involving real estate developers, a construction lender, and a permanent or long-term lender. An examination of the nature of their arrangement is imperative at this point. What immediately follows has been culled from the affidavits and depositions submitted to the trial court for consideration.

[1] In order for lenders to gain a degree of certainty before a construction project begins, it is the practice to establish the rights and duties of the parties at the outset by means of various documents as found in the present case. One such document is the buy-sell agreement. The buy-sell agreement is executed by all three parties for the purpose of preventing the borrower from abrogating existing loan agreements in favor of a more attractive loan. Thus, the long-term loan and the construction loan are represented by the same documents, and upon completion of construction, the construction lender merely assigns and transfers the documents to the long-term lender. While the con-

struction lender's role is only temporary, he often, as here, expects to receive future income by "servicing" the long-term loan after being paid off or "taken out" by the long-term lender. Servicing the long-term loan can involve collecting monthly loan payments and interest, taking care that the property taxes are paid, and inspecting the property from time to time in order to advise the long-term lender of the condition of his security.

In the present case Wachovia rightfully expected to receive future income, for it had an agreement with Aetna to service Aetna's long-term loan. According to defendant's affidavits, the income from servicing a loan was important to Wachovia and represented a major inducement for locating and securing a long-term lender. The documents, such as the buy-sell agreement, were intended to assure the lenders of their respective rights to the benefits of the transaction as originally contemplated. When plaintiffs wanted out of the arrangement, Wachovia was holding a deed of trust on the property. We find nothing wrong in Wachovia's requirement that it receive a 1% premium in addition to satisfaction of the construction loan in return for releasing its interest in the transaction. There is no contention that the premium was excessive in light of Wachovia's lost expectations.

[2] In addition, we disagree with plaintiffs' claim that the payment was exacted under conditions amounting to economic duress. Clearly, plaintiffs' position was not an enviable one for they stood to lose a $70,000.00 standby fee to Western unless Wachovia gave up its interest in the transaction. On the other hand, it cannot be said that Wachovia was in any way responsible for plaintiffs' predicament. (Indeed, part of the cost overrun on the project appears due to the addition of a "Day Care Center" which involved between $150,000.00 and $175,000.00.) The duress must be found, if at all, in Wachovia's decision to stand on its valuable contractual and property rights. It was not required by law to release these rights and its demand for a 1% premium to do so was neither wrongful nor excessive.

Plaintiffs also refer to the 1% premium as usurious. We see nothing in the way of usury here. The transaction of which plaintiffs complain was the very reverse of a loan for, as stated in *Smithwick v. Whitley*, 152 N.C. 366, 67 S.E. 914 (1910), "[i]t put an end to credit instead of giving it."

The order of the trial court allowing defendant's motion for summary judgment is affirmed.

Affirmed.

Judges PARKER and VAUGHN concur.

SOUTHEASTERN DRYWALL, INC. v. YEARGIN CONSTRUCTION COMPANY, INC.

No. 7526SC6

(Filed 7 May 1975)

1. **Contracts § 21— building contract — failure to pay installment — substantial breach**

Failure to pay an installment of the contract price as provided in a building or construction contract is a substantial breach of the contract and gives the contractor the right to consider the contract at an end and to discontinue work.

2. **Contracts § 23— waiver of breach**

Strict performance of a contract by one party may be waived by the other party.

3. **Contracts § 23— refusal to perform — waiver of objections**

Where a party to a contract bases his refusal to fulfill the contract on a particular ground, clearly and deliberately stated, all other objections are deemed waived.

4. **Contracts § 27— breach of contract — insufficiency of court's findings**

In an action for breach of a drywall construction subcontract, the findings of fact were not dispositive of the issues raised by the pleadings and evidence and did not support the court's conclusions of law where the court determined that defendant breached the subcontract by failing to pay an invoice the month after it was submitted and by withholding from its payment an amount paid for work done by another drywall company, but the court failed to make findings as to the requirements for payment under the subcontract, the identity of the claims comprising the sum the court found to be due, whether plaintiff acquiesced in the delay of payment, whether plaintiff waived objection to any failure to make timely payment by basing its claim solely on the withholding of a sum from the payment, and whether defendant's withholding of a sum from the payment was a substantial default justifying rescission by plaintiff.

APPEAL by defendant from *Webb, Judge.* Judgment entered 12 August 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 March 1975.

It is alleged that on 19 April 1972, plaintiff, as subcontractor, entered into a contract with defendant, as general contractor, for the installation of all the drywall in a residential complex identified as Sir John's Hill Condominiums. The total contract price for the drywall installation was $90,451.00.

Plaintiff's evidence tends to show that plaintiff began work under the contract during the month of June or July 1972. Plaintiff's "Invoice No: one" was dated 23 August 1972, showing a net payment due of $14,050.50. Payment of this invoice by defendant was received by plaintiff on 14 September 1972. Plaintiff's "Invoice No: two" was dated 15 September 1972, showing a net payment due of $3,697.50. Payment of this invoice by defendant was received by plaintiff on 18 October 1972. Plaintiff's "Invoice No: three" was dated 18 October 1972, showing a net payment due of $3,961.00. Of this amount plaintiff concedes that $510.00 had been previously paid. This leaves the net amount properly claimed by plaintiff to be due in the sum of $3,451.00. Payment on this invoice by defendant in the sum of $2,396.38 was received by plaintiff on 12 December 1972. The difference of $1,054.62 was withheld by defendant as a "backcharge" against plaintiff because of payment of this sum by defendant to another drywall contractor for work done on the drywall installation for the defendant while plaintiff's workmen were not on the project. By letter dated 27 November 1972, defendant advised plaintiff as follows: "This letter is to advise that after repeated efforts to obtain sufficient support from Southeastern Drywall, Yeargin Construction Co. is proceeding to furnish necessary support from a Greenville Drywall Contractor to complete the first 19 units on Sir John's Hill Project in Charlotte, N. C. The costs incurred by Yeargin Construction Co. will be deducted by Yeargin Construction Co. from the contract amount, including necessary room and board."

After a stoppage of work around Thanksgiving 1972, plaintiff's workmen continued working until about noon of 12 December 1972, at which time they "walked off" the job. After plaintiff received the payment on 12 December 1972, from which the $1,054.62 had been withheld, it notified defendant by letter dated 12 December 1972, mailed 13 December 1972, that it elected to rescind the contract. By letter dated 13 December 1972, defendant advised plaintiff as follows: "Due to your consistent failure to adequately man the Sir John's Hill project; and have failed to have anyone on site since Monday, December 11, 1972, this

will serve as your formal notice that three (3) days from this date and in accordance with Section # 7 of our Subcontract Agreement # 12440037, we will bring in other forces to assume control of your work. All cost will be for your account in accordance with Section # 7."

There was considerable testimony from plaintiff's witnesses that defendant delayed plaintiff's workmen, that defendant continually demanded that work be redone, and that plaintiff's work was all done in an acceptable and workmanlike manner. There was considerable testimony from defendant's witnesses that plaintiff did not keep workmen on the job, did not adequately supervise the workmen's work, and that plaintiff's failure to adequately pursue its duties caused defendant's project to fall behind the completion schedule. However, we think that specific reference to this evidence is not pertinent to a disposition of this appeal.

Plaintiff instituted this action on 19 July 1973. Defendant filed an answer and counterclaim on 12 October 1973. On 14 June 1974 defendant moved for permission to file an amendment to its counterclaim upon the grounds that at the time of filing its original counterclaim, the Sir John's Hill project had not been completed, and it did not have available the full cost of completing plaintiff's work. The motion was allowed, and defendant sought damages against plaintiff in the sum of $100,000.00.

The trial judge, sitting without a jury, made findings of fact and conclusions of law and entered judgment that plaintiff recover from defendant the sum of $8,818.23. The judgment also dismissed defendant's counterclaim. Defendant appealed.

Joe T. Millsaps, for the plaintiff.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and William P. Farthing, Jr., for the defendant.

BROCK, Chief Judge.

The principles of law, reason, and logic which seem applicable to this appeal may be stated briefly.

[1-3] The failure to pay an installment of the contract price as provided in a building or construction contract is a substan-

tial breach of the contract and gives the contractor the right to consider the contract at an end and to discontinue work. 13 Am. Jur. 2d *Building and Construction Contracts* § 102 (1964). Strict performance of a contract by one party may be waived by the other party, in which case there is, to the extent of the waiver, no right to damages for the failure to perform strictly. 17 Am. Jur. 2d *Contracts* § 390 (1964). Where a party to a contract refuses to fulfil it and bases his refusal on a particular ground, clearly and deliberately stated, all other objections are deemed waived. 17 Am. Jur. 2d *Contracts* § 390 (1964).

In this case the trial judge made findings of facts and conclusions of law as follows:

"1. That the Plaintiff and the Defendant entered into a contract or (sic) or about the 19th day of April, 1972.

"2. That Plaintiff had men available to work during the month of June and July and that during the last week in July and throughout the month of August and thereafter, Plaintiff diligently executed its part of the contract.

"3. That after paying Plaintiff's statement for August, 1972, in September, 1972, and after paying Plaintiff's statement for September in October, 1972, the Defendant failed to make the third monthly payment in November when, in the course of dealings, it would have been due, and finally made a partial payment which was received by the Plaintiff on December 12, 1972, the Defendant having deducted, without good and sufficient provocation, the sum of $1,054.62.

"4. That the Plaintiff received a partial payment of its October 18, 1972, billing on December 12, 1972, and upon receipt of that partial payment, the Plaintiff immediately notified the Defendant that the Defendant had breached its contract and that the Plaintiff would no longer continue to work for the Defendant.

"5. That on December 12, 1972, Plaintiff had a full crew of men on the job and were working in Building # 11 when the representative of Yeargin Construction Company advised Plaintiff to terminate work in Building # 11 because the roof would have to be removed and corrected and at least a part of the drywall work would have to be redone as a result of the removal of that roof.

"6. That at the time of the breach of the contract by the Defendant Corporation, the Defendant Corporation was justly indebted to the Plaintiff in the sum of $8,818.23.

"NOW, THEREFORE, BASED UPON THE FOREGOING FINDINGS OF FACTS, THE COURT CONCLUDES AS A MATTER OF LAW:

"1. That the Defendant Corporation breached the contract of April 19, 1972, by failing to remit to Plaintiff the full amount of its October 18, 1972, invoice in the normal course of business during the month of November, 1972.

"2. That the Defendant Corporation further breached its contract with Plaintiff Corporation by failure to remit the entire sums due under the October 18, 1972, billing and by 'back charging' to Plaintiff the sum of $1,054.62, which had been arbitrarily and without just cause, paid to a South Carolina drywall contractor called in to work on Thanksgiving Day, 1972, a legal holiday.

"3. That the Plaintiff Corporation was justified in walking off the job as of December 12, 1972, and suing for damages.

"4. That by breaching its contract, Defendant lost all entitlement to benefits under the contract."

[4] The above findings of fact are not dispositive of the issues raised by the pleadings and the evidence.

Finding number 1. identifies neither the nature nor the provisions of the contract which the court found the parties had entered into. It may be reasonable for us to assume that the judgment refers to the contract which was allowed in evidence as plaintiff's exhibit No. 1. However, the judgment with this indefinite finding number 1. would always be open to question.

Finding number 2. identifies neither the work plaintiff had men available for nor plaintiff's duties under the contract.

Finding number 3. does not determine the requirement for payments under the contract.

Finding number 6. does not identify the claims comprising the sum of $8,818.23. It seems that the only item which the court found to be delinquent was the sum of $1,054.62 withheld from the payment received by plaintiff on 12 December 1972.

The first conclusion of law by the trial court is not supported by the findings of fact.

There was no finding of a contractual provision requiring defendant to pay the 18 October 1972 invoice in November 1972. Further, the findings of fact disclose that plaintiff continued to work until 12 December 1972, which conduct would seem to acquiesce in the delay and to waive payment in November, if such were required by contract. Additionally, plaintiff has clearly and deliberately based its refusal to perform after 12 December 1972 upon its objection to defendant's withholding the sum of $1,054.62 from the payment received on 12 December 1972. In its complaint plaintiff alleged the grounds for its election to rescind in the following language:

> "5. That on or about the 12th day of December, 1972, Defendant failed and refused to pay sums then due and properly billed to Defendant by Plaintiff.
>
> "6. Upon the failure of Defendant to honor Plaintiff's statement for payment, Plaintiff elected to rescind the contract due to the breach of the Defendant."

Strict performance of a contract by one party may be waived by the other party, in which case there is, to the extent of the waiver, no right to damages for the failure to perform strictly. 17 Am. Jur. 2d *Contracts* § 390 (1964). Where a party to a contract refuses to fulfil it and bases his refusal on a particular ground, clearly and deliberately stated, all other objections are deemed waived. 17 Am. Jur. 2d *Contracts* § 390 (1964).

The second conclusion of law by the trial court is not supported by the findings of fact. There is no finding of fact to indicate that the withholding by defendant of the sum of $1,054.62 from its payment made to plaintiff on 12 December 1972 was in violation of a contractual obligation.

Although there may be a dispute between plaintiff and defendant over whether defendant improperly withheld $1,054.62 from the 12 December 1972 payment, there is no finding that this partial performance was a substantial default. It seems clear that before rescission is justified for failure to strictly perform, it must be shown that the default was substantial. *See* 13 Am. Jur. 2d *Building and Construction Contracts* § 101 (1964). There was no finding of fact by the trial judge to support a conclusion that defendant's conduct in withholding the

$1,054.62 from the 12 December 1972 payment was a substantial default, justifying rescission by the plaintiff.

Because the findings of fact are not dispositive of the issues raised by the pleadings and the evidence, and because the findings of fact do not support the conclusions of law, the judgment appealed from must be reversed and a new trial ordered.

Reversed and remanded.

Judges PARKER and ARNOLD concur.

STUART STUDIO, INC. v. NATIONAL SCHOOL OF HEAVY EQUIPMENT, INC., GILBERT S. SHAW, AND DONALD T. SHAW

No. 7518SC49

(Filed 7 May 1975)

Frauds, Statute of § 5— oral promise to answer another's debt — main purpose rule

Plaintiff's evidence was sufficient for submission to the jury on the issue of whether defendant's oral promise to stand good for the cost of printing catalogues for a school of heavy equipment came within the "main purpose rule" and thus was not within the statute of frauds where it tended to show that defendant was the founder of the school, owned 100% of the Class A voting stock and 49% of the Class B stock, was chairman of the board of directors and as an officer drew a monthly salary of $2,000, that the school was facing financial difficulty and defendant had advanced $12,000 to the school, and that the catalogues were for the purpose of attracting new students and avoiding financial ruin for the school.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 28 August 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 March 1975.

In this action plaintiff seeks to recover of the defendant, National School of Heavy Equipment, Inc., (hereafter School), and the individual defendants the sum of $18,010.02 under a contract whereby it produced catalogues for use by the School in promoting its services. The School has been adjudged a bankrupt corporation, and plaintiff has obtained a judgment against the School in the sum claimed, plus interest. By amended complaint plaintiff seeks to recover of individual defendant, Gilbert

S. Shaw, the sum of $17,828.02 for purchasing and supervising the printing of the catalogues, claiming that Shaw promised, when the contract was made on 6 March 1972, to stand behind or guarantee payment.

It was stipulated that all work pursuant to the contract was completed and catalogues delivered to and accepted by the School on 7 July 1972.

It appeared from the evidence that Gilbert S. Shaw was Chairman of the Board of Directors of the School and drew a salary of $2,000 per month. He held 100% of the voting stock and 49% of the Class B stock of the School; he employed various members of his family in the operation of the School, including his son, Donald T. Shaw, as President.

Plaintiff is an art studio. Its president, Keith Stuart, had a conversation with Gilbert Shaw and Donald Shaw in August 1971, about the preparation of a new catalogue for the School, and in September, 1971, all agreed that plaintiff was to produce the camera-ready art for the catalogue. Plaintiff completed this work and the School accepted the format. There was a discussion between Stuart and the Shaws about the printing. Plaintiff does not do printing but in some cases purchased the printing for its clients. In a meeting on 6 March 1972, when the camera-ready art work was virtually finished, Gilbert Shaw requested Stuart to purchase and supervise the printing of 25,000 catalogues. They discussed payment of printing costs, and Gilbert Shaw told Stuart that payment would be made within ten days after billing and that if the *National School could not pay the full total that he would stand good for the entire bill.*

Plaintiff then contracted in its name for the printing. The School made an advance payment of $2,000 to plaintiff on 23 March 1972. Plaintiff delivered the catalogues to the School on 7 July 1972 with its invoice. To requests for payment thereafter, Donald T. Shaw, Gilbert S. Shaw being overseas, replied that the School did not have the money but expected to get it.

At the completion of plaintiff's evidence, the individual defendants moved for directed verdicts, and from judgment granting the motions, the plaintiff appeals. It appears from the amended complaint, filed after entry of judgment, that plaintiff has elected to proceed only against the individual defendant, Gilbert S. Shaw.

Clark, Tanner & Williams by David M. Clark and P. Trevor Sharp for plaintiff.

James, Williams, McElroy & Diehl, P.A., by William K. Diehl, Jr., and Gary S. Hemric, Jr., for defendants.

CLARK, Judge.

On appeal from the granting of a motion for directed verdict this Court must determine if plaintiff has made out a case sufficient to go to the jury, and plaintiff's evidence must be taken as true and considered in the light most favorable to it. *Wilson v. Miller*, 20 N.C. App. 156, 201 S.E. 2d 55 (1973).

The North Carolina Statute of Frauds, a substantial prototype of the historic English statute, 29 Charles II (1676) Ch. 3, Sec. 4, contains the provision that "no action shall be brought . . . upon a special promise to answer the debt . . . of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized." G.S. 22-1.

The promise of Gilbert S. Shaw to stand good for the debt of National School of Heavy Equipment, Inc., to be incurred for the printing of catalogues was not in writing and was within the Statute of Frauds unless plaintiff has offered evidence to invoke the application of the "main purpose rule", which is a well-known exception to the rule requiring that such promises be evidenced by a written memorandum.

The "main purpose rule" is stated in *Burlington Industries v. Foil*, 284 N.C. 740, 748, 202 S.E. 2d 591, 597 (1974), as follows:

> "' . . . [W]henever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' "

The transaction between plaintiff and the defendants involved two separate and distinct operations in the production

of catalogues for the School: (1) the camera-ready art, which plaintiff prepared, and (2) the printing, which was outside the scope of plaintiff's business and was purchased from and done by printers under the supervision of plaintiff. The cost of printing was several times that of the camera-ready art. At the 6 March 1972 meeting, plaintiff's President, Keith Stuart, sought assurances that the cost of printing would be paid within ten days after billing; then Gilbert S. Shaw made the promise that if the School "could not pay the full total that he would stand good for the balance or for the entire bill."

This promise of Gilbert S. Shaw was supported by a new consideration, the agreement to purchase and supervise the printing of the catalogues, which plaintiff had not previously agreed to do. Shaw's personal and pecuniary interest in the transaction was evident; he was the founder of the School, owned 100% of the Class A voting stock and 49% of the Class B stock, was Chairman of the Board of Directors, and as an officer drew a monthly salary of $2,000. At this time, 6 March 1972, it is reasonable to assume that the School was facing financial difficulty; Shaw personally advanced $12,000 to the School during this period of financial distress. The School went into receivership in December 1972, and bankruptcy in March 1973. Apparently, Shaw sought, in a final effort to avoid the School's financial ruin, to attract new students through an advertising campaign, which included the production and circulation of new catalogues.

Burlington Industries v. Foil, supra, a 1974 decision, culminates a line of cases which have developed the "main purpose rule" and prescribed its limitations. The *Foil* case holds that the benefit accruing to a party merely by virtue of his position as a stockholder, officer, or director is not alone such personal, immediate and pecuniary benefit as to invoke the main purpose rule, and that Foil's evidence failed to establish the required *direct interest* on the part of Foil.

In *Foil, supra,* the Court cited with approval the cases of *May v. Haynes,* 252 N.C. 583, 114 S.E. 2d 271 (1960) and *Warren v. White,* 251 N.C. 729, 112 S.E. 2d 522 (1960). In *Warren v. White, supra,* defendant promisor was the principal investor and owned most of the capital stock, and during a period of financial difficulty advanced in excess of $23,000 to the corporation. In *May v. Haynes, supra,* the defendant and his wife owned the entire capital stock of the corporation, and he

was its president, managing officer and controlling stockholder. In both of these cases it was held that the evidence was sufficient to invoke the main purpose rule and in doing so it is obvious that the significant, if not controlling, factor was the extent of the promisor's control over the corporation.

In this case the evidence offered by the plaintiff tends to show that Gilbert S. Shaw had a personal and direct interest in the School; and the evidence is clearly sufficient to raise an issue for jury determination. We find that the trial court improvidently granted defendant's motion for directed verdict and the judgment is modified and the cause remanded for trial on the issue of the liability of Gilbert S. Shaw on the printing contract of 6 March 1972.

Modified and remanded.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. HARVEY PITTS

No. 7521SC1

(Filed 7 May 1975)

1. **Parent and Child § 9— nonsupport of child — sufficiency of findings**

In a prosecution of defendant for wilful refusal to support his illegitimate children, facts found by the trial court were sufficient to support the court's conclusion that defendant had failed to comply with conditions on which his sentences had been suspended and revocation of the suspension was proper where the evidence tended to show that defendant was in arrears in making child support payments, that he had been gainfully employed and earning money on a regular weekly basis, and that his only excuse for not complying with the orders of the court was that the mother of the children would not accept money from him and would not allow him to see the children.

2. **Criminal Law §§ 138, 143— revocation of suspended sentences — sentences to run concurrently**

In revoking the suspension of sentences in two nonsupport cases, the trial court erred in requiring that the sentences run consecutively where there was no provision that they were to run consecutively in the judgments in which the sentences were originally imposed.

APPEAL by defendant from *Exum, Judge*. Judgments entered 4 October 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 March 1975.

In Case No. 71-CR-7523 defendant pled guilty in district court to the charge that he willfully refused to support his illegitimate child born 4 July 1967, and judgment was entered on 2 April 1971 sentencing defendant to jail for a period of three months. This sentence was suspended for a period of five years on conditions set out in the judgment, including the condition that beginning 9 April 1971 defendant pay $10.00 each week into the office of the clerk of superior court for the use and benefit of the child. In Case No. 71-CR-7524 defendant also pled guilty in district court to the charge that he willfully refused to support his illegitimate child born 5 February 1965, and judgment was entered in that case on 2 April 1971 sentencing defendant to jail for a period of six months. This sentence was also suspended for a period of five years on conditions set out in the judgment.

On 6 August 1971 the district court, after notice and hearing, found in Case No. 71-CR-7523 that defendant was in arrears in his support payments and that he had willfully failed to comply with a valid condition upon which execution of the sentence in that case had been suspended. On these findings the district court ordered the suspension revoked and issued commitment placing the three months sentence into effect. On the same date, 6 August 1971, the district court in Case No. 71-CR-7524 found that defendant was in arrears in his support payments and that he had willfully failed to comply with a valid condition upon which execution of the sentence in that case had been suspended. Accordingly, the district court also ordered the suspension of sentence in Case No. 71-CR-7524 revoked and ordered that defendant be imprisoned for the term of six months, "to run at the expiration of sentence in 71-CR-7523." From these orders of the district court defendant appealed in both cases to the superior court.

The record indicates that the appeals were heard at the 30 September 1974 session of the superior court, but does not indicate any reason why the hearing was so long delayed. At the hearing in the superior court defendant was represented by court-appointed counsel and appeared and testified. At the conclusion of the hearing the court entered judgments in each case dated 4 October 1974 in which the court made detailed findings of fact, including findings that defendant had been in arrears on 6 August 1971 and still remained in arrears, that since 8 October 1971 he had made only two payments into the clerk's office,

that throughout the period in question defendant had been gainfully employed and earning money on a regular weekly basis, and that his only excuse for not complying with the orders of the court was that the mother of the children would not accept money from him and would not allow him to see the children. The court found that defendant had willfully failed to comply with conditions on which the sentences had been suspended, ordered the three months sentence in Case No. 71-CR-7523 placed into immediate effect, and ordered the six months sentence in Case No. 71-CR-7524 placed into effect "to run at the expiration of the sentence imposed in case number 71CR7523."

Defendant appealed.

Attorney General Edmisten by Assistant Attorney General William Woodward Webb for the State.

Edward B. Higgins, Jr. for defendant appellant.

PARKER, Judge.

By his single assignment of error appellant seeks to challenge the sufficiency of the evidence to support the court's findings. This assignment lacks merit. The evidence is amply sufficient to support the court's findings of fact. Moreover, appellant failed to note an exception to any particular finding of fact, and, indeed, made no exception whatever throughout the record on this appeal. Although the appeal itself constitutes an exception to the judgments appealed from, an appeal alone does not present for review the sufficiency of the evidence to support the court's findings of fact. 1 Strong, N. C. Index 2d, Appeal and Error, § 26. Our review in this case is limited, therefore, to whether error of law appears on the face of the record. This includes the question whether the facts found support the judgments appealed from and whether the judgments are regular in form, but does not present for review the sufficiency of the evidence to support the findings.

[1] In the judgments appealed from the court found as a fact that defendant had willfully failed to comply with valid conditions upon which his sentences had been suspended. This was more than was required. "[A]ll that is required to revoke a suspension of a sentence in a criminal case, and to put the sentence into effect is that the evidence shall satisfy the judge in the exercise of his sound discretion that the defendant has violated, without lawful excuse, a valid condition upon which the sen-

tence was suspended and that the judge's findings of fact in the exercise of his sound discretion are to that effect." *State v. Robinson,* 248 N.C. 282, 287, 103 S.E. 2d 376, 380 (1958). In the present case the court supported its findings as to willfulness by making detailed findings of fact, including findings as to defendant's continued failure to make the support payments specified as a condition of suspension, a finding that throughout the period in question he had been gainfully employed and earning money at a regular weekly rate, and a finding that his "only excuse" for not complying with the court's orders was that the mother of the children would not accept money from him and would not allow him to see the children. As the court noted, defendant had been ordered to make payments to the office of the clerk of superior court, not to the children's mother, and the payments were to be for their benefit, not hers. Defendant's "only excuse" was not a lawful excuse, and the court's detailed findings fully support its judgments that the suspended sentences should be put into effect.

[2] Although not discussed in the briefs, we note from the record that when the sentences in the two cases were first imposed on 2 April 1971, the trial court did not provide that the sentences were to run consecutively. Each judgment was complete within itself. Absent a provision to the contrary in the judgments in which the sentences were originally imposed, these sentences run concurrently as a matter of law. *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538 (1967). The court had no authority in the revocation hearing to order that they run consecutively. *State v. Fields,* 11 N.C. App. 708, 182 S.E. 2d 213 (1971).

The result is:

In Case No. 71-CR-7523, the judgment is

Affirmed.

In Case No. 71-CR-7524, the cause is remanded to the Superior Court in Forsyth County with directions that the judgment and commitment in that case be modified by striking therefrom the language "this sentence to run at the expiration of the sentence imposed in case number 71CR7523."

Remanded with directions.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. PERCY WILMER DAIL, JR.

No. 741SC958

(Filed 7 May 1975)

1. **Automobiles § 127— drunken driving — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury in a prosecution for a second offense of drunken driving where it tended to show that a highway patrolman saw defendant driving his automobile in a weaving pattern for four to five hundred feet, defendant was unsteady on his feet, his speech was slurred and his eyes were red and glassy, defendant did not perform agility tests satisfactorily, a breathalyzer test disclosed that defendant's blood contained .15 percent by weight of alcohol, and defendant stipulated that he had been previously convicted of drunken driving.

2. **Automobiles § 126; Criminal Law § 64— breathalyzer test — arresting officer**

A highway patrolman was not an "arresting officer" so as to be disqualified by the proviso to G.S. 20-139.1(b) from administering a breathalyzer test to defendant where defendant had been arrested by another officer and was sitting in the patrol car with that officer, the patrolman was called by radio to come to the police station to administer the breathalyzer test, the patrolman arrived at the arrest scene because it was on his direct route to the police station, and he stopped there solely to assist in moving defendant's car out of the way of traffic, not to assist in the arrest, which was already fully accomplished.

Appeal by defendant from *Wells, Judge.* Judgment entered 26 June 1974 in Superior Court, CHOWAN County. Heard in the Court of Appeals 11 February 1975.

This is an appeal from judgment imposed upon verdict finding defendant guilty of the charge of operating a motor vehicle on a public highway while under the influence of intoxicating liquor, this being his second offense.

Attorney General Edmisten by Associate Attorney General Elisha H. Bunting, Jr. for the State.

Carter W. Jones for defendant appellant.

PARKER, Judge.

[1] By motions for directed verdict of not guilty, for nonsuit, and for dismissal, defendant challenged the sufficiency of the evidence to take the case to the jury. The State presented the testimony of two State Highway Patrolmen. Patrolman Chap-

pell testified that on the date stated in the warrant he saw defendant operate his automobile for a distance of approximately four to five hundred feet on U. S. Highway 17 just inside the city limits of Edenton, that the vehicle was "in a constant weaving pattern," that he stopped the car and found defendant to be its operator and sole occupant, that he detected a strong odor of intoxicants about defendant, and that when defendant got out of the car, defendant was unsteady on his feet, his speech was slurred, and his eyes were red and glassy. Officer Chappell found a partially filled can of beer in a holder located on the driver's side door, and defendant told the patrolman he had been drinking beer. Chappell administered a number of performance and agility tests to defendant to determine whether he was intoxicated, and defendant did not perform satisfactorily. Patrolman Newberry, who administered a breathalyzer test to defendant, testified that the test disclosed that defendant's blood contained 0.15 percent by weight of alcohol. Each patrolman testified that in his opinion defendant was under the influence of some alcoholic beverage. Defendant stipulated that he had been once previously convicted of the same offense as charged in the warrant.

The State's evidence was amply sufficient to require submission of the case to the jury. Such inconsistencies and discrepancies as existed in the State's evidence were for the jury to resolve and would not warrant nonsuit. 2 Strong, N. C. Index 2d, Criminal Law, § 104. Defendant's assignments of error directed to the denial of his various motions challenging the sufficiency of the evidence are overruled.

[2] Defendant assigns error to denial of his motions to suppress all evidence as to results of the breathalyzer test. In this connection defendant contends that Patrolman Newberry, who admistered the breathalyzer test, was an "arresting officer" and therefore was disqualified to administer the test under the proviso to G.S. 20-139.1(b) which provides "that in no case shall the arresting officer or officers administer said test." The evidence, both that presented before the jury and upon a voir dire examination before the judge, disclosed the following: After Patrolman Chappell stopped defendant and observed his condition, he placed defendant under arrest and put defendant in his patrol car. He then radioed to Patrolman Newberry, who was qualified to administer the breathalyzer test, and asked him to come in to administer the test. When Newberry received this

message, he was in his own patrol car some distance away. His most direct route to the police station, where the breathalyzer machine was located, took him past defendant's automobile, which was still in the traveled portion of the highway where it had been stopped. Chappell's patrol car, in which Chappell and defendant were seated, was still at the scene. At Chappell's request, Patrolman Newberry stopped, got out of his patrol car, and drove defendant's car off of the highway and into the parking lot of a nearby motel. Newberry testified that he did not see defendant at the scene, though he recalled that another person was seated in the front seat of Chappell's patrol car along with Trooper Chappell. Newberry did not speak to defendant at the scene and did not then know him. As Newberry was parking defendant's car, Chappell left with the defendant in his patrol car for the police station, and the two were in the station waiting when Newberry later arrived in his patrol car.

This evidence fully supports the trial court's ruling that Newberry was not an arresting officer so as to be disqualified by the proviso to G.S. 20-139.1 (b) from administering the breathalyzer test. *State v. Stauffer,* 266 N.C. 358, 145 S.E. 2d 917 (1966), cited and relied on by defendant, is clearly distinguishable on its facts. There, the officer who administered the test was the very person who first noticed the unusual manner of driving of the defendant in that case, who stopped the automobile, and who first approached the stopped vehicle. Clearly in that case the officer involved was "present at the scene of the arrest for the purpose of assisting in it, if necessary." 266 N.C. at 359. Here, the defendant was already under arrest and was seated in the patrol car of the arresting officer when Newberry first arrived on the scene. Newberry had not been called to the scene for any purpose of assisting in the arrest and he in no way did assist in the arrest. He arrived at the scene merely because it happened to be on his direct route to the police station, and he stopped there solely to assist in moving the defendant's car out of the way of traffic, not to assist in the arrest, which was already fully accomplished. The fact that Newberry testified on cross-examination by defendant's counsel that "[i]f trouble had developed with the defendant [he] would have assisted Mr. Chappell with that too," did not make him an arresting officer in this case. No such trouble did develop nor does anything in the evidence suggest that Chappell had any reason to anticipate that it might or that Newberry was on the scene for any such eventuality. On the contrary, Chappell testified

that "Mr. Dail responded to my questions and was cooperative with me throughout the whole thing." We hold that the trial court did not err in ruling that Patrolman Newberry was not an arresting officer in this case and that he was not disqualified from administering the breathalyzer test.

Finally, the evidence discloses that the test was administered in compliance with all applicable statutory requirements. In connection with the two requirements made by G.S. 20-139.1(b) for the breathalyzer test to be considered valid, defendant stipulated that Officer Newberry was "a licensed operator and possessed the prerequisite permit at the time he administered the test to this defendant," and Newberry testified "that he did administer the breathalyzer test to Mr. Dail on this occasion according to the methods and rules approved by the North Carolina Commission for Health Services." The results of the test were properly admitted in evidence. *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243 (1971).

We have carefully reviewed defendant's remaining assignments of error, and find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

IN THE MATTER OF: TONY MEYERS, AGE 13

No. 7419DC1006

(Filed 7 May 1975)

1. **Infants § 10; Criminal Law § 148— juvenile delinquency proceeding — prayer for judgment continued — appeal**

An appeal from an adjudication of delinquency may be maintained in a proceeding in which the order of disposition has been indefinitely delayed by entry of a prayer for judgment continued. G.S. 7A-289.

2. **Infants § 10; Criminal Law § 75— juvenile delinquency proceeding — in-custody statement — Miranda warnings — determination of voluntariness**

Testimony by a deputy sheriff as to a juvenile's extrajudicial inculpatory admission should have been excluded in a juvenile delinquency proceeding where the admission was made in response to a direct question from the officer while the juvenile was in custody, no

Miranda warnings were given the juvenile, and the trial court made no finding as to the voluntariness of the statement.

APPEAL by juvenile respondent from *Hammond, Judge.* Order entered 30 August 1974 in District Court, RANDOLPH County. Heard in the Court of Appeals 14 February 1975.

In a juvenile petition dated 2 October 1973 it was alleged that respondent, a 13-year-old boy, was a delinquent child as defined by G.S. 7A-278(2) in that on 25 September 1973 he did unlawfully break and enter the home of Stamey Pierce, a violation of G.S. 14-54(b) and which is a misdemeanor. After a hearing, the court on 10 December 1973 entered an order adjudicating that the child was delinquent as alleged in the petition. This order continued the matter for disposition until 14 January 1974 to give the court counselor an opportunity to conduct a home study. An attempted immediate appeal from the adjudication of delinquency was dismissed by this Court as premature. *In re Meyers,* 22 N.C. App. 11, 205 S.E. 2d 569 (1974). On remand, the court counselor conducted a study of the child and his home. The report of the counselor, dated 5 August 1974, was submitted to the court. This report reveals that the child appeared to be a well-mannered, intelligent boy, who was active in the Boy Scouts, attended 4-H Camp, was president of the Beta Club at his school, and maintained an almost perfect A average at school. His school principal reported that he had not experienced any behavior or attendance problems with the child, and the child's parents made a similar report. The counselor concluded that the child was a fine student and was involved in many worthwhile activities, and that his parents were concerned and "very capable of providing adequate supervision for him." Accordingly, the counselor recommended "that supervision by the court be withheld at this time."

On 30 August 1974 the judge signed what are denominated in the record as "Exceptions and Appeal Entries." These contain the following:

> "1. Upon hearing oral evidence from the petitioner and witnesses for the petitioner the Court finds the following facts and beyond a reasonable doubt: that on or about September 25, 1973, in the daytime this child did break and enter the home of Stamey Pierce of Rt. 3, High Point, North Carolina; that entry was apparently gained by opening a basement window; that no damage was done to the

home; the child admitted this to Deputy R. C. Ward and later to Mrs. Pierce, the wife of the owner of the home.

"2. That the child is delinquent as alleged in the petition.

"3. That it would be to the best interest of this child that prayer for judgment be continued."

To the foregoing, the respondent juvenile excepted and appealed.

Attorney General Edmisten by Assistant Attorney General Ann Reed for the State.

Ottway Burton for juvenile appellant.

PARKER, Judge.

[1] In a criminal action "[w]here prayer for judgment is continued and no conditions are imposed, there is no judgment, no appeal will lie, and the case remains in the trial court for appropriate action upon motion of the solicitor." *State v. Pledger*, 257 N.C. 634, 638, 127 S.E. 2d 337, 340 (1962). In a juvenile proceeding, however, the statute, G.S. 7A-289, expressly provides that an appeal may be taken "from an adjudication *or* from any order of disposition." (Emphasis added.) As was pointed out in the opinion on the prior appeal of this case, the statute is intended to remedy the long-standing practice of indefinite continuations of disposition of juvenile cases. We held on the prior appeal that where the time lapse between adjudication and order of disposition is short and reasonable and for a specific purpose, appeal should be delayed until the disposition. In the present posture of this case, there has been an adjudication of delinquency but the order of disposition has been indefinitely delayed. Therefore, this appeal from the adjudication of delinquency may now be maintained.

[2] At the hearing on the petition, the deputy sheriff who investigated the entry into the Pierce home testified that the respondent child admitted he had been in the home. This admission was made in response to a question from the deputy after the deputy had picked up the child and a young companion and was taking them back in his car toward the Pierce home. The deputy testified that he did not advise the child of any of his rights because he had previously talked to Mrs. Pierce and

understood that she did not want to prosecute. Objections to the deputy's testimony as to the child's admission were overruled and timely motion to strike was denied, to which actions of the court appellant now assigns error.

Clearly, had this been an ordinary criminal prosecution the testimony of the deputy sheriff as to the accused's extrajudicial inculpatory admission should have been excluded. The admission was made in response to a direct question from the officer and at a time when the respondent was effectively in custody. Not only was there a total failure to comply with the *Miranda* requirements, but there was also no finding by the court as to the voluntariness of the statement. Although a confession is not inadmissible merely because the person making it is a minor, Annot., 87 A.L.R. 2d 624 (1963), to be admissible it must have been voluntary, and the age of the person confessing is an additional factor to be considered in determining voluntariness. The fact that the present proceeding is not an ordinary criminal prosecution but is a juvenile proceeding under G.S. Chap. 7A, Article 23, does not lessen but should actually increase the burden upon the State to see that the child's rights were protected. Juvenile proceedings to determine delinquency, though not the same as criminal prosecutions of an adult, may nevertheless result in commitment to an institution in which the juvenile's freedom is curtailed. We find error in the admission in evidence of the deputy sheriff's testimony as to respondent child's admission that he had been in the Pierce home.

In fairness to the deputy sheriff who was the witness in this case, it should be noted that nothing in the record suggests any improper conduct on his part. On the contrary, the record indicates that he investigated with speed and efficiency what turned out to be a wrongful but minor trespass by two children and that he failed to advise the children as to their constitutional rights only because he justifiably understood at the time that no court proceedings of any nature were contemplated. Unfortunately, however, the present proceedings did ensue, and for error in admitting the officer's testimony noted above, the appellant is entitled to a new hearing.

Since there must be a new hearing, we direct attention to the following provision in G.S. 7A-285 relating to juvenile hearings:

> "If the court finds that the conditions alleged do not exist, *or that the child is not in need of the care, protection*

or discipline of the State, the petition shall be dismissed." (Emphasis added.)

In view of the information contained in the court counselor's report, the court may wish to give consideration to that provision of the statute in any further proceedings in this matter.

The order adjudicating appellant a delinquent is reversed and this proceeding is remanded to the district court.

Reversed and remanded.

Judges VAUGHN and MARTIN concur.

WILLIAM OSCAR BLOUNT, ADMINISTRATOR OF THE ESTATE OF PEARLIE MAE BLOUNT v. EDDIE HOWARD TYNDALL AND DEWEY BROS., INC. AND WILLIAM O. BLOUNT v. EDDIE HOWARD TYNDALL AND DEWEY BROS., INC.

No. 753SC92

(Filed 7 May 1975)

1. **Automobiles § 90— instructions on counterclaim — no confusion of jury**

In an action for wrongful death and damages to an automobile, the trial court's awkward instruction concerning defendant's counterclaim did not confuse and mislead the jury in any way where it was clear from the jurors' inquiries and statements that they understood that each side was trying to recover damages from the other side on the ground of negligence in causing the collision.

2. **Automobiles § 90— instruction on duty to yield right of way at intersection — no error**

Plaintiff's assignment of error to the trial court's instruction that a vehicle approaching an intersection has the duty to yield the right of way to a vehicle already in the intersection is without merit, since that instruction was in accordance with plaintiff's allegations and stipulated contentions.

3. **Automobiles § 91; Trial § 42— wrongful death — damage to automobile — no inconsistent verdicts**

Where an action for wrongful death was consolidated with an action for damages to an automobile and both parties were the same in each action, the jury's verdict in the wrongful death action that defendant was negligent and plaintiff's intestate was contributorily negligent was not inconsistent with its verdict in the damages action that neither defendant nor plaintiff's intestate was negligent, though the wording itself was inconsistent, since the consequences of each verdict were precisely the same.

4. Trial § 51— verdict contrary to weight of evidence — motion to set aside

A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed in the absence of a showing of abuse of discretion.

APPEAL by plaintiffs from *Webb, Judge.* Judgments entered 11 September 1974 in Superior Court, PITT County. Heard in the Court of Appeals 10 April 1975.

These two actions were consolidated for trial in the Superior Court. In one action the plaintiff, as administrator of his wife's estate, seeks recovery of damages for her wrongful death. In the other action the plaintiff, individually, seeks recovery of damages to his automobile, which was driven by his wife. Both actions arise out of a collision between plaintiff's automobile and defendant's truck on 21 November 1972, at the intersection of N. C. Highway No. 11 and N. C. Highway No. 102 in Pitt County.

The evidence tends to show that plaintiff's intestate drove plaintiff's automobile in an easterly direction on Highway No. 102 and approached its intersection with Highway No. 11. Defendant driver drove the corporate defendant's truck in a northerly direction on Highway No. 11 and approached its intersection with Highway No. 102. Traffic at the intersection of the highways was controlled by electrically operated red and green traffic signals.

The parties stipulated that plaintiff's intestate died as a result of injuries received in the accident. They also stipulated the amount of property damages to each of the vehicles involved in the collision.

Plaintiff's evidence tended to show that plaintiff's intestate entered the intersection at a time when the electric signal was green for traffic on Highway No. 102. Defendant's evidence tended to show that defendant driver entered the intersection at a time when the electric signal was green for traffic on Highway No. 11.

In each case the jury answered the issues to the effect that neither the plaintiffs nor the defendants were entitled to recover damages. Plaintiff in each case appealed.

James, Hite, Cavendish & Blount, by Robert D. Rouse III, for the plaintiffs.

Gaylord & Singleton, by Danny D. McNally, for the defendants.

BROCK, Chief Judge.

[1] Plaintiffs assign as error that the instructions to the jury by the trial court were so ambiguous and confusing that they caused the jury to return verdicts which plaintiffs contend are inconsistent. Specifically plaintiffs except to the following language reported to have been used by the trial court in its instructions:

> "In each action the defendant has filed what is called a counterclaim, and it is also suing the plaintiff in each action for a sum of money which he contends is for damage by reason of the truck of Dewey Bros., Inc., which Dewey Bros., Inc., contends in the accident which was caused by the negligence of Pearlie Mae Blount."

The foregoing was stated at the beginning of the trial court's instructions. Obviously it is awkward and probably inaccurately reported, but in view of the remaining instructions, we cannot see how this language could have confused or misled the jury in any way. It is clear from the inquiries and statements by the jurors that they understood that each side was trying to recover damages from the other side on the ground of negligence in causing the collision. This assignment of error is overruled.

[2] Plaintiffs assign as error that the trial court instructed the jury that a vehicle approaching an intersection has the duty to yield the right of way to a vehicle already in the intersection. Plaintiffs argue that this principle of law has no application to an intersection in which traffic is controlled by electrically operated stop lights. Plaintiff in each complaint alleged:

> "C. He failed to yield the right-of-way of (sic) another motor vehicle already within an intersection in violation of the motor vehicle laws of the State of North Carolina in such cases made and provided."

Also, in pretrial stipulations plaintiffs stipulated:

"h. Plaintiff in each case contends that defendants were negligent in that:

"3. The driver-agent of Dewey Bros., Inc. failed to yield the right-of-way to another vehicle who (sic) was already entering the intersection, in violation of motor vehicle laws of the State of North Carolina."

Plaintiffs now complain that the trial judge instructed the jury in accordance with their allegations and stipulated contentions. If the instruction constituted error, clearly it was invited and encouraged error. Plaintiffs should not now be heard to complain. This assignment of error is overruled.

[3] Plaintiffs argue that the verdict in the wrongful death case and the verdict in the property damage case are inconsistent with each other and should not have been accepted by the trial judge. Plaintiffs argue that this inconsistency requires a new trial of each action.

When each verdict is considered separately, each is clearly free from ambiguity and each is sufficient to support entry of judgment denying recovery to both plaintiff and defendant. Plaintiffs' argument is based upon the fact that in the wrongful death action the jury found defendant negligent and plaintiff's intestate contributorily negligent, while in the property damage action it found defendant not negligent and the plaintiff's intestate not negligent. Admittedly the wording that the jury used in the two verdicts is inconsistent, but it is clear that the consequences of each verdict are precisely the same: neither party is entitled to recovery from the other. The case of *Cody v. England,* 216 N.C. 604, 5 S.E. 2d 833 (1939), is relied upon by plaintiffs. In our view *Cody* is inapplicable. There the court was speaking of a verdict in one case, not separate verdicts in two cases. Additionally, in *Cody* the verdict did not clearly dispose of the controversy and for that reason was found to be contradictory, ambiguous, and uncertain. In the present cases there is no contradiction, ambiguity, or uncertainty in either verdict. Each is sufficient to support a judgment. The words used by the jury, although inconsistent as between the two verdicts, accomplish exactly the same result in each case. The verdicts support the judgments entered. This assignment of error is overruled.

We note that the verdict in the property damage action contains within itself what appears to be an ambiguity with respect to the issues submitted upon defendants' defense and counterclaim. As noted above, in the property damage action the jury answered that defendants were not negligent. However, upon defendants' defense of contributory negligence, the jury answered that plaintiff's intestate was contributorily negligent. Upon defendants' counterclaim for damages, the jury answered that plaintiff's intestate was not negligent. Plaintiffs, properly, do not contend that plaintiffs were prejudiced by such an ambiguity. This might be cause for defendants to complain, but they have not appealed.

[4] Plaintiffs assign as error the refusal of the trial judge to set aside the verdicts as being against the weight of the evidence. Such a motion is addressed to the discretion of the trial judge. His ruling thereon will not be disturbed in the absence of a showing of abuse of discretion. *Wilson v. Young,* 14 N.C. App. 631, 188 S.E. 2d 671 (1972); 7 Strong, N. C. Index 2d *Trial* § 51 (1968).

In our opinion plaintiffs had fair trials, free from prejudicial error.

Judges PARKER and ARNOLD concur.

FLOYD S. PIKE ELECTRICAL CONTRACTOR, INC. v. GOODWILL MISSIONARY BAPTIST CHURCH, THROUGH ITS TRUSTEES AND PASTOR—REVEREND B. H. BONHAM, PASTOR, FREDDIE WEBSTER, CHAIRMAN OF BOARD OF TRUSTEES; LEWIS BROWN, ASSISTANT CHAIRMAN; WILBERT H. CARTER, EARLY JOHNSON, ROY WEBSTER, CLARENCE SMITH, CLARENCE FOYE, MEMBERS OF THE BOARD OF TRUSTEES

No. 7517SC40

(Filed 7 May 1975)

Execution § 1; Religious Societies and Corporations § 2— execution sale of church property

Church property is not exempted from sale under execution by G.S. 61-3 or G.S. 61-6.

APPEAL by defendants from *Collier, Judge.* Judgment entered 17 December 1974 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 19 March 1975.

The parties stipulate the following: On 6 June 1974, plaintiff filed a claim of lien against the Goodwill Missionary Baptist Church of Rockingham County, "through" its pastor and trustees, (defendants) for material furnished and labor rendered to defendants. On 25 July 1974 the defendants executed a verified statement for the purpose of confessing judgment in the amount of $11,500 in favor of plaintiff and on 9 August 1974 a judgment by confession was entered in favor of plaintiff for said amount. On 6 November 1974 an execution was issued to the Sheriff of Rockingham County ordering that the property of defendants, a church sanctuary, be sold to satisfy the judgment. On 26 November 1974 defendants filed a motion asking that the sheriff be enjoined from executing said judgment and on the same day an order was entered directing that plaintiff appear and show cause why the injunction should not be granted. (In their motion for injunction, defendants allege that they desire to pay plaintiff and their other creditors but that "tight money conditions" have made it impossible for them to obtain a loan sufficient to cover obligations.) A hearing was held and on 17 December 1974 judgment was entered denying the motion for an injunction. Defendants appealed.

Folger & Folger, by Fred Folger, Jr., and Larry W. Bowman, for the plaintiff appellee.

Hanes & Rodenbough, by Leigh Rodenbough and Don Eggleston, for the defendant appellants.

BRITT, Judge.

By their sole assignment of error, defendants contend the trial judge erred in denying their motion for an injunction, arguing that church property is exempt from execution. We find no merit in the assignment.

Defendants base their argument primarily on Chapter 61 of the General Statutes and particularly on G.S. 61-3 and G.S. 61-6 which provide (in pertinent part as to 61-3) as follows:

> § 61-3. *Title to lands vested in trustees, or in societies.* —All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or re-

ligious denomination, religious society or congregation within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, society or congregation for which the glebes, lands, tenements, property and estate were so purchased, given, granted or devised, or for which such churches, chapels or other houses of public worship were built; . . . .

§ 61-6. *House on vacant land vests title.*—All houses and edifices erected for public religious worship on vacant lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same, shall hereafter be held and kept sacred for divine worship, to and for the use of the society by which the same was originally established.

Defendants submit that the quoted statutes were enacted in the very early years of our State, 1776 and 1778, and that while G.S. 61-6 has received no construction by our appellate courts, that the clear intent of the statutes is to create statutory exemptions with respect to the tenure of property specifically used for religious purposes. They further submit that G.S. 61-3 adopts "the general proposition that church property must remain forever to the use and benefit of the congregation"; that with regard to real property, G.S. 61-6 limits this protection to the land under or surrounding buildings constructed for religious use. They concede that G.S. 61-4 (enacted in 1855 and amended in 1889) grants trustees of religious bodies the authority to *mortgage, sell* or *convey* land belonging to the body, but argue that the authority given does not authorize the sale of church property under execution.

Plaintiff's argument with respect to the history and intent of the quoted statutes is briefly summarized as follows: The statutes arose out of the disruption of civil affairs occasioned by the American Revolution and the establishment of new governments in the American colonies. Prior to the revolution, the Episcopal or Anglican church was the established or official church in North Carolina as was true in other colonies. Upon the establishment of a new government in North Carolina, the Anglican church was officially disestablished by the Constitution of 1776. The question was then raised as to what would happen to the lands then held by the church, there being some authority at that time supporting the view that property held by the

church should be forfeited to the State. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 3 L.Ed. 650 (1815). To clarify the fate of church lands, the statute now codified as G.S. 61-3 was enacted in 1776. The statute now codified as G.S. 61-6 was enacted in 1778 for purpose of covering those cases where church houses had been built on unused or unappropriated land to which no one had title.

While the stipulated facts indicate that plaintiff filed a notice and claim of lien for the labor and materials furnished defendants, the stipulation does not show that the judgment entered pursuant to defendants' confession created a laborer's and material furnisher's lien as provided by G.S. Ch. 44A. That judgment is not a part of the record on appeal. Nor does the record disclose that the execution issued was pursuant to Ch. 44A, therefore, we consider the question presented on the assumption that the execution was issued pursuant to G.S. 1-302 et seq. That being true, we do not discuss the applicability of Article X, § 3, of the State Constitution and statutes enacted pursuant thereto.

There being no provision in our Constitution exempting church property from execution, unless exempted by statute, said property is subject to sale under execution. *Rector v. Fleming*, 174 Misc. 473, 20 N.Y.S. 2d 597. (Sup. Ct., Special Term, where the court discusses this issue), *aff'd*, 260 App. Div. 930, 23 N.Y.S. 2d 46 (1940), *aff'd*, 285 N.Y. 706 (1941); 76 C.J.S., Religious Societies, § 63, page 840. Defendants contend that the words of G.S. 61-3 " . . . shall be and remain forever to the use and occupancy of that church . . . " creates such an exemption. We reject that contention. We think the quoted words have to be considered in the context of the time they were written and of wordage required by ancient English law and custom to create a fee simple estate. While contemporary attorneys continue to employ many of the old terms in our deeds of conveyance, i.e., to John Doe, "his heirs and assigns forever", we know they are not always necessary. In 7 Thompson, Real Property, § 3132, at 14, 15 (J. Grimes repl. 1962), we find another example: " . . . A grant to one and his heirs carries with it the estate to his assigns by operation of law, and the use of the words 'assigns' or 'assigns forever' has no effect to convey land or enlarge the grant". We hold that the quoted words from G.S. 61-3 do not have the effect of exempting church property from execution.

Clearly, defendants' contention with respect to G.S. 61-6 has no merit. There is no showing that defendants' church building is located on " . . . *vacant* lands, or on lands of the State not for other purposes intended or appropriated, together with two acres adjoining the same . . . . " (Emphasis added.) On the contrary, defendants' verified motion refers to "its (defendants) real estate which consists of the church sanctuary and the lot on which it is built."

In *Fishel and Taylor v. Church*, 22 N.C. App. 647, 207 S.E. 2d 330 (1974), although the question presented in this case was not raised, this court held that church property is subject to sale to satisfy the judgment of an architect.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. PATRICK ALAN KEEN

No. 7428SC965

(Filed 7 May 1975)

1. **Criminal Law § 121— solicitation to commit murder — entrapment issue**

In a prosecution of defendant for soliciting two persons to kill his wife, the trial court properly submitted defendant's contentions concerning entrapment to the jury and gave instructions which were correct in law and manifestly fair to defendant.

2. **Homicide § 21— solicitation to commit murder — completion of crime**

In a prosecution of defendant for soliciting two persons to kill his wife, defendant's argument that there could have been no completion of the crime since all parties with whom he spoke were connected with law enforcement is without merit since the crime of solicitation to commit a felony is complete with the solicitation even though there could never have been an acquiescence in the scheme by the one solicited.

3. **Criminal Law § 138— solicitation to commit murder — severity of sentence**

Sentence of confinement for not less than five nor more than ten years imposed in a prosecution for solicitation to commit murder did not exceed that authorized by law. G.S. 14-3(b).

ON *certiorari* to review trial before *Friday, Judge.* Judgment entered 11 April 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 11 February 1975.

Defendant was charged in a bill of indictment with soliciting Blaine Bacon and Ben Wade to kill and murder Susan Page Keen, wife of defendant.

Evidence for the State is summarized as follows. Blaine Bacon first saw Patrick Alan Keen, the defendant, on the afternoon of 12 September 1973. Defendant brought his Volkswagen bus into Bacon's garage to be repaired. Bacon examined the vehicle, told defendant that he did not have the necessary parts and suggested that defendant return the next day. Defendant returned the next day and Bacon proceeded to repair the vehicle. Defendant asked Bacon if he knew "someone with few scruples and in need of some money." Bacon asked, "how few scruples and how much money." Defendant replied that he wanted his wife killed so that he could collect the proceeds from an insurance policy in her name. He agreed to pay Bacon $5,000.00 from the proceeds of the policy.

Defendant told Bacon the death of his wife must occur before 1 October since that was the expiration date of her life insurance policy. At the close of the conversation Bacon asked defendant to give him a few days to consider the proposition and to contact him the following Monday.

Defendant had purchased a $100,000.00 policy on his wife's life dated 1 July 1973, and was the named beneficiary. Defendant paid the quarterly premium for the months of July, August and September but did not pay the premium due 1 October 1973, and the policy lapsed on 31 October.

Bacon immediately attempted to contact several law enforcement officers with whom he had become acquainted when he had worked as an informer or undercover agent. He finally reached a U. S. Treasury agent and informed him of what defendant had said. The agent advised him to keep in contact. Bacon's actions thereafter were generally directed by law enforcement officers. On Friday, defendant again visited Bacon, told him of the urgency of the time factor and sought a definte answer as to whether Bacon would kill Mrs. Keen. Defendant informed Bacon that she was in Fayetteville and said he could go there and "blow her brains out." Bacon again told defendant to wait until Monday for an answer.

The following Monday afternoon, defendant met Bacon at his garage. Ben Wade, an agent of the State Bureau of Investigation, was concealed in Bacon's rear office so that he could overhear their conversation. At this meeting defendant again stressed the importance of time and asked Bacon when he was going to kill Mrs. Keen. Bacon replied that accidents were not his style but that he had discussed the matter with a friend who was a professional killer. Bacon told defendant that his friend was an expert at making deaths appear accidental and that he would be in Asheville the following Friday. On Wednesday defendant visited Bacon again. The two established Friday morning as their meeting time, and defendant was asked to bring a picture of his wife.

On that Friday the two men drove in defendant's van to a motel in Asheville. They went to a room where Wade, posing as a professional killer, was waiting. A wireless transmitter was taped to Wade's back for the purpose of recording the conversation. Tapes of the conversation were introduced at trial for the purpose of corroboration.

At the motel defendant told Wade that his wife was in Fayetteville and gave him her address. He also gave him a photograph and physical description of her. He told Wade that his wife's death must appear accidental and must occur prior to the cancellation of her life insurance policy on the first of October. Defendant volunteered to raise the fee for the killing to $6,000.00 and the method of payment was discussed. With respect to "front money," defendant said that he had no cash but did have a motorcycle, a Volkswagen bus, and a five-acre tract of land to which titles could be signed over to Bacon who, in turn, could transfer them to Wade. Wade replied that he wanted the titles transferred that day and instructed defendant to put the vehicles in Bacon's name and the property in Wade's name. He told defendant he would wait at the motel until 2:30 that afternoon.

At the conclusion of the conversation, defendant left the room. Police immediately placed him under arrest. Upon being arrested defendant replied, "Oh, my God, how did you find out about it so fast?"

Defendant testified, in substance, as follows. He did not originally intend to have his wife killed but Bacon implanted the idea in his mind. After he and Bacon discussed the life in-

surance policy in Mrs. Keen's name, Bacon suggested that defendant "knock her off" and collect on the policy. Bacon volunteered to kill Mrs. Keen for $5,000.00. When Bacon telephoned him and told him that his friend had arrived, defendant indicated to Bacon that he wanted to call off the thing and did not care to visit Bacon's friend. Bacon responded that his friend had come all the way to Asheville, would be very upset if defendant did not at least talk with him and might seek vengence on defendant. Defendant, although he had no intention of following through with the plan, proceeded to the motel in order to talk the other men out of it. He was frightened and answered Wade's questions because of his fear.

The jury found defendant guilty and judgment was entered imposing a sentence of confinement of not less than five nor more than ten years.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

McGuire, Wood, Erwin & Crow, by James P. Erwin, Jr., for defendant appellant.

VAUGHN, Judge.

[1] In support of his contention that the court should have granted his motion for judgment of nonsuit, defendant argues that the State's own evidence shows that:

> " . . . the defendant was (1) entrapped and (2) that there was the interposition of a resisting will thereby making the commission of a crime impossible."

We hold that defendant's contentions on entrapment were properly submitted to the jury with instructions from the court which were correct in law and manifestly fair to defendant.

[2] Defendant argues that there could have been no completion of the crime since all parties with whom he spoke were connected with law enforcement. The answer is that the interposition of a resisting will, by a law enforcement officer or anyone else, between the solicitation and the proposed felony is of no consequence. This is so "because the solicitation was complete before the resisting will of another had refused its assent and cooperation." *State v. Hampton,* 210 N.C. 283, 285, 186 S.E. 251, 252 (1936). Defendant was not charged with the crime of con-

spiracy, a crime which was not completed because of the failure of Bacon, in fact, to concur in defendant's scheme to murder defendant's wife. The crime of solicitation to commit a felony is complete with the solicitation even though there could never have been an acquiescence in the scheme by the one solicited.

[3] Defendant also contends that his conviction of solicitation to commit murder cannot be punished by imprisonment for more than two years. We concede that the applicable statute G.S. 14-3(b) and the reported cases leave some lack of certainty as to what crimes may be designated and punished as "infamous." *See State v. Surles,* 230 N.C. 272, 52 S.E. 2d 880 (1949); Note, 28 N.C. L. Rev. 103 (1949). It appears, nevertheless, to be settled that conspiracy to murder is an infamous offense and punishable as a felony. *State v. Alston,* 264 N.C. 398, 141 S.E. 2d 793 (1965).

The crime of which defendant was convicted is but one step away from conspiracy to murder—and that step is not one defendant could have taken. If Bacon had concurred in defendant's scheme to murder the latter's wife, the conspiracy would have been complete. Bacon's rejection of defendant's atrocious scheme does not render defendant's conduct any less "infamous" than it would have been if his offer had been accepted. We hold that the punishment imposed does not exceed that authorized by law.

We have considered the other contentions made in defendant's brief and find them to be without merit.

No error.

Judges MARTIN and ARNOLD concur.

SHIRLEY SMITH HINSON v. NORMAN EUGENE SPARROW

No. 748SC1047

(Filed 7 May 1975)

Damages § 16— instructions — peculiar susceptibility

The trial court did not err in instructing the jury that the general rule is that if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility except insofar as he was

on notice of the existence of such susceptibility, but if his conduct amounted to a breach of duty to a person of ordinary susceptibility he is liable for all damages suffered by plaintiff notwithstanding such damages were unusually extensive because of peculiar susceptibility.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 6 September 1974. Heard in the Court of Appeals 20 February 1975.

Civil action to recover damages for personal injuries. Plaintiff alleged that she was injured as result of defendant's negligence in backing his automobile into plaintiff's parked car while defendant was attempting to manipulate his car out of the parking space immediately in front of plaintiff's car. A first trial ended in a directed verdict for defendant on the ground that the evidence taken in the light most favorable to the plaintiff failed to establish actionable negligence. On appeal, this court reversed. *Hinson v. Sparrow,* 21 N.C. App. 554, 204 S.E. 2d 925 (1974).

On retrial, plaintiff's evidence tended to show: On 2 April 1971 plaintiff was sitting on the passenger side of the front seat of her automobile which was lawfully parked on a street in Kinston. Defendant's car was parked directly in front of plaintiff's car. In attempting to leave his parking space, defendant backed his car into plaintiff's, denting her car's bumper and knocking its hood out of alignment. The force of the impact threw plaintiff around in the seat. Approximately an hour after the collision she experienced sharp pains in her back. An examination of plaintiff by a chiropractic physician disclosed a deteriorated spinal disc. In the opinion of this witness, the impact of the collision could have aggravated this deterioration. Similarly, in the opinion of an orthopedic surgeon who removed a ruptured disc from plaintiff's spine on 1 June 1971, the collision could have aggravated her condition.

Defendant's evidence tended to show that in backing his car to get out of his parking place, he moved only two to three feet and did not use the accelerator. He looked back before moving and then idled back until he made contact lightly with plaintiff's car. The only apparent damage to plaintiff's car was a scratch on the bumper. Plaintiff got out of her car unharmed, talked with defendant, and got down on her hands and knees to inspect the bumper.

Issues as to negligence and damages were submitted to the jury. The jury answered the issue of negligence in favor of the defendant, and from judgment on the verdict, plaintiff appealed.

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

Jeffress, Hodges, Morris & Rochelle P.A. by Thomas H. Morris for defendant appellee.

PARKER, Judge.

Plaintiff's sole assignment of error is to the following portion of the trial court's charge to the jury:

> "Now, when a person's negligent conduct proximately causes an injury to a person suffering from a disease or condition which is aggravated or made worse by the injury, he is liable for damages to the extent that his wrongful acts proximately and naturally aggravated the disease or condition.
>
> "The general rule is if the defendant's act would not have resulted in any injury to an ordinary person, he is not liable for its harmful consequences to one of peculiar susceptibility except insofar as he was on notice of the existence of such susceptibility, but if his conduct amounted to a breach of duty to a person of ordinary susceptibility he is liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility."

In his brief, plaintiff's counsel concedes that the foregoing instruction was intended by the court to be considered by the jury in passing on the issue of damages, an issue not reached in this case. He also concedes that the charge as given seems to be approved by the rule announced in *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964). He contends, nevertheless, that giving such a charge in this case resulted in prejudicial error such as to require a new trial. We do not agree.

Initially, we note that plaintiff apparently makes no objection to the first paragraph of the charge above quoted, but contends that error resulted because of the addition of the second paragraph. In this connection, we note that the second paragraph is taken almost verbatim from the opinion in *Lockwood v. McCaskill, supra.*

If it be conceded that the jury might have considered the second paragraph while passing on the negligence issue, yet we see no prejudicial error to the instruction given. Negligence is the failure to use due care under the circumstances. One of the circumstances in a particular case might be the known susceptibility to injury of a person to whom the duty of due care is owed. Obviously, in the exercise of due care one may not act toward a frail old lady in the same way one could act toward a robust young man. The duty owed, to exercise due care, is the same in each instance, but in fulfilling that duty the difference in circumstances requires a difference in conduct by the actor. 57 Am. Jur. 2d, Negligence, § 86, pp. 434, 435.

If, however, the conduct of the actor is such as to amount to a failure to exercise due care even toward a person of ordinary strength and quite apart from any peculiar susceptibilty to injury on the part of the person to whom the duty is owed, the actor may be held liable for aggravation of a preexisting condition of which he had no knowledge, *Potts v. Howser*, 274 N.C. 49, 161 S.E. 2d 737 (1968), or for unforeseeable consequences flowing from the peculiar susceptibility of the person injured, *Lockwood v. McCaskill, supra. See,* 22 Am. Jur. 2d, Damages, § 122, pp. 173, 174.

In effect what the court told the jury in the portion of the charge to which plaintiff now objects is that even though defendant may not have been on notice of any peculiar susceptibility to injury on the part of the plaintiff, if defendant's conduct was such as to amount to failure to exercise due care to a person of ordinary susceptibility, he would be liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility on plaintiff's part. This instruction was favorable to plaintiff. We do not believe that the jury could have been misled, as plaintiff contends, into thinking that they could find negligence on the part of defendant only if they could first find that he was on notice of some peculiar susceptibility to injury on the part of plaintiff. When we consider the entire charge, we find it free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. GARLAND WADE ATKINSON

No. 7416SC972

(Filed 7 May 1975)

Criminal Law §§ 79, 102— pleas of guilty by nontestifying codefendants — remarks by prosecutor

In a prosecution for conspiracy to possess marijuana with intent to distribute, defendant was denied his fundamental right to a fair trial when, during the jury selection, cross-examination of witnesses and jury argument, the prosecuting attorney on five occasions referred to the fact that codefendants who were not witnesses had pled guilty to the same charge, notwithstanding the trial court on each occasion sustained objections to the remarks and instructed the jury not to consider them.

ON *writ of certiorari* to review trial before *Hall, Judge.* Judgment entered 11 April 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 24 January 1975.

Defendant and eleven other persons were jointly charged in a bill of indictment with feloniously conspiring to import marijuana into North Carolina "and then and there to possess said marijuana with express intent to distribute, dispense, sell or deliver such substance, and then and there to actually distribute said controlled substance. . . ." A number of the other persons who were charged in the bill of indictment pled guilty. Defendant pled not guilty and was tried separately from the others. Three of the other persons who had been charged jointly with defendant in the bill of indictment and who had pled guilty testified as witnesses for the State. Each of these witnesses testified concerning defendant's participation in an agreement and plan under which a large quantity of marijuana was purchased in Texas and brought into North Carolina where it was distributed and sold.

Defendant presented no evidence. He was found guilty as charged and from judgment imposing a prison sentence gave notice of appeal. To permit perfection of the appeal, this court subsequently granted his petition for a writ of certiorari.

Attorney General Edmisten by Associate Attorney General Robert P. Gruber for the State.

Doran J. Berry for defendant appellant.

PARKER, Judge.

During selection of the jury, the assistant district attorney who was prosecuting for the State made a statement that other codefendants named in the bill of indictment had entered pleas of guilty. Defendant's counsel promptly objected and moved for a mistrial. The court denied the motion but instructed the jury panel that defendant had pled not guilty, that he was presumed to be innocent, and that "[a]ny remarks by the Solicitor will not be considered against him in any way whatsoever." Later, while the prosecuting attorney was examining a State's witness, the witness referred to another person named in the indictment, whereupon the prosecuting attorney asked the witness if the person referred to was another codefendant in this case "who pled guilty yesterday." The court promptly sustained defendant's objection and instructed the jury not to consider the statement but to dismiss it from their minds. Subsequently, while continuing with the examination of the same witness the prosecuting attorney again asked, this time concerning still another person who had been referred to by the witness, if this person was not a codefendant in this case who "pled guilty yesterday." Again the court sustained defendant's objection and instructed the jury not to consider the statement but to dismiss it from their minds. After completion of the evidence and while arguing the case to the jury, the prosecuting attorney again referred to "all of the others having pled guilty." The court again sustained defendant's objection but denied his motion for a mistrial. Argument by counsel to the jury continued and the counsel for the State again referred to "the others having pled guilty." Defendant's counsel again objected and moved for a mistrial. The court again denied the motion, but repeated its instructions to the jury that it should "not consider the Solicitor's statement as to anyone, other than the witnesses in this case, who has pled guilty."

Evidence that a codefendant who was not a witness had pled guilty to the same charge was not competent against the defendant on trial. *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876 (1957); Annot., 48 A.L.R. 2d 1016 (1956).

"The rationale of this rule is that every person charged with the commission of a criminal offense must be tried upon evidence *against him.* Evidence competent and satisfactory against one person is not necessarily competent against another charged with the same crime. The introduction of such a plea

when the witness has not testified against the defendant would also deprive a defendant of his constitutional rights of confrontation and cross-examination." *State v. Cameron,* 284 N.C. 165, 168, 200 S.E. 2d 186, 189 (1973).

In the present case the able trial judge ruled correctly in every instance and did what he could to correct the impact upon the jurors of the incompetent evidence which the prosecuting attorney persisted in bringing to their attention. The question presented is whether, despite these efforts of the trial judge to conduct a trial according to the rules of law, the actions of the prosecuting attorney resulted in depriving the defendant of his fundamental right to a fair trial. We hold that they did and that defendant is entitled to a new trial.

"Prosecuting attorneys are in a very peculiar sense servants of the law. . . . They owe the duty to the State which they represent, the accused whom they prosecute, and the cause of justice which they serve to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial." *State v. Phillips,* 240 N.C. 516, 522, 82 S.E. 2d 762, 766 (1954). In the present case the prosecuting attorney persisted in violating the "rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence." *State v. Phillips, supra,* at p. 527. Had this violation occurred but once or twice, it might be attributed to ignorance of the law or inadvertence on the part of the State's attorney, and the prompt actions of the trial court might have served to minimize the prejudicial effect upon the jury. Here, however, the violations occurred on five separate occasions throughout the trial, beginning during the process of selecting the jury and ending with final argument to the jury. Such repeated violations in the face of consistent rulings of the court can only be ascribed to a studied, deliberate, and intentional effort to force inadmissible evidence into the minds of the jurors. It is regrettable that the State must put to the expense of another trial, but the actions of the prosecuting attorney in this case make that necessary.

The verdict and judgment are vacated and a new trial ordered.

New trial.

Judges MORRIS and HEDRICK concur.

NORTH CAROLINA BLUE CROSS AND BLUE SHIELD, INC. v. AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY

No. 7415SC956

(Filed 7 May 1975)

Insurance § 125— fire insurance — house moved to another location

Where an insurance policy provided coverage against loss by fire to a house "while located or contained as described in this policy . . . but not elsewhere," the policy did not cover a fire loss which occurred after the house had been moved from its location described in the policy to another lot approximately 600 feet away whether or not the risk was thereby increased.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 18 September 1974 in Superior Court, ORANGE County. Heard in the Court of Appeals 24 January 1975.

Civil action to recover under a fire insurance policy. The following facts were established by the pleadings and by answers to interrogatories:

On 16 May 1969 defendant issued to plaintiff its North Carolina standard form fire insurance policy providing coverage to plaintiff against loss by fire to property of plaintiff described in the policy as:

> "[T]he one story, brick veneer, approved roof, tenant occupied, one family dwelling, situated Lot No. 1, Cedar Terrace Annex, s/s of Lakeview Drive, Route 7, Durham, N. C. (Christopher Property)."

The policy was issued for a period of three years, the premium was paid, and the policy was outstanding on 25 June 1971. The policy provided on its face that it afforded coverage "to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere."

The building insured had been acquired by plaintiff from John Christopher and wife on 16 May 1969, the same date on which the policy was issued. On that date the building was

located on Tract 1 or 2, or partly on each, of the "Christopher Property" on the south side of South Lakeview Drive in the subdivision known as Cedar Terrace Annex. Between 14 and 21 May 1971 the building was disconnected from its original foundation and moved a distance of approximately 600 feet to property which plaintiff had acquired known as Lot Numbers 6 and 7 of the Cedar Terrace Annex Subdivision, on East Lakeview Drive and located on the west side of the street. On 25 June 1971, when the building had been in position at its new location for approximately five weeks, it was extensively damaged by fire. On that date the building was resting with its weight upon a masonry foundation and upon steel beams which had been used in transporting it from its original location. No water, electricity, or telephone service was then being supplied to the building.

At no time prior to the fire did the plaintiff notify defendant of the moving of the building or request any alteration or change of the policy in connection with that circumstance. On the date of the fire, Lots 1, 2, 6 and 7 of Cedar Terrace Annex were all owned by plaintiff, and along with other parcels, acquired by plaintiff at different times from various owners, constituted a holding of approximately forty acres by plaintiff.

The defendant moved for summary judgment on the ground that the policy did not cover the building at its location on the date of the loss by fire. The court allowed the motion, and from judgment dismissing the action, plaintiff appealed.

Manning & Jackson by Frank B. Jackson for plaintiff appellant.

Cockman, Akins & Aldridge by William C. Lawton for defendant appellee.

PARKER, Judge.

Plaintiff contends that removal of the insured property from the location designated in the policy should not relieve defendant insurer of its obligation to pay under the policy unless the change materially increased the risk of loss, that whether the change of location did materially increase the risk of loss in this case presents a genuine issue of material fact, and that

for this reason summary judgment was not proper. In our view, however, this case presents only a matter of contract interpretation on undisputed facts. As we interpret the contract, the unresolved factual issue to which plaintiff refers is immaterial in determining the rights of the parties, and summary judgment for defendant was properly entered.

By unambiguous language in the policy, the defendant insured the plaintiff against loss by fire and other hazards occurring to the property described in the policy "while located or contained as described in this policy . . . but not elsewhere." It is difficult to conceive how language could be more explicit. The parties contracted with reference to property at a particular location. In consideration of the premium paid, defendant agreed to carry certain risks to the property while located as described in the policy, *but not elsewhere.* When plaintiff moved the property from its location as described in the policy, the property was no longer within the coverage provided by the policy. The removal changed the risk contracted against, and by the express language of the policy took the moved property out from under its coverage. Whether the hazard was thereby increased or decreased is simply immaterial, since plaintiff had no power acting alone to change the contract.

Plaintiff cites *Griswold v. The American Central Insurance Company,* 70 Mo. 654 (1879), in support of its position. In that case the insured dwelling was moved before the fire some 150 feet north of the spot it had occupied when the policy was issued. The Missouri Supreme Court held that the insurance company would be discharged if the risk had been increased and that whether there was such an increase in the risk consequent upon the removal of the building from one spot to another was a question of fact for the jury. In that case, however, the Missouri Court also noted that the insured building even after the removal and in its new position was still "on the west side of King's Highway near present terminus of Lindell Avenue," which was the location described in the policy. Quite apart from that distinguishing feature, however, we do not find the reasoning of the *Griswold* case compelling or the decision therein controlling in the present case. Rather, we find persuasive and more directly controlling here the decision of our own Supreme Court in *Parker v. Insurance Co.,* 264 N.C. 339, 141 S.E. 2d 466 (1965), which supports our conclusion here.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES REGINALD HOLMES

No. 758SC89

(Filed 7 May 1975)

1. **Criminal Law § 92— four charges of armed robbery — consolidation proper**

The trial court did not err in allowing the State to consolidate for trial four charges of armed robbery where all the crimes occurred in Goldsboro, one witness's testimony dealt directly with two of the robberies and was relevant to the others, and in none of the robberies was defendant actually seen by the victims, but in each he was alleged to have driven the getaway car.

2. **Criminal Law § 34— defendant's participation in other crimes — evidence admissible to show general plan**

The trial court in an armed robbery case did not err in allowing a witness to testify concerning defendant's statements about participating in other robberies in Goldsboro since such testimony was admissible to show a general plan or design.

3. **Constitutional Law § 33— Fifth Amendment — pleading by indicted witness proper**

The trial court did not err in allowing a witness to plead the Fifth Amendment with respect to his and defendant's involvement in the offenses charged where the witness was under indictment for the offenses and did not have an attorney to represent him, and it was possible that the witness's testimony could incriminate him.

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

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where defendant confessed to a former partner in crime that he had committed two robberies, victims of the robberies identified defendant's companion and one saw defendant in the store minutes before the robbery, and another witness saw a blue Ford LTD like defendant's behind the store.

APPEAL by defendant from *Webb, Judge.* Judgments entered 18 September 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 10 April 1975.

Defendant was charged in four bills of indictment with armed robbery. He pleaded not guilty and the charges were consolidated for trial.

Leo Davis testified for the State that he and defendant robbed the Downtowner Motor Inn in Goldsboro on 28 March 1974 and Merritt's Supermarket on 1 April 1974. In both instances it was Davis who actually obtained the money by pointing a gun at the cash register clerk while defendant drove the getaway car, his blue Ford LTD. Davis also testified that defendant told him that he and Calvin Kennimore had robbed the Kentucky Fried Chicken restaurant and Bob's Supermarket in Goldsboro.

M. A. Fritz testified that he was present when Leo Davis robbed the Downtowner Motor Inn on 26 (sic) March 1974. Creo Merritt testified that he was present on 1 April 1974 when Leo Davis robbed his supermarket. Just before the robbery, Merritt saw defendant enter the store and buy some orange juice and cigarettes.

James Zadock Hinson III and Joanne R. Grant testified that they were present when Calvin Kennimore robbed the Kentucky Fried Chicken restaurant on 26 October 1973. Judy Marie Kiser testified that she was present on 26 December 1973 when Kennimore robbed Bob's Supermarket. Gladys Bass testified that after she left work at the supermarket, shortly before the robbery, she saw a blue Ford LTD parked behind the store. Calvin Kennimore was called as a witness for the State. He testified that defendant drove a blue LTD automobile. To all other significant questions, he refused to answer on Fifth Amendment grounds.

Defendant offered no evidence. The jury returned a verdict of guilty on all charges. From judgments imposing prison sentences, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

Roland C. Braswell, by Roger W. Hall, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in allowing the State to consolidate the cases for trial pursuant to G.S.

15-152. In *State v. White,* 256 N.C. 244, 247, 123 S.E. 2d 483, 486 (1962), the North Carolina Supreme Court said:

> "Where a defendant is indicted in separate bills 'for two or more transactions of the same class of crimes or offenses' the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider whether the offenses alleged are so separate in time or place and so distinct in circumstances as to render a consolidation unjust and prejudicial to defendant."

In the case at bar we have four charges of armed robbery, all in Goldsboro. Leo Davis' testimony dealt directly with two of the robberies and was relevant to the others. In none of the robberies was defendant actually seen by the victims, but in each he was alleged to have driven the getaway car. Given these identities and similarities, we find no abuse of discretion in consolidating these cases for trial.

[2] Defendant next contends that the court erred in allowing Davis to testify concerning defendant's statements about participating in other robberies in Goldsboro. Evidence of other offenses is admissible, however, when as in the case at bar, it tends to show a general plan or design. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853 (1949). Defendant also objected to the State's use of leading questions in examining Davis. This was within the court's discretion, *see State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967); *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965), which was not shown to have been abused. Defendant correctly contends that Creo Merritt's testimony that a Mr. Gooding told him that Leo Davis had shot at him is hearsay. Nevertheless, we believe its admission was harmless error in view of Davis' testimony that he shot close to the person who pursued him from Merritt's Grocery.

[3] Defendant further contends that the court erred in allowing Kennimore to plead the Fifth Amendment with respect to his and defendant's involvement in the offenses charged. It is well settled that the court should deny the witness's claim of privilege only if there is no possibility that a truthful answer might incriminate him. 1 Stansbury, N. C. Evidence (Brandis rev.) § 57; *see State v. Smith,* 13 N.C. App. 46, 184 S.E. 2d 906 (1971). The record shows that Kennimore was under indictment

for these offenses and did not have an attorney to represent him. Despite discussions between Kennimore and the solicitor, no binding plea bargain was in effect, and it was possible that Kennimore's testimony could incriminate him. The court properly allowed him not to testify.

[4] Finally, defendant contends that the court erred in denying his motions for nonsuit as to the robberies at the Kentucky Fried Chicken restaurant and Bob's Supermarket. Defendant's confession plus independent evidence of the *corpus delicti* is sufficient to overcome a motion for nonsuit. *See State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Elam,* 263 N.C. 273, 139 S.E. 2d 601 (1965). *See also* 2 Stansbury, *supra,* § 182; 2 Strong, N. C. Index 2d, Criminal Law § 106, pp. 659-60. The corroborative evidence may be circumstantial. *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396 (1961). Taken in the light most favorable to the State, the evidence shows that defendant confessed to Davis that he and Kennimore committed the robberies. The victim identified Kennimore, and one saw defendant in the store minutes before the robbery. Another witness saw a blue Ford LTD behind the store. We find the evidence sufficient to go to the jury on each offense charged.

Defendant has received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

LOUISE MILLER v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 7526SC101

(Filed 7 May 1975)

Municipal Corporations §§ 14, 42— collapse of street pavement — claim for personal injury — notification of city council

The trial court properly dismissed plaintiff's claim against the City of Charlotte for damages for injuries she sustained when a portion of street pavement collapsed beneath her, since the city charter required that notification of a claim against the city be given to the city council, but plaintiff notified only the city manager of her claim.

APPEAL by plaintiff from *Falls, Judge.* Judgment entered 26 November 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 April 1975.

This is a civil action wherein the plaintiff, Louise Miller, seeks $15,000 damages for personal injuries allegedly caused by the negligence of the defendant, City of Charlotte.

In her complaint, filed 3 July 1973, plaintiff alleged that on 7 July 1970 she parked her automobile in the 1200 block of Oaklawn Avenue, a paved street maintained by and located within the city limits of the City of Charlotte. As she stepped out of her automobile onto the pavement "said pavement loosened, gave way, [and] caved in, causing the Plaintiff to fall . . ." and injure her left hip, right knee and lower back. These injuries were caused by the failure of the defendant to exercise due care in discovering and repairing "the dangerous condition of the said street."

Defendant filed answer denying the material allegations of the complaint and alleged as a further answer and defense that plaintiff had failed to notify the City Council of her claim in accordance with Section 9.01 of the Charter of the City of Charlotte, which provides:

> *Notice of damages.* No action for damages against the City of Charlotte of any character whatever, to either person or property, shall be instituted against the city unless within ninety (90) days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the *City Council* of such injury in writing, stating in such notice the date, time and place of happening or infliction of such injury, the manner of such infliction, the character of the injury and the amount of damages claimed therefor, but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of happening or infliction of such injury or in any manner interfere with its running. [Emphasis ours.]

Plaintiff thereafter made a motion to amend her complaint and this motion was allowed by the trial court. In her amended complaint, filed 25 April 1974, plaintiff alleged that she notified the defendant of her injuries in a letter (Exhibit A) written by her attorney dated 30 July 1970 which was mailed to the City

Manager of Charlotte. The receipt of this letter was duly acknowledged by the City Manager in a letter (Exhibit B) dated 3 August 1970. Exhibit A is as follows:

July 30, 1970

Mr. William Veeder
Manager, City of Charlotte
City Hall
East Trade Street
Charlotte, N. C.

Re: Mrs. Louise G. Miller
D/A 7/7/70

Dear Mr. Veeder;

This letter is to advise that I represent Mrs. Miller and she advises me that she was injured at 1210 Oaklawn Ave in the City of Charlotte when the street pavement gave way beneath her causing her to fall. I have personally looked at this hole which was left after her fall and the same is located in the westbound travel portion of Oaklawn Avenue adjacent to the address 1210 Oaklawn Avenue.

In view of the fact that Mrs. Miller was rather seriously injured in the fall and has required medical attention, I feel compelled to assist her in her claim for damages against the City. I called this condition to the attention of the City Attorney several days ago, but I am not sure that the street has been repaired.

If the appropriate representative of the city would like to discuss Mrs. Miller's claim, I will be happy to discuss the same with him. If I do not hear from you, I will assume that you are not interested and file the appropriate lawsuit to protect Mrs. Millers' (sic) interest.

Thank you for your cooperation.

Sincerely,
Edmund A. Liles

cc; Mr. Henry Underhill, City Atty.

Exhibit B is as follows:

August 3, 1970

Mr. Edmund A. Liles
Attorney at Law
Law Building, Room 511
Charlotte, North Carolina 28202

Dear Mr. Liles:

This will acknowledge your letter of July 30, 1970 making claim against the City of Charlotte on behalf of Mrs. Louise G. Miller for injuries she reportedly received in a fall at 1210 Oaklawn Avenue on July 7, 1970.

Your claim has been forwarded to our City Attorney for his study and recommendation.

Cordially,
s/ W. J. Veeder
City Manager

WJV:aa
cc: H. W. Underhill, City Attorney

Thereafter, defendant made a motion for judgment on the pleadings, which was allowed. From a judgment dismissing the claim, plaintiff appealed.

Edmund A. Liles for plaintiff appellant.

Office of the City Attorney by H. Michael Boyd for defendant appellee.

HEDRICK, Judge.

Plaintiff contends (1) that her attorney's letter to the City Manager dated 30 July 1970 (within ninety days of the date of the accident) substantially complied with the requirements of Section 9.01 of the Charter of the defendant city and (2) that the defendant city in part because of its letter dated 3 August 1970 acknowledging receipt of Exhibit A is estopped to complain of a lack of notice in this matter.

Similar contentions in remarkably similar factual situations were made and rejected in *Redmond v. City of Asheville,* 23 N.C. App. 739, 209 S.E. 2d 820 (1974); *Johnson v. City of Winston-Salem,* 15 N.C. App. 400, 190 S.E. 2d 342 (1972), aff'd. 282

N.C. 518, 193 S.E. 2d 717 (1973); and *Short v. City of Greensboro*, 15 N.C. App. 135, 189 S.E. 2d 560 (1972). We find and hold that these decisions are controlling in the present case and no useful purpose will be served by further elaboration thereon. The judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

JAMES B. ADDER v. HOLMAN & MOODY, INCORPORATED

No. 7422SC1051

(Filed 7 May 1975)

1. Duress— duress of goods

Where defendant rebuilt plaintiff's car into a dragstrip racer, plaintiff acquired possession of the car and the engine thereafter blew up, plaintiff returned the car to defendant's place of business, and defendant refused to allow plaintiff to regain possession of the car until plaintiff signed a paper writing releasing defendant from liability for poor workmanship and a promissory note for the balance due for the original work done on the car, the release and promissory note were wrongfully obtained by duress of goods and are unenforceable.

2. Mechanics' Liens § 1— voluntary relinquishment of possession

Any possessory lien defendant might have acquired under G.S. 44A-2 for work done on plaintiff's car was terminated when defendant voluntarily relinquished possession of the car to plaintiff after completion of the work and was not reinstated upon defendant's reacquisition of the car. G.S. 44A-3.

Judge VAUGHN dissents.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 11 September 1974 in Superior Court, DAVIDSON County. Heard in the Court of Appeals on 20 February 1975.

Plaintiff instituted this action to recover for injuries allegedly resulting from defendant's negligence and breach of implied warranty in rebuilding plaintiff's automobile. In his answer, defendant denied plaintiff's allegations of negligence and alleged that plaintiff had released it from any liability arising out of the facts set forth in the complaint. By way of counterclaim, defendant sought recovery on a promissory note allegedly

executed by plaintiff for the sum of $1,538.03. Plaintiff filed a reply denying the allegations of defendant and asserting in part that defendant had unlawfully held plaintiff's automobile; that in order to obtain possession thereof plaintiff signed the two paper writings purporting to be a release and a promissory note; and that the paper writings were obtained by unlawful duress.

With the consent of the parties, the questions concerning the release were tried by the court sitting without a jury and in advance of a trial on the issue of damages. Having heard evidence presented by both parties, the trial court made findings of fact substantially as follows: Pursuant to an agreement between the parties, defendant agreed to rebuild plaintiff's automobile into a dragstrip racer. After completion of the work, plaintiff borrowed $2,500.00 from the Bank of Commerce, and defendant endorsed the note. The $2,500.00 was paid to defendant. In addition, defendant received plaintiff's personal check of $1,538.03 for the balance due on the contract, and plaintiff acquired possession of the car. However, the check was not honored by the bank due to insufficient funds. Several weeks later, while plaintiff was warming up the engine for a race, the engine blew up, causing extensive damage. The next day plaintiff took the car back to defendant's place of business and left it. Subsequently, plaintiff asked defendant for the car but was told that he could not have it until he paid the note at the Bank of Commerce and paid defendant the balance due on the contract (the balance due was $1,538.03). In a telephone conversation, plaintiff's attorney and defendant's attorney agreed that plaintiff would give defendant a certified check payable to the Bank of Commerce in the amount of $2,500.00 as payment on the note, that defendant would release the car to plaintiff, and that the parties would sit down and discuss payment of the balance due on the contract. Pursuant to the telephone conversation, plaintiff went to defendant's place of business but was told that defendant would not release the car until some arrangements were made regarding the balance due defendant. At that time plaintiff agreed to pay the balance in several weeks. Defendant contacted its attorney and then prepared a promissory note in the amount of $1,538.03 representing the balance due. Defendant also prepared a paper writing releasing defendant from any liability resulting from poor workmanship (or other objections) and providing that if defendant undertook suit against plaintiff on the note, plaintiff would not plead any defenses against pay-

ment on the same. In order to obtain possession of the car, plaintiff signed the note and the release.

The trial court further found that plaintiff had read and understood what he was signing and that the release was supported by consideration in that (1) defendant extended time for the plaintiff to pay his indebtedness, (2) defendant agreed to waive the interest if said indebtedness was paid before 10 August 1972, and (3) defendant released plaintiff's automobile to plaintiff. In addition, it was found that there was no evidence of fraud or fraudulent misrepresentation on the part of defendant in the procurement of the release.

Based on its findings of fact, the court concluded that the release was valid and barred plaintiff's action and ordered that defendant recover on its counterclaim the sum of $1,538.03 with interest. Plaintiff appealed.

Wilson & Biesecker, by Roger S. Tripp and Joe E. Biesecker, for plaintiff appellant.

Grubb and Penry, by Robert L. Grubb, for defendant appellee.

MARTIN, Judge.

The trial court treated the release as a bar to plaintiff's action for damages and allowed defendant to recover on the promissory note. It also found that the release and the note were signed by plaintiff in order to regain possession of his car. The question arises as to whether the release and note were obtained by duress or, to be more accurate, by duress of goods.

> "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. . . . Duress is commonly said to be of the person where it is manifested by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Or it may be of the goods, when one is obliged to submit to an illegal exaction in order to obtain possession of his goods and chattels from one who has wrongfully taken them into possession." *Smithwick v. Whitley*, 152 N.C. 369, 67 S.E. 913 (1910); *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965). *See* 13 Williston, Contracts, § 1616 (3d ed. 1970).

[1] Clearly, plaintiff signed the release and note in order to obtain possession of his car and would not have signed them otherwise. In his testimony plaintiff indicated that he wanted his car because it had been sitting at defendant's place of business for "a good while" and he needed it and had to have it. He further testified that he was "over a barrel" because he had a $10,000.00 car sitting there and "couldn't see losing it for a signature." In accordance with a telephone conversation between the attorneys for the respective parties, plaintiff obtained a certified check for $2,500.00 and returned to get his car back when defendant demanded a release and promissory note as well. Under the circumstances, plaintiff was forced into signing the documents.

[2] The remaining question for determination is whether defendant's refusal to return plaintiff's car was "wrongful." In our opinion it was. Defendant had no right to retain possession of the car in the face of plaintiff's demand for same. Any possessory lien which defendant might have acquired under G.S. 44A-2 for its prior services was terminated when defendant voluntarily relinquished possession of the car to plaintiff after completion of the work. *See* G.S. 44A-3. Possession is necessary to the existence of the lien. *Reich v. Triplett,* 199 N.C. 678, 155 S.E. 573 (1930). "The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien." G.S. 44A-3. There is no evidence that defendant performed additional work after the car was returned to it. It is clear that defendant had no intention of preserving its lien.

Having no right to retain possession of the car, defendant wrongfully exacted a release and promissory note from plaintiff. Consequently, neither the release nor the note are enforceable. Of course, defendant may still have his claim for the underlying debt representing the balance due on the contract.

Reversed.

Chief Judge BROCK concurs.

Judge VAUGHN dissents.

STATE OF NORTH CAROLINA v. JAMES RALPH WHITEHEAD

No. 757SC149

(Filed 7 May 1975)

Criminal Law § 66— identification of defendant — viewing in hospital room

In a prosecution for armed robbery and felonious assault with a firearm inflicting serious injury the trial court properly determined that the robbery victim's in-court identification of defendant was based on her observation at the scene of the crime and not on a viewing of defendant in a hospital room.

APPEAL by defendant from *Peel, Judge.* Judgment entered 4 October 1974 in Superior Court, NASH County. Heard in the Court of Appeals 17 April 1975.

Defendant was charged with armed robbery and felonious assault with a firearm inflicting serious injury. He pleaded not guilty but was found guilty as charged. The five assignments of error which have been brought forward on this appeal challenge the in-court identification of defendant by the prosecuting witness. Defendant contends that the identification was not of independent origin, as the court found, but the product of an impermissibly suggestive procedure which permitted the prosecuting witness to see the defendant in his hospital room six days after the robbery.

Facts necessary for the determination of this issue are set forth in the opinion.

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

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

BROCK, Chief Judge.

Mrs. Frances Avent was operating a combination service station and grocery store on 3 June 1974. Defendant entered the store that afternoon when no other customers were present. He purchased some cigarettes and pretended to leave the store, but whirled around and pulled out a pistol. As he took about $75.00 from the cash drawer, defendant directed Mrs. Avent to go into a back room and close the door. He warned Mrs. Avent not to follow him after he left. Mrs. Avent did as she was told and

waited for defendant to drive away, but did not hear a car start. She then went to the back door and saw defendant bicycling down the road. A neighbor in a nearby garden was called for help, and the sheriff's department was notified. Then Mrs. Avent and the neighbor got into the neighbor's car and pursued the robber. They soon caught up with him and continued past him. Knowing that he had a gun, Mrs. Avent hid so that she could not be seen. She and her neighbor stopped the car somewhat further down the road and observed the defendant pedal to the Watson Seed Farm, where he dismounted and disappeared into the woods. Another neighbor arrived and fired a shot into the trees in an attempt to halt the defendant. A deputy sheriff of the Nash County Sheriff's Department soon arrived and followed the defendant through the woods. Quarters, nickels, and pennies were strewn along the path the defendant had taken. Another deputy, J. E. Doughtie, went to the Thomas home on the other side of the woods. After being invited inside the house, Doughtie began searching the rooms. Most of the rooms were well lighted, but one room was dark. Doughtie took out his flashlight and shined it into the room. He heard a noise, and defendant charged out, holding a gun in his right hand. Several shots were fired, and Doughtie was hit in the ear and in the chest. Doughtie managed to fire his revolver at the defendant, hitting him twice. Thomas Earl Whitehead, the defendant's cousin, emerged from the room and surrendered. A later search uncovered a .25 caliber pistol and $44.08 under a blanket. Thomas Whitehead had $34.00 on his person.

Thomas Whitehead testified that he first planned to rob Mrs. Avent but did not go through with it. When he told defendant he had failed, defendant took the .25 caliber pistol and peddaled away on a bicycle. He returned shortly, pursued by two cars and a man who fired a shot into the woods. Thomas and defendant divided the money and then went to their gandmother's house where defendant was apprehended.

Defendant testified that he sold some pills to someone and divided the proceeds with Thomas. As he returned home on a bicycle, he was pursued by a car and a man who shot at him. When he got to his grandmother's house, he was told that Doughtie had been looking for him. He hid when Doughtie returned to the house and fired only after Doughtie had fired at him first.

The trial court found as a fact that Mrs. Avent had had no difficulty seeing defendant at the time of the robbery. She had given an accurate description to the sheriff's department after the robbery. Although she did not know defendant's name, she had seen him before. She later saw defendant at the hospital and recognized him immediately, although his hair appeared to be different. The court concluded that the identification was of independent origin and not the product of any highly suggestive procedure, despite the fact that at the time Mrs. Avent viewed the defendant, he was the only Negro in the hospital room.

The contention of defendant may be stated briefly: The discrepancies between the description given to the sheriff's department and the physical appearance of the defendat cast doubt on Mrs. Avent's ability to recognize the defendant. Had she not viewed him in the hospital room, defendant asserts that she could not have accurately described the person who robbed her store. In its finding of fact number two, the court dealt with this point:

> "That immediately after the robbery she described the person who had robbed her to Mr. Gilliam as being a person of eighteen to nineteen years of age, although she stated that she is not able to estimate ages very well; that she described the clothes which he was wearing at the time, and she stated that he was approximately five feet nine inches tall and of slender build weighing approximately 155 to 160 pounds; that she was not able to call his name but that she knew that she had seen him before. The Court finds that this estimate insofar as it relates to a description of the defendant's person is reasonably accurate based on the Court's observation of the defendant here in court."

No exception was taken by defendant.

In *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed. 2d 1247, 1253 (1968), the Supreme Court stated that "each case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Findings of fact as to whether the identification was the result of constitutionally impermissible circumstances are re-

quired. When those findings are supported by competent evidence, they are conclusive and binding on appellate courts. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), *citing State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971). It is our opinion that the findings of fact are clearly supported by the evidence.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM HENRY SMITH, JR.

No. 748SC1079

(Filed 7 May 1975)

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

Evidence was sufficient to support the trial court's finding that a robbery victim's identification of defendant was based on her observation of him at the crime scene and not on a subsequent photographic identification where the evidence tended to show that the crime took place in daylight, the victim had ample time to observe defendant, the victim studied defendant's appearance because she wanted to know him when she saw him again, the police showed the victim six photographs on the day after the robbery but none resembled defendant, five weeks later on 13 August 1974 the police notified the victim that a man fitting her assailant's description had been apprehended, the victim was shown nine photographs from which she identified defendant, defendant's photograph had the date 13 August 1974 written on it, and none of the other photographs were dated in this manner.

2. **Criminal Law § 102— jury argument of solicitor — immediate curative instruction — no prejudice**

Defendant was not prejudiced by the solicitor's argument which made reference to matters which had not been introduced into evidence before the jury, since the trial court immediately gave a curative instruction.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 3 October 1974 in Superior Court, LENOIR County. Heard in the Court of Appeals 8 April 1975.

Defendant was charged with and found guilty of robbery with a firearm.

The evidence presented at the trial indicated that on the afternoon of 17 July 1974, defendant approached a yellow Cadillac in which Mrs. Shelby Casey was sitting, and demanded, at gunpoint, that Mrs. Casey give him two pocketbooks that were in the car. One of the pocketbooks belonged to Mrs. Casey and contained approximately $200.00; the other belonged to Mrs. Emma Jet and contained approximately $1,000.00. Defendant attempted to get inside the car, which was locked, through a partially opened window. Mrs. Casey tried to prevent him from opening the door, but failed. However, she did manage to kick the gun out of defendant's hand after the door was opened. A struggle ensued, and defendant's hat and glasses fell off. Defendant finally was able to grab the pocketbooks and escape. The pocketbooks were found later under some nearby bushes.

Defendant testified that he had been wearing a rhinestone earring in his left ear for three years. The witness' description of defendant made no mention of this. He also testified that he was elsewhere at the time of the robbery. Three witnesses corroborated this testimony.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for the State.

Wallace, Langley, Barwick & Llewellyn, for the defendant-appellant.

BROCK, Chief Judge.

[1] Defendant's first assignment of error challenges the in-court identification of defendant by the prosecuting witness: Was the identification tainted by an impermissively suggestive pretrial photographic identification procedure? Each case must be considered on its own facts, and the findings of fact and conclusions of law drawn from the *voir dire* examination must be upheld if they are supported by competent evidence.

Before Mrs. Casey was allowed to identify defendant as her assailant, a *voir dire* examination was conducted. In her testimony Mrs. Casey repeatedly described the defendant as her assailant. She stated that she "concentrated on what he looked like" because "whenever [she] saw him again, [she] wanted to know what he looked like." She described defendant as being

> " . . . about 5' 11". He weighed about 145 pounds. He was very slim, had on a white tee-shirt and yellow pants and

green hat and sunglasses. He had a very short haircut, no sideburns. He had a mustache. It was very light. The complexion of his skin was about medium and he appeared to be between 20 and 24 years old."

On the day after the robbery, six photographs were brought to her. None resembled the defendant. Five weeks later, on 13 August 1974, Mrs. Casey was notified that a man fitting the description of her assailant had been apprehended. Mrs. Casey went to the Kinston Police Department where she viewed a group of nine photographs. She identified defendant's photograph as being among the nine. On the front of the defendant's photograph the date 13 August 1974 was written. None of the other photographs were dated in this manner.

The defendant complains that prejudicial error appears not only from the "meager" description of the assailant, the lack of opportunity to observe the assailant, and the length of time between the robbery and identification, but also from the identification of defendant from a photograph bearing the date 13 August 1974.

The trial court found that during the robbery Mrs. Casey had ample opportunity to observe her assailant. After weighing the evidence, the court concluded that the in-court identification of defendant was based on Mrs. Casey's observations at the time of the offense and was not the result of the photographic identification procedures. Evidence of the photographic procedure was not offered in evidence before the jury.

Whether an identification has an independent origin or is based on illegal procedures is an issue to be decided by a trial court on a *voir dire* examination. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972). Its findings and conclusions drawn therefrom are binding if supported by evidence. *Id.* at 291, 188 S.E. 2d at 335. While we disapprove of marking a photograph in such a manner as to make it stand out from others with which it is viewed, there was competent evidence which supported the trial court's determination that the in-court identification was of independent origin. This assignment of error is overruled.

[2] The final argument raised by defendant deals with the failure of the court to award a mistrial when the district attorney, in his jury argument, made reference to matters which had

not been introduced into evidence before the jury. The remarks of the district attorney have not been reproduced in the record. However, the court did make the following statement:

> "Ladies and gentlemen of the jury, there has been an objection to the argument of the Solicitor for the State. I'll sustain that objection and I instruct the jury that it must disregard any statements or arguments of the Solicitor with respect to the photographs. You will not consider such argument in determining your verdict."

The argument of counsel is left largely to the discretion and control of the trial court, and in this instance the court gave an immediate curative instruction. This assignment of error is overruled.

In our opinion defendant had a fair trial. No prejudicial error has been shown.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID EUGENE O'DONALD, JOHN ALLAN WESLEY AND LOWELL H. SMITH, JR.

No. 742SC1046

(Filed 7 May 1975)

Larceny § 7— automobile larceny — recent possession doctrine

The State's evidence was sufficient for the jury in a prosecution for larceny of an automobile where it tended to show that defendants were seen in the middle of the night standing close behind the opened trunk of an automobile which had been stolen that same night, and defendants admitted to the police that the automobile was under their control and that they intended to continue on a trip southward in it; the introduction of evidence by the State of the exculpatory statement made by defendants to the police to the effect that one of their buddies had brought the automobile to them from Pennsylvania did not prevent the State from showing that the facts were otherwise.

APPEAL by defendants from *James, Judge.* Judgments entered 2 October 1974. Heard in the Court of Appeals on 20 February 1975.

Defendants were separately indicted but jointly tried on their pleas of not guilty to indictments charging each of them with the felonious larceny on 19 July 1974 of a 1969 Chrysler automobile, Serial No. CL43H9F127614, the property of Griffin Motor Company, Inc., Williamston, N. C.

The State's evidence showed: When the manager of Griffin Motor Company, Inc., a North Carolina corporation, finished his day's work and closed up on the evening of 19 July 1974, the Chrysler automobile described in the indictments was on the company's used car lot at Williamston in Martin County, N. C. The automobile was the property of the corporation and was worth $1,000.00. At that time it had a North Carolina inspection sticker. The Chrysler was still on the lot when the manager checked by the lot at 9:00 p.m. He had returned from supper to check the lot because his suspicions had been aroused earlier when he had seen three white males sitting on the curb in front of the car. The manager was not able to identify defendants as these men. On the following morning the car was gone. Defendants had not been given permission to take it, and the manager still had the key. When he next saw the car on the afternoon of 20 July 1974, the North Carolina inspection sticker had been scraped off the windshield, the deck lid cylinder had been changed, and the key would no longer unlock the deck lid.

At 12:35 a.m. on 20 July 1974 Sgt. Todd of the Windsor Police Department, while on routine patrol with two other officers, saw the three defendants on the parking lot of the R & W Chevrolet Company in Windsor in Bertie County. Defendants were standing behind the 1969 Chrysler, which was parked with its trunk lid up. A 1972 model Dodge car was parked about 20 feet away, with its back toward the back of the Chrysler and with its trunk also open. Defendants told the officers that they were headed south from Pennsylvania, that their car, which they said was the Dodge, had broken down and that they had permission to spend the night on the R & W lot. The officers had not seen the defendants or the Chrysler when they checked by the lot 15 minutes previously. When asked about the 1969 Chrysler, defendants told the officers that one of their buddies had brought the Chrysler to them from Pennsylavania and that they were going to take that car and go on. When Sgt. Todd later noted a Pennsylvania license plate on the Chrysler and asked about this, defendants told him that it was because the car was from Pennsylvania.

After checking at the police station, where he learned that the Dodge had been reported stolen, Sgt. Todd placed defendants under arrest for possession of a stolen vehicle, the Dodge automobile. He handcuffed defendants and placed them in his patrol car. While Sgt. Todd went to the Chrysler to get its registration number, the patrol car with the defendants as its only occupants was driven away. Defendants were apprehended a few hours later hiding in a wooded area lying on the ground, partially covered with leaves, and still handcuffed.

Defendants did not introduce evidence. They were found guilty as charged, and from judgments imposing prison sentences, appealed.

Attorney General Edmisten by Associate Attorney General David S. Crump for the State.

Hugh M. Martin for defendant appellant David Eugene O'Donald.

J. Melvin Bowen for defendant appellant John Allan Wesley.

Edgar J. Gurganus for defendant appellant Lowell H. Smith, Jr.

PARKER, Judge.

Appellants assign error to (1) the denial of their motions for directed verdicts of not guilty and (2) the portion of the court's charge to the jury in which the court instructed the jury how it should view the evidence concerning the partially exculpatory statement made by defendants to the police.

Viewed in the light most favorable to the State, the evidence was sufficient to require submission of the case to the jury. Defendants were seen in the middle of the night standing close behind the opened trunk of the stolen Chrysler automobile. They admitted to the police that the Chrysler was under their control and that they intended to continue their trip southward in it. Defendants' midnight possession of the stolen Chrysler so soon after it was stolen affords presumptive evidence for the jury's consideration that defendants committed the larceny. *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966). The introduction in evidence by the State of the exculpatory portion of the statement made by defendants to the police to the effect that one of their buddies had brought the Chrysler to them from

Pennsylvania, did not prevent the State from showing that the facts were otherwise. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972). The motions for directed verdicts of not guilty were properly denied.

We have carefully examined the court's charge to the jury and particularly the portion to which defendants assign error. The charge, considered contextually and as a whole, was free from prejudicial error. We find

No error.

Judges HEDRICK and CLARK concur.

JOHN S. SAMIA AND WIFE, FRANCES SAMIA v. A. J. BALLARD, JR. TIRE & OIL COMPANY, INC.

No. 753SC74

(Filed 7 May 1975)

1. **Appeal and Error § 6; Rules of Civil Procedure § 50— mistrial — denial of motion for directed verdict — no appeal**

An order denying a motion for directed verdict following a mistrial is not appealable.

2. **Landlord and Tenant § 6— operation of service station — conversion to convenience store — no breach of lease**

Defendant did not breach its lease agreement with plaintiff when it converted from a full-scale service station with automobile repair facilities to a convenience store which sold gasoline where the lease agreement clearly gave lessee the right to adapt the premises to any lawful business use, rent was to be one cent per gallon of gasoline sold but in no event less than $265 per month, gasoline sales did not decrease with the change in the business, and defendant continued to pay plaintiff the minimum amount of rent specified in the contract; therefore, the trial court erred in denying defendant's motion for a directed verdict in an action for damages and rescission for the alleged breach of the lease agreement.

APPEAL by defendant from *Browning, Judge.* Order entered 18 September 1974 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 April 1975.

Plaintiffs instituted this action on 6 August 1973 seeking damages and rescission for the alleged breach of a lease agree-

ment. Evidence adduced at trial tended to show that on 11 April 1958 the Samias agreed to lease certain premises in New Bern to Sinclair Refining Co. The lease was for a term of 15 years, and the lessee had options to renew for 45 years thereafter. The rent was to be one cent per gallon of gasoline sold on the premises but in no event less than $265.00 per month. Article IV provided in part:

> "Lessor shall furnish at its sole cost and expense, the necessary consents and permits . . . required by any governmental authority for the construction and installation of the desired buildings, structures, and improvements including driveways and approaches over the sidewalks, parkways and curbing, and for installation and maintenance of tanks, pumps, signboards, light posts and lighting facilities, including illuminated signs, and other equipment and appliances for operating and conducting upon said premises a gasoline and oil filling and service station, including the greasing and servicing of automobiles, the making of minor replacements and repairs, the parking of automobiles for hire, and for the marketing of automobile tires, accessories, and other merchandise; all, or one or more, branches thereof being the business which Lessee proposes to conduct or cause to be conducted on said premises; Lessee reserving, however, the right to conduct or cause to be conducted thereon any lawful business."

Article V provided in part:

> "Lessee shall have the right to erect, install, maintain and operate on said premises such buildings, structures, improvements, equipment, fixtures (trade or otherwise) and appliances (with the right of removal as hereinafter provided), on, under, and above the ground as it may require or desire in the conduct of the business to be conducted on said premises . . . ."

The agreement also provided that a building was to be constructed on the premises for use as a service station.

Sinclair assigned its rights under the lease agreement to BP Oil Co., and BP assigned its rights to defendant. In early 1973 the service station was closed for remodeling. The wash pit and grease pit were removed. In July 1973 defendant's sublessee began operating a Stop-N-Go Grocery Store on the prem-

ises, selling self-service gasoline and oil in addition to grocery items. Defendant has paid plaintiff $265.00 rent each month, including the period during which the station was closed. Gasoline sales have never generated the minimum rent reserved under the lease.

The court denied defendant's motions for summary judgment and for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. The jury failed to reach a verdict and defendant moved, pursuant to G.S. 1A-1, Rule 50(b)(1), for judgment in accordance with its motions for a directed verdict. From the order denying this motion and ordering that the case be retried, defendant appealed to this Court.

Beaman, Kellum & Mills, by James C. Mills, for plaintiff appellees.

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

ARNOLD, Judge.

[1] A threshhold question presented by this case is whether an order denying motion for directed verdict following a mistrial is appealable. We conclude that it is not appealable and that it is therefore subject to dismissal.

In a majority of jurisdictions which have considered this question, absent statutory provision to the contrary, orders of this kind have been held nonappealable. The decisions are primarily based on the reasoning that such orders are interlocutory and do not affect a substantial right of the movant. *Compare Basciano v. Reinecke*, 313 F. 2d 542 (2d Cir. 1963), *and Dearborn Stove Co. v. Farmers Union Coop Gas & Oil Co.*, 304 F. 2d 273 (8th Cir. 1962), *with Ford Motor Co. v. Busam Motor Sales*, 185 F. 2d 531 (6th Cir. 1950), *and Dostal v. Baltimore & O. R. Co.*, 170 F. 2d 116 (3rd Cir. 1948). *See also* Annot., 40 A.L.R. 2d 1284 (1955); 2B Barron & Holtzoff, Federal Practice and Procedure, Civil § 1082, at 434 (1961); 9 Wright & Miller, Federal Practice and Procedure, Civil § 2540, at 612 (1971). When the court denies a motion for judgment n.o.v. and orders a new trial, there is no judgment from which to appeal. 5A J. Moore, Federal Practice ¶ 50.16, at 2387-88 (2d ed. 1974).

Immediately following the jury's failure to agree on a verdict the appellant, pursuant to G.S. 1A-1, Rule 50(b)(1), moved for judgment in accordance with its earlier motions for directed verdict. Without question, appellant strictly complied with the procedural requirements of Rule 50. However, Rule 50 has nothing to do with broadening appellate jurisdiction. The scope of the court's jurisdiction on appeal in this case is found in G.S. 1-277 and in Rule 4 of this Court.

There is no verdict or judgment from which to appeal, and there is no statute granting this Court jurisdiction to hear an appeal from an order such as was entered in this case. The order is not appealable.

Even though we hold that there is no right to appeal in this action, since the facts are not in dispute, and on the basis of the unambiguous lease agreement, we elect to treat the appeal as a petition for certiorari, which we grant.

[2] Viewing the evidence in the light most favorable to plaintiffs we are of the opinion that defendant is entitled to judgment as a matter of law. *See Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549 (1973); *Burns v. Turner,* 21 N.C. App. 61, 203 S.E. 2d 328 (1974). Although the parties to the lease may have contemplated that the premises would be used for a full-scale service station, with automobile repair facilities, Articles IV and V of the agreement clearly give the lessee the right to adapt the premises to any lawful business use. Gasoline sales have not decreased under the current operation of the premises, and plaintiffs have not been deprived of rental income.

There being no breach of the lease agreement, the trial court erred in denying defendant's motion for a directed verdict. Since defendant made a timely motion for judgment in accordance with its motion for a directed verdict, we reverse the order appealed from and remand with directions to the trial court to enter judgment in defendant's favor. G.S. 1A-1, Rule 50(b)(1) & (2); *see Chavis v. Reynolds,* 22 N.C. App. 734, 207 S.E. 2d 396 (1974); *Nichols v. Real Estate, Inc.,* 10 N.C. App. 66, 177 S.E. 2d 750 (1970).

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

LEWIS C. RAMSEY v. JANIE RAMSEY TODD

No. 7526DC18

(Filed 7 May 1975)

Divorce and Alimony § 23— child support — absence of findings

The trial court erred in entering an order for child support without making findings as to the ages and circumstances of the children where such order provided (1) that $5200 in child support be placed in escrow by the clerk to be distributed to defendant at the rate of $32.50 per week for the minor son of the parties, and (2) that after payment of $12,200, the amount in which plaintiff was delinquent in making support payments, plaintiff would be relieved of further obligation to support his children.

APPEAL by defendant from *Beachum, Judge.* Judgment entered 10 September 1974 in District Court, MECKELNBURG County. Heard in the Court of Appeals 18 March 1975.

Defendant wife appeals from an order modifying a judgment providing for child custody and support. Plaintiff instituted this action for purpose of obtaining a divorce on ground of one-year separation; defendant filed answer and cross action asking for custody of, and support for, two minor children.

On 10 May 1969 the court, with the consent of the parties, entered a judgment providing, among other things, that defendant be awarded custody of the children and that plaintiff pay into the office of the clerk of superior court $65.00 per week " . . . payable to the Defendant for the benefit of the two minor children. . . . "

On 8 January 1971, pursuant to an order to show cause entered 19 February 1970 and continued from time to time, the court entered an order finding that plaintiff was in arrears in making payments for the support of his children and adjudging him in contempt. The court ordered that plaintiff be committed to jail until he complied with the orders of the court but stayed execution of the commitment on certain conditions.

On 10 September 1974, pursuant to a motion filed by defendant on 12 February 1974 and a hearing on the motion, the court entered an order making detailed findings of fact and conclusions of law, those pertinent to this appeal being summarized as follows: As of the date of the hearing, in making child support payments plaintiff was delinquent in the sum of $12,200. Plain-

tiff is the fee simple owner, free from encumbrance, of a residence and 23 acres of land in Mecklenburg County, North Carolina; he is the owner of substantial equity in 66 acres of land in Virginia; he is employed as a contractor for general building, repair and remodeling work. Plaintiff has been gainfully employed and has had necessary funds available to provide support for his children. He is in willful contempt of the court "for his willful and knowing failure to comply with" lawful orders of the court.

The court adjudged that plaintiff was in contempt and ordered the following (summarized except where quoted and numbering ours):

1. " . . . Plaintiff may purge himself of this contemptuous behavior by paying into the office of Clerk of Superior Court the sum of $12,200.00 within sixty (60) days of this Order. Of this amount the sum of $5,200.00 shall be placed in escrow by the Clerk, to be distributed to defendant at the rate of $32.50 per week for minor child, Lewis C. Ramsey, Jr."

2. "That upon Plaintiff's payment of the sum of $12,200.00 to the Defendant, no further Orders will be entered in this Court requiring Plaintiff to support his minor children."

3. Plaintiff will pay defendant's attorney $400 within 60 days.

Defendant excepted to certain provisions of the order and appealed.

Robert F. Rush for plaintiff appellee.

Edmund A. Liles for defendant appellant.

BRITT, Judge.

Defendant contends the court erred (1) in ordering that $5,200 be placed in escrow, to be distributed to her at the rate of $32.50 per week "for minor child, Lewis C. Ramsey, Jr."; and (2) in providing that upon the payment of $12,200 to defendant, " . . . no further Orders will be entered in this Court requiring Plaintiff to support his minor children". The contentions have merit and we will discuss them in the order stated.

(1) While the trial court, in matters relating to child custody and support, is given wide discretion, it is required to make

sufficient findings from which it can be determined, upon appellate review, that its orders are justified and appropriate. *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971). In the instant case, the court made no finding in support of its requirement that $5,200 of the amount ordered paid by plaintiff be placed "in escrow" and distributed to defendant for the benefit of Lewis C. Ramsey, Jr., at the rate of $32.50 per week.

(2) There is no finding to support the provision of the order relieving plaintiff of further child support after paying $12,200. Since the 10 May 1969 judgment did not specify the duration of time that plaintiff would have to support his children, it would appear that his obligation would continue for the period provided by law. Since the enactment of G.S. 48A in 1971, our appellate division has concluded that a father's legal obligation to support his child ceases when the child reaches age 18, absent a showing that the child is insolvent, unmarried, and physically or mentally incapable of earning a livelihood. *Shoaf v. Shoaf,* 282 N.C. 287, 192 S.E. 2d 299 (1972); *Nolan v. Nolan,* 20 N.C. App. 550, 202 S.E. 2d 344 (1974), *cert. den.* 285 N.C. 234 (1974); *Taylor v. Taylor,* 17 N.C. App. 720, 195 S.E. 2d 355 (1973); *Choate v. Choate,* 15 N.C. App. 89, 189 S.E. 2d 647 (1972); and *Crouch v. Crouch,* 14 N.C. App. 49, 187 S.E. 2d 348 (1972), *cert. den.* 281 N.C. 314 (1972). While the order *indicates* that plaintiff's daughter might have reached age 18, there is no finding to that effect or that the other facts that would relieve plaintiff of her support exist. There are no findings as to the age or circumstances of the son.

For the reasons stated, the provisions of the order requiring that $5,200 be placed in escrow by the clerk, to be distributed to defendant at the rate of $32.50 per week for the minor Lewis C. Ramsey, Jr., and the provision relieving plaintiff of further obligation to support his children after payment of $12,200, are vacated; and this cause is remanded to the District Court of Mecklenburg County where plaintiff will have 30 days from the date of certification of this opinion to petition the district court for further findings and determination with respect to the provisions of the order we have vacated. Should plaintiff fail to petition as herein allowed, the order appealed from, as modified by this opinion, will stand.

Order modified and cause remanded.

Judges HEDRICK and MARTIN concur.

IN RE: CUSTODY OF JAMES HURLEY EDWARDS, III (MINOR)

No. 749DC1091

(Filed 7 May 1975)

1. **Infants § 9— custody of minor — mother unfit — sufficiency of findings**

Evidence was sufficient to support the trial court's finding that respondent wife was unable to fulfill the physical, emotional, spiritual and educational needs of her son where such evidence tended to show that respondent had carried on adulterous relationships, that she was working in a business in Hillsborough which prevented her from seeing her son except on rare occasions, and that on several occasions respondent and her son spent the night with respondent's business partner in his trailer.

2. **Infants § 9— custody of minor — award to person not party to action**

Where the trial court awarded custody of a child to one who was not a party to the action, the action is remanded with directions that the trial court issue the necessary notices and orders to make the third person a party to the action to the end that the court has effective jurisdiction over her person.

APPEAL by petitioner and respondent from *Peoples, Judge.* Judgment entered 4 October 1974 in District Court, FRANKLIN County. Heard in the Court of Appeals 12 March 1975.

Petitioner husband and respondent wife were married in 1966 and had one child, James Hurley (Jay) Edwards, III, who was born on 15 July 1967. On 18 March 1970 they separated pursuant to a separation agreement, and on 26 April 1971 they were divorced. Petitioner brought this proceeding to obtain custody of the child. Both parties presented extensive evidence at the trial of the case. Among the court's findings of fact were the following: The original separation agreement gave respondent custody of the child. At the time of the separation, respondent was having an adulterous affair with another man. In April 1971 respondent had another adulterous affair, this time with Bobby Elam. In that month she and the child went on a trip to California with Bobby Elam. After respondent returned from California, she began living with her mother, Louise Edwards, in Louisburg. At this time the separation agreement was modified to provide that petitioner would have custody of the child, but the parties further agreed that the child would continue living with respondent at Louise Edwards's home. The child continued to live at Louise Edwards's home until 18 January 1974. During this period, petitioner contributed little or nothing

toward his son's support, showed little or no interest in him, and spent little or no time with him. Respondent did show interest in the child and supported him by her earnings, but she rarely saw him because of her employment. The child spent most of his time with his grandmother, Louise Edwards, and her maid. In April 1973 respondent and Robert Dugger purchased the franchise for a "Golden Skillet" restaurant in Hillsborough, and since that time they have been employed in operating the restaurant. In February 1974 respondent moved to Hillsborough to be nearer to her employment.

On 18 January 1974 petitioner took his son from Louise Edwards's home to his own home in Louisburg. The court found that this action was not in the child's best interest. Since 18 January 1974 the child has lived with petitioner, but he has visited Louise Edwards and respondent frequently. On several occasions respondent and her son have spent the night with Robert Dugger in his trailer. Robert Dugger is married and is separated from his wife.

The district court concluded: "1. That the past conduct respectively of the Petitioner and the Respondent indicate that neither the Petitioner nor the Respondent at this time is able to fulfill the physical, emotional, spiritual and education needs of said minor child and that, therefore, neither the Petitioner nor the Respondent is at this time entitled to primary custody of said minor child; 2. That the Respondent's mother, Louise Edwards, is able to fulfill the physical, emotional, spiritual and educational needs of said minor child and is a fit and proper person at this time to be awarded primary custody of said child; 3. That it would be in the best interest of said minor child at this time for his primary custody to be awarded to the Respondent's mother, Louise Edwards; 4. That the matter of custody of said minor child should be reviewed and re-examined during the month of June of 1975, unless good cause is shown prior to that time that such review and re-examination should occur sooner;" and awarded primary custody of the child to Louise Edwards with visitation privileges for each parent. Both the petitioner and the respondent appealed.

No appearance for petitioner appellant-appellee.

Dalton Hartwell Loftin for respondent appellant.

HEDRICK, Judge.

Although petitioner gave notice of appeal, he neither served on the respondent nor filed in this court a record on appeal, nor did he file a brief either as appellant or as appellee. Petitioner's appeal is dismissed.

[1] Respondent assigns as error that there is not sufficient evidence to support the findings and conclusions of the trial judge that respondent is presently unable to fulfill the physical, emotional, spiritual, and educational needs of her son and that the best interests of the child will be served by awarding his primary custody to Louise Edwards. She argues that the only evidence supporting the court's conclusion is that she committed adultery in 1970 and 1971. She cites *Pendergraft v. Pendergraft,* 23 N.C. App. 307, 208 S.E. 2d 887 (1974), and *Savage v. Savage,* 15 N.C. App. 123, 189 S.E. 2d 545 (1972), for the proposition that a parent does not become unfit to have custody of a child merely because he or she commits adultery.

It is true that under *Pendergraft, supra,* and *Savage, supra,* the district court is not required to deny a parent custody of a child whenever it finds that the parent has had an adulterous affair. However, the additional findings of the court with respect to the respondent's conduct up to and including the date of the hearing, including the findings with respect to her relation with her business partner, support the conclusion that the respondent is not presently able to fulfill the physical, emotional, spiritual, and educational needs of her son. A more critical conclusion, however, is that the best interests of the child will be served if his primary custody is awarded to the grandmother, Louise Edwards. The record is replete with evidence and findings that support this conclusion. It seems from the record that for all practical purposes the child has been in Louise Edwards's custody since the respondent returned from her trip to California with Bobby Elam. Indeed, it appears from the record that Louise Edwards at least shared custody of the child with the petitioner and the respondent all his life. Moreover, the record is replete with evidence and findings that Louise Edwards is a fit and proper person to have primary custody of the child. We think the trial judge exercised sound judicial discretion in resolving the matter by awarding the primary custody of the child to his grandmother, who has demonstrated not only her willingless but her ability to provide a good home for the child.

[2] While the court, upon proper findings and conclusions, can award the custody of a minor child to any person, agency, or institution as will best promote the interest and welfare of the child, G.S. 50-13.2(a), under the circumstances of this case, where the court awarded custody of the child to Louise Edwards who is not a party to the proceeding, we think the proceeding should be remanded with directions that the trial court issue the necessary notices and orders to make Louise Edwards a party to this action to the end that the court has effective jurisdiction over her person. *Tucker v. Tucker*, 24 N.C. App. 649, 211 S.E. 2d 825 (1975).

The result is: petitioner's appeal is dismissed; as to respondent's appeal, the order of the trial court is affirmed and the proceeding is remanded to the district court with directions.

Affirmed and remanded with directions.

Judges PARKER and CLARK concur.

DORIS Q. WHALEY, ADMINISTRATRIX OF THE ESTATE OF RESSIE WHALEY, DECEASED v. EDWARD R. ADAMS

No. 758SC163

(Filed 7 May 1975)

Automobiles § 76— overturned vehicle in highway — contributory negligence of motorist striking it

In an action to recover damages for injuries sustained by plaintiff's intestate in an automobile collision, the trial court erred in denying defendant's motions for directed verdict and judgment n.o.v. where plaintiff's evidence tended to show that the accident occurred at 3:00 a.m., the weather was fair, plaintiff's intestate had consumed one beer, the road was on a decline for 800-900 feet and straight, intestate's lights were burning and he was going 45-50 mph in his right-hand lane of travel, defendant's car was dark green, its lights were burning, though it was overturned, and it was "framed" by the lights of a third motorist's car, and as intestate approached the wrecked vehicle he did not decrease his speed nor change his direction.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 15 November 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals on 17 April 1975.

This is an action to recover damages for injuries sustained by plaintiff's intestate as the result of a collision between two motor vehicles. Plaintiff alleged that the driver of defendant's vehicle was negligent in that he failed to give adequate warning to oncoming motorists of his disabled vehicle which had overturned in the highway in the nighttime.

Plaintiff's evidence, pertinent to decision, tends to show:

Defendant's son, Billy Albert Adams (Adams), was operating defendant's dark green Pontiac with defendant's permission at the time of the accident. Around 3:00 a.m. on 26 January 1969, Adams, intestate, and Linwood Martin were at the County Line Grill (located apparently at the Wayne County-Lenoir County Line). Shortly thereafter, Adams left on Highway 55 going in a westerly direction toward Seven Springs. After traveling one-quarter to one-half mile, the Adams vehicle ran off the road at approximately 55-60 mph, turned over, and came to rest on its top, blocking the left lane of Highway 55 and its rear end protruding from one to two feet into the right lane of travel. The Pontiac was almost perpendicular (off about 15 degrees) to the highway, with its lights, both front and back, burning. Adams left the Pontiac and obtained the aid of Mr. Gibbs, who lived 50-75 yards back toward the County Line Grill, in going for a wrecker. Mr. Gibbs testified that as they came by the Pontiac, traveling west, he could see the Adams car "framed" by the lights of Linwood Martin's car and that the lights of the Adams car were burning.

Linwood Martin testified: The weather was fair. He left the grill about five minutes after Adams left and saw the overturned Adams car some 200-250 feet before he got to it; that the lights were on. He drove onto the shoulder of the highway, proceeded around the overturned car, then turned around and drove back in the east-bound traffic lane to within 10-12 feet of the wreck with his lights shining into defendant's car. Shortly thereafter, Adams and Gibbs came by going to Seven Springs (about ½ mile away) to get a wrecker. After they left he saw the vehicle operated by intestate approaching some 200-400 feet away with its headlights burning. Intestate was traveling approximately 45-50 miles per hour and as he approached defendant's car, he did not decrease his speed or change his direction. The left front of the vehicle operated by intestate collided with the rear end of defendant's car and came to a stop about 100 feet

down the road in a ditch. The road was straight on a slight decline for 800-900 feet before getting to defendant's car.

Intestate was taken to a hospital where he was treated for two weeks. His doctor testified that intestate told him that he thought that he had been in an accident and that he had drunk one beer. (Intestate died approximately one year later from causes unrelated to the accident.)

At the close of all the evidence, defendant moved for a directed verdict. The motion was denied. The jury answered the issues of negligence and contributory negligence in favor of plaintiff and assessed damages in the amount of $2,500. Defendant then moved for judgment nothwithstanding the verdict on the grounds that intestate was contributorily negligent as a matter of law and that Adams was not negligent. The motion was denied and from judgment entered on the verdict, defendant appealed.

Jeffress, Hodges, Morris & Rochelle, P.A., by Thomas H. Morris, for the plaintiff appellee.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith, for defendant appellant.

BRITT, Judge.

Defendant contends the court erred in denying his motions for directed verdict and judgment n.o.v. on grounds that plaintiff failed to show actionable negligence on the part of Adams, and plaintiff's own evidence established intestate's contributory negligence as matter of law.

Assuming, *arguendo,* that Adams was negligent, we think the evidence clearly establishes contributory negilgence on the part of plaintiff's intestate in that he failed to keep a proper lookout and failed to keep his vehicle under proper control.

On the question of contributory negligence, Justice Stacy (later Chief Justice), speaking for the court in *Construction Co. v. R. R.,* 184 N.C. 179, 181, 113 S.E. 672 (1922), said:

> The plaintiff's negligence, in order to bar a recovery in an action like the present, need not be the *sole* proximate cause of the injury, for this would exclude the idea of negligence on the part of the defendant, as in any legal sense material or significant. It is sufficient if his negli-

gence is a cause, or one of the causes, without which the injury would not have occurred. If the plaintiff's negligence be the sole and only cause of the injury, it would not be contributory negligence at all, but rather the source of a self-inflicted injury.

In the case at bar plaintiff's evidence tends to show: It was 3:00 a.m. and the weather was fair. Intestate had consumed one beer. The road was on a decline for 800-900 feet and straight. Intestate's lights were burning and he was going 45-50 mph in his right-hand lane of travel. Defendant's car was dark green, its lights were burning and it was "framed" by the lights of Linwood Martin's car. As intestate approached the wrecked vehicle he did not decrease his speed nor change his direction.

While there is no evidence that intestate actually saw defendant's car prior to impact, " . . . [i]t is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen". *Wall v. Bain,* 222 N.C. 375, 379, 23 S.E. 2d 330 (1942). The law charges a nocturnal motorist, as it does every other person, with the duty of exercising ordinary care for his own safety. *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825 (1959); *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276 (1951).

We further note the case of *Hines v. Brown,* 254 N.C. 447, 119 S.E. 2d 182 (1961), in which the Supreme Court held that a motion for involuntary nonsuit was properly granted on the ground that plaintiff's evidence established contributory negligence as a matter of law. We think the showing of contributory negligence was considerably stronger in the instant case than was the showing in *Hines.*

For the reasons stated, we hold that the trial court erred in denying defendant's motions. The judgment appealed from is

Reversed.

Judges PARKER and VAUGHN concur.

MARGIE E. SPRINGS v. WINBORNE F. SPRINGS

No. 7526DC78

(Filed 7 May 1975)

Divorce and Alimony § 23— decrease in child support — changed circumstances

There was a sufficient showing of changed circumstances to support reduction of defendant's child support payments where the evidence showed that defendant's net income from salary had decreased because of increased deductions for social security and income taxes, his V.A. benefits had decreased, and plaintiff's net income had increased from $129 to $388 per month.

APPEAL by plaintiff from *Beachum, Judge.* Judgment entered 29 August 1974 in District Court, MECKLENBURG County. Heard in the Court of Appeals 7 April 1975.

Plaintiff appeals from judgment modifying a prior consent judgment requiring defendant to make alimony and child support payments. The record discloses:

On 15 August 1973 a consent judgment was entered in which the court found, among other things, that defendant was receiving a net salary of approximately $740 per month, and was also receiving approximately $250 per month from the U. S. Government while attending college under the G. I. Bill. The court awarded plaintiff custody of the three children, and required defendant to pay plaintiff $50 per month as permanent alimony and $250 per month for support of the children; the court also awarded plaintiff possession of the home owned by the parties as tenants by the entirety and ordered that defendant continue making payments of $156 per month on the home until 1 June 1974 at which time "the matter of said house shall be reviewed by the parties". Under the provisions of the judgment, defendant assumed the responsibility of paying certain accounts approximating $6,300, agreeing to try to pay at least $200 per month thereon; he also agreed to pay medical and hospital insurance premiums and the parties agreed to share equally in paying medical and dental expenses for the children which insurance benefits did not pay.

On 29 July 1974, on motion of plaintiff, the court entered an order requiring defendant to appear and show cause why he should not be adjudged in contempt for failure to comply with provisions of the consent judgment. On 5 August 1974 defendant

filed motion asking that the support payments be reduced because of changed circumstances.

On 29 August 1974, following a hearing, the court entered judgment making findings of fact and conclusions of law including findings and conclusions that there had been substantial change in circumstances since the entry of the consent judgment, adjudging that defendant was not in willful contempt of the orders of the court, and ordering that defendant continue to make deed of trust and escrow payments on the residence indebtedness but that his $250 monthly child support payments be reduced by the amount of the deed of trust and escrow payments.

Plaintiff appealed.

Lila Bellar for plaintiff appellant.

Harkey, Faggart, Coira & Fletcher, by Francis M. Fletcher, Jr., and Philip D. Lambeth, for defendant appellee.

BRITT, Judge.

Plaintiff contends the trial court erred for the reason that the findings of fact and conclusions of law are not supported by the evidence presented at the hearing, and there was not sufficient showing of changed conditions to justify the reduction in child support payments. We find no merit in the contention.

We deem it unnecessary to review all of the evidence presented at the hearing or to enumerate the findings of fact and conclusions of law made by the trial court. Suffice it to say, the court found that due to increased deductions for Social Security and income taxes, defendant's net income from salary was reduced from $740 to $674 per month; that defendant expected to receive only $100 from V.A. benefits in September 1974 and not more than $156 in monthly V.A. benefits in October, November and December of 1974 (as contrasted with $250 monthly V.A. benefits at time of the consent judgment); that plaintiff's net income from earnings had increased from $129 per month in August of 1973 to $388 per month in August of 1974.

The foregoing key findings are supported by the evidence and we hold that there was sufficient showing of changed circumstances to justify the modification of the consent judgment.

The judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. WALTER HAMMONDS

No. 7516SC69

(Filed 7 May 1975)

Criminal Law §§ 96, 169— erroneous admission of evidence — curative instruction

The erroneous admission of testimony concerning defendant's prior convictions for violations of the liquor laws was not prejudicial where the trial court subsequently instructed the jury that the evidence was not competent and should in no way be considered against defendant; furthermore, there was evidence by the prosecuting witness that defendant sold him a beer in Robeson County, that act being illegal, and defendant failed to object to such evidence.

APPEAL by defendant from *Clark, Judge.* Judgment entered 13 September 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals on 7 April 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with a deadly weapon with intent to kill inflicting serious injury. He pleaded not guilty and evidence for the State tended to show:

Defendant operated Dreamland, a place of business between Lumberton and Pembroke on Highway 711. The prosecuting witness, Tony Locklear, went to Dreamland on 16 November 1973, purchased a beer for sixty cents from defendant, and began playing pool with his cousin. An argument arose between Locklear and his cousin and defendant ordered them to leave. Heated words were exchanged between Locklear and defendant, resulting in an altercation in which defendant cut Locklear across his face with a knife. Hospitalization was required for treatment of Locklear's wounds.

Defendant did not testify but offered evidence tending to show that Locklear was cut by someone else.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. The court entered judgment imposing prison sentence of not less than three nor more than five years from which defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas M. Ringer, Jr., for the State.

Musselwhite, Musselwhite & McIntyre, by Charlie S. McIntyre, Jr., for the defendant appellant.

BRITT, Judge.

By his second assignment of error, defendant contends the trial court erred in allowing the State, through cross-examination of defendant's wife, to elicit evidence which tended to impeach his character. Defendant did not testify nor otherwise put his character in issue and the evidence elicited tended to show that he had been convicted several times of liquor law violations.

At the close of defendant's evidence, the court instructed the jury, separate and apart from its regular charge, that it had erred in admitting evidence of defendant's prior convictions. The court instructed the jury that the evidence was not competent and that they should disregard it and in no way consider it against defendant. The court again instructed the jury in the regular charge that this evidence was not to be considered by them in any way.

We hold that the court's subsequent instructions adequately removed any prejudice caused by the error in admitting the evidence. *State v. Strickland,* 229 N.C. 201, 207-08, 49 S.E. 2d 469 (1948); 1 Stansbury, North Carolina Evidence, § 28 (Brandis rev. 1973). Furthermore, there was evidence by the prosecuting witness, admitted without objection, that defendant sold him a beer for sixty cents and that on other occasions beer was sold over-the-counter at Dreamland. We take judicial notice of the fact that the sale of beer in Robeson County in November of 1973 was illegal. That being true, the rule that the admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, 3 Strong, N. C. Index 2d, Criminal Law, § 169, is applicable. The assignment of error is overruled.

By his first assignment of error, defendant contends that the trial court erred in allowing the prosecuting witness to testify that defendant operated a "bootleg place". As set out above, there was ample evidence admitted without objection tending to show that defendant sold beer at his place of business, a violation of the liquor laws; therefore, the stated rule would apply to this assignment and it too is overruled.

We have reviewed the other assignments of error brought forward and argued in defendant's brief, but finding them to be without merit, they too are overruled.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. LEON HICKSON

No. 7515SC103

(Filed 7 May 1975)

1. **Criminal Law § 66— in-court identification — prior photographic identification**

   In-court identification of defendant was of independent origin and not tainted by a photographic identification.

2. **Robbery § 5— possession of recently stolen property — applicability to armed robbery**

   The trial court did not err in charging that the doctrine of possession of recently stolen property was applicable to armed robbery.

3. **Criminal Law § 9— instructions on principals in first degree**

   Instructions on the law of principals in the first degree were proper in a robbery prosecution in the light of evidence that defendant and two others were acting together and in concert.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 29 October 1974 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 April 1975.

To the charge of armed robbery, the defendant pled not guilty.

The State's evidence tended to show that shortly after midnight defendant and two others, wearing ski masks, entered

the "Pit Stop" in Hillsborough, a pool room and "beer joint", and relieved the several patrons of their wallets while defendant had them covered with a sawed-off shotgun and a pistol.

Three victims testified that they knew defendant and recognized him.

The bookkeeper and manager of a local grocery store testified that in midafternoon of the same day of the robbery the defendant requested that they cash a payroll check; they cashed the check after he presented to them a social security card. Several days later a deputy sheriff exhibited to them six photographs of young black males, and they identified the photograph of the defendant as the one who cashed the check. The check and social security card were identified by one of the robbery victims as his property which was in his stolen wallet.

Defendant was found guilty as charged, and appealed from the judgment imposing imprisonment.

Attorney General Edmisten by Associate Attorney C. Diederich Heidgerd for the State.

B. Frank Bullock for the defendant.

CLARK, Judge.

The defendant assigns as error the admission of the testimony of several victims relating to their identification of defendant as one of the three perpetrators, and to their failure to specify which of the three perpetrators made certain statements or did certain acts. Examination of the record reveals that plenary evidence of the same import was introduced without objection. Under these circumstances the error, if any, was harmless. See *State v. Brown,* 272 N.C. 512, 158 S.E. 2d 354 (1968), and *State v. Blount,* 20 N.C. App. 448, 201 S.E. 2d 566 (1974).

[1] Nor do we find error in admission of the in-court identification of defendant by the two store employees, which was done after plenary hearing and the finding that it was based on their observation of the defendant at the store when he cashed the check and was untainted by the photographic identification. The trial fully complied with standards required by *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970), and *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970).

[2] The defendant contends that the trial court committed error in charging that the doctrine of possession of recently stolen property was applicable to armed robbery. In *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967), it was held that if and when it is established that there was an armed robbery in which property was stolen, then the possession of such recently stolen property raises a presumption of fact that the possessor is guilty of the armed robbery. The trial court correctly charged the jury on this principle of law.

[3] The defendant's claim of error is that the trial court erroneously charged on conspiracy. However, we find no instructions on the subject of conspiracy; rather, the instructions relate to the law of principals in the first degree, which was appropriate in light of the evidence that defendant and two others were acting together and "in concert". See *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975).

We find that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

EVERETT DAVENPORT TRADING AS DAVENPORT SUPPLY & GRAIN COMPANY v. DOUGLAS W. DAVENPORT AND WIFE, VIVIAN H. DAVENPORT

No. 752SC91

(Filed 7 May 1975)

Contracts § 18— extension of delivery date — summary judgment

In an action in which plaintiff alleged that defendant breached a contract for sale of corn by refusing to make further deliveries twenty-two days after the final delivery date called for in the contract, affidavit of plaintiff's truck driver that he picked up corn at defendant's farm pursuant to the contract three days after the final delivery date in the contract was insufficient to show an extension of the date for deliveries beyond the date provided in the contract, and summary judgment was properly entered for defendant.

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 5 November 1974 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 8 April 1975.

This is an action by plaintiff to recover damages from defendants for breach of contract.

Defendants denied the breach, moved for summary judgment, and filed supporting affidavits. Plaintiff filed responsive affidavits. The trial court entered judgment granting summary judgment for defendants and plaintiff appealed.

Franklin B. Johnston for the plaintiff.

Charles W. Ogletree and Hutchins, Romanet, Hutchins & Thompson by R. Wendell Hutchins for defendants.

CLARK, Judge.

The parties agree that the written contract, duly executed by plaintiff and defendant, Douglas W. Davenport, on 10 August 1972, provided in substance that said defendant would sell to plaintiff 20,000 bushels of corn at $1.18 per bushel, and that plaintiff would pick up the corn in his vehicles at defendants' farm from time to time on or before 20 September 1972.

Plaintiff alleges that said defendant breached the contract on 12 October 1972, twenty-two days after the final delivery date provided for in the contract, when defendant refused to make further deliveries under the contract.

Plaintiff further alleges that deliveries, a total of 6,747.12 bushels, were made from 8 September to 12 October 1972 "pursuant to . . . [the] written contract." Plaintiff submitted the affidavit of his truck driver in which he stated that he "picked up a load of corn from . . . [the] farm on September 23, 1972, pursuant to the written contract. . . ."

G.S. 1A-1, Rule 56(e), relating to summary judgment contains the following provision:

> " . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . ."

The plaintiff may not rely on the bare allegations of his complaint. *Peterson v. Winn-Dixie,* 14 N.C. App. 29, 187 S.E. 2d 487 (1972).

The only relevant specific fact set forth in plaintiff's responsive affidavits is the truck driver's statement that on 23 September 1972, three days after the final delivery date under the written contract, he picked up corn at defendant's farm "pursuant to the contract". This evidence alone is not sufficient to show waiver, estoppel, novation or any other basis for effecting an extension of the date for deliveries of corn beyond the final date provided in the contract that would support plaintiff's claim that defendant breached the contract on 12 October 1972 by refusing to make further deliveries.

The burden is on the plaintiff to show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie for its breach. *McAden v. Craig*, 222 N.C. 497, 24 S.E. 2d 1 (1943).

"Where the pleadings or proof disclose that no cause of action exists, a summary judgment may be granted." *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 257, 185 S.E. 2d 793, 796 (1972). We find that the trial court was correct in entering summary judgment for defendants.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DONALD RAY ALLEN

No. 7515SC53

(Filed 7 May 1975)

1. **Constitutional Law § 31— identity of confidential informant**

The trial court did not err in the denial of defendant's motion for disclosure of the identity of a confidential informant whose information led to a photographic identification of defendant by a robbery victim where there was no showing that disclosure of the informant's identity was necessary or even helpful in the preparation of his defense.

2. **Criminal Law § 66— in-court identification — photographic identification — confrontation at jail**

Robbery victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification or by a confrontation at the jail.

ON *Certiorari* to review the order of *Hall, Judge*. Judgment entered 13 December 1973, in Superior Court, ORANGE County. Heard in the Court of Appeals 20 March 1975.

Defendant was charged with armed robbery. Prior to plea, defendant moved for disclosure of the identity of the informant upon whose information Chapel Hill Police Officer Don Tripp investigated defendant as a suspect; Officer Tripp obtained a photograph of defendant which was submitted, along with nine other photographs, to the alleged victim for identification. The motion to disclose identity and the motion to suppress the identification testimony of the alleged victim were denied after a voir dire hearing.

At trial the State offered the testimony of June C. Merritt, which tended to show that in midafternoon defendant entered the office on Mr. Merritt's used car lot, hit him on the head and in the face several times, knocking him to the floor; defendant then stuck the gun in his face, threatened to kill him if he made a noise, demanded his money, grabbed his wallet which contained $780 and credit cards, and then left.

Defendant presented no evidence. The jury returned a verdict of guilty as charged. From the judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Winston, Coleman and Bernholz by Barry T. Winston and Roger B. Bernholz for defendant appellant.

CLARK, Judge.

[1] Defendant contended that the State should disclose the identity of the informant because it was essential to his defense of alibi. He offered no evidence at the voir dire hearing on his motions to disclose identity and to suppress the identification evidence. Neither did the defendant present evidence at trial. There is no showing that his defense was alibi or in what manner the disclosure of the identity of the informant would be necessary or even helpful to him in the preparation of his defense. We find no error in the denial of his motion to disclose the identity of the informer.

To protect the public interest, it is the general rule that the prosecution is privileged to withhold from an accused the

identity of an informant. There are certain exceptions and limitations, and the propriety of disclosure depends on the circumstances of the case. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971). The burden is on the defendant to make a sufficient showing that the disclosure is needed for the preparation of his defense. *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957). Annot., 76 A.L.R. 2d 262 (1961).

[2] The victim testified on voir dire and at trial that he based his identification of defendant as the perpetrator on his close observation of him during daylight at the scene of the crime. There was no irregularity or unfairness in the procedure employed by the law officer in submitting the ten photographs to the victim for identification, and the trial court justifiably ruled that the in-court identification of defendant was not tainted by the confrontation at the jail after the photographic identification had been made.

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

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS H. WYNN

No. 7516SC130

(Filed 7 May 1975)

Homicide § 26— conviction of voluntary manslaughter — submission of second degree murder — no error

Defendant's conviction of voluntary manslaughter rendered harmless the submission of the greater charge of second degree murder to the jury, at least absent some showing that the verdict of guilty of the lesser offense was affected thereby.

ON writ of *certiorari* to review the order of *Clark, Judge.* Judgment entered 7 August 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 15 April 1975.

Defendant pleaded not guilty to a charge of murder and was convicted of voluntary manslaughter.

Defendant's prosecution arose out of a shooting of one Edmund Hardin on the morning of 27 October 1973. Witnesses for the State testified that earlier that morning Robert Wynn, the defendant's brother, and Hardin got into an argument at a party near the defendant's trailer. After the argument Hardin and a companion, Reginald Bell, started walking toward Hardin's car, which was parked some one hundred feet from defendant's trailer. Bell stated that he heard defendant say, "Let's get him, boys," and then saw defendant go into his trailer. Hardin went to his car, opened the trunk, and took out a paper bag. He and Bell then walked back towards defendant's trailer. As they approached the trailer, defendant started shooting. Bell scrambled for cover. One of defendant's shots hit Hardin, and he fell. None of the State's witnesses saw a gun either in Hardin's possession or on the ground where he fell. Two of the witnesses testified that they did not see a paper bag near Hardin's body.

Linda McGirt, who was in her trailer when the shooting occurred, looked out her window as her husband, Billy, ran to Hardin's aid. Linda McGirt next ran to Hardin, then to the defendant's trailer. The defendant was inside, and stated that Hardin had fired at him.

When Billy McGirt got to Hardin, he was still alive and called out Billy's name. Billy McGirt then ran to his trailer, got his car keys, and took Hardin to the hospital.

Evidence offered by the defendant indicated that he was acting in self-defense. Thomas Wynn testified that his brother, Robert, arrived at the party and began talking with the deceased. Defendant then went to his trailer. Another of his brothers, Arthur, ran up, shouting that Hardin was going to get a gun to kill Robert. Arthur asked the defendant to give him his gun. Defendant got his gun and went outside just as Hardin was approaching his trailer. Defendant stated that he could not give the gun to Robert, who was "half-crazed" with drink, or to Arthur because of his excited emotional state. Defendant tried unsuccessfully both to get Robert into his trailer and to quiet Arthur. Defendant then spoke to Hardin, who said he intended to kill defendant. While they were standing fifteen feet apart, Hardin fired three shots at defendant. None found its target. As Hardin prepared to fire a fourth time, defendant shot him. He then ran to administer first aid to Hardin, but Hardin was dead. Defendant put his gun on a car, told Arthur to put it up, and went into his trailer to call the police.

Arthur Wynn testified that Robert picked up Hardin's gun and put it in his pocket. However, Arthur sneaked the gun out of Robert's pocket and threw it into a nearby drainpipe. He then took defendant's gun from the car and threw it into a creek.

Luther Sanderson, a deputy sheriff at the time of the shooting, testified for the defense. He stated that in investigating the shooting, he found the two pistols where Thomas had placed them. Both were entered as exhibits. Sanderson also testified that the State's witness Bell originally had stated that Hardin had taken a gun from the bag and fired at defendant but that later Bell changed his position and denied this.

Eight witnesses testified to defendant's good character and reputation.

Attorney General Edmisten, by Associate Attorney Issac T. Avery, III, for the State.

L. J. Britt and Son, by L. J. Britt and Bruce W. Huggins, for the defendant-appellant.

BROCK, Chief Judge.

Defendant's three assignments of error raise one issue for our resolution: Did the trial court err in failing to dismiss the charge of second degree murder? We point out that defendant was convicted of voluntary manslaughter and conclude that his conviction of a lesser charge rendered harmless the submission of the greater charge to the jury, at least absent some showing that the verdict of guilty of the lesser offense was affected thereby. *State v. Sallie,* 13 N.C. App. 499, at 508, 186 S.E. 2d 667, at 672-673 (1972), *cert. denied,* 281 N.C. 316 (1972); *State v. Casper,* 256 N.C. 99, 122 S.E. 2d 805 (1961). Defendant has made no showing that his conviction was affected in any way by the jury's consideration of his possible guilt of the more serious charge.

No error.

Judges PARKER and ARNOLD concur.

MINNIE STATEN STEWART v. FRANK STEWART

No. 748SC1033

(Filed 7 May 1975)

Deeds § 4— undue influence in procurement of deed — mental capacity of grantor — sufficiency of evidence

In an action to set aside a deed in which plaintiff purportedly conveyed a life estate in certain real property to defendant, the trial court properly directed verdict for defendant where plaintiff's evidence as to fraud, undue influence, and mental capacity was insufficient to submit issues thereon to the jury.

APPEAL by plaintiff from *Browning, Judge.* Judgment entered 27 September 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals on 19 February 1975.

This action was brought to set aside a deed dated 5 January 1971 in which plaintiff purportedly conveyed a life estate in certain real property to defendant.

In her complaint, plaintiff alleges that her signature on the instrument was obtained by fraud; that she did not know what she was doing at the time; and that there was no consideration for the conveyance.

At the close of plaintiff's evidence the trial court granted defendant's motion for directed verdict, and plaintiff appealed.

Kornegay & Bruce, by Robert T. Rice, for plaintiff appellant.

Whitley and Vickory, by C. Branson Vickory, for defendant appellee.

MARTIN, Judge.

Plaintiff assigns as error the trial court's order allowing defendant's motion for directed verdict.

In considering a motion for directed verdict, the court must view the evidence in the light most favorable to the non-movant, giving to it the benefit of all reasonable inferences and resolving all inconsistencies in its favor. *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975). The motion presents a question of law, namely, whether the evidence is sufficient to require submission to the jury. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973).

Viewed in this manner, plaintiff's evidence tends to show the following. Plaintiff and defendant were married on 9 March 1949 and were divorced on 18 August 1969. She does not recall signing the deed in question in January of 1971. According to plaintiff, she had seizures during which she did not know what was happening but sometimes she walked around and talked to people and sometimes she fell down. Doctor Shackelford, plaintiff's physician, testified as follows: Plaintiff suffered from epileptic seizures and generally had seizures of the type known as "grand mal". Following a seizure she generally lapsed into a state of confusion and uncertainty which could last for hours or days. According to Dr. Shackelford, it would not be fair to say that the average person would recognize that she had had a seizure. In addition he stated that epileptics in general may have a degree of amnesia following an attack which could last for hours or days. His records showed that she was seen on 15 December 1970 and had suffered a seizure six days prior to that time and that she was seen again on 17 December 1970, 21 December 1970, and 5 January 1971 and was doing well. If she had been "out of it" on January 5 he would have noted this, and if she had been highly confused or disoriented at that time this probably would have come to his attention.

Plaintiff contends that the deed of 5 January 1971 was procured by fraud and undue influence and that she did not possess sufficient mental capacity to make and execute said deed. In addition it is argued that no consideration was paid for the conveyance.

Ordinarily, the consideration recited in a deed is presumed to be correct. *Speller v. Speller,* 273 N.C. 340, 159 S.E. 2d 894 (1968). "The controlling principle established by our decisions is that inadequacy of consideration is a circumstance to be considered by the jury in connection with other relevant circumstances on an issue of fraud, but inadequacy of consideration standing alone will not justify setting aside a deed on the ground of fraud. However, if the inadequacy of consideration is so gross that it shows practically nothing was paid, it is sufficient to be submitted to the jury without other evidence." *Garris v. Scott,* 246 N.C. 568, 99 S.E. 2d 750 (1957).

In the present case there is no showing that the transaction was accompanied by overreaching, oppression, or advantage. Nor is there evidence of a fiduciary relationship between the

parties. Indeed, plaintiff testified that she did not remember talking to defendant in January of 1971 about conveying him a life estate. A careful consideration of the evidence, bearing on the question of fraud and undue influence, leads us to the conclusion that plaintiff's evidence was insufficient to warrant the submission of an issue thereon to the jury.

We next consider plaintiff's assertion that she did not possess sufficient mental capacity to make and execute the deed dated 5 January 1971. The law presumes that every person is sane in the absence of evidence to the contrary. *Davis v. Davis*, 223 N.C. 36, 25 S.E. 2d 181 (1943). In our opinion the trial court properly refused to submit an issue to the jury regarding plaintiff's mental capacity to execute the deed of 5 January 1971. Plaintiff's evidence was simply insufficient. Indeed, Doctor Shackelford testified that she was doing well on 5 January 1971 when she was seen in his office.

The judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. DICKEY JERALD JOHNSON

No. 7519SC71

(Filed 7 May 1975)

Automobiles § 3— driving while license revoked — record and certificate of revocation — requirements for validity

In a prosecution for driving under the influence of an intoxicating beverage while defendant's license was permanently revoked, the trial court did not err in admitting into evidence the official notice and record of revocation of defendant's driving privilege and the attached certificate, though the certificate was only initialed by an employee of the Department of Transportation and was not notarized, since G.S. 20-48 does not require the full signature of the employee making the certificate or that such certificate be notarized.

APPEAL by defendant from *Seay, Judge*. Judgment entered 4 September 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 7 April 1975.

State v. Johnson

The defendant, Dickey Jerald Johnson, was charged in a single warrant, proper in form, with operating a motor vehicle on the public highway (1) while he was under the influence of an intoxicating beverage and (2) while his operator's license was permanently revoked. The defendant pleaded not guilty and was found guilty on both charges. From judgments imposing a jail sentence of six (6) months on the count charging the defendant with driving under the influence and eighteen (18) months on the count charging him with driving an automobile while his license was permanently revoked, defendant appealed.

Attorney General Edmisten by Assistant Attorney General James L. Blackburn for the State.

Davis, Ford & Weinhold by Robert M. Davis for defendant appellant.

HEDRICK, Judge.

All of defendant's assignments of error relate to the charge of driving a motor vehicle while his license was permanently revoked and present the question of whether the trial court erred in admitting into evidence the official notice and record of revocation of defendant's driving privilege.

G.S. 20-48 requires that when notice is given by the Department of Transportation under any law regulating the operation of motor vehicles, proof of the giving of such notice "may be made by the certificate of any officer or employee of the Department or affidavit of any person over 18 years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof." Notice may be given by "deposit in the United States mail . . . in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Department. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice." G.S. 20-48.

Defendant argues that the certificate required by G.S. 20-48 to prove that notice of the revocation of his operator's license was mailed to him was insufficient because (1) it was not "signed" by an employee of the Department, but was merely initialed and (2) the certificate was not sworn to and subscribed before a notary public.

We find nothing in G.S. 20-48 which requires that the certificate to prove that the notice of revocation was mailed in accordance with the statute contain the full signature of the employee making the certificate or that such certificate be notarized. See *State v. McDonald,* 23 N.C. App. 286, 208 S.E. 2d 915 (1974); *State v. Teasley,* 9 N.C. App. 477, 176 S.E. 2d 838 (1970). In the instant case, the certificate meets all the requirements of G.S. 20-48 and provides *prima facie* evidence of the genuineness of such certificate, the truth of the statements made in such certificate, and the official character of the person who purportedly initialed and executed it. G.S. 8-35; *State v. Herald,* 10 N.C. App. 263, 178 S.E. 2d 120 (1970). We therefore hold that the court did not err in admitting into evidence the official notice and record of revocation of the defendant's driving privilege and the attached certificate; that the court did not err in declaring and explaining the law arising on such evidence; and that the court did not err in denying defendant's motions for judgment as of nonsuit.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. THEODORE MIDDLETON

No. 7528SC153

(Filed 7 May 1975)

Criminal Law § 163— jury instructions — failure to object or tender instruction

Where defendant neither objected to the charge nor tendered any request for special instructions with respect to the various conflicts in the testimony of the State's witnesses, his assignment of error contending that the trial court failed to declare and explain the law arising on the evidence is without merit.

ON *certiorari* to review the trial of defendant before *Fountain, Judge.* Judgment entered 29 May 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 April 1975.

State v. Middleton

This is a criminal prosecution wherein the defendant, Theodore Middleton, was charged in a bill of indictment, proper in form, with committing a crime against nature, a violation of G.S. 14-177.

At the trial, the State offered the testimony of William Johnson, age fourteen, who stated that at about 9:35 a.m. on 18 March 1974 he and several friends were playing near the defendant's apartment. The defendant invited Johnson inside, and Johnson voluntarily accepted the invitation. The defendant thereafter told Johnson to pull down his pants. Johnson obeyed and the defendant committed the act of fellatio upon him. After approximately fifteen minutes, the defendant "ran . . . [Johnson] out of the house" by threatening him with a butcher knife. Four of Johnson's friends, all of whom were approximately thirteen years of age, testified for the State that they followed Johnson into the defendant's apartment and observed the defendant perform the crime against nature. When asked on cross-examination as to what time the alleged offense occurred, the boys responded 12:45 p.m., 12:35 p.m., 11:00 a.m., and 11:00 a.m., respectively.

Defendant offered evidence tending to establish an alibi between the hours of 9:30 a.m. and 12:30 p.m. He further offered the testimony of Sgt. W. L. Dillingham, the investigating officer, who stated that when he first interviewed Johnson and his friends each of the boys told him that the defendant had forced Johnson into his apartment with the use of a butcher knife.

The jury returned a verdict of guilty as charged. From a judgment that defendant be imprisoned for not less than seven (7) nor more than ten (10) years, he appealed.

Attorney General Rufus L. Edmisten by Associate Attorney William H. Guy for the State.

Peter L. Roda, Public Defender, for defendant appellant.

HEDRICK, Judge.

By his first assignment of error, defendant contends the trial court failed to declare and explain the law arising on the evidence in its charge to the jury in violation of G.S. 1-180 in that in recapitulating the evidence the trial court did not mention the discrepancies in the testimony of the State's witnesses

(1) as to the time the alleged offense occurred and (2) as to whether the victim voluntarily entered the defendant's apartment.

Objections to the charge in stating the contentions of the parties or in recapitulating the evidence as a general rule must be called to the trial court's attention in apt time to afford an opportunity for correction. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contentions of the parties, it complies with G.S. 1-180, and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender a request for special instructions. *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973).

In the instant case, the record discloses that the defendant neither objected to the charge nor tendered any request for special instructions with respect to the various conflicts in the testimony of the State's witnesses. Furthermore, a careful review of the charge discloses that the able trial judge fully instructed the jury on all substantial features of the case, declared and explained the law thereon, and stated and reviewed the contentions of the defendant. This assignment of error is not sustained.

By his second assignment of error, defendant contends the court erred in refusing to set aside the verdict as being "contrary to the evidence" and in signing the judgment. This assignment of error has no merit.

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. CALVIN LOUIS BRANNON

No. 7521SC126

(Filed 7 May 1975)

1. **Searches and Seizures § 3— signing of warrant — no invalidation for technical error**

Search warrant was not invalidated by the fact that the magistrate signed it at the place set aside for the affiant and that the Chief of Police, who was the affiant, signed it at the place set aside for the magistrate.

2. **Searches and Seizures § 3— affidavit — time of signing**

Though the record indicated that the affidavit was actually signed subsequent to the signing of the search warrant, the trial judge's finding and conclusion that the search warrant "was issued upon probable cause as set out in the affidavit to obtain the warrant" was supported by the evidence adduced at the *voir dire* hearing.

3. **Searches and Seizures § 3— warrant valid on its face — allegations sufficient to establish probable cause**

Where the search warrant was valid on its face and the sworn allegations in the affidavit were sufficient to establish probable cause, it is not necessary for the court on appeal to discuss the validity of the allegations in the affidavit or the credibility of the affiant.

APPEAL by defendant from *Exum, Judge.* Judgment entered 17 September 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 April 1975.

The defendant, Calvin Louis Brannon, was charged in a warrant proper in form with the misdemeanor larceny of three dogs belonging to George O. Gunter.

The defendant pleaded not guilty but was found guilty by the jury. From a judgment that he be imprisoned for eighteen months, defendant appealed.

Attorney General Edmisten by Associate Attorney Raymond L. Yasser for the State.

Blanchard, Tucker, Twiggs & Denson by Irvin B. Tucker, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motion to suppress any and all evidence regarding a leather dog leash seized

pursuant to a search of the trunk of his automobile. After an extensive voir dire hearing on the defendant's motion to suppress, the trial court made detailed findings and conclusions, which included the following:

> "4. The search warrant offered in evidence as State's Exhibit Number Two was issued upon probable cause as set out in the affidavit to obtain the warrant as amplified by the testimony of Chief Wilson at the voir dire hearing and is a valid search warrant notwithstanding the fact that the magistrate signed the warrant in the space set aside for the affiant and that Chief Wilson signed in the space set aside for the signature of the magistrate."

[1] Citing G.S. 15-26 which requires that a search warrant be signed by the issuing officer, the defendant argues that the search warrant in the instant case was not "properly signed" because the Chief of Police signed the search warrant and not the magistrate. The search warrant shows on its face that it was signed by the magistrate at the place set aside for the affiant and that the Chief of Police signed it at the place set aside for the magistrate. G.S. 15-27(b) provides that mere technical deviations in a search warrant do not invalidate the warrant. Clearly, the fact that the issuing magistrate's signature was misplaced on the warrant is a mere technical deviation, which does not invalidate the search warrant.

[2] Next, the defendant contends the search warrant was issued "without affidavit," because the affidavit indicates that it was signed at 1:30 p.m., while the search warrant itself shows on its face that it was issued at 1:20 a.m. While the record indicates that the affidavit was actually signed subsequent to the signing of the search warrant, the trial judge's finding and conclusion that the search warrant "was issued upon probable cause as set out in the affidavit to obtain the warrant" is supported by evidence adduced at the voir dire hearing and is conclusive on appeal. *State v. Wingard,* 9 N.C. App. 719, 177 S.E. 2d 330 (1970), appeal dismissed, 277 N.C. 459, 178 S.E. 2d 226 (1971).

[3] Finally, defendant contends that the evidence in the affidavit to establish probable cause for the issuance of the search

warrant was illegally obtained. In *State v. Harris,* filed 16 April 1975, Judge Clark, speaking for this court, said:

> "We adopt the majority rule that where the search warrant is valid on its face, and the sworn allegations are sufficient to establish probable cause, the defendant may not dispute and attack the allegations, or the credibility of the affiant or his informant, in the voir dire hearing on the defendant's motion to suppress the evidence seized by law officers pursuant to the search warrant. *State v. Salem,* 17 N.C. App. 269, 193 S.E. 2d 755 (1973), *cert. denied,* 283 N.C. 259, 195 S.E. 2d 692 (1973). See also Annot., 5 A.L.R. 2d 394 (1949)."

Therefore, since the search warrant is valid on its face and the sworn allegations in the affidavit are sufficient to establish probable cause, it is not necessary for us to discuss the validity of the allegations in the affidavit or the credibility of the affiant. We hold the search of the defendant's automobile and the seizure of the leather dog leash pursuant to the search warrant was proper and the trial court did not err in denying the defendant's motion to suppress the evidence.

Defendant attacks other findings and conclusions of the trial court sustaining on other grounds the validity of the search and seizure; however, in view of our decision holding that the search warrant is valid, it is not necessary for us to discuss these contentions. Defendant's one assignment of error is overruled.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. JACKIE RIMMER

No. 7512SC85

(Filed 7 May 1975)

1. Criminal Law § 66— meeting of witness and defendant at police station — in-court identification proper

The trial court properly allowed a witness to make an in-court identification of defendant where the court found that the witness's identification was independent of his chance meeting of defendant at

the police station and the meeting at the police station in no way violated any of defendant's rights.

2. **Constitutional Law § 28— waiver of indictment — signature of assistant district attorney on information**

Defendant was not entitled to have judgment arrested where he was tried upon an information signed by the assistant district attorney rather than the district attorney himself. G.S. 7A-63; G.S. 15-140.1.

APPEAL by defendant from *Alvis, Judge.* Judgments entered 17 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 10 April 1975.

Defendant was tried and convicted upon two charges of failure to stop or render aid or give information after two automobile accidents, each of which resulted in property damage and personal injury. G.S. 20-166.

After the second collision defendant was observed by Mr. William Repsher, a security guard at a nearby store. Defendant jumped from his car and ran across a field towards some trees. Mr. Repsher pursued defendant, tackled defendant in the field, lost his grip on defendant's legs, and further pursued and caught defendant. Defendant struck and cut Mr. Repsher and evaded him. Mr. Repsher identified defendant at trial.

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

Deno G. Economore, Assistant Public Defender, Twelfth District, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the identification of defendant by Mr. Repsher should not have been permitted in evidence because of a chance meeting of the witness and the defendant at the police station. After a full hearing upon the question, in the absence of the jury, the trial judge found, upon plenary competent evidence, that the witness' identification of defendant was independent of his chance meeting at the police station and that the meeting at the police station in no way violated any of defendant's rights. This assignment of error is overruled.

[2] In each case defendant and his counsel waived the finding and return into court of a bill of indictment. In each case defendant and his counsel signed this waiver attached to an in-

formation signed by Ed Grannis, Jr., assistant district attorney. Defendant now moves in arrest of judgment in each case upon the ground that each information was not signed by the district attorney.

Defendant relies upon G.S. 15-140.1, which provides in part as follows: ". . . [T]he prosecution shall be on an information signed by the solicitor [district attorney]." Defendant argues that this requirement of the statute does not permit the assistant district attorney to sign an information.

G.S. 7A-63 provides in part as follows:

> "Each solicitor [district attorney] shall be entitled to the number of full-time assistant solicitors [assistant district attorneys] set out in this Subchapter, to be appointed by the solicitor [district attorney], to serve at his pleasure. . . . An assistant solicitor [assistant district attorney] shall take the same oath of office as the solicitor [district attorney], and shall perform such duties as may be assigned by the solicitor [district attorney]."

No evidence was offered and no argument made to the effect that the district attorney had not duly delegated and assigned the duty of signing an information to the assistant district attorney.

It is interesting to note that G.S. 7A-61 specifically provides that the district attorney "shall . . . prosecute in the name of the State all criminal actions requiring prosecution. . . ." However, defendant does not suggest that the assistant district attorney was thereby disqualified from prosecuting these actions.

We think it is eminently clear that the legislative intent and the statutory provisions contemplate that an assistant district attorney is fully authorized to carry out such duties of the district attorney as the district attorney may assign to him.

The motion in arrest of judgment in the trial court was properly denied, and the same is denied by this Court.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHAMUAL LARRY GREENLEE

No. 7528SC125

(Filed 7 May 1975)

1. **Narcotics § 4— possession and distribution of heroin**

The State's evidence was sufficient for the jury in a prosecution for possession and distribution of heroin where it tended to show that an S.B.I. undercover agent gave defendant money to buy heroin and that defendant entered a residence and thereafter returned and delivered to the agent a glassine bag containing heroin.

2. **Narcotics § 3— events two days before transaction in question**

In a prosecution for possession and sale of heroin, the trial court properly allowed an S.B.I. agent to testify that two days prior to the transaction in question the agent gave money to defendant for the purchase of heroin but that defendant did not deliver the heroin.

3. **Constitutional Law § 31— cover name of confidential informant**

In a prosecution for possession and distribution of heroin, the trial court properly refused to require the disclosure of the cover name of a confidential informant where defendant failed to show that such information would be helpful or relevant to his case.

4. **Criminal Law § 121— failure to charge on entrapment**

In a prosecution for possession and distribution of heroin, the trial court did not err in failing to charge on entrapment where the record shows the intent to commit the crimes originated in the mind of defendant and an S.B.I. undercover agent only offered defendant an opportunity to perpetrate the crimes.

ON writ of *certiorari* to review judgments of *Fountain, Judge,* entered 29 May 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 April 1975.

Defendant was charged in separate bills of indictment with (1) felonious possession of heroin and (2) distribution of heroin. He entered pleas of not guilty, was found guilty as charged, and from judgments imposing prison sentences of five years in each case, to run concurrently, he appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Assistant Public Defender J. Robert Hufstader, for the defendant appellant.

BRITT, Judge.

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

[1] On 27 November 1973, Ray Eastman, a special agent of the S.B.I., was working "undercover" in Buncombe County. On that date, as Eastman was seated in his car on the K-Mart parking lot, defendant approached Eastman's vehicle and asked if Eastman would like to buy some skag or heroin. Eastman indicated that he would and gave defendant $30 for three bags of heroin. Defendant left, but did not return with the heroin. On 29 November 1973 Eastman saw defendant who told Eastman he did not have the $30 but could buy him some skag for $12. They went to 35 Clingman Avenue, where Eastman gave defendant $12, defendant entered a residence and thereafter returned with and delivered to Eastman a glassine bag containing a white powdery substance which was later determined to be heroin and quinine. We hold that the evidence was sufficient to survive the motion for nonsuit.

[2] Defendant contends in his second assignment of error that the court should not have allowed Eastman to describe the events that occurred on 27 November, two days prior to the actual delivery of heroin. The contention is without merit. It is well settled that every circumstance that is calculated to shed light upon the alleged crime is relevant and admissible if competent; and that proof of other offenses is competent when such proof tends to show *quo animo*, intent, or exhibit a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to shed light on one or more of these questions. 2 Strong, N. C. Index 2d, Criminal Law, §§ 33-34, pp. 531, 536-7. The assignment is overruled.

[3] In his third assignment of error defendant contends the court erred in not allowing his counsel to obtain the cover name of a confidential informant or the name he went by. This contension has no merit. We see no distinction between defense counsel's wanting the name of the informant and wanting the cover name. The burden is still upon the defendant to show that the information would be relevant or helpful to defendant's case. *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53 (1969). Defendant has failed to show that the cover name would be helpful or relevant in his case. The assignment is overruled.

[4] In his fifth assignment of error defendant contends the court erred in not charging on entrapment. The assignment has no merit. Our Supreme Court has held that entrapment is not a defense to a person, who has the intent and design to commit a crime originating in his own mind, and who does in fact commit all the essential elements constituting it, merely because an officer of the law, or another, in his effort to secure evidence against him for a prosecution, affords him an opportunity to commit the criminal act or purposely places facilities in his way or aids and encourages him in the perpetration of the crime which had its genesis in his own mind. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191 (1955). We have reviewed the record and hold that there was no evidence of entrapment. The intent originated in the mind of defendant and Eastman only offered defendant an opportunity to perpetrate the crime. The assignment of error is overruled.

With respect to defendant's remaining assignments of error, we have carefully reviewed them and find them also to be without merit. We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

IN RE: APPEAL OF LAWRENCE TAYLOR

No. 7514DC59

(Filed 7 May 1975)

1. **Insane Persons § 1; Jury § 1— involuntary commitment proceeding — no right to jury trial**

Respondent in a proceeding for involuntary commitment to a mental health care facility was not entitled to a trial by jury.

2. **Insane Persons § 1— finding of imminent danger — sufficiency of evidence**

In a proceeding for involuntary commitment to a mental health care facility, evidence was sufficient to support the trial court's finding that respondent was imminently dangerous to himself and to others.

APPEAL by respondent from *Read, Judge.* Order entered 24 September 1974 in District Court, DURHAM County. Heard in in the Court of Appeals 21 March 1975.

This is an involuntary commitment proceeding instituted pursuant to G.S. 122-58.3 against respondent, Lawrence Taylor, who had been arrested on the night of 10 September 1974 on a charge of trespassing and placed in the Durham County Jail. From the order of the district court committing him to John Umstead Hospital for a period of 90 days, respondent appealed to this court pursuant to G.S. 122-58.9.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for the State.

Loflin, Anderson & Loflin, by Thomas F. Loflin III and Ann F. Loflin, for the respondent appellant.

BRITT, Judge.

The Attorney General contends that this case is moot because of respondent's unconditional release from John Umstead Hospital on 25 October 1974. This court has held that an appeal is not moot solely because the period of commitment has expired. *In re Carter,* No. 7415DC888 (N.C. App., filed on 16 April 1975). Therefore, we consider the appeal on its merits.

By his first assignment of error, respondent contends the court erred in denying his motion to strike the custody order and suppress all documents arising therefrom, for one or both of the following reasons: The petition upon which the custody order was based did not comply with G.S. 122-58.3; the custody order itself was unlawful for that it was not executed by an impartial official. (The magistrate who executed the order is respondent's brother.)

Suffice it to say, we have carefully considered this assignment and find it to be without merit.

[1] In his second assignment of error, respondent contends the court erred in denying his motion for a trial by jury of all issues of fact. We find no merit in this assignment.

Respondent relies on Article I, § 25, of the State Constitution which guarantees the right of jury trial in *civil cases.* In *Groves v. Ware,* 182 N.C. 553, 109 S.E. 568 (1921), the court held that the right to trial by jury guaranteed by this section

(formerly § 19) of the Constitution applies only to cases in which the prerogative existed at common law or by statute in existence at the time the Constitution was adopted (1868); the court further held that right to trial by jury did not exist at common law in insanity proceedings. The statute under which respondent was committed was ratified 13 April 1974 and became effective 12 June 1974. (Ch. 1408, 1973 Session Laws).

In the case of *In Re Cook,* 218 N.C. 384, 11 S.E. 2d 142 (1940), an inquisition of lunacy proceeding, the court said: "It is not contemplated that there should be a jury trial of the issue in a matter of this kind. . . ." *See also In re Annexation Ordinance,* 284 N.C. 442, 451, 202 S.E. 2d 143 (1974) and *In re Bonding Co.,* 16 N.C. App. 272, 192 S.E. 2d 33, *cert. den.,* 282 N.C. 426 (1972), where it was held that the right to jury trial preserved under Article I, § 25, applies only in cases in which the prerogative existed at common law or by statute at the time the State Constitution was adopted. We hold that respondent was not entitled to a jury trial.

[2] In his third assignment of error, respondent contends that the court erred in finding that he was imminently dangerous to himself and others. The judge found as a fact the following:

> . . . That while in jail he became violent and uncontrollable and flooded the cell by stopping up the commode and did destroy the commode by ripping it from its setting and breaking it into small pieces. That he cut and injured his hands while destroying this commode. That he shook and awakened the three other inmates in his cell block and acted beligerent toward them. That he walked around the inside of the cell with a steel bar in his hand. That he threatened to assault Deputies Welch and Walker. That he threatened Dr. Perry by saying, "I'll get you." That he threw broken pieces of the commode at Deputy Strayhorn. That he has been tentatively diagnosed as having Paranoid Schizophrenia, psychotic state. That he has been treated at John Umstead Hospital for mental illness before. That he is now taking thorazine. . . .

We hold that the record shows by "clear, cogent, and convincing evidence" that the respondent was imminently dangerous to himself and others and that the evidence supports the trial court's findings.

Affirmed.

Judges HEDRICK and MARTIN concur.

WILLIAM E. CREASMAN AND DOROTHY MARIE CREASMAN v. LUCILLE PATRICIA WELLS, AND DENVER WELLS

No. 7528SC99

(Filed 7 May 1975)

Boundaries § 8; Trespass to Try Title § 1— admission as to title — processioning proceeding

In an action to try title to real estate and to have defendants restrained and enjoined from trespassing on plaintiffs' land, defendants' admission in their answer of plaintiffs' title converted the action from one to try title into a processioning proceeding to determine the true dividing line between the lands of the respective parties, and the court did not err in failing to submit an issue of title by adverse possession.

APPEAL by defendants from *McLean, Judge.* Judgment entered 5 November 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 April 1975.

This action was commenced as one to try title to real estate and to have defendants restrained and enjoined from trespassing on plaintiffs' land.

In their complaint, plaintiffs allege, among other things, that they are the fee simple owners of a parcel of land on which is located their residence, the land being particularly described in a deed to them recorded in Buncombe County Registry in deed book 1039, page 538, copy of which is attached to the complaint as Exhibit "A"; and that the feme defendant is the purported owner of an adjoining parcel of land on which is located her residence, her land being particularly described in deed recorded in said registry in deed book 979, page 538, copy of which is attached to the complaint as Exhibit "B". In their answer, defendants admit the foregoing allegations of the complaint. The deeds describe the respective lands by courses and distances.

Plaintiffs further allege that there is a driveway on their land adjacent to defendants' land, that defendants have placed obstructions in said driveway and have in other respects tres-

passed on their land. Plaintiffs asked that they be declared the fee simple owners of "the property described in their deed set forth in Paragraph 3 of the complaint", that defendants be required to remove the obstructions placed on plaintiffs' land, and that defendants be restrained and enjoined from interfering with plaintiffs' possession of their land. In their answer and amended answer, defendants allege that the driveway is on their land.

After pleadings were filed and prior to trial, a surveyor was appointed to survey the lands in question and prepare a map showing the contentions of the respective parties. Following a survey, he filed a map showing the dividing line according to plaintiffs' contentions as being from D to Y to X, and showing the dividing line according to defendants' contentions as being from C to Z to Y to X.

At trial the surveyor testified, his map was introduced as an exhibit, and one issue was submitted to, and answered by the jury, as follows:

"Is the true dividing line between the lands of the Plaintiffs and the Defendants the line D, Y, X, or C, Z, Y, X?

ANSWER: D, Y, X."

From judgment entered on the verdict in favor of plaintiffs, defendants appealed.

Paul J. Smith for plaintiff appellees.

Pope & Brown, by Ronald C. Brown, for defendant appellants.

BRITT, Judge.

Defendants' principal assignment of error is that the trial court erred "in not submitting an issue of title (in defendants) under adverse possession to the jury". We find no merit in the assignment.

In our opinion, when, in their answer, defendants admitted plaintiffs' title, this cause was converted from an action to try title into a processioning proceeding to determine the true dividing line between the lands of the respective parties. That being true, the trial court submitted the proper issue arising on the pleadings and the evidence presented.

While the court was confronted with a different factual situation and additional issues in *Goodwin v. Greene*, 237 N.C. 244, 74 S.E. 2d 630 (1953), we think the following statement by Justice (later Chief Justice) Denny, p. 249, is applicable to this case: " . . . There has never been any dispute between the parties about the validity of the title to their respective tracts of land. Furthermore, the plaintiff having alleged ownership of the land described in his complaint and the defendants having admitted such ownership in their answer, no issue involving plaintiff's title was raised. . . . "

In *Welborn v. Lumber Co.*, 238 N.C. 238, 240, 77 S.E. 2d 612 (1953), opinion by Justice (later Chief Justice) Barnhill, we find: "Title to real property is not at issue in this action. Plaintiffs and defendant admit the parties own the respective tracts claimed by them. The two tracts are contiguous and the northern boundary of the drainage district is the true dividing line. The exact location of this line is the question at issue. Realizing this, the parties entered into certain stipulations quoted in the statement of fact. These stipulations converted the trial in the court below into a processioning proceeding. . . . "

The assignment of error is overruled.

We have considered the other assignments of error brought forward and argued by defendants, but finding no merit in them, they too are overruled.

No error.

Judges HEDRICK and MARTIN concur.

TRIAD CONSTRUCTORS, INC., NOW KNOWN AS JESCO, INCORPORATED v. R. F. MORRIS, SR.

No. 7421DC1054

(Filed 7 May 1975)

1. Evidence § 41— testimony not invasion of province of jury

In a counterclaim action for breach of contract in failing properly to elevate the floor of a building constructed by plaintiff for defendant, testimony by defendant's witness that if the floor of the building had been constructed a certain distance higher there would have been

more of a slope available for drainage from the back of the lot toward the front did not invade the province of the jury.

2. **Damages § 13— diminution in value — cost of repairs**

Testimony as to the cost of repairs was properly admitted on the question of "diminution in value" in an action for breach of contract in the construction of a building.

3. **Damages § 13; Contracts § 29— improper construction of building — damages — capitalization of income method**

In a counterclaim action for breach of contract in failing properly to construct a building, the trial court did not err in the admission of expert testimony as to "diminution in value" based on the value of the building if properly constructed, the return on investment under an existing lease, and what the reduced value of the property would be in order to give a similar rate of return.

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 18 July 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 20 February 1975.

Plaintiff instituted this action to recover the sum of $4,452.00 pursuant to a contract between the parties. In his complaint, plaintiff alleged that it was to construct a metal building for defendant at a price of $23,288.00 and that only $18,876.00 had been paid, leaving a balance due of $4,412.00 plus $40.00 for additional work on the building. Defendant answered, denying plaintiff's claim. Defendant also counterclaimed asking for recovery of $10,000.00 for planitiff's breach of contract in that plaintiff failed properly to elevate the floor of the building, causing a water problem. The jury returned a verdict awarding defendant $6,929.93. From judgment entered on the verdict, plaintiff appealed.

Berrell F. Shrader and Raymond D. Thomas, for plaintiff appellant.

Jack F. Canady for defendant appellee.

MARTIN, Judge.

Defendant offered evidence tending to show that at the time he entered into the contract he indicated a concern to plaintiff about a possible water problem if the building was constructed too low. The building was constructed on a lot which drained from back to front according to its slope. After the first rain, defendant noticed water running into the building and standing around the outside of the building.

[1] Harold Swain testified for defendant, over plaintiff's objection, that if the concrete floor of the building had been constructed five and three-quarter inches higher then there would have been more of a slope available for the drainage of water from the back of the lot toward the front. Plaintiff contends that Mr. Swain's testimony should have been excluded because the jury could have drawn the same conclusion from the evidence. We disagree. Mr. Swain was hired by defendant to pave the lot around the building and had vast experience in this business. He also dealt with drainage problems. He was better qualified than the jury to form such an opinion, and the jury benefited from his experience.

[2] Plaintiff also contends that it was error to admit testimony concerning the cost of repairs required to correct the water problem where the "diminution in value" was the proper measure of damages due to the substantial repair cost. We find no error here. As stated by Justice Ervin in *Simrel v. Meeler*, 238 N.C. 668, 78 S.E. 2d 766 (1953), "[T]he law is realistic enough to recognize that the cost of the necessary repairs has a logical tendency to shed light upon the question of the difference in market value." The trial court properly instructed the jury as to whether they should measure damages by the "cost of repair" or by the "diminution in value" of the building and the amount to be credited to plaintiff. This assignment of error is overruled.

[3] Plaintiff further contends that it was error to allow Ray Johnson, an expert in property evaluation, to testify as to the value of the premises as promised and the value actually received by defendant—that is, the "diminution in value". Johnson testified that defendant was damaged in the amount of $10,500.00. He explained his valuation as follows: The premises were actually leased to a tenant for a term of ten years. (According to testimony of the tenant, the tenant was unaware of a water problem when he leased the building.) Based on the rent under the existing lease, Johnson calculated defendant's return on his investment (about 10%). Johnson then estimated the reduced rental value of the building due to the water problem and determined what the reduced value of the premises would be in order to give defendant a similar rate of return. This latter figure represented the value of the building as actually received by defendant with the water problem. Subtracting the value of the building as built from the value if properly constructed, Johnson found a difference of $10,500.00. We find nothing wrong in this

method. It appears to be just another way to determine the diminution in value of business property resulting from a breach of contract by the builder. This assignment of error is overruled.

Plaintiff's remaining assignment of error is also overruled.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

JOHN JACOB STAUFFER, JR. v. GROVER LEE OWENS T/A OWENS BODY SHOP

No. 752DC23

(Filed 7 May 1975)

Unjust Enrichment — office improvements — no compensation — benefit inuring to defendant

Evidence was sufficient to support the trial court's finding that plaintiff had provided goods and services which inured to the benefit of defendant where such evidence tended to show that plaintiff constructed and furnished an office in leased premises used by defendant in his business, plaintiff furnished labor in connection with these improvements, defendant ordered plaintiff to stay off the premises, and defendant subsequently sold the business including the office improvements, furniture and fixtures.

APPEAL by defendant from *Manning, Judge.* Judgment entered 19 August 1974 in District Court, BEAUFORT County. Heard in the Court of Appeals on 18 March 1975.

Civil action commenced on 24 February 1971 wherein plaintiff alleges that the parties entered into an oral partnership agreement; that he advanced defendant $2,400 to be used in equipping the partnership business; and that he furnished labor and materials in the amount of $2,900 for improvements. Plaintiff seeks to recover said amounts together with the additional sum of $2,000 alleged to have been the net profit of the business.

Defendant answered, denying the existence of a partnership and the existence of any business relationship with the plaintiff. Defendant acknowledged that he had borrowed $2,400 from the plaintiff to be used as operating capital but denied any further

obligations to the plaintiff either by contract or otherwise over and above the sum of $2,400 advanced to him by the plaintiff.

Judgment was entered in the cause on 8 August 1972 in the Superior Court of Beaufort County allowing plaintiff to recover $2,400 and remanding the cause to District Court for trial on the issues raised by the pleadings with reference to any sum over and above the $2,400 set forth in the judgment.

The matter was heard before the judge, sitting without a jury, on the remaining issues. Based on the evidence the court made findings of fact and concluded that there was no formation of a partnership but that plaintiff had provided goods and services which inured to the benefit of defendant in the amount of $1,750.00. From judgment for the plaintiff in the sum of $1,750.00, defendant appealed.

LeRoy Scott, for plaintiff appellee.

Wilkinson and Vosburgh, by James R. Vosburgh, for defendant appellant.

MARTIN, Judge.

The court found facts and concluded as a matter of law: "That goods and services provided by the Plaintiff inured to the benefit of the Defendant to the extent of $1,750, and the Defendant is under legal obligation to make payment of same to the Plaintiff."

To the foregoing conclusion the defendant excepted for the assigned reasons that the court failed to find as a fact the existence of an oral or implied contract and that the equitable relief afforded plaintiff was not supported by findings of fact.

The findings of the court may be summarized to the effect that defendant desired to go into the automobile body repair business and being without capital discussed the matter of financing with plaintiff; that as a result of the discussion defendant leased land and buildings in his own name and plaintiff advanced certain sums to be used for supplies; that plaintiff also constructed and furnished an office in the leased building and furnished labor in connection with these improvements; that thereafter the office facilities were used by defendant in connection with the operation of the business; that defendant found fault with plaintiff's use of the office facilities and ordered

plaintiff to remain off the premises; that defendant later sold the business to a third party for an amount in excess of $2,400; and that among the assets sold by defendant were defendant's right, title and interest in the lease on the property, together with the office improvements, furnishings and fixtures.

From the facts as found by the court, it appears that the improvements furnished by plaintiff were used by defendant in connection with a business in which defendant claimed to be the sole owner. Furthermore, it appears that defendant later sold the business to a third party and that the office improvements were transferred in the sale. Even though the court found that no partnership existed between the parties, in our opinion it properly allowed plaintiff to recover for those goods and services which benefited defendant. The rule of unjust enrichment is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. *R. R. v. Highway Commission,* 268 N.C. 92, 150 S.E. 2d 70 (1966). The mere ineffectiveness of a partnership agreement between the parties would not prevent plaintiff's recovery. In addition, there was no error in the court's failure to make further findings of fact which were immaterial and which would not have called for a different conclusion.

The facts found by the court are supported by the evidence and are sufficient to support the judgment.

The judgment is

Affirmed.

Judges BRITT and HEDRICK concur.

THE MUNCHAK CORPORATION (DELAWARE) AND RDG CORPORATION, A JOINT VENTURE D/B/A THE CAROLINA COUGARS AND THE MUNCHAK CORPORATION (GEORGIA) v. JOE L. CALDWELL

No. 7518SC96

(Filed 7 May 1975)

Process § 13— jurisdiction over foreign corporation — minimum contacts

A foreign corporation which was the assignee of a contract with a professional basketball player had sufficient contacts with this State

to give the courts of this State *in personam* jurisdiction over the corporation in an action to reform a pension provision of the contract where the contract was executed and was to be performed substantially in this State, and the basketball player has remained a resident of this State and receives remuneration under the contract in this State. G.S. 55-145(a)(1).

APPEAL by additional party plaintiff from *Rousseau, Judge.* Order entered 5 December 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 April 1975.

Plaintiffs brought this action on 14 March 1973 to reform the pension provision of a contract entered into on 30 October 1970 between Southern Sports Corporation and defendant Joe L. Caldwell, a professional basketball player. Defendant answered and counterclaimed for specific performance.

The contract was assigned to The Munchak Corporation (Georgia) on or about 25 July 1974. On 4 November 1974 defendant moved pursuant to G.S. 1A-1, Rule 19, to add the assignee as a party plaintiff. The trial court entered an order on 12 November 1974 granting the motion and giving the additional party ten days in which to file pleadings. On 22 November 1974 Munchak (Georgia) moved, on grounds of lack of *in personam* jurisdiction, to strike the order granting defendant's motion to add it as a party. From the order denying its motion to strike and holding that the trial court had *in personam* jurisdiction pursuant to G.S. 1-75.4(2) and G.S. 55-145(a)(1), Munchak (Georgia) appealed to this Court.

Younce, Wall and Suggs, by Robert V. Suggs and Peter F. Chastain, for additional plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and David M. Moore II, for defendant appellee.

ARNOLD, Judge.

This case presents a two-fold question: the applicability and the constitutionality of G.S. 55-145(a)(1), part of North Carolina's "long-arm" statute, with respect to appellant The Munchak Corporation (Georgia). G.S. 55-145(a)(1) provides:

> *"Jurisdiction over foreign corporations not transacting business in this State.*—(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this

State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause arising as follows:

(1) Out of any contract made in this State or to be performed in this State. . . . "

The record shows, and the trial court found, that the contract which forms the basis of this action was executed in Greensboro and was to be performed substantially in North Carolina. Although defendant Caldwell no longer plays basketball in the State, he has remained a resident of Greensboro and receives remuneration under the contract there. Appellant, as assignee, assumed, with full knowledge of the pendency of this lawsuit, a portion of the obligations under the contract. It stepped into the shoes of the assignor. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973) ; *cf. Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970). The facts of this case manifestly meet the statutory criteria for "long-arm" jurisdiction.

Appellant nevertheless contends that the court's assumption of jurisdiction under G.S. 55-145(a)(1) violates the constitutional requirement of "certain minimum contacts" with the State enunciated by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). We disagree. The North Carolina Supreme Court has said: "It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state." *Byham v. House Corp.*, 265 N.C. 50, 57, 143 S.E. 2d 225, 232 (1965) ; *Citing McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) ; *accord, Goldman v. Parkland,* 277 N.C. 223, 176 S.E. 2d 784 (1970) (contract executed and to be performed in state). While the mere execution of a contract in North Carolina has never been held to be such a connection, we believe that the execution, anticipated performance, and continuing part performance of the contract in Greensboro constitute substantial in-state activity. North Carolina's courts have *in personam* jurisdiction over Munchak (Georgia). The order of the trial court is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

NANCY H. FUNDERBURK v. HAROLD LEE JUSTICE

No. 7526DC26

(Filed 7 May 1975)

Appeal and Error § 6— interlocutory order — no appeal

An order allowing plaintiff's motion to amend her complaint to reply and denying defendant's motion for judgment on the pleadings was interlocutory and did not deprive defendant of a substantial right which he would lose if the order were not reviewed; therefore, the order was not appealable.

APPEAL by defendant from *Griffin, Judge.* Order entered 15 October 1974 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 March 1975.

Plaintiff instituted this action to recover upon a loan of $2,000 made by her to defendant on 17 February 1970. Summons and complaint were filed 2 July 1973. Answer filed by the defendant affirmatively set up the defense of the statute of limitations. On 29 April 1974, defendant filed a motion for judgment on the pleadings. Plaintiff thereafter filed a motion that she be allowed to file a reply, which was eventually granted in a *nunc pro tunc* order dated 15 October 1974. The reply pleaded matters which sought to prevent the application of the statute of limitations to bar the present action.

From the order (1) allowing plaintiff's motion to amend her complaint to reply and (2) denying defendant's motion for judgment on the pleadings, the defendant appealed.

Elbert E. Foster for the plaintiff.

Charles B. Merryman, Jr., for the defendant.

CLARK, Judge.

G.S. 1-277 and G.S. 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669 (1951).

The order of the trial court granting the motion to amend and denying the motion for judgment on the pleadings is obviously not a final judgment but is interlocutory. Consequently, no appeal lies of right to this Court from the order unless the order deprives the appellant of a substantial right which he would lose if not reviewed before final judgment.

The appellate courts have allowed appeals from interlocutory orders in some cases, for example, where the order of the trial court allowed the defendant to take the deposition of plaintiff's attending physician though a statutory privilege prevented it, *Lockwood v. McCaskill,* 261 N.C. 754, 136 S.E. 2d 67 (1964); where the trial court granted a change of venue, *Coats v. Hospital,* 264 N.C. 332, 141 S.E. 2d 490 (1965); where an order directed the taking of an inventory of defendant's safe but the relevance therefor was not stated and was not apparent, *Hooks, Solicitor v. Flowers,* 247 N.C. 558, 101 S.E. 2d 320 (1958); where interests in real property were substantially affected, *Horne v. Horne,* 261 N.C. 688, 136 S.E. 2d 87 (1964); and where an order striking a pleading is tantamount to ademurrer denying the pleader a right to recover, *Bank v. Easton,* 3 N.C. App. 414, 165 S.E. 2d 252 (1969); *McAdams v. Blue,* 3 N.C. App. 169, 164 S.E. 2d 490 (1968).

In cases more in point, it has been held that an order denying defendant's motion to dismiss plaintiff's complaint for failure to state a cause of action was interlocutory and could not be entertained on appeal before this Court, *Green v. Best,* 9 N.C. App. 599, 176 S.E. 2d 853 (1970), the only available course of action being a petition for certiorari pursuant to Rule 4, Rules of Practice in North Carolina Court of Appeals. It has also been held that orders relating to pleadings generally are not appealable, *Williams v. Denning,* 260 N.C. 539, 133 S.E. 2d 150 (1963), particularly orders allowing amendment of pleadings. *Order of Masons v. Order of Masons,* 225 N.C. 561, 35 S.E. 2d 613 (1945).

Strict construction of the rule against allowing appeal from an interlocutory order of the trial court serves the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. In this case the interlocu-

tory order does not deprive the defendant of a substantial right which he would lose if not reviewed.

Appeal dismissed.

Judges MORRIS and VAUGHN concur.

LEE W. ASHE v. AKERS MOTOR LINES, INC., AND DUNCAN E. MACKENZIE, TRUSTEE

No. 7527SC39

(Filed 7 May 1975)

Pensions— date of resignation — determination of retirement benefits

The eligibility date for computing plaintiff's benefits under a noncontributory profit sharing trust for defendant's employees was 31 December 1973, the date plaintiff submitted letters of resignation to defendant and on which date the resignation was made effective, since the terms of the trust provided that an employee would be deemed participating for the purposes of determining his retirement benefits ". . . only through the eligibility date next preceding or coincident with his date of withdrawal."

APPEAL by plaintiff from *Hasty, Judge.* Judgment entered 30 December 1974 in Superior Court, GASTON County. Heard in the Court of Appeals 13 March 1975.

Basil L. Whitener and Anne M. Lamm for the plaintiff.

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr., for the defendants.

CLARK, Judge.

The plaintiff, for 23 years prior to 31 December 1973, was an employee of Akers Motor Lines, Inc., (hereinafter Akers). Akers in prior years had set up the Akers Motor Lines, Inc., Retirement Trust which is a noncontributory profit sharing trust for its employees. Under the terms thereof and because of his retirement from Akers, plaintiff became entitled to receive benefits thereunder.

On 31 December 1973, plaintiff submitted two letters of resignation to Akers, one to his supervisor and the other to the

trustee in charge of the Retirement Trust. Both letters were dated 31 December and specifically referred to his resignation as "effective" that date.

Retirement benefits under the plan are determined pursuant to the terms of the trust agreement which provide that the amount of employees' benefits are to be determined on the "eligibility date" of each year, a term defined as " . . . December 31, 1952 and each succeeding anniversary thereof." For any one participating employee in the plan who withdraws voluntarily, the terms of the trust provide that he will be *deemed* participating for purposes of determining his retirement benefits " . . . only through the eligibility date *next preceding* or *coincident with* his date of withdrawal." (Emphasis added.)

The trustees of the Retirement Trust ruled that the eligibility date for computing his benefits under the trust was 31 December 1973, and that his share amounted to the sum of $9,683.48. The plaintiff instituted this action alleging that the applicable eligibility date was 31 December 1972, and that his share amounted to the sum of $14,178.00. The judgment of the trial court upheld the ruling of the trustees, and plaintiff appealed.

Presumably, the value of the trust securities had decreased during the year of 1973 because of depressed market conditions. Plaintiff elected to date and present his letters of withdrawal on 31 December 1973, and it is obvious he must be "deemed participating for purposes of determining his retirement benefits" on the date of 31 December 1973, which is "coincident with his date of withdrawal." Plaintiff does not contend that his withdrawal on that date was involuntary or that he was in any way misled by his employers or the trustees of the Retirement Fund.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN REID LISK AND ROBERT STEVEN JOHNSON

No. 7526SC104

(Filed 7 May 1975)

Constitutional Law § 30— speedy trial — delay of one year between arrest and trial

Defendants were not denied their right to a speedy trial by the delay of a year between their arrest and trial where one defendant was incarcerated nine days and the other defendant eight days pending their trial, neither defendant moved for a speedy trial prior to the trial, neither defendant showed any prejudice from the delay, and there was no showing that the State wilfully or negligently caused the delay.

ON writ of *certiorari* to review judgments entered by *McLelland, Judge,* on 15 August 1973 in Superior Court, MECKLENBURG County. Certiorari allowed 3 February 1975. Heard in the Court of Appeals 10 April 1975.

By separate indictments proper in form, defendants were charged with (1) breaking or entering a building occupied by Fairco Drug Company, a corporation, and (2) larceny of eleven vials of morphine and other drugs. They pleaded not guilty, a jury found them guilty of felonious breaking or entering, and from judgments imposing prison sentences of not less than two nor more than seven years, they appealed.

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

J. Reid Potter for defendant appellants.

BRITT, Judge.

By their first assignment of error, defendants contend the trial court erred in denying their motions to dismiss the charges for the reason that they were not given a speedy trial. We find no merit in the assignment.

The record reveals: The alleged offenses occurred, warrants were issued, and defendants were arrested on 16 August 1972. Bills of indictment were returned at the 5 February 1973 Session of the court. Defendant Lisk was incarcerated nine days, and defendant Johnson eight days, pending trial of their cases which were tried at the 6 August 1973 Session of the court.

Neither defendant, at any time between the date of his arrest and the date of trial, moved for a speedy trial, and neither showed any prejudice, only inconvenience, resulting from the delay. The motions to dismiss were made when the cases were called for trial. Following a hearing on the motions, the trial judge found that there was no showing that the State had willfully or negligently delayed the trial of the cases, or that either defendant had been prejudiced by the delay.

In *State v. Spencer,* 281 N.C. 121, 124, 187 S.E. 2d 779 (1972), we find: "The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time. Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. *The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. . . .* " (Emphasis added.)

The assignment of error is overruled.

In their remaining two assignments of error, defendants contend the court erred in denying their motions to suppress evidence obtained by a search of their persons, and in denying their motions to dismiss interposed at the conclusion of the evidence. Suffice it to say, we have carefully reviewed the record, particularly with respect to these assignments, and finding no merit in either of them, they are both overruled.

We hold that defendants received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

CITY OF GREENSBORO v. PEARL T. IRVIN (WIDOW); CHARLES W. IRVIN, JR., AND WIFE, MARY S. IRVIN; JOHN L. IRVIN AND WIFE, HELEN A. IRVIN; AND DORIS IRVIN EGERTON AND HUSBAND, GEORGE G. EGERTON

No. 7518SC129

(Filed 7 May 1975)

Eminent Domain § 7— condemnation action — filing of belated answer

The trial court had no authority to allow the filing of an answer in a city's condemnation action after the time for filing answer provided by G.S. 136-107 had passed.

APPEAL by plaintiff from *Crissman, Judge.* Order entered 22 November 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 April 1975.

Plaintiff instituted this action pursuant to its charter and Article 9 of Ch. 136 of the General Statutes for purpose of acquiring a right-of-way across lands of defendants in order to install, and thereafter maintain, a sanitary sewer outfall line. At the time of filing complaint, plaintiff filed a declaration of taking and notice of deposit and deposited $1,000.00 with the Clerk, said amount being estimated just compensation for the interest taken, as required by G.S. 136-103.

Summonses were issued on 6 August 1973 and, together with copies of the complaint, declaration of taking and notice of deposit, were served on defendants on various dates between 7 and 22 August 1973.

On 9 October 1974, plaintiff moved for final judgment and order of disbursement, alleging that more than twelve months had elapsed since service of process and that no answer, nor request for extension of time to answer, had been filed by any defendant. Thereafter, on 12 November 1974, defendants filed motion requesting permission to file answer.

Following a hearing, the trial court entered an order (1) finding that defendants have a meritorious defense and that their failure to file answer in due time was not due to neglect on their part but was due to inadvertence and excusable neglect on the part of their attorney, (2) denying plaintiff's motion for final judgment, and (3) allowing defendants 30 days within which to file answer.

Plaintiff appealed from the order.

City Attorney Jesse L. Warren, by Assistant City Attorney James W. Miles, Jr., for plaintiff appellant.

Z. H. Howerton, Jr., for defendant appellees.

BRITT, Judge.

The order from which plaintiff purports to appeal is interlocutory, hence, it is not appealable. Rule 4, Rules of Practice in the Court of Appeals of North Carolina. Nevertheless, we treat the papers filed as a petition for writ of certiorari, allow the petition and consider the cause on its merits.

Plaintiff contends that pursuant to its charter and amendments thereto, Ch. 1137, 1959 Session Laws, and Ch. 784, 1973 Session Laws, it is authorized to utilize the procedure provided by Article 9 of Ch. 136 of the General Statutes; and that the trial court was without authority to grant defendants' motion to be allowed to file answer. Plaintiff relies on *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967) applying G.S. 136-107. We think the contention is valid and that the cited case controls.

The order appealed from is reversed and this cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. EUGENE ENSLIN

No. 754SC90

(Filed 7 May 1975)

Crime Against Nature § 1— constitutionality of statute

G.S. 14-177 which provides that the crime against nature is a felony is constitutional.

APPEAL by defendant from *Webb, Judge*. Judgment entered 26 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 April 1975.

By bill of indictment proper in form defendant was charged with committing " . . . the abominable and detestable crime against nature with Herbert P. Morgan, a male person . . . . " Before pleading, defendant moved to quash the indictment and for a dismissal of the prosecution on the ground that the indictment is unconstitutional.

The court reserved its ruling on the motion to quash but later overruled it. Defendant pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of one year, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Edwin M. Speas, Jr., for the State.

Smith, Carrington, Patterson, Follin & Curtis, by Norman B. Smith, and Marilyn G. Haft (by brief), for defendant oppellant.

BRITT, Judge.

By his sole assignment of error, defendant contends the court erred in denying his motions to quash the indictment, dismiss the action, and for nonsuit on the ground that the statute under which he was indicted, G.S. 14-177, is unconstitutional, in that it violates the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution. We find no merit in the assignment.

In *State v. Crouse,* 22 N.C. App. 47, 205 S.E. 2d 361 (1974), and *State v. Moles,* 17 N.C. App. 664, 195 S.E. 2d 352 (1973), this court upheld the constitutionality of G.S. 14-177. We reaffirm our rulings in these cases and again hold that the subject statute is constitutional.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNY FIELDS

No. 759SC156

(Filed 7 May 1975)

1. **Rape § 10— opinion testimony child had been molested**

In a prosecution for assault on a female under the age of 12 years with intent to commit rape, the admission of a question to a medical expert as to whether he had an opinion concerning whether the child "had been the victim of an attack," and the expert's opinion "that certainly she had been molested," if erroneous, was harmless beyond a reasonable doubt in light of the mass of other evidence of defendant's guilt.

2. **Criminal Law § 89— times of prior convictions**

The trial court did not abuse its discretion in refusing to allow defense counsel to cross-examine a State's witness as to the exact times of his prior convictions.

ON writ of *certiorari* to review judgment entered by *Bailey, Judge,* on 25 June 1974 in Superior Court, VANCE County. Heard in the Court of Appeals 17 April 1975.

Defendant was charged with the felony of assaulting a female under the age of 12 years with the intent to commit rape. The alleged victim was eight years old. Defendant pleaded not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of 15 years, he appealed.

Attorney General Edmisten, by Associate Attorney Sandra M. King, for the State.

Smith and Banks, by J. Henry Banks, for the defendant appellant.

BRITT, Judge.

Defendant contends first that the trial court erred in admitting certain testimony of Dr. Currin, a medical expert witness, who examined the alleged victim, Valerie Henderson, soon after the occurrence. The record reveals:

[1] Dr. Currin testified that he examined Valerie and found multiple excuriations or abrasions near the entrance to her vagina; that there were considerable blood stains on the pants removed from Valerie; however, he found no tear or laceration of the hymen and found no sperm. Dr. Currin was then asked

by the prosecuting attorney if he had an opinion based upon his medical examination of Valerie on the night in question as to whether "she had been the victim of an attack". Defendant objected to the question, the court overruled the objection, and the witness answered, "[m]y opinion was that certainly she had been molested".

Assuming, *arguendo,* that the trial court erred in admitting the testimony, in the light of the mass of other evidence of defendant's guilt, we hold that the error was harmless beyond a reasonable doubt. *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972), and cases therein cited.

[2] Defendant next contends that the trial court erred in not allowing him to cross-examine one of the State's witnesses as to the exact times of his prior convictions. The witness had theretofore admitted on cross-examination that he had several prior convictions for transporting liquor and that his last conviction was "about a year ago". While it is the rule that wide latitude is allowed in the cross-examination of a witness, it is also well recognized that the latitude of cross-examination rests largely in the trial court's discretion, especially where the questions are repetitious. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972); 1 Stansbury, North Carolina Evidence, § 35 (Brandis rev. 1973). We hold that the court did not abuse its discretion.

Finally, defendant contends that the court erred in accepting the verdict of the jury. Suffice it to say that we have carefully reviewed the record with respect to this contention and conclude that the court did not err.

We hold that defendant received a fair and impartial trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF ROSA LEE MOSTELLA

No. 7410DC1002

(Filed 7 May 1975)

Insane Persons § 1— involuntary commitment — sufficiency of findings

The involuntary commitment of a prison inmate to a State mental hospital was supported by the court's finding that she suffers from mental illness resulting in her refusal to eat which makes her imminently dangerous to herself. G.S. 122-58.8(b).

APPEAL by respondent from *Barnette, Judge.* Order entered 30 August 1974 in District Court, WAKE County. Heard in the Court of Appeals 13 February 1975.

This is a proceeding in involuntary commitment instituted pursuant to G.S. 122-58.3 and 122-85(a) against respondent Rosa Lee Mostella, an inmate at the North Carolina Correctional Center for Women. From the order of the district court committing her to Dorothea Dix Hospital for a period of ninety days, respondent appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for the State.

Lawrence D. Spears, Special Counsel for Mentally Ill, Dorothea Dix Hospital, for respondent appellant.

ARNOLD, Judge.

The order of involuntary commitment was entered on 30 August 1974. Respondent entered the hospital on 3 September 1974 and was discharged on 30 September 1974. Before her appeal was perfected, however, she was returned to Women's Prison where she is serving a 24-26 year sentence for second degree murder. We agree with the discussion and holding in *In re Carter* (No. 7415DC888, N. C. Court of Appeals, filed 16 April 1975), with respect to whether the questions raised on appeal are moot. We, therefore, proceed to a consideration of this case on its merits.

The question before us is whether the district court found, as required by G.S. 122-58.8(b), "by clear, cogent and convincing evidence that the respondent is mentally ill or inebriate, and is imminently dangerous to himself or others . . . . " Upon a

careful review of the record, we are of the opinion that the requirements of the statute have been met.

Mary Rowe, correctional officer at Women's Prison, testified that she had observed respondent for nine days and that she refused to eat because she thought the prison staff was trying to poison her. Respondent also refused to wear clothing or take showers. The report of the examining psychiatrist, Ralph H. Massengill, Jr., M.D., concluded that respondent was of imminent danger to herself and unable because of mental illness (schizophrenic paranoid type vs. paranoid state) "to provide for basic personal needs for food, clothing, or shelter." This report and testimony at the hearing support the court's findings that respondent suffers from mental illness resulting in her refusal to eat which makes her imminently dangerous to herself.

The order of the trial court is

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. LEROY EVANS

No. 7510SC132

(Filed 7 May 1975)

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

Witnesses' in-court identification of defendant was not tainted by an illegal lineup where the witnesses had ample opportunity to observe defendant at the crime scene, though he was wearing a stocking mask at the time.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 2 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1975.

Defendant was indicted on a charge of armed robbery. He pleaded not guilty and was tried before a jury. He was found guilty as charged and the trial court sentenced him to 25 to 30 years imprisonment. Defendant appealed to this Court. Additional facts are set out in the opinion.

Attorney General Edmisten, by Associate Attorney T. Lawrence Pollard, for the State.

William E. Marshall, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant's principal assignment of error concerns the admissibility of the identification testimony of Emik Hanson Etuk and Amos Hanson Etukodah. He contends that the trial court's finding that the witness's in-court identification was not tainted by an illegal lineup is unsupported by clear and convincing evidence. We disagree. At the pretrial voir dire hearing, Etuk testified that on the night of 11 July 1974 he and his brother Etukodah were working at a Seven-Eleven Store in Raleigh. Defendant came in, pointed a gun at Etukodah, and forced the brothers to give him the money in the cash register. Defendant was wearing a stocking mask, which prevented Etuk from seeing all of his face. However, Etuk was able to identify defendant "by his build, complexion, shape of his mouth, shape of his chin and the back of his head." Etukodah testified that he could see through the panty hose and could identify defendant by his facial features. Both witnesses picked defendant out of a seven-man lineup. The court found that the in-court identification of defendant was independently arrived at by each witness. The trial court's findings on the admissibility of identification testimony are conclusive on appeal when supported by competent evidence. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). This assignment of error is overruled.

Defendant further contends that the court erred in denying his motions for nonsuit. In addition to the testimony of Etuk and Etukodah, the State offered circumstantial evidence concerning defendant's arrest near the scene of the robbery and the presence of his fingerprint on a magazine rack in the store. Considered in the light most favorable to the State, the evidence against defendant clearly was sufficient to go to the jury.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. BILLY SANFORD McCOY

No. 7515SC66

(Filed 7 May 1975)

Criminal Law § 155.5— failure to docket appeal in apt time

Appeal is dismissed for failure to docket the appeal within 90 days after the date of the judgment appealed from, no valid order extending the time to docket having been entered during the 90-day period. Court of Appeals Rule 5.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 27 August 1974 in Superior Court, CHATHAM County. Heard in the Court of Appeals 8 April 1975.

Defendant was charged in a warrant with operating a motor vehicle on a public street or highway while under the influence of intoxicating liquor, second offense, and with operating a motor vehicle on a public street or highway while his operator's license was revoked. He was convicted in district court and appealed to superior court.

The jury found him guilty of both offenses charged. From judgment imposing a suspended sentence, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

Gunn & Messick, by Paul S. Messick, Jr., and Robert L. Gunn, for defendant appellant.

ARNOLD, Judge.

The judgment appealed from was entered on 27 August 1974, but the record on appeal was not docketed until 20 January 1975, more than 90 days later. No valid order extending time to docket was entered during the 90-day period. For failure to comply with Rule 5 of the Rules of Practice of the Court of Appeals, this appeal is

Dismissed.

Chief Judge BROCK and Judge PARKER concur.

GENEVA PERKINS GAMMON v. WILLIAM JACKSON CLARK

No. 7517SC123

(Filed 7 May 1975)

Automobiles § 61— negligence in backing vehicle — issue of fact — judgment on pleadings improper

The trial court erred in granting defendant's motion for judgment on the pleadings where there was a genuine issue of fact concerning defendant's negligence in the operation of his automobile.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 2 December 1974 in Superior Court, CASWELL County. Heard in the Court of Appeals 15 April 1975.

Plaintiff instituted this action on 13 December 1973 seeking damages for personal injuries suffered in an automobile accident. In her complaint plaintiff alleged that on 21 June 1972 she was proceeding east on State Road 1301 west of Yanceyville when she collided with an automobile being driven by defendant on the right side of the road. She further alleged that defendant was negligent in driving without due caution or circumspection, at a dangerous speed, and in backing his vehicle without giving a proper lookout in his direction of travel.

Defendant in his answer admitted that the collision occurred as alleged but denied the allegations of negligence. He counterclaimed for damages to his automobile, alleging that a bridge had washed out on the road ahead and that, under the direction of a State Highway Commission employee, he was backing up in order to turn around. Plaintiff allegedly approached at high speed and collided with him. In her reply, plaintiff denied negligence.

Defendant then moved pursuant to G.S. 1A-1, Rule 12(c), for judgment on the pleadings. From the order of the trial court granting defendant's motion, plaintiff appealed to this Court.

Blackwell & Farmer, by R. Lee Farmer, for plaintiff appellant.

McLeod & Campbell, by W. F. McLeod, for defendant appellee.

ARNOLD, Judge.

The sole question for decision is whether the complaint sets forth matters sufficient to constitute a cause of action. Judgment on the pleadings is proper only when the pleadings fail to to present any issue of fact for the jury. *Jones v. Warren,* 274 N.C. 166, 161 S.E. 2d 467 (1968). *See also Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974); 6 Strong, N. C. Index 2d, Pleadings § 38, pp. 376-77.

The rule, as stated by Ervin, J., is as follows:

> "When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary. [Citations omitted.]" *Erickson v. Starling,* 235 N.C. 643, 656, 71 S.E. 2d 384, 393 (1952).

In the case at bar, plaintiff has alleged and defendant has admitted facts from which a jury could infer that defendant was negligent. Defendant's allegation of plaintiff's negligence is controverted by plaintiff's reply and for the purpose of his motion is deemed untrue. The factual allegation of defendant's negligence, however, remains in issue. Since judgment on the pleadings was improper, the order of the trial court is

Reversed.

Chief Judge BROCK and Judge PARKER concur.

P. J. COBLE, INDIVIDUALLY AND T/A P. J. COBLE CONSTRUCTION CO. v. MARTIN FIREPROOFING GEORGIA, INC.

No. 7415DC1072

(Filed 7 May 1975)

Rules of Civil Procedure § 51— failure to apply law to evidence

The trial court in a breach of contract action failed to declare and explain the law arising on the evidence in violation of G.S. 1A-1, Rule 51(a) where the court merely recapitulated the evidence, stated the parties' contentions, and recited certain general principles of contract law.

Coble v. Martin Fireproofing

APPEAL by defendant from *Paschal, Judge.* Judgment entered 26 July 1974 in District Court, ALAMANCE County. Heard in the Court of Appeals 8 April 1975.

Plaintiff is a general contractor engaged in the construction of commercial and industrial buildings. Defendant is a manufacturer of roof deck. This action arises from a claim by the plaintiff against the defendant for breach of a contract to furnish labor and materials for the construction of the roof on the Hillsborough School Gymnasium in Orange County.

It is plaintiff's contention that defendant submitted an offer to him to furnish labor and materials for the roof of the gymnasium. Plaintiff accepted the offer and, in reliance, submitted a bid for the construction of the building. When plaintiff was awarded the contract, he called on defendant to perform. Defendant refused, and plaintiff was forced to secure other services at a price $5,533.00 above defendant's offer.

Defendant contends that the contract never existed because it was never approved by an authorized officer of Martin Fireproofing. The offer was first extended by one W. C. Bull, a salesman for defendant, but was never signed in the spaces marked "Approved . . . By." Alternatively the defendant contends that even if a contract existed, the plaintiff's claim should not be allowed in that defendant was never given a chance to perform.

The jury found that a contract between plaintiff and defendant existed and that defendant breached the contract, entitling plaintiff to $5,000.00 damages. Defendant appeals.

Vernon, Vernon & Wooten, by Wiley P. Wooten, for the plaintiff-appellee.

Latham, Cooper and Ennis, by Thomas D. Cooper, Jr., for the defendant-appellant.

BROCK, Chief Judge.

The resolution of a single argument is all that is necessary for the disposition of this appeal: Did the trial court violate the mandate of G.S. 1A-1, Rule 51(a), by failing to "declare and explain the law arising on the evidence?" We agree with defendant that it did, and order a new trial.

The charge given by the trial court merely recapitulated the evidence, stated the parties' contentions, and recited certain gen-

eral principles of contract law. This will not suffice. *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1971). The law must be declared, explained, and applied to the evidence bearing on the substantial and essential features of a case. *Hawkins v. Simpson,* 237 N.C. 155, 74 S.E. 2d 331 (1953).

New trial.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF THE ADOPTION OF ROBERT CECIL COOKE, III, GLENDA FAYE PEELE, PETITIONER v. ROBERT C. COOKE, JR.

No. 7412SC1012

(Filed 7 May 1975)

Adoption § 2— abandonment of child — incompetent evidence

In a trial to determine whether respondent had abandoned his child and was thus not a necessary party to an adoption proceeding instituted by the child's stepfather, the trial court erred in the admission of evidence of proper custody, the suitability of the stepfather as an adoptive parent and whether adoption of the child by the stepfather might be in the best interests of the child.

APPEAL by respondent from *Hobgood, Judge.* Judgment entered 30 August 1974 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 February 1975.

Respondent, Robert Cooke, is the father of Robert Cooke III, who was born of the marriage of respondent and Glenda Cooke (now married to Sidney Peele and known as Glenda Peele.).

Sidney Peele filed a petition to adopt the child. The court was asked to declare that respondent had abandoned the child and was, therefore, not a necessary party to the adoption proceeding. Respondent denied the abandonment and the issue was transferred to the Superior Court for trial.

The jury determined that respondent had willfully abandoned the child for at least six consecutive months immediately preceding institution of the proceeding.

Bobby G. Deaver, for petitioner appellee.

Henry L. Anderson, Jr., for defendant appellant.

VAUGHN, Judge.

Since there must be a new trial we will refrain from a recital of the evidence and say only that the conflicting inferences and conclusions arising therefrom presented a close question for the jury. The errors at trial are, therefore, especially prejudicial to respondent.

The sole issue at trial was whether respondent had abandoned his child.

The questions of proper custody, the suitability of Sidney Peele as an adoptive parent and whether adoption of the child by Peele might be in the best interests of the child were not for consideration by the jury. Nevertheless, incompetent and irrelevant evidence on these matters was allowed, over respondent's objection, to such an extent that it undoubtedly influenced if, indeed, it did not dominate, the jury's deliberations.

New trial.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT OOTEN, JR.

No. 748SC1095

(Filed 7 May 1975)

Criminal Law § 124— sufficiency of verdict

In a prosecution upon an indictment charging felonious breaking or entering, larceny and receiving, a jury verdict finding defendant guilty of nonfelonious entry and "not guilty on the other counts" was not ambiguous although the court did not submit the receiving count to the jury.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 14 October 1974 in the Superior Court, WAYNE County. Heard in the Court of Appeals 11 March 1975.

The defendant, Robert Ooten, Jr., was charged in a three-count bill of indictment, proper in form, with felonious breaking or entering, larceny, and receiving.

The defendant pleaded not guilty. The jury found the defendant "guilty of non-felonious entry; not guilty on the other counts." From a judgment imposing a jail sentence of two years, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Whitley and Vickory by C. Branson Vickory for defendant appellant.

HEDRICK, Judge.

The only argument advanced by the defendant on this appeal is that "the verdict is clearly ambiguous and in view of the Law of North Carolina clearly holding that an ambiguous verdict, the ambiguity being unexplainable, must be interpreted in favor of the defendant. . . ."

Defendant insists that the phrase "not guilty on the other counts" makes the verdict ambiguous because he could have been found guilty of only two *counts* under the indictment. Defendant's argument is not persuasive. By finding the defendant guilty of the lesser included offense charged in the first count of the bill of indictment, the jury found the defendant not guilty of felonious breaking or entering. The phrase in the verdict, "not guilty on the other counts," merely expands the verdict to find the defendant not guilty of felonious larceny, the second count in the bill of indictment.

The defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

RUTH FOSTER v. THOMAS D. FOSTER

No. 751DC176

(Filed 7 May 1975)

Divorce and Alimony § 16— alimony — defense of adultery — absence of finding

When adultery is pleaded in bar of a demand for alimony or alimony *pendente lite*, an award will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking the award.

APPEAL by defendant from *Chaffin, Judge.* Judgment entered 22 January 1974 in District Court, PASQUOTANK County. Heard in the Court of Appeals 17 April 1975.

The appeal is from an order awarding alimony pendente lite and counsel fees.

No counsel for plaintiff.

White, Hall, Mullen & Brumsey, by Gerald F. White and H. T. Mullen, Jr., for defendant appellant.

VAUGHN, Judge.

Plaintiff seeks alimony, alimony pendente lite and counsel fees. Defendant pleaded his spouse's adultery in bar of her right to recover. The order from which defendant appeals contains no finding on the issue.

When adultery is pleaded in bar of a demand for alimony or alimony pendente lite, an award will not be sustained in the absence of a finding of fact on the issue of adultery in favor of the party seeking the award. *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420. The court also failed to find facts to support the award of counsel fees. The judgment is vacated and remanded.

Vacated and remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROY V. CLARK, JR.

No. 7527SC20

(Filed 7 May 1975)

Criminal Law § 155.5— docketing of record — expiration of 90 days — extension of time

Appeal is subject to dismissal where the record on appeal was not docketed within 90 days after the date of the judgment appealed from and an order extending the time for docketing was entered after the 90-day period had expired. Court of Appeals Rule 5.

APPEAL by defendant from *Grist, Judge.* Judgment entered 11 September 1974 in Superior Court, LINCOLN County. Heard in the Court of Appeals 18 March 1975.

Defendant was charged in a bill of indictment with the larceny of an automobile belonging to Nadine Ellis Brown and having a value of $600.00. He pleaded not guilty. The jury found defendant guilty as charged, and from judgment entered on the verdict, defendant appealed.

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

M. Clark Parker, for defendant appellant.

MARTIN, Judge.

We note that the judgment appealed from was entered 11 September 1974. More than ninety days thereafter, the trial court granted defendant's motion for an extension of the time to docket the record on appeal in this Court. This was too late. See *State v. Lee*, 15 N.C. App. 234, 189 S.E. 2d 505 (1972). "Within ninety days after the date of a judgment appealed from, but not thereafter, the trial tribunal may for good cause shown extend the time for docketing the record on appeal not exceeding sixty days. Rule 5." *State v. Lassiter*, 18 N.C. App. 208, 196 S.E. 2d 592 (1973).

For failure to comply with the Rules of Practice in the Court of Appeals, this appeal is subject to dismissal. Nevertheless, we have carefully considered defendant's assignments of error and conclude that defendant's trial was free of prejudicial error.

Appeal dismissed.

Judges BRITT and HEDRICK concur.

ROSS CLARENCE AYERS v. B. WALTON BROWN, ADMINISTRATOR OF THE ESTATE OF ARCHIE MERRELL CREEF, JR., DECEASED

No. 7419SC1088

(Filed 7 May 1975)

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 1 August 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 12 March 1975.

This is one of four civil actions arising out of the same automobile accident. Over plaintiff's objection, the cases were consolidated for trial. The jury answered the issue of negligence in plaintiff's favor but answered the issue of contributory negligence against plaintiff. From judgment on the verdict, plaintiff appealed.

Ottway Burton, for plaintiff appellant.

Smith & Casper, by Archie L. Smith, for defendant appellee.

MARTIN, Judge.

This case presents no question not answered by this Court in *Wood v. Brown, Administrator,* 25 N.C. App. 241, 212 S.E. 2d 690 (filed 2 April 1975). It would serve no useful purpose to discuss each assignment of error. On authority of *Wood v. Brown, supra,* all assignments of error are overruled.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. STANLEY GORDON WOODWARD, JR.

No. 754SC128

(Filed 7 May 1975)

APPEAL by defendant from *Fountain, Judge.* Judgment entered 17 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 April 1975.

Defendant was tried upon separate bills of indictment charging him with (1) unlawful possession of the controlled substance cocaine with intent to sell and deliver same and (2) the unlawful sale and delivery of the controlled substance cocaine. He pleaded not guilty to the charges. The jury found defendant guilty of both charges, and from judgment imposing prison sentences, defendant appealed.

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

Edward G. Bailey, for defendant appellant.

MARTIN, Judge.

Defendant presents the record for review for possible errors. We have carefully reviewed the record and find that defendant had a fair trial which was free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

IN THE MATTER OF: THE LAST WILL AND TESTAMENT AND FIRST CODICIL OF SALLIE B. ASHLEY

No. 7521SC141

(Filed 7 May 1975)

APPEAL by respondent, North Carolina Baptist Homes, Inc., from *Walker, Judge.* Order entered 9 January 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 April 1975.

J. Robert Elster and Robert J. Lawing, for propounder appellees.

Womble, Carlyle, Sandridge & Rice, by E. Lawrence Davis, for respondent appellant.

MORRIS, VAUGHN and CLARK, Judges.

The appeal is from an order denying a discovery motion and denying an extension of time for discovery. The order is interlocutory. Appellees' motion to dismiss the appeal is allowed. Certiorari is denied.

Appeal dismissed.

STATE OF NORTH CAROLINA v. BILLY PARKER

No. 757SC165

(Filed 7 May 1975)

ON *certiorari* to review proceedings before *Rouse, Judge.* Judgments entered 25 February 1974 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 17 April 1975.

Attorney General Edmisten, by Associate Attorney Robert P. Gruber, for the State.

Howard S. Boney, Jr., for defendant appellant.

BRITT, PARKER and VAUGHN, Judges.

No error.

STATE OF NORTH CAROLINA v. WILLIE R. STITT

No. 756SC114

(Filed 7 May 1975)

APPEAL by defendant from *Rouse, Judge.* Judgment entered 18 November 1974 in Superior Court, HALIFAX County. Heard in the Court of Appeals 16 April 1975.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

H. P. McCoy, Jr., for defendant appellant.

BRITT, HEDRICK and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. SEDGIE R. DANIELS

No. 754SC94

(Filed 7 May 1975)

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 April 1975.

Attorney General Edmisten by Associate Attorney Jesse C. Brake for the State.

William J. Morgan for defendant appellant.

BRITT, HEDRICK and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. GEORGE WASHINGTON SUGGS

No. 758SC27

(Filed 7 May 1975)

ON *certiorari* to review the judgment of *Cohoon, Judge.* Judgment entered 22 March 1971 in Superior Court, LENOIR County. Heard in the Court of Appeals 18 March 1975.

Attorney General Edmisten by Associate Attorney Sandra M. King for the State.

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

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. MICKEY DIXON

No. 754SC117

(Filed 7 May 1975)

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 September 1974. Heard in the Court of Appeals 11 April 1975.

Attorney General Edmisten by Associate Attorney Noel Lee Allen for the State.

Edward G. Bailey for the defendant.

PARKER, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. JIMMY L. HARDY

No. 758SC73

(Filed 7 May 1975)

ON *writ of certiorari* to review proceedings before *Martin, Judge.* Judgment entered 3 September 1973 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 April 1975.

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

Bland & Wood, by D. Reed Thompson, for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

No error.

Myers v. Holshouser

ROBERT E. MYERS, RALEIGH, NORTH CAROLINA, SALES REPRESENTATIVE OF HIRAM WALKER, INC., NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL PERMIT NO. 38, PETITIONER v. DR. L. C. HOLSHOUSER, MARCUS T. HICKMAN, ESQUIRE, AND GEORGE L. COXHEAD, MEMBERS OF THE NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL AND THE NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, RESPONDENTS

No. 7510SC52

(Filed 21 May 1975)

1. **Intoxicating Liquor § 2; Administrative Law § 4— ABC Board — compelling production of records — absence of probable cause**

The Board of Alcoholic Control may require the holder of a distillery representative's permit to produce relevant business books and records without abridging his Fourth Amendment rights even though the Board lacks traditional probable cause. G.S. 18A-15(12).

2. **Intoxicating Liquor § 2; Administrative Law § 4— ABC Board — compelling production of records — absence of evidence of rule violation**

The Board of Alcoholic Control was not required to have evidence that the holder of a distillery representative's permit had violated its rules and regulations before it undertook an investigation of him and required him to produce books and records pertaining to promotional activities in this State for a distillery.

3. **Administrative Law § 4— administrative agency — compelling production of records**

An administrative agency may require the production of documents only when its investigation is authorized by law and conducted pursuant to a legitimate purpose, the information sought is relevant to a lawful subject of investigation, and the demand for production is reasonable and specific in directive so that compliance is not unreasonably burdensome.

4. **Intoxicating Liquor § 2; Administrative Law § 4— production of records — sufficiency of order**

Order of the Board of Alcoholic Control requiring the holder of a distillery representative's permit to produce all books and records pertaining to his promotional activities in this State for a distillery was not so overbroad as to be impermissibly burdensome.

5. **Intoxicating Liquor § 2; Administrative Law § 4— denial or revocation of permit — due process — notice and hearing**

The Board of Alcoholic Control must give notice and an opportunity to be heard to an applicant or permittee before it can refuse or revoke a permit for failure to produce records as ordered by the Board pursuant to G.S. 18A-15(12).

6. Intoxicating Liquor § 2; Administrative Law § 5— refusal to renew permit — declaratory judgment — authority of superior court — due process hearing

In a declaratory judgment action instituted after the Board of Alcoholic Control refused to renew petitioner's permit to operate as a distillery representative when petitioner failed to produce certain business records as ordered by the Board, the superior court had no authority to order the Board to issue a permit to petitioner but was limited to a declaration that petitioner is entitled to a due process hearing before the Board before action is taken to revoke or deny renewal of his permit.

APPEAL by respondents from *Bailey, Judge.* Judgment entered 20 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 20 March 1975.

Petitioner is the holder of a permit to operate as a distillery representative in North Carolina for Hiram Walker, Inc. Respondents are the North Carolina Board of Alcoholic Control (Board) and its individual members who are responsible for granting permits to persons operating as distillery representatives in North Carolina. This action was instituted because of an order of the Board, made on 19 February 1974 pursuant to G.S. 18A-15(12), for petitioner to produce his business records for the calendar years 1968 through 1972 as they related either to petitioner's or to Hiram Walker's promotional activities in North Carolina. Respondents required compliance with the order as a condition precedent to renewal of petitioner's permit for 1974-1975. In this action petitioner sought both (1) a declaratory judgment that the actions of the Board in requesting the records were unconstitutional and (2) a mandatory injunction requiring the issuance of a distillery permit to operate through 28 February 1975. Specifically petitioner contended that the actions of the Board pursuant to G.S. 18A-15(12) were unconstitutional, that its request was overbroad, that its action deprived him of a property right without due process of law, and that its action was arbitrary and capricious. The superior court granted the relief sought by petitioner, and respondents appealed. The appeal raises the following issues for our resolution: whether an administrative agency has investigatory powers; whether the Board could request the production of books and records even when it lacked "traditional" probable cause; whether its request was so overbroad as to be impermissibility burdensome; and whether petitioner was deprived of due process of law in the failure to renew his permit without a hearing.

A controversy between the parties first arose on 19 February 1973 when the Attorney General of North Carolina filed a petition with the Board in which he asked for the Board's assistance in completing an investigation by the North Carolina Department of Justice of the purchase, sale, and transportation of liquor in North Carolina. Paragraph six of the petition asked that the Board obtain the business records relating to promotional activities of petitioner. These records had already been requested by the State Bureau of Investigation, but its request had been denied by counsel for petitioner. Respondent Board, by its chairman, respondent L. C. Holshouser, notified petitioner on 19 February 1973 by telegram and letter that he should appear before the Board "to show just cause as to why action should not be taken by the State ABC Board in order to comply with the requests of the Attorney General."

Petitioner appeared before the Board on 26 February 1973. On 5 March 1973 the Board ordered that petitioner furnish

> "[A]ll business records, including expense accounts and/or other records showing business expenses incurred, canceled checks (of the Permittee), receipts, invoices and vouchers relating to any and all promotional activities of the Permittee and/or promotional activities on behalf of Hiram Walker, Incorporated, in North Carolina for the period January 1, 1968, to and including December 31, 1972, which promotional activities shall include but shall not be restricted to entertainment, gifts of money or property, political contributions (in cash or in property), either directly or indirectly, where the contribution was intended to benefit a particular candidate, committee or party, irrespective of to whom made, given or delivered."

Petitioner sought judicial review of the Board's order, pursuant to Chapter 143 of the North Carolina General Statutes, and a hearing in superior court was held. The court subsequently entered an order on 4 April 1973 finding that substantial rights of the petitioner had been abridged and adjudicating the Board's order "null and void and of no effect."

Again on 15 May 1973 the Board ordered petitioner to furnish the information requested in the 5 March 1973 order. Petitioner moved for judicial review, and a hearing was held. On 8 June 1973 the superior court entered an order declaring respondents' 15 May order "null, void, and of no effect."

This appeal is taken from the third attempt of the Board to compel production of petitioner's books and records. On 19 February 1974 the respondents ordered petitioner to produce his business records. Although the request itself was identical in scope to the request of 5 March 1973, this latter order was not issued in support of the request by the Attorney General. The Board's order also contained the following:

> "Mr. William G. Aycock has indicated to this office that during the period he was employed by Hiram Walker under your direct supervision, that he was instructed to work clubs and turn over to you sums of money for improper promotional activities. This would clearly constitute a violation of North Carolina Laws and the rules and regulations of the North Carolina ABC Board.
>
> . . . .
>
> "If these documents are not produced, your 1974-75 Distillery Representative's permit will not be issued."

Petitioner instituted this independent action on 1 March 1974 for relief in the form of a declaratory judgment and a mandatory injunction compelling the Board to issue a permit for 1974-1975 to petitioner. An *ex parte* order was entered on 1 March 1974 requiring respondents to issue the permit and providing that the order itself would serve as a permit. Respondents answered, and a deposition of L. C. Holshouser, chairman of the Board, and an affidavit of petitioner were introduced. On 20 November 1974 the court again granted the relief sought by the petitioner. The court found as a fact that the Board's request was based solely on a conversation between William G. Aycock and Holshouser. The court further found that allegations of a very general nature had been made against petitioner by Aycock and that the Board had no other information concerning petitioner's activities. The court concluded that the 19 February 1974 order of the Board denied petitioner due process of law; that its actions deprived him of a property right without due process; that the Board's attempt to investigate pursuant to G.S. 18A-15(12) was unconstitutional; and that the Board acted arbitrarily and without competent evidence of wrongdoing on the part of petitioner. The court again ordered the Board to issue a permit to petitioner; in the event that it did not do so, the court's judgment purported to authorize petitioner to operate as a representative.

Respondents appeal from this judgment. Accordingly, we will not be concerned with whether the first two orders of the Board deprived petitioner of due process of law; we deem the 20 November judgment and the circumstances surrounding it the subject of this appeal.

Other facts necessary for the resolution of this appeal are set forth in the opinion.

Ragsdale and Liggett, by George R. Ragsdale and James C. Ray, for petitioner-appellee.

Attorney General Edmisten, by Associate Attorney James Wallace, Jr., for respondents-appellant.

BROCK, Chief Judge.

[1] We are confronted, at the outset, with a determination of the scope of the investigatory powers of the North Carolina Board of Alcoholic Control: may the Board, even if it has no probable cause, require petitioner to produce relevant business books and records without abridging his constitutional rights under the Fourth Amendment? We conclude that it may.

The Twenty-First Amendment to the United States Constitution grants to the states the right "to legislate concerning intoxicants brought from without the state for use or sale therein, unfettered by the commerce clause." 45 Am. Jur. 2d *Intoxicating Liquors* § 42 (1969). Because of the Twenty-First Amendment and the effect of liquor on the health and welfare of the people, states have broad powers to regulate intoxicants. However, the power to regulate is subject to the United States Constitution and cannot transcend its bounds.

Administrative investigating power is essential not only for law enforcement but also for adjudication, rule-making, and supervision. "There is a peculiar need for an administrative body to provide close surveillance and regulation of the liquor industry because of the numerous and complex problems that arise and the inability of the legislature to anticipate specific problems and to maintain effective continuing supervision." 45 Am. Jur. 2d *Intoxicating Liquors* § 26 (1969). Hence, statutes establishing administrative agencies, both state and federal, necessarily confer broad investigatory powers.

North Carolina General Statute 18A-15(12) provides:

"The State Board of Alcoholic Control shall have power and authority as follows:

"(12) To grant, to refuse to grant, or to revoke permits for any person, firm, or corporation to do business in North Carolina in selling alcoholic beverages to or for the use of any county or municipal store and to provide and to require that such information be furnished by such person, firm, or corporation as a condition precedent to the granting of such permit, or permits, and to require the furnishing of such data and information as it may desire during the life of such permit, or permits, and for the purpose of determining whether such permit, or permits, shall be continued, revoked, or regranted after expiration dates. No permit, however, shall be granted by the State Board to any person, firm, or corporation when the State Board has reason sufficient unto itself to believe that such person, firm, or corporation has furnished to it any false or inaccurate information or is not fully, frankly, and honestly cooperating with the State Board and the several county and municipal boards in observing and performing all liquor laws that may now or hereafter be in force in this State, or whenever the Board shall be of opinion that such permit ought not to be granted or continued for any cause. Upon the granting of a permit in accordance with this Chapter, the State Board of Alcoholic Control shall notify the county sheriff and county tax collector, and if applicable, the city chief of police and city tax collector, as well as the county alcoholic beverage control officer, whenever an alcoholic beverage control permit of any type is issued within the respective county and/or city;

. . . .

"The State Board shall have all other powers which may be reasonably implied from the granting of express powers herein named, together with such other powers as may be incidental to, or convenient for, carrying out and performing the powers and duties herein given to the Board."

A primary reason advanced by petitioner for denying the Board access to books and records stems from the fear that such access would permit fishing expeditions into private affairs. In *Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 (1924), Justice Holmes, speaking for a unanimous court, stated:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loathe to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . , and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime." 264 U.S. at 305-306.

This position, however, has been eroded by a long line of decisions expanding the scope of an administrative agency's investigatory powers. *See* Davis, *The Administrative Power of Investigation*, 56 Yale L.J. 1111 (1947). In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), a subpoena *duces tecum* was issued by the Administrator of the Fair Labor Standards Act. It required the production of

> "[a]ll of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof [November 3, 1943], including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods." 327 U.S. at 210 n. 46.

The Court rejected the argument that administrative investigations involved unreasonable search and seizure in violation of the Fourth Amendment. Without attempting to sumarize or accurately distinguish all the cases, the Court stated that the fair distillation, as applied to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, was that

> "the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,'

if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." 327 U.S. at 208.

[1] The holding in *Oklahoma Press* was buttressed by language in *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950):

> "The respondents argue that since the Commission made no charge of violation either of the decree or the statute, it is engaged in a mere 'fishing expedition' to see if it can turn up evidence of guilt. We will assume for the argument that this is so.
>
> "We must not disguise the fact that sometimes, . . . the courts were persuaded to engraft judicial limitations upon the administrative process. The courts could not go fishing, and so it followed neither could anyone else. Administrative investigations fell before the colorful and nostalgic slogan 'no fishing expeditons.' It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature. More recent views have been more tolerant of it than those which underlay many older decisions." (Citations omitted.) 338 U.S. at 641-642.
>
> . . . .
>
> "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *Id.* at 652.

However, the Court did not completely abandon its position against fishing expeditions, and emphasized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* More recent decisions have been very liberal in expanding an administrative agency's investigatory powers, even to the extent of sanctioning a warrantless administrative inspection of a locked gun

storeroom under 18 U.S.C. § 923(g) of the Federal Gun Control Act of 1968, *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972), and a third party "John Doe" summons issued by the Internal Revenue Service to a bank to discover the identity of a person who had bank transactions suggesting the possibility of liability for unpaid taxes. *United States v. Bisceglia,* 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed. 2d 88 (1975). *Cf. Camara v. Muncipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967); *See v. Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967); *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed. 2d 60 (1970). These cases lead us to the ineluctable conclusion that an administrative agency, in this case the Board of Alcoholic Control, is empowered to conduct inquiries to whatever extent is reasonably necessary to make the power of investigation effective. *See* Davis, Administrative Law Text, *Investigation* § 3.02 (3rd ed. 1972).

A second reason advanced by petitioner for denying the Board the right to compel production of his books and records stems from his belief that (1) the Board had no reason to believe he had violated the law when it requested the documents, and (2) its request for the production of the documents was so overbroad as to be impermissibly burdensome.

[2] In *United States v. Morton Salt Co., supra,* the Court made it clear that the Federal Trade Commission had

> "a power of inquisition . . . not derived from the judicial function [but] more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, *or even just because it wants assurance that it is not.* When invesigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. 338 U.S. at 642-643. (Emphasis added.)

In our opinion the Board of Alcoholic Control was not required to have evidence that petitioner had violated its rules and regulations before it undertook an investigation of him. The Board is not bound by traditional probable cause. The purpose of an administrative investigation is to protect the public; therefore, the public's interest in applying more relaxed criteria for administrative investigations is greater than the regulated person,

firm, or corporation's right to privacy. *See* Note, 58 Geo. L.J. 345, 363 n. 93 (1969). The Board could not perform its duty and determine whether its rules and regulations were being violated if it first had to establish a probable violation as a condition precedent to an investigation. Such a requirement would render the Board's enforcement provisions nugatory.

[3] An order to produce documents is subject, however, to certain bounds. The investigation must be authorized by law and conducted pursuant to a legitimate purpose, *United States v. Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed. 2d 112 (1964); the information sought must be relevant to a lawful subject of investigation, *United States v. Powell, supra;* the investigative demand must be reasonable and specific in directive so that compliance is not unreasonably burdensome. *See v. Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943 (1967). *See also United States v. Morton Salt Co., supra* 338 U.S. at 651-652. The practical effect of these requirements is that requests for records will be denied only where they are either extreme, vague, or oppressive, or irrelevant. We hold that the Board's request meets none of these objections. It fully satisfies the tests set forth above.

[4] In reaching the conclusion that the Board can compel petitioner to produce his books and records, we have relied on cases in which subpoenas were issued by administrative agencies for certain documents. The Administrative Procedure Act of North Carolina, set forth in Chapter 150A of the General Statues, empowers agencies to issue subpoenas upon their own motions or upon written request. G.S. 150A-27. That Act becomes effective 1 July 1975. N. C. Session Laws 1973, c. 1331, § 4. However, we do not deem harmful the absence of a subpoena in this case. One of the purposes of a subpoena *duces tecum* is to insure that documents are described with sufficient particularity and with such definiteness that they can be identified without prolonged or extensive search. *Vaughan v. Broadfoot,* 267 N.C. 691, 149 S.E. 2d 37 (1966). G.S. 18A-55 requires the keeping of accurate records and grants to the Board the right to inspect those records. The order of the Board is sufficiently particular and definite to satisfy the requirement of a subpoena, and the court's conclusion that the order is "so broad as to be unduly burdensome to the petitioner resulting in a substantial denial of his constitutional rights" is error.

In our opinion the Board of Alcoholic Control can conduct, without traditional probable cause, an investigation of petition-

er's books and records pertaining to promotional activities in North Carolina for Hiram Walker, Inc. All conclusions of law of the superior court contrary to this are overruled.

Having so concluded, we are left to resolve two issues: whether the refusal of the Board to renew the permit, without a hearing, upon petitioner's refusal to produce his records, deprived petitioner of due process of law, and whether the superior court should have ordered the Board to issue a permit to petitioner.

When petitioner failed to produce his records for respondents' inspection, the Board of Alcoholic Control refused to renew petitioner's permit to operate as a distillery representative. In its declaratory judgment of 20 November 1974, the court found as a fact that the "ABC Board at no time granted, offered to grant or held a hearing in connection with the issuance of its order of February 19, 1974, amounting to a refusal to renew or reissue the permit of Robert Myers." Respondents have not taken exception to this finding of fact. After receiving notification that his permit would not be renewed if he did not comply with the Board's order, petitioner applied to the superior court for a mandatory injunction compelling the Board to issue petitioner a permit. On 1 March 1974 the court granted petitioner the remedy he sought and ordered the Board to issue a permit. The Board complied with the order and issued a permit to operate as a distillery representative until 28 February 1975. On 20 November 1974 the court entered a declaratory judgment in which it again commanded the Board to issue a permit. In the event the Board did not do so, the judgment authorized petitioner "to conduct such business affairs as he was authorized to conduct under Distillery Representative's permit # 38 of March 1, 1973."

Petitioner worked as a distillery representative until the license issued pursuant to the 1 March 1974 court order expired on 28 February 1975. Petitioner did not expect to have his license renewed beyond that date, but the Board did issue another permit licensing petitioner as a distillery representative until 28 February 1976. In a motion filed with this Court, respondents assert that the issuance of the last permit was the result of clerical error. The Board states that it has no plans to revoke the permit, even though it was issued by mistake. Petitioner also filed a motion with this Court, asserting that the action of the Board has "disposed of" the subject matter of this appeal and urging us to find that this controversy has become moot. Against

this background, we now turn to the two remaining issues raised by this appeal.

The prevailing view among the states is that "a license to sell intoxicating liquor is not property in any constitutional sense, . . . except where the license is held to be a franchise." 45 Am. Jur. 2d *Intoxicating Liquors* § 117 (1969). However, North Carolina has taken the position that "[a] license to engage in a business or practice a profession is a property right that cannot be suspended or revoked without due process of law." 2 Strong, N. C. Index 2d *Constitutional Law* § 23 (1967). In *State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786 (1961), the judgment of a superior court suspending the license of a professional bail bondsman was held void. The bondsman had not violated any provisions of the applicable statute. His conduct had not been the subject of inquiry by the official board of either the county or city, and the bondsman himself had never had a hearing before either board. The court stated that "[t]he granting of such license is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process." 254 N.C. at 303. The *Parrish* due process requirement has been applied in subsequent decisions of the appellate courts of this State to disciplinary proceedings against attorneys, *compare In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962) *with In re Bonding Co.,* 16 N.C. App. 272, 192 S.E. 2d 33 (1972), and to revocation of an operational license for massage parlors. *See Smith v. Keator,* 285 N.C. 530, 206 S.E. 2d 203 (1974).

[5] We interpret G.S. 18A-15(12) to require the Board of Alcoholic Control to give notice and an opportunity to be heard to the applicant or permittee before a permit is refused or revoked for failure to produce records as ordered by the Board. In our opinion the Board exceeded its authority in refusing to renew petitioner's permit for 1 March 1974 without notice and an opportunity to be heard. Insofar as the declaratory judgment of the superior court found that "[t]he order of the Board of February 19, 1974, has deprived Robert E. Myers of a property right in his Distillery Representative's Permit # 38 in that it has taken such permit from him by the refusal to renew it, without due process of law," it is affirmed.

[6] We finally consider whether the court should have ordered the Board to issue a permit to petitioner. The hearing in this matter by the superior court was not an appeal under G.S. 143-315 to review a decision of an administrative agency. The su-

perior court heard this matter in an independent action for a declaratory judgment and a mandatory injunction. Although petitioner prayed for a mandatory injunction, such relief was inappropriate under our holding herein that the Board's statutory power of investigation does not abridge petitioner's constitutional rights. In view of our determination that the statutory investigative authority of the Board is not unconstiutional, the authority of the superior court in this action was limited to a declaration that petitioner is entitled to a due process hearing before the Board, upon its order to produce records, before action is taken to revoke or deny renewal of his permit. Under the circumstances presented upon this appeal, it was error for the superior court to order the Board to issue a permit to petitioner.

Reversed in part.

Affirmed in part.

Judges PARKER and ARNOLD concur.

WALTER LEE POWELL v. AUDREY S. POWELL

No. 757DC105

(Filed 21 May 1975)

1. **Divorce and Alimony § 24— child custody — insufficiency of findings**

Findings that "defendant is a fit and suitable person to have the custody of the children born of the union" and that "plaintiff is a fit and suitable person to have visitation rights with the children" are insufficient to sustain an award of custody.

2. **Divorce and Alimony § 8— abandonment without physical departure**

One spouse may abandon the other without physically leaving the home; in that event, the physical departure of the other spouse from the home is not an abandonment by that spouse.

3. **Divorce and Alimony § 8— constructive abandonment**

The constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support.

4. **Divorce and Alimony § 8— abandonment — decrease in support — insufficient findings**

Finding that while living apart plaintiff supplied his wife and family with funds and materials in excess of $600 per month but that

in August 1973 cut the amount to $80 per week was insufficient to sustain the court's conclusion that plaintiff abandoned defendant in August 1973 where there was no finding that plaintiff brought their cohabitation to an end without justification, without consent of the other spouse and without intent of renewing it, and there was no finding that plaintiff's reduction of support was wilful or without excuse.

5. **Divorce and Alimony § 16— attorney's fee — insufficient findings**

The trial court's award of an attorney's fee to defendant cannot be sustained where the court failed to make findings of fact upon which a determination of its reasonableness could be based.

6. **Divorce and Alimony § 16— alimony based on capacity to earn — insufficient findings**

The trial court erred in basing the amount of plaintiff's alimony and child support payments on his capacity to earn rather than on his actual earnings where there was no finding that plaintiff was failing to exercise his capacity to earn because of a disregard of his marital obligation.

APPEAL by plaintiff from *Harrell, Judge.* Judgment entered 26 November 1974, in District Court, WILSON County. Heard in the Court of Appeals 9 April 1975.

Plaintiff husband instituted this action on 1 April 1974 seeking an absolute divorce from defendant based on one year's separation. On 10 April 1974 defendant filed an answer in which she denied a continuous separation for more than one year. Defendant pled abandonment as a bar to plaintiff's action and counterclaimed for permanent alimony, child support and custody and reasonable attorney fees.

At the trial plaintiff's evidence tended to show that he and the defendant were married in 1961 and have three children; that about four years before the trial of this case, defendant left the family home in Wilson County and moved to her mother's home in Pink Hill, taking the three children with her; that thereafter, until January 1973, plaintiff frequently visited defendant and the children in Pink Hill, but he "usually spent the night with one of his wife's relatives" and he and defendant "did not have any sexual relations"; and that in January 1973, plaintiff and defendant began living "completely and separately apart." Other evidence introduced by the plaintiff tended to show that until August 1973, plaintiff "was able from money he saved in prior years, to provide the defendant and children with money and goods from his service station in the amount of approximately $600.00 per month [but] [t]hat the money

he had saved had been completely used up and that he has been able to pay only $80.00 per week since that time"; that plaintiff operates a service station in Lucama, North Carolina, and in 1973 he had "a net loss of $14,143.35; [t]hat he has no other income, and that the business for 1974 is about the same." Plaintiff also introduced evidence tending to show that when he and defendant were living together, plaintiff's father deeded him a farm and when the defendant moved to Pink Hill plaintiff conveyed the farm back to his father without consideration.

Defendant's evidence tended to show that defendant moved out of plaintiff's home to her mother's home in Pink Hill in October 1969, and has lived there since then; that "until August, 1973, the plaintiff visited her and the children approximately twice a week at her mother's home and that she had sexual relations with the plaintiff during those visits; that she and the plaintiff had sexual relations on several other occasions; "[t]hat in August, 1973, the plaintiff told her that he did not love her any longer and wanted to separate"; "[t]hat she has only a high school education and no business training or experience" and "works part-time for Nationwide Insurance Agency for 12 hours per week at $1.50 per hour"; that she owns a farm in Lenoir County from which she receives $1200 a year for leasing the tobacco acreage and that she plants other crops from which she receives income and also plants a large garden for her own use; that defendant's expenses for her and the children are $657-$723 per month.

The trial court held that plaintiff was not entitled to a divorce and entered judgment (1) awarding the defendant custody of the children, and (2) ordering plaintiff to pay the Clerk $200 for defendant's attorney's fee, $50 per week in alimony and $60 per week in child support. Plaintiff appealed.

Kirby and Clark, by John E. Clark, for plaintiff appellant.

Turner & Harrison, by Fred W. Harrison, for defendant appellee.

MORRIS, Judge.

Plaintiff first contends that the trial court did not make sufficient findings of fact to sustain the award of custody of the three minor children to the defendant.

G.S. 50-13.2(a) provides that "[a]n order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."

[1] Here, the trial court found "[t]hat the defendant is a fit and suitable person to have the custody of the children born of the union." Such a finding was necessary under the decision in *Cameron v. Cameron,* 231 N.C. 123, 56 S.E. 2d 384 (1949). See 3 Strong, N. C. Index 2d, Divorce and Alimony, § 24, p. 377. The trial court also found that "the plaintiff is a fit and suitable person to have visitation rights with the children" and then, without further findings, concluded that the defendant is entitled to an order awarding custody of the children to her.

Our Supreme Court frequently has stated that the findings of the trial court in regard to the custody of children are conclusive when supported by competent evidence. 3 Strong, N. C. Index 2d, *ibid.*

> "However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby,* 272 N.C. 235, 238-239, 158 S.E. 2d 77 (1967), citing *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967).

In this regard we find the language of Britt, J., in the case of *In re Moore,* 8 N.C. App. 251, 254, 174 S.E. 2d 135 (1970), instructive. There it was noted:

> ". . . The institution of the present proceeding invoked the jurisdiction of the District Court of Beaufort County to inquire into the custody of Amy Hope Moore, *to determine what custodial arrangement would best serve her welfare, to make findings of fact based on competent evidence with respect thereto,* and enter an order awarding her custody to such 'person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child.' G.S. 50-13.2(a)." (Emphasis supplied.) See also *Boone v. Boone,* 8 N.C. App. 524, 174 S.E. 2d 833 (1970); and *In re Williams,* 9 N.C. App. 24, 175 S.E. 2d 326 (1970).

We conclude that the facts found by the trial court are insufficient to sustain the award of custody in this case. Nor do we find in the record evidence sufficient for the court to make findings of fact as to the best interests of the children with respect to their custody. A new hearing is necessary in order that the court may, upon competent evidence, make findings with respect to the question of whether an award of the custody of the three minor children to the plaintiff or the defendant will "best promote the interest and welfare of the child[ren]."

[2-4] Plaintiff next argues that the trial court failed to make sufficient findings of fact to sustain its conclusion of abandonment upon which the award of permanent alimony to the defendant was based. Again, we find merit in plaintiff's contention.

G.S. 50-16.2(4) provides as follows:

"§50-16.2. *Grounds for alimony*—A dependent spouse is entitled to an order for alimony when:

. . .

(4) The supporting spouse abandons the dependent spouse."

". . . The statute does not define abandonment. [However], [o]ne spouse abandons the other, within the meaning of this statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. See, *Richardson v. Richardson,* 268 N.C. 538, 151 S.E. 2d 12. One spouse may abandon the other without physically leaving the home. *Bailey v. Bailey,* 243 N.C. 412, 90 S.E. 2d 696; *McDowell v. McDowell,* 243 N.C. 286, 90 S.E. 2d 544; *Blanchard v. Blanchard,* 226 N.C. 152, 36 S.E. 2d 919. In that event, the physical departure of the other spouse from the home is not an abandonment by that spouse. The constructive abandonment by the defaulting spouse may consist of either affirmative acts of cruelty or of a wilful failure, as by a wilful failure to provide adequate support. *McDowell v. McDowell, supra; Blanchard v. Blanchard, supra." Panhorst v. Panhorst,* 277 N.C. 664, 670-671, 178 S.E. 2d 387 (1971).

Here, the trial court found:

"That for several years, the plaintiff (Walter Lee Powell) has resided in Wilson County; and the defendant (Audrey S. Powell) has resided with her mother in Lenoir County near the town of Pink Hill."

"That up until the month of August, 1973, the plaintiff (Walter Lee Powell) visited his wife in her mother's home on an average of at least twice each week, during which time the marriage relationship continued."

"That during the period of living in separate households, the parties took trips together and spent several nights in various motels, one such occasion being in March, 1973 at the Holiday Inn in Raleigh and another such occasion being in August, 1973 at Myrtle Beach, South Carolina.",

and finally:

"That living in separate households and until August, 1973, the plaintiff supplied his wife and family with funds and materials in excess of Six Hundred Dollars ($600.00) monthly. That beginning in August, 1973, said funds were cut to Eighty Dollars per week, and materials received from the business were eliminated entirely."

The trial court then concluded "[t]hat the plaintiff . . . by his actions . . . abandoned his wife and children in August of 1973 without providing them with sufficient support to maintain them in their usual manner of living . . ." The record contains no finding of fact with respect to whether plaintiff brought their cohabitation to an end "without justification, without the consent of the other spouse, and without the intent of renewing it." Furthermore, while one spouse may abandon the other by a *"wilful* failure and refusal to provide her with any support," here there was no finding of fact that the reduction of support after August, 1973, was wilful or without excuse. (Emphasis supplied.) The fact that in 1973 plaintiff's business had a net loss of $14,000 would tend to negate such a finding.

The facts found by the trial court are insufficient to sustain its finding of abandonment.

[5] By his third assignment of error plaintiff argues that the trial court did not make sufficient findings of fact to sustain the award of reasonable attorney fees to the defendant. As we pointed out in *Austin v. Austin,* 12 N.C. App. 286, 296, 183 S.E. 2d 420 (1971),

". . . It is uncontroverted that G.S. 50-16.4 and G.S. 50-13.6 permit the entering of a proper order for 'reasonable' counsel fees for the benefit of a dependent spouse, but the record

in this case contains no findings of fact, such as the nature and scope of the legal services rendered, the skill and time required, *et cetera,* upon which a determination of the requisite reasonableness could be based. Compare, for example, the evidence and findings in *Stanback v. Stanback,* 270 N.C. 497, 155 S.E. 2d 221 (1967). See also *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949)."

The failure of the trial court to make adequate findings of fact with respect to counsel fees requires that this assignment of error be sustained.

[6] Plaintiff also argues that the trial court abused its discretion in setting the amount of his weekly alimony and support payments in that it failed to consider the amount of his present earnings, and instead based its decision on his capacity to earn, without finding that he was "failing to exercise his capacity to earn because of a disregard of his marital obligation." We again find merit in plaintiff's contention. Here the trial court found:

"That the plaintiff is self-employed, with a gross income exceeding One Hundred Seventeen Thousand Dollars $117,-000) annually, as reflected upon his tax returns, which also reflect a net loss of Fourteen Thousand Dollars ($14,000) for 1973 and very little profit for the preceding years.",

and that

". . . the plaintiff is an able-bodied man, with a gross income of more than One Hundred Seventeen Thousand Dollars ($117,000) who has shown a loss or little profit from his business (service station) for several years. Yet the plaintiff personally and his family until August, 1973, lived very well from the business, and the plaintiff stated to the Court that although he was not making any money from the business, he had no plans to seek other employment and that he had no other sources of income or savings. That the plaintiff is fully able to support his family as evidenced by his actions prior to August of 1973."

As was pointed out in *Robinson v. Robinson,* 10 N.C. App. 463, 467-468, 179 S.E. 2d 144, 147 (1971):

"Plaintiff is entitled to a fair and reasonable allowance for support for herself and her three children. The granting of an allowance and the amount thereof does not necessarily

depend upon the earnings of the husband. One who is able bodied and capable of earning, may be ordered to pay subsistence. *Brady v. Brady,* 273 N.C. 299, 160 S.E. 2d 13; *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728. If the husband is honestly and in good faith engaged in a business to which he is properly adapted, and is making a good faith effort to earn a reasonable income, the award should be based on the amount which defendant is earning when the award is made. *To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife and children. Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912." (Emphasis supplied.)

For reasons set out, the cause must be remanded for further hearing and findings consistent with this opinion. We observe that in the order entered the court did not make separate findings with respect to the needs of the children and the needs of defendant. In the order entered upon rehearing, should the court determine that defendant is entitled to alimony, the court would be well advised to make findings with respect to the needs of defendant separate from the findings with respect to the needs of the children.

Error and remanded.

Judges VAUGHN and CLARK concur.

IN RE: IMPRISONMENT OF MICHAEL H. LONG

No. 7510SC41

(Filed 21 May 1975)

1. **Parent and Child § 1— parent's control over child — no absolute right**

Courts regard with great deference the parent's right to bring up a child as he or she so chooses, yet this parental authority is not viewed as absolute.

2. **Constitutional Law § 23— minor committed to mental health care facility — applicability of due process requirements**

A fifteen year old child who never gave his consent to confinement in the forensic unit of Dorothea Dix Hospital was entitled to due

process procedures guaranteed by the Fourteenth Amendment to the U. S. Constitution.

3. Insane Persons § 1— commitment of minor to health care facility upon parent's request — inadequate protection of constitutional rights

At present, Article 4 of G.S. 122 providing for voluntary commitment to a mental health care facility is constitutionally inadequate to protect the interest of a minor who is admitted at the parent's request.

4. Constitutional Law § 23; Insane Persons § 1— commitment of minor upon parent's request— procedural due process required

Commitment of a minor to a mental health care facility solely upon authorization of his mother was permissible procedure since the judicial deference afforded to parental authority along with the parent's interest in being able to seek immediate treatment and the policy of encouraging voluntary admissions outweigh any interest the minor may have in a pre-admission hearing; however, the continued confinement of a minor based on an admission without a prior hearing requires procedural safeguards consistent with the Due Process Clause, and such procedural due process should be afforded at the earliest possible time after admission.

Judge BRITT concurs in result.

ON *writ of certiorari* to review the order of *McLelland, Judge.* Order entered 23 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals on 21 March 1975.

By application for writ of habeas corpus, the minor, Michael H. Long, sought his release from the forensic unit of Dorothea Dix Hospital. The presiding judge of Wake County Superior Court issued a writ of habeas corpus commanding that the body of Michael H. Long be brought before him and setting a hearing for 26 July 1974. Counsel was appointed to represent Michael H. Long and the matter was continued until 23 August 1974. On 23 August 1974, Judge McLelland ordered the release of the petitioner Michael H. Long with the following:

"ORDER

This cause, coming on for hearing and being heard before the undersigned Presiding Judge of the Wake County Superior Court, State of North Carolina, upon Petitioner's application for Writ of Habeas Corpus. Appearing for and on behalf of the Petitioner was Jerry W. Leonard, court appointed counsel, and, appearing for the State of North Carolina was Parks H. Icenhour, Jr., Assistant Attorney General.

The parties, by and through counsel, in open Court stipulated as follows:

I. The Petitioner is fifteen (15) years of age and has been confined to the Forensic Unit at Dorothea Dix Hospital since the 2nd day of April, 1974;

II. Petitioner was admitted to Dorothea Dix under the 'voluntary admission' procedure set forth in NCGS § 122-56.5 which provides in pertinent part that for purposes of voluntary admission to a State facility for the treatment and evaluation of mental illness or inebriety, a parent, person standing in loco parentis, or guardian shall act for a minor;

III. The State of North Carolina asserts no justification for restraining the Petitioner, except for the authorization of Petitioner's mother;

IV. Petitioner has not been afforded the benefits of the involuntary admission procedures set forth in NCGS §§ 122-58 et seq.; and,

V. Petitioner has never consented to confinement at Dorothea Dix Hospital.

Upon the foregoing findings of fact, this Court concludes as a matter of law that Petitioner's continued confinement at Dorothea Dix Hospital is illegal, in that, he has been denied the safeguards provided by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, IN RE GAULT, 387 US 1 (1967) and IN RE CONFINEMENT OF GRACIE MAE HAYES, 18 NC App 560 (1973).

WHEREFORE, it is

ORDERED, ADJUDGED, and DECREED that the Petitioner be immediately released from confinement by the State authorities.

This 23rd day of August 1974.

s/ D. M. MCLELLAND
JUDGE PRESIDING"

This Court allowed the State's petition for writ of certiorari to review the order of Judge McLelland.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour, for the State.

Jerry W. Leonard, for petitioner appellee.

MARTIN, Judge.

We have before us the serious question as to whether the admission and the continued confinement of Michael Long in a state hospital, pursuant to G.S. 122-56.5 and Article 4, Chapter 122 of the General Statutes, constitutes a deprivation of his liberty in violation of the Due Process Clause.

Effective 2 April 1974, the General Assembly of North Carolina rewrote Article 4 of Chapter 122 of the General Statutes concerning voluntary admissions to mental health facilities. G.S. 122-56.5 as thereby enacted reads:

> "In applying for admission to a treatment facility, in consenting to medical treatment when consent is required, in giving or receiving any legal notice, and in any other legal procedure under this Article, a parent, person standing in loco parentis, or guardian shall act for a minor, and a guardian or trustee shall act for a person adjudicated non compos mentis."

The initial and most obvious question is whether Michael Long comes within the protection of the Due Process Clause. The Fourteenth Amendment to the Constitution of the United States forbids the State to deprive any person of life, liberty, or property without due process of law. In recent years the rights of minors under the Federal Constitution have received increased attention. Referring to earlier cases, the Supreme Court of the United States in *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967), stated, "Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." Again in *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 21 L.Ed. 2d 731, 89 S.Ct. 733 (1969), the Court recognized certain basic rights of children by saying, "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

The State contends that *In Re Gault* is not applicable to the present case. Instead, it is argued that the minor, Michael Long, is subject completely to the control and supervision of his parent in the matter of receiving proper mental health treatment.

[1] Our courts regard with great deference the parent's right to bring up a child as he or she so chooses, yet this parental authority is not viewed as absolute. In *Spitzer v. Lewark,* 259 N.C. 50, 129 S.E. 2d 620 (1963), the Court said, "As a general rule at common law, and in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and the same being a natural and substantive right may not lightly be denied or interfered with by action of the courts. However, the 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 interest and welfare of the children clearly require it. (Citations omitted.)"

Parental authority continues to enjoy this special deference, and rightfully so. "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder,* 406 U.S. 205, 32 L.Ed. 2d 15, 92 S.Ct. 1526 (1972).

However, we disagree with the State when it asserts that *In Re Gault* is not applicable to the present case. In *Heryford v. Parker,* 396 F. 2d 393 (10th Cir. 1968), the following observation is made: "[L]ike Gault, and of utmost importance, we have a situation in which liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process." *See Melville v. Sabbatino,* 30 Conn. Sup. 320, 313 A. 2d 886 (1973).

It must be kept in mind that where the interests of a minor conflict with those of the parent the courts have not deferred as readily to the judgment of the parent. *See Strunk v. Strunk,* 445 S.W. 2d 145, 35 A.L.R. 3d 683 (1969); *see, e.g., White v. Osborne,* 251 N.C. 56, 110 S.E. 2d 449 (1959). The parent's ad-

mission of a child to a treatment facility may result from a variety of factors, and it is possible that not all of these factors stem from a legitimate concern for the child. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Calif. L.Rev. 840 (1974) [hereinafter referred to as Ellis, *Volunteering Children*].

[2] Having determined that Michael Long is entitled to the protection of due process procedures, we now consider the State's contention that Article 4 of Chapter 122 provides adequate safeguards against the unnecessary admission and confinement of a minor by his parent. First, it is argued that a voluntary patient must be discharged within 72 hours of his written request for release pursuant to G.S. 122-56.3. The procedure for voluntary admissions is set out in G.S. 122-56.3 as follows:

> "Any person who believes himself to be in need of treatment for mental illness or inebriety may seek voluntary admission to a treatment facility by presenting himself for evaluation to the facility. No physician's statement is necessary, but a written application for evaluation or admission, signed by the person seeking admission, is required. The application shall acknowledge that the applicant may be held by the treatment facility for a period of 72 hours subsequent to any written request for release that he may make. At the time of application, the facility shall provide the applicant with the appropriate form for discharge. The application form shall be available at all times at all treatment facilities. However, no one shall be denied admission because application forms are not available. Any person voluntarily seeking admission to a treatment facility must be examined and evaluated by a qualified physician of the facility within 24 hours of presenting himself for admission. The evaluation shall determine whether the person is in need of treatment for mental illness or inebriety, or further psychiatric evaluation by the facility. If the evaluating physician or physicians determine that the person is not in need of treatment or further evaluation by the facility, or that the person will not be benefitted by the treatment available, the person shall not be accepted as a patient."

It is doubtful whether a minor admitted by his parent could secure his own release against the parent's wishes. G.S. 122-56.5 provides that in any legal procedure under Article 4 a parent

shall act for a minor. In addition, it could hardly be expected that a young, insecure child would readily stand up against hospital authorities and parents to assert such a right.

It is argued further that the examination of a patient within 24 hours as provided in G.S. 122-56.3 constitutes a sufficient safeguard against the improvident admission of a minor by his parent. For an excellent reply to this argument and a general discussion of the basic questions before us, see Ellis, *Volunteering Children, supra.* While recognizing the ability of those in the psychiatric profession to screen out many children who are unnecessarily admitted, the author points out several factors which mitigate against an effective screening process. At the initial examination there may be an understandable tendency to "over-diagnose." In other words, a psychiatrist may be predisposed to find illness rather than health at the first examination on the assumption that it is better to err on the side of caution. Also, where the parent admits a child for treatment, the examining doctor may quite naturally identify with the interest of the parent. If either of these happens, the doctor would be unable to act effectively as a screening agent at the initial stage of examination.

[3] At present, Article 4 of Chapter 122 is constitutionally inadequate to protect the interest of a minor who is admitted at the parent's request. "Short of bringing suit on constitutional grounds or seeking favorable statutory construction, the juvenile patient who seeks discharge has no recourse except to those who agreed to the original hospitalization—parents and hospital authorities. Here the child's position bears no resemblance to that of either the adult voluntary or involuntary patient; rather, it is uniquely restrictive." Ellis, *Volunteering Children, supra* at 847.

Returning to the present case, we reiterate that two distinct issues arise from the confinement of Michael Long—the admission procedure and the continued confinement of Michael Long based on that procedure. As mentioned earlier, we are of the opinion that Michael Long must be afforded the protection of due process at some stage. Such protective measures can be adapted to the peculiar needs of the minor. While there are certain minimum requirements to procedural due process, "the interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally

applicable to every imaginable situation.' *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 6 L.Ed. 2d 1230, 81 S.Ct. 1743 (1961)." *Goss v. Lopez,* 419 U.S. 565, 42 L.Ed. 2d 725, 95 S.Ct. 729 (1975).

[4] In view of this, we find the admission procedure used in the present case to be permissible. The judicial deference afforded to parental authority along with the parent's interest in being able to seek immediate treatment and the policy of encouraging voluntary admissions outweigh any interest the minor may have in pre-admission hearing. *But cf. Saville v. Treadway,* Civil No. 6969 (M.D. Tenn., 8 March 1974). However, the continued confinement of a minor based on that procedure requires procedural safeguards consistent with the Due Process Clause. Such procedural due process should be afforded at the earliest possible time after admission. We will not undertake to formulate a post-admission procedure designed to protect against the unnecessary confinement of a minor under Article 4 of Chapter 122. That is best left to the wisdom of the Legislature.

The order of the trial court releasing the minor Michael H. Long is

Affirmed.

Judge HEDRICK concurs.

Judge BRITT concurs in result.

STATE OF NORTH CAROLINA v. JOE LEE BRIM AND DOUGLAS SANDS

No. 7517SC115

(Filed 21 May 1975)

1. Larceny § 8— possession of recently stolen property — presumption — contention by defendant — instructions

The trial court did not err in failing to instruct the jury on the limitations of the presumption arising from the possession of recently stolen property or in failing to give the jury defendant's contention that he obtained the stolen goods honestly by taking them in pawn from a man in a poolroom where the court properly instructed the

jury as to when the presumption arises, defendant offered no evidence, and defendant made no written request for instructions.

2. **Criminal Law § 113— acting in concert — instructions**

In a prosecution for breaking and entering and larceny, the court's charge on acting in concert was supported by evidence that both defendants were in joint possession of recently stolen property and that they acted together in attempting to sell the property.

3. **Larceny § 8— instructions — identification of stolen property**

Trial court's instruction that defendant would be guilty of larceny if he took and carried away without the owner's consent "boxes of tools, two Homelite chain saws, or other items of personal property, or any of these items of personal property which had some value," when considered contextually, did not allow the jury to convict defendant if they found that he had stolen any unspecified item of personal property regardless of whether it was mentioned in the indictment.

4. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering — larceny — possession of recently stolen property**

The State's evidence was sufficient for submission to the jury on issues of defendant's guilt of breaking and entering and larceny where it tended to show that defendant and a codefendant were in joint possession of property recently stolen in a break-in and that defendant made an offer to sell the stolen property to another.

5. **Larceny § 8— possession of recently stolen property — presumption**

Where defendant's possession of recently stolen property was established by direct evidence, it was proper to allow the jury to infer that he could not reasonably have acquired possessison of the stolen property unless he stole the property himself.

6. **Larceny § 7— possession of recently stolen property — explanation by defendant — nonsuit question**

The State's evidence in a larceny case was sufficient for the jury under the doctrine of possession of recently stolen property notwithstanding defendant offered evidence that the stolen property was lawfully acquired from a man at a poolroom.

7. **Burglary and Unlawful Breakings § 4; Larceny § 6— attempt to sell property — no identification as item stolen — competency**

In a prosecution for breaking and entering and larceny, testimony that defendant offered to sell the witness a Homelite chain saw the day after the crimes were committed was admissible as circumstantial evidence that defendant was guilty of the crimes charged although there was no evidence that the chain saw was the same one stolen in the break-in.

APPEAL by defendants from *Exum, Judge*. Judgment entered 9 October 1974 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 11 April 1975.

These cases were consolidated for trial.

State v. Brim

Defendants were charged with felonious breaking and entering and felonious larceny. Upon their pleas of not guilty, the jury returned verdicts of guilty as charged. From judgments sentencing defendant Brim to imprisonment for a term of six years and sentencing defendant Sands to imprisonment for a term of three years, both defendants appealed.

State's evidence tended to show that on 21 March 1974 John Talmage Ziglar found that someone had broken into his locked toolshed, and taken (1) a tool box containing assorted tools, (2) a strap binder used to tighten straps around timber for fork lifting, and (3) two Homelite chain saws; that on the same day the defendants went to the home of Daniel Gray Boles, showed him the same box of tools, told him the tools belonged to Brim, and asked if he would like to buy them; that Boles agreed to buy the box of tools and gave the defendants a check for $30; and that Sands returned to Boles's home the following day and offered to sell him a Homelite chain saw, but Boles decided not to buy it. Other evidence offered by the State showed that on 23 May 1974 Boles told a deputy sheriff that he had purchased a box of tools from the defendants; that the deputy sheriff took the box of tools and showed it to Ziglar, and Ziglar identified the tools as the tools which had been stolen from his toolshed earlier in the year.

Defendant Brim offered no evidence. Defendant Sands offered evidence tending to show that one evening he and Brim were in a poolroom when a man came with a box of tools and wanted to pawn them; that Sands did not have any money, but he told Brim about them, and Brim agreed to lend the man some money and take the tools in pawn; and that "after a couple or three days" the man had not returned to repay the loan and therefore the defendants went to Boles's house and sold him the tools. Other evidence offered by the defendant Sands tended to show that he did not offer to sell Boles a chain saw.

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

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, and Associate Attorney C. Diederich Heidgerd, for the State.

Gwyn, Gwyn, & Morgan, by Melzer A. Morgan, Jr., for defendant Brim.

Clyde C. Randolph, Jr., and Doris G. Randolph, for defendant Sands.

PARKER, Judge.

Defendant Brim's Appeal

[1] In his first assignment of error defendant Brim contends that the trial court did not instruct the jury adequately on the doctrine of possession of recently stolen property. More specifically, he asserts that the trial court should have discussed the limitations of this presumption and should have given to the jury his contention that he obtained the stolen goods honestly by taking them in pawn from the man in the poolroom. We find no merit in defendant's first contention. Here the trial court instructed the jury that the presumption raised by the doctrine of possession of recently stolen property would apply only if the jury found "beyond a reasonable doubt that certain personal property was stolen from Tal Ziglar's building and the defendant . . . had possession of the same personal property as soon after it was stolen and under such circumstances as to make it unlikely that he obtained its possession honestly, . . ." In our opinion this instruction was sufficient. We also note that defendant Brim presented no evidence on his behalf at the trial. Furthermore, his counsel presented no written request for instructions prior to the charge. This assignment of error is overruled.

[2] Defendant Brim next contends that the trial court erred in charging the jury on the law pertaining to "conspiracy". The trial court instructed the jury as follows:

> "Members of the jury, in order for a person to be guilty of a criminal offense, it is not necessary that he himself do all the acts necessary to constitute the criminal offense. If two or more persons act together with the common purpose to commit a criminal offense, each of them is held responsible for the acts of the other, or others, done in the commission of the criminal offense."

According to defendant Brim, this instruction allowed the jury to convict him upon a finding that the defendant Sands was guilty of any of the offenses charged, when there was no evidence Brim acted with Sands for the common purpose of committing a criminal offense. There was evidence that Brim and Sands were in joint possession of recently stolen property, and that *they* went to the home of Boles and offered to sell him the tools after "*they* said *they* were in the lumber sawmill business,

pulpwood business, something of that nature, and were getting out of the business [and this] was the reason *they* were selling it so cheap. The defendants were in each other's presence. *They* agreed on the price." (Emphasis supplied.) The charge on acting in concert is supported by the evidence, and this assignment of error is overruled.

[3] Defendant Brim's final assignment of error relates to the trial court's charge to the jury that a verdict of guilty should be returned "if you find from the evidence and beyond a reasonable doubt that on or about March 21, 1974, the defendant, Joe Lee Brim, took and carried away from a storage building owned by Tal Ziglar, certain personal property, to wit: boxes of tools, *two Homelite chain saws, or other items of personal value, or any of these items of personal property which had some value,* without the consent of Tal Ziglar . . . then it would be your duty to return a verdict of guilty of felonious larceny." Defendant Brim contends that this instruction allowed the jury to convict him if they found that he had stolen any unspecified item of personal property, regardless of whether it was mentioned in the indictment.

It is well settled in this State that "[a] charge will be construed contextually as a whole, and when so construed, it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception thereto will not be sustained." 7 Strong, N. C. Index 2d, Trial, § 33, p. 330. When the charge is read contextually it is sufficient.

Defendant Sands's appeal

Defendant Sands's first assignment of error relates 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. (Citations omitted.)" *State v. McWilliams,* 277 N.C. 680, 687, 178 S.E. 2d 476 (1971).

[4] The State relied entirely on the doctrine of possession of recently stolen property to overcome defendant's motion for nonsuit. Defendant Sands maintains this doctrine is inapplicable to the evidence in the present case because (1) all the evidence tends to establish that he never had possession; and (2) assuming the evidence supports an inference that he was in possession of the stolen property, this inference cannot be extended to support a further inference that he was either the thief or one of the thieves; (3) all of the evidence includes an explanation tending to destroy the basis for the inference; and (4) the State's evidence exonerates him. As we have already noted, there was plenary evidence that the defendants were in joint possession of the recently stolen property and that *they* sold the property to Boles. Moreover, on several occasions the defendant testified that "[w]e had the tools with *us*" and "I told Mr. Boles how *we* come by them tools". (Emphasis supplied.) Finally, it is undisputed that Sands drove Brim out to Boles's home and that Sands made the offer to sell the tools to Boles.

> "One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof. (Citations omitted.)" *State v. Eppley,* 282 N.C. 249, 254, 192 S.E. 2d 441, 445 (1972).

[5] With respect to defendant's second contention, it is unnecessary to rely upon an inference that he had possession of the stolen property. Defendant's possession having been established by direct evidence, it was entirely proper to allow the jury to infer that he could not have reasonably acquired the possession of the stolen property unless he stole the property himself.

[6] Defendant next argues that the State's evidence was insufficient to withstand his motion for nonsuit because of the explanation that Brim lawfully acquired the goods from a man at a poolroom. We find no merit in this contention. Our Supreme Court has held such self-serving explanations insufficient to destroy the basis for the inference that the defendant was guilty of larceny.

> "The evidence that the defendant was in the possession of many articles of sample clothing found concealed in the trunk of the automobile which he was driving within less than three days after the articles were stolen was sufficient

to take the case to the jury and to sustain the verdict. The defendant's explanation that he and one of his companions bought $600.00 worth of new clothing from a colored man somewhere in Atlanta for the sum of $80.00 was not calculated to weaken the presumption that the recent and unexplained possession of stolen property gives rise to an inference of fact that the possessor was the thief. Evidence was ample to sustain the conviction." *State v. Jolley*, 262 N.C. 603, 604, 138 S.E. 2d 212, 212-213 (1964).

Considering the evidence in the light most favorable to the State, as we must on motion to nonsuit, we conclude there was plenary evidence to sustain the defendant Sands's conviction. This assignment of error is overruled.

[7] In his second assignment of error defendant Sands contends that State's witness Boles should not have been permitted to testify that Sands offered to sell him a Homelite chain saw on 22 March 1974, since there was no evidence that this chain saw was the same chain saw that was stolen from Ziglar. We disagree. In our opinion, although such testimony, standing alone, was insufficient to convict the defendant, it was admissible as circumstantial evidence that defendant was guilty of the offenses charged. This assignment of error is overruled.

Questions raised by defendant Sands's remaining assignments of error were raised by defendant Brim, and were found to be without merit.

Defendants received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. ANDREW WALLACE POOLE

No. 7525SC120

(Filed 21 May 1975)

1. Jury § 6— jury examination — changing opinion — improper question

It was not error for the trial court to sustain the State's objection to defendant's question to a juror as to whether seeing the other 11

members of the jury panel voting for acquittal would cause him to change his opinion.

2. **Criminal Law §§ 111, 163 —objection to charge — failure to set out what charge should be**

Defendant's argument that the trial court should have instructed with respect to the consequences of the failure of the jurors to agree is without merit where the court gave an adequate instruction as to the purpose of the jury, their deliberating together and reaching a verdict and where defendant did not suggest what the court should have said or request any specific instruction.

3. **Jury § 5— jurors acquainted with solicitor or witness — jurors related to law enforcement personnel — failure to remove proper**

The trial court did not err in failing to allow defendant to remove certain jurors because they knew the solicitor or a witness or were related to people in the field of law enforcement.

4. **Robbery § 4— accessory after the fact to armed robbery — sufficiency of evidence**

Evidence was sufficient to support a guilty verdict in a prosecution for being an accessory after the fact to armed robbery where such evidence tended to show that two men robbed two convenience store employees at knifepoint at 9:00 p.m., one of the victims observed the men flee in a white Dodge van, a white Dodge van was stopped by police at 9:25 p.m., defendant was the driver of the van, and defendant had a number of bills on his person when apprehended.

5. **Criminal Law § 88— splitting up money from robbery — cross-examination proper**

In defendant's trial for being an accessory after the fact to armed robbery where the evidence raised an inference that the money taken had been split between the robbers and the defendant following the robbery, the trial court did not err in allowing the State to ask one of the robbers on cross-examination, "How did you split the money up that you got down there?"

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 14 November 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 April 1975.

Defendant was charged with being an accessory after the fact to armed robbery in violation of G.S. 14-7. 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 ten years, defendant appealed.

State's evidence tended to show that shortly after 9:00 p.m. on 20 August 1974 two men, later identified in court as Clarence Majors and Charles Williams, entered the Smile Food-O-Mat convenience store on South Center Street in Hickory; that the

men threatened two of the employes working in the store with a knife and robbed them; that one of the employees observed the two men flee in a white Dodge van, and he remembered part of the license number as being AK 12. Other evidence introduced by the State showed that two patrolmen for the City of Hickory received a report than an armed robbery had just occurred and a description of the robbers and the van; that the patrolmen proceeded to the area of the robbery, spotted a white Dodge van with license number AK-152 and stopped it at approximately 9:25 p.m.; and that Charles Williams and the defendant got out from the driver's side of the van and Clarence Majors and the defendant's wife exited from the passenger side. One of the officers testified that although he did not see the defendant operating the van, the defendant told him he had been driving it. Other officers testified to finding currency and a knife inside the van. Four $5 bills, one $20 bill, five $10 bills and nineteen $1 bills also were found on the person of the defendant.

The only evidence offered by the defendant consisted of the testimony of Clarence Majors, who was identified in court as one of the participants in the armed robbery. Majors testified that after he left the Smile convenience store he returned to "this place where I was supposed to be visiting" and that he asked the defendant to drive him to Asheville. According to Majors, no one had notified the defendant that a crime had been committed.

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

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

L. Oliver Noble, Jr., for defendant appellant.

PARKER, JUDGE.

[1] Three arguments are presented in defendant's first assignment of error. Defendant first contends that it was error for the trial court to sustain the State's objection to his question to a juror as to whether seeing the other 11 members of the jury panel voting for acquittal would cause him to change his opinion. Defendant maintains this question was asked merely to determine whether the juror was of independent mind or whether he would entertain any individual opinions if the other members of the jury disagreed. "In a number of cases, attempts

have been made during the jurors' voir dire examination to ascertain whether a juror would be influenced by other jurors if there was disagreement among the members of the jury as to their verdict." 47 Am. Jur. 2d, Jury, § 205, p. 795. In a majority of cases such questions have been considered improper. See Annotation, 99 A.L.R. 2d 7, 99, § 7 (1965). The rationale of the cases is succinctly set forth in the case of *State v. Tally*, (Mo.), 22 S.W. 2d 787, 788 (1929), where Chief Justice White, speaking for a unanimous Court stated:

> "The trial court is vested with a large discretion in allowing examination of prospective jurors as to their qualifications. A juror is sworn and instructed to decide the issues according to the law and the evidence. Counsel may not, in advance, ask him to speculate upon what he might do, and how his verdict might be influenced by certain contingencies that may arise later. His view of the evidence and the instruction may be influenced by the reasoning of his associates and by the argument of counsel, and there is no objection to that. The only thing required is that he reach a conclusion which is satisfactory to him. Such questions are therefore improper. (Citation omitted.)"

[2] Defendant next argues that the trial court should have instructed with respect to the consequences of the failure of the jurors to agree. The trial court instructed the jury essentially that the purpose of a jury is to have the collective wisdom of the group in considering the guilt or innocence of defendant; that it was anticipated that they would do their best to reach a responsible verdict which reflects the truth; that they would deliberate together, consider the opinions of all, and reach a verdict if they could. The defendant cites no authority for his position that the court was required to give the jury any instruction after sustaining the State's objection to defendant's question, nor does he suggest what, in his opinion, the court should have said, nor did he request any specific instruction. We are of the opinion that the instruction given was adequate.

[3] Defendant next contends that the trial court erred in failing to allow him to remove certain jurors after defendant's counsel had stated that he was satisfied with the jury, and after the jury had been sworn, but after defendant had shown cause in open court for dissatisfaction with certain jurors. The record shows that after the jury was empanelled, but before any evidence was presented, the defendant attempted to make a state-

ment. When he was allowed to make a statement at a later recess, outside the presence of the jury, the defendant stated that he was not satisfied with the jury since several jurors either knew the solicitor or a witness, or were related to people in the field of law enforcement. The trial judge noted "that the jury selection process on Tuesday took in excess of an hour; And that counsel for the defendant asked numerous questions of all of the jurors and in the Court's opinion consumed an inordinate amount of time attempting to obtain a fair and impartial jury. The Court, having no reason to believe that this jury cannot give the defendant a fair and impartial trial, directs that the trial proceed but further directs that the defendant's remarks be made and preserved as a part of the record."

As pointed out in *Young v. Mica Co.*, 237 N.C. 644, 651, 75 S.E. 2d 795 (1953), citing *S. v. Davis*, 80 N.C. 412 (1879):

> " ' . . . It is well settled by English authorities sanctioned by the uniform practice of centuries and by numerous decisions in this state, that no juror can be challenged by the defendant without consent after he has been sworn, unless it be for some cause which has happened since he was sworn. . . . where the challenge is to the poll, made for good cause, in apt time—that is before the juror is sworn—it is strictly and technically a ground for a *venire de novo;* if made after the juror is sworn the court may in its discretion allow the challenge; but its refusal to do so is no ground for a *venire de novo,* because the prisoner has lost his legal right by not making his objection at the proper time.' "

The question of whether to allow defendant's challenges was a matter entirely within the discretion of the trial judge and defendant has failed to demonstrate an abuse of this discretion. This assignment of error is overruled.

[4] In his second assignment of error defendant contends that the trial court committed prejudicial error in denying his motion to set aside the verdict as being against the weight of the evidence. He argues that the evidence "fails to prove beyond a reasonable doubt, that the defendant had any knowledge that Clarence George Majors and Charles Williams had been involved in a robbery prior to the time that he started driving them toward Asheville". Defendant also points to the fact that the only evidence tending to show his knowledge of the robbery is circumstantial.

Evidence tendered by the State did more than raise suspicions as to defendant's involvement and possible guilt. This is especially true when the time element involved is considered. In our opinion, there was sufficient evidence to support a guilty verdict and defendant has failed to show abuse of discretion in the trial court's denial of his motion to set aside the verdict as being against the greater weight of the evidence. *State v. Leigh,* 278 N.C. 243, 179 S.E. 2d 708 (1971).

[5] On cross-examination of defense witness Majors, the District Attorney asked, "How did you split the money up that you got down there?" Defendant's objection was overruled, and the witness answered that the money which he had taken during the robbery was found in the van and that he had not split it with anyone. In his third assignment of error defendant argues this question was improper since it assumed a fact not in evidence. The record discloses that police officer Gadfield of the Hickory Police Department testified that "[o]n Mr. Poole I found in U. S. Currency four $5 bills, one $20 bill, five $10 bills and 19 $1 bills". In our opinion the evidence certainly raises an inference that the money taken had been split between Majors, Williams and the defendant following the robbery. Even if we should concede that the question was improper, the witness's answer that the money he took was by him put in the van, found in the van, and that he had not split it with anyone obviously was sufficient to rid the question of any prejudicial effect insofar as defendant is concerned. This assignment of error is overruled.

Defendant's remaining assignments of error are directed to the charge of the court to the jury. These assignments of error we also find to be without merit.

Defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

DELMAS DURHAM AND WIFE, IRENE W. DURHAM v. MARGIE M. CREECH (WIDOW); HAROLD LEE CREECH, ADMINISTRATOR OF THE ESTATE OF JESSE S. CREECH, DECEASED; AND WILLIE FLOYD SMITH AND WIFE, MILDRED PARRISH SMITH

No. 7511SC158

(Filed 21 May 1975)

Rules of Civil Procedure § 54— multiple defendants — order dismissing claim against and counterclaim of two defendants — interlocutory order —no appeal

The trial court's order dismissing plaintiff's claim against two defendants and dismissing by consent the counterclaim of the defendants against the plaintiffs adjudicated fewer than all the claims of all the parties and did not contain a determination by the trial judge that there was "no just reason for delay" in entering such order; therefore, the order was interlocutory and not presently appealable. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiffs from *Winner, Judge.* Judgment entered 12 November 1974 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 17 April 1975.

This is a civil action instituted by the plaintiffs, Delmas Durham and wife, Irene Durham, against the defendants, Margie M. Creech (widow) and Harold Lee Creech, Administrator of the Estate of Jesse S. Creech (deceased), and Willie Floyd Smith and wife, Mildred Parrish Smith, for reformation of a warranty deed dated 29 April 1961 executed by plaintiffs conveying certain real property to defendant Margie M. Creech, which property was subsequently conveyed by defendants Margie M. Creech and husband, Jesse S. Creech, to defendants Smith by warranty deed dated 22 February 1963.

In their complaint, filed 4 April 1969, plaintiffs alleged the following: Several weeks prior to 29 April 1961, Jesse S. Creech approached the plaintiffs about purchasing certain real property owned by them located in Johnston County. Plaintiffs agreed to sell the property, consisting of approximately 22.5 acres, subject to "their life estates in and to the dwelling then occupied by them as a home, and one acre of land immediately surrounding said house . . . . " The purchase price for the property was $6000, a price considerably less than the value of the property without reservation of the life estate.

On 29 April 1961 plaintiffs met with Mr. Creech in the office of Mr. Creech's attorney to "effectuate the agreement to

convey said land to him . . . . " When the plaintiffs observed that the deed, which had been prepared by Mr. Creech's attorney, did not contain a reservation of their life estate, Mr. Creech "assured . . . [the plaintiffs] that a separate paper was being prepared by his attorney for the purpose of reserving their life estates in the property as agreed upon . . . . " This paper writing, however, only purported to reserve a life estate to the plaintiffs "so long as Margie M. Creech owned . . . " the property. Plaintiffs again objected and Mr. Creech's attorney had the following words added to the paper writing: "This will be a lifetime right in the house and one acre of land for the life of Delmas Durham and wife, Irene Durham." Plaintiffs were thereafter "assured by the said Jesse S. Creech, deceased, and his attorney that the said paper writing was in all respects sufficient and proper to assure and reserve unto them their life estates and residences in the acre of land pursuant to their agreement . . . . " Plaintiffs and Jesse S. Creech thereupon signed the paper writing and the plaintiffs, "relying upon the assurances" of Mr. Creech and his attorney, signed the warranty deed conveying their property to Margie M. Creech. Mrs. Creech was not present and did not sign the paper writing. She did not participate personally in any of the negotiations for the sale of the property. Plaintiffs delivered the warranty deed to Mr. Creech, "who accepted the same as agent for and in behalf of his wife, Margie M. Creech, and at all times was acting within the scope of his said agency." Plaintiffs, being inexperienced in business matters, were "either fraudulently misled by the representations of Jesse S. Creech, deceased, and his attorney, or the said Jesse S. Creech and his attorney were mistaken, as were the plaintiffs, as to the legal effect of the instruments that were prepared and signed; however, due to the misrepresentations made by the said Jesse S. Creech, deceased, and his attorney, plaintiffs agreed to accept said paper writing in lieu of reserving their life estates in the deed executed by them."

The deed to Mrs. Creech was duly recorded in Book 587, page 306, Johnston County Registry; and on 24 October 1962 the Creeches executed an option to defendants Smith for the sale of the property free and clear of all encumbrances for the sum of $9000. This option was recorded in Book 607, page 430, Johnston County Registry. Plaintiffs learned of said option and immediately advised Willie Floyd Smith of the existence of their life estate "in the home where they were then living on said lands and one acre of land surrounding the same . . . " and fur-

ther advised him that Jesse and Margie Creech had no right to sell the property without reserving said life estate. Plaintiffs thereafter caused the paper writing purporting to reserve their life estate to be recorded in the Office of the Johnston County Register of Deeds. On 22 February 1963 Jesse S. Creech and Margie M. Creech "in complete disregard of the rights of plaintiffs" executed a warranty deed to the defendants Smith for the property originally owned by the plaintiffs. Defendants Smith accepted this deed "with full knowledge and notice of plaintiffs' rights in and to said property."

Defendants Smith filed a demurrer to plaintiffs' complaint on 3 June 1969 and on 18 June 1969 defendants Creech demurred to the complaint. On 14 January 1974, upon motion of defendants Smith, Judge Hobgood permitted the Smiths to withdraw their demurrer and granted them thirty days within which to file answer.

In their answer, defendants Smith admitted purchasing the property described in the complaint free and clear of all encumbrances and denied all other material allegations. By way of counterclaim, defendants Smith claimed paramount title to the property in question and alleged that the plaintiffs were still in possession of the premises and had refused to vacate the premises upon numerous demands of the defendants. Defendants Smith therefore asked the court to have plaintiffs removed from the property and sought to recover from the plaintiffs $3,300 in rent and $500 for damage to the dwelling.

On 16 September 1974 Judge McKinnon, treating the demurrer filed by defendants Creech as a motion to dismiss pursuant to Rule 12(b) (6), overruled the demurrer and allowed them thirty days within which to file answer. On 12 November 1974 Judge Winner, upon his own motion, dismissed plaintiffs' complaint as to the defendants Smith pursuant to Rule 12(b) (6) for failure of the complaint to state a claim upon which relief could be granted and, upon consent of defendants Smith, dismissed their counterclaim against the plaintiffs. Plaintiffs appealed.

L. Austin Stevens and E. V. Wilkins for plaintiff appellants.

W. R. Britt and James A. Wellons, Jr. for defendant appellees.

HEDRICK, Judge.

Although the parties have not raised the question, we must consider whether the trial judge's order dismissing plaintiffs' claim against the defendants Smith is presently appealable. Rule 54(b) of the Rules of Civil Procedure provides:

> *"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."

In the recent cases of *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975) and *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974), this court dismissed the appeals where the judgments purported to adjudicate "the rights and liabilities of fewer than all the parties" and contained no determination by the trial judges that there was "no just reason for delay". For a more complete discussion of the purpose and need for Rule 54(b), see *Leasing, Inc. v. Dan-Cleve Corp. supra*, and *Arnold v. Howard, supra.*

In *Arnold v. Howard, supra*, Judge Parker, speaking for this court, said:

> "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 judgment 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 expression 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)." 24 N.C. App. at 258-259.

In the present case, the order dismissing plaintiffs' claim against the defendants Smith and dismissing by consent the counterclaim of the defendants Smith against the plaintiffs adjudicates fewer than all the claims of all the parties and does not contain a determination by the trial judge that there was "no just reason for delay" in entering such order. Therefore, the order is interlocutory and presently not appealable. Rule 54(b); *Leasing, Inc. v. Dan-Cleve Corp., supra; Arnold v. Howard, supra.*

Since the order dismissing plaintiffs' claim and the counterclaim of defendants Smith appears to be a final order except for the trial court's failure to certify its finality by finding that there was "no just reason for delay", a legitimate question arises as to what follows in the trial court upon our dismissal of this appeal. We believe the answer is to be found in that portion of Rule 54(b) which states:

"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."

When and if plaintiffs' claim against the defendants Creech comes on for trial, the trial court may revise the order dismissing plaintiffs' claim as to defendants Smith and as to the counterclaim of the defendants Smith against the plaintiffs "at any

time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties". If the trial court makes or fails to make any revision of the "interlocutory" order, the aggrieved parties, provided they have preserved their exception to any such order, may then challenge the correctness of the "interlocutory" order or any revision thereof on an appeal from a final judgment which determines all of the rights and claims of all of the parties.

For the reasons stated, the purported appeal of the plaintiffs is dismissed and the cause is remanded to the Superior Court for further proceedings.

Dismissed and remanded.

Chief Judge BROCK and Judge MORRIS concur.

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PROPERTY
PUBLIC OFFICERS

QUASI CONTRACTS

RAPE
RECEIVING STOLEN GOODS
RELIGIOUS SOCIETIES AND CORPORATIONS
ROBBERY
RULES OF CIVIL PROCEDURE

SEARCHES AND SEIZURES
SHERIFFS AND CONSTABLES

TELEPHONE AND TELEGRAPH COMPANIES
TRESPASS
TRESPASS TO TRY TITLE
TRIAL
TRUSTS

UNJUST ENRICHMENT

WATERS AND WATERCOURSES
WEAPONS AND FIREARMS
WILLS

ACCOUNTANTS

Plaintiff could not satisfy the experience requirements for certification as a CPA by practicing law under the supervision of a lawyer who was also a CPA. *Duggins v. Board of Examiners*, 131.

ADMINISTRATIVE LAW

§ 4. Procedure, Hearings and Orders of Administrative Boards

Board of Alcoholic Control may require the holder of a distillery representative's permit to produce relevant business books and records even though the Board lacks traditional probable cause, but the Board must give permittee notice and an opportunity to be heard before it can revoke a permit for failure to produce records as ordered. *Myers v. Holshouser*, 683.

§ 5. Appeal and Review of Administrative Orders

Where plaintiff did not seek judicial review of an administrative decision ordering the demolition of buildings declared unfit for human habitation, plaintiff could not collaterally attack such decision by an independent action seeking injunctive relief. *Axler v. City of Wilmington*, 110.

ADOPTION

§ 2. Parties and Procedure

The consent of respondent department of social services to the adoption sought by petitioners is required by statute, and the trial court properly determined that the withholding of consent by respondent was not unjust and unreasonable and was in the best interest of the child. *In re Daughtridge*, 141.

In a trial to determine whether respondent had abandoned his child and was not a necessary party to an adoption proceeding, trial court erred in admission of evidence of proper custody and suitability of the stepfather as an adoptive parent. *In re Cooke*, 673.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animal

Trial court properly granted defendant's motion for summary judgment in an action to recover for personal injuries sustained when plaintiff's motorcycle collided with a dog owned by defendant. *Sams v. Sargent*, 219.

Summary judgment was improperly entered for defendant in an action to recover damages for personal injuries sustained by plaintiff when he was frightened by defendant's German shepherd dog and fell down the steps leading to defendant's house. *Sanders v. Davis*, 186.

§ 7. Criminal Responsibility for Killing or Cruelty to Animals

State's evidence was sufficient for the jury in a prosecution for needlessly killing animals. *S. v. Candler*, 318.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Order setting aside an entry of default is interlocutory and therefore not appealable. *Acoustical Co. v. Cisne and Associates*, 114.

An order allowing plaintiff's motion to amend her complaint to reply and denying defendant's motion for judgment on the pleadings was not appealable. *Funderburk v. Justice*, 655.

An order denying a motion for directed verdict following a mistrial is not appealable. *Samia v. Oil Co.*, 601.

§ 9. Moot Questions

An appeal presenting a moot question will not be dismissed where the question involves a matter of public interest. *Leak v. High Point City Council*, 394.

Appeal from a superior court judgment refusing to order a new primary election to select a nominee to run for alderman in the November 1974 general election is dismissed as moot. *Little v. Board of Elections*, 304.

Though respondent was discharged before her appeal from an order committing her to a mental health care facility, her appeal from the order was not moot. *In re Carter*, 442.

§ 16. Jurisdiction of Lower Court After Appeal

The district court was without jurisdiction to enter further orders while plaintiff's appeal was pending. *Carpenter v. Carpenter*, 307.

§ 42. Conclusiveness and Effect of Record and Matters Properly Included

Appellate court could not rule upon admissibility of a foreign divorce decree where the decree was not made a part of the record on appeal. *Rogers v. Rogers*, 229.

ARREST AND BAIL

§ 3. Right to Arrest Without Warrant

Sheriff had probable cause to arrest defendant without a warrant for armed robbery. *S. v. White*, 398.

§ 11. Liabilities on Bail Bonds

Plaintiffs were entitled to judgment against the surety on a bond given for the release of a defendant arrested in a civil action. *Smith v. McClure*, 280.

The surety on a bail bond in a civil action had no standing to move to vacate the arrest of defendant or to move to vacate an order entering summary judgment against defendant. *Ibid.*

ASSAULT AND BATTERY

§ 15. Instructions

In a prosecution for wilfully discharging a firearm into an occupied automobile, trial court erred in giving instructions which equated wilful and wanton conduct with knowledge of occupancy. *S. v. Tanner*, 251.

AUTOMOBILES

§ 2. Grounds and Procedures for Suspension of Drivers' Licenses

Bond forfeiture in a drunken driving case in another state constituted a conviction which would abrogate the discretion of a trial judge to grant a limited driving permit. *In re Sparks*, 65.

Superior court had no authority to reinstate petitioner's driver's license where the facts found by the court show that the Department of Motor Vehicles had discretion to suspend the license. *In re Grubbs*, 232.

§ 3. Driving After Revocation of License

Contents of defendant's drivers license record check were properly limited by court. *S. v. Phillips*, 313.

State's evidence was sufficient for the jury in a prosecution for driving while license was revoked. *Ibid; S. v. Turner*, 321.

Certificate of revocation of a driver's license was admissible where it was initialed by an employee of the Department of Transportation and was not notarized. *S. v. Johnson*, 630.

§ 61. Negligence in Backing

Summary judgment was improper in an action for negligent backing of an automobile. *Gammon v. Clark*, 670.

§ 63. Negligence in Striking Child

Evidence failed to establish actionable negligence on the part of defendant motorist in striking a child who "trotted" into the street. *Daniels v. Johnson*, 68.

§ 76. Contributory Negligence in Hitting Stopped Vehicle

Plaintiff was contributorily negligent in striking an overturned vehicle. *Whaley v. Adams*, 611.

§ 91. Issues and Verdict

Verdicts in a wrongful death action and an action for damages to an automobile, though inconsistent in their wording, achieved the same results. *Blount v. Tyndall*, 559.

§ 112. Competency of Evidence in Homicide Case

Opinion testimony concerning the speed of defendant's automobile was admissible in a manslaughter case. *S. v. Courtney*, 351.

§ 114. Instructions in Homicide Case

Court's instruction allowing the jury to find defendant guilty of involuntary manslaughter if the collision was caused by the concurring negligence of defendant and the decedent was not erroneous. *S. v. Ellis*, 319.

§ 126. Competency and Relevancy of Evidence of Driving Under the Influence

A highway patrolman was not an arresting officer so as to be disqualified from administering a breathalyzer test to defendant where the patrolman passed an arrest scene because it was on his way to the police station and stopped to move defendant's car out of the way of traffic. *S. v. Dail*, 552.

AUTOMOBILES — Continued

§ 127. Sufficiency of Evidence in Prosecution for Driving Under the Influence

Trial court did not err in denying defendant's motions for nonsuit on the charge of a sixth offense of driving under the influence. *S. v. Carlisle*, 23.

Evidence was sufficient for the jury in a prosecution for a second offense of drunken driving. *S. v. Dail*, 552.

BOUNDARIES

§ 8. Proceedings to Establish Boundaries

Defendant's admission of plaintiffs' title converted action from one to try title to processioning proceeding to determine boundary. *Creasman v. Wells*, 645.

§ 11. Declarations of Decedents

Trial court properly admitted declarations by a deceased person concerning a boundary line. *Reid v. Midgett*, 456.

§ 14. Court Surveys

Court's determination of boundary based on court survey which was contrary to a stipulation was erroneous. *Blair v. Fairchilds*, 416.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Testimony that defendant offered to sell witness a chain saw was admissible as circumstantial evidence that defendant was guilty of breaking and entering although there was no evidence the chain saw was the same one stolen in the break-in. *S. v. Brim*, 709.

§ 5. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for breaking and entering a drug store. *S. v. Brown*, 10; *S. v. Erwin*, 301.

Evidence that defendant drove car to place where stolen goods were hidden was insufficient for jury in a prosecution for breaking and entering and larceny. *S. v. McKinney*, 283.

State's evidence was sufficient for submission to the jury on issue of defendant's guilt of breaking and entering under doctrine of possession of recently stolen property. *S. v. Brim*, 709.

§ 7. Instructions as to Possible Verdicts

Court did not err in failure to submit lesser offenses in prosecution for breaking and entering a service station. *S. v. Crowe*, 420.

§ 10. Possession of Housebreaking Implements

Tools found at the scene of the crime but not in defendant's actual possession were admissible in a prosecution for breaking and entering and possession of burglary tools. *S. v. Brown*, 10.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 10. Sufficiency of Evidence

Defendant's contention that he signed a contract with an employment agency because he was told by an employment counselor that the fee

CANCELLATION AND RESCISSION OF INSTRUMENTS — Continued

payment provision would not apply to him because he wanted a fee-paid sales job is insufficient to set aside the contract on the ground of fraud. *Allied Personnel v. Alford,* 27.

Evidence was insufficient for jury in an action to set aside a deed to defendant and her deceased husband and for breach of contract based on alleged false representations that the husband would build a house on the property and take care of plaintiffs. *Gribble v. Gribble,* 366.

CONSPIRACY

§ 5. Relevancy and Competency of Evidence

Trial court properly allowed evidence of conversations which took place between the other conspirators and defendants. *S. v. Lindsey,* 343.

Trial court properly allowed testimony concerning statements made by the witness, defendant and others tending to show that each member of the group planned or consented to the commission of the crimes with which defendant was charged. *S. v. Davis,* 385.

CONSTITUTIONAL LAW

§ 20. Equal Protection; Application of Laws

The statutory requirement that an applicant for licensing as a CPA have two years' experience on the field staff of a CPA in the public practice of accountancy is not unconstitutional. *Duggins v. Board of Examiners,* 131.

§ 23. Scope of Protection of Due Process

A 15 year old child committed to a mental health care facility by his mother was entitled to due process procedures at the earliest possible time after admission. *In re Long,* 702.

§ 28. Necessity for and Sufficiency of Indictment

Defendant was properly tried upon an information signed by the assistant district attorney rather than the district attorney. *S. v. Rimmer,* 637.

§ 29. Right to Trial by Jury

Defendant was not entitled to a jury trial in a criminal contempt proceeding based on his failure to make child support payments ordered by court. *Thompson v. Thompson,* 79.

§ 30. Right to Speedy Trial

Defendants were not denied their right to a speedy trial where there were no allegations as to neglect of the prosecution but where delays were caused by defendants. *S. v. Crowe,* 420.

Defendant was not denied his right to a speedy trial where 10½ months elapsed between the offense and trial. *S. v. Courtney,* 351.

Defendants were not denied their right to a speedy trial by delay of one year between their arrest and trial. *S. v. Lisk,* 659.

§ 31. Right of Confrontation and Access to Evidence

Trial court properly refused to require disclosure of identity of a confidential informant whose information led to a photographic identification of defendant. *S. v. Allen,* 623.

CONSTITUTIONAL LAW — Continued

Trial court properly refused to require disclosure of the cover name of a confidential informant in a prosecution for possession and distribution of heroin. *S. v. Greenlee*, 640.

§ 32. Right to Counsel

Defendants were denied their constitutional guaranty of right to counsel where their attorneys were notified of appointment on the first day of the session and trial was scheduled for the next day. *S. v. Alderman*, 14.

Trial court did not err in failing to appoint counsel to represent defendant where defendant effectively waived counsel. *S. v. Turner*, 321.

§ 33. Self-incrimination

Trial court properly allowed indicted witness to plead the Fifth Amendment with respect to his and defendant's involvement in the offenses charged. *S. v. Holmes*, 581.

§ 34. Double Jeopardy

Defendant was not placed in double jeopardy where at the first trial of the case defendant voluntarily consented to a mistrial in order to employ other counsel. *S. v. Deas*, 294.

CONTRACTS

§ 7. Contracts Against Public Policy

Where a third party sold the products of plaintiff oil company on premises subleased from defendant oil company, defendant's cancellation of the sublease of the third party and entry of a new sublease, after which the third party began selling the products of defendant oil company, did not constitute an unlawful restraint of trade. *Oil Co. v. Oil and Refining Co.*, 82.

§ 12. Construction and Operation of Contracts

Where plaintiff agreed with defendant executor to accept notes "at face value, including all accrued interest" as partial distribution of plaintiff's share under a will and the executor knew that plaintiff understood the language in the contract to mean interest on the notes would not accrue after the date of the agreement, the intention of the parties was determined by plaintiff's interpretation which defendant understood. *Gaddy v. Bank*, 169.

Option for resale of linens in the parties' contract did not obligate defendant to resell linens to plaintiff. *Evergreens, Inc. v. Linen Service*, 439.

§ 16. Time of Performance

Defendant was not entitled to withhold liquidated damages for plaintiff's failure to complete a construction project on time where defendant waived any expectation of adherence to the original contract schedule. *Graham and Son, Inc. v. Board of Education*, 163.

Where defendant delayed payment of valid estimates made by plaintiff, trial court properly awarded interest on the late payments to plaintiff. *Ibid.*

CONTRACTS — Continued

§ 18. Modification and Rescission

Oral agreement between the architect and the contractor amounted to an enforceable modification of the original contract. *Graham and Son, Inc. v. Board of Education*, 163.

Evidence did not show extension of delivery date for corn. *Davenport v. Davenport*, 621.

§ 19. Novation and Substitution

Oral agreement by defendant's employer to pay one half of employment agency's fee was consistent with the agency contract and did not replace it. *Allied Personnel v. Alford*, 27.

§ 21. Performance and Breach

Contractor was not liable for a leaky roof where he advised the architect of defective specifications for the roof but the architect instructed him to follow the specifications. *Graham and Son, Inc. v. Board of Education*, 163.

Failure to pay an installment of the contract price as provided in a building or construction contract is a substantial breach of the contract. *Southeastern Drywall, Inc. v. Construction Co.*, 538.

§ 23. Waiver of Breach

Where a party to a contract bases his refusal to fulfill the contract on a particular ground, all other objections are deemed waived. *Southeastern Drywall, Inc. v. Construction Co.*, 538.

§ 27. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for the jury in an action to recover an amount allegedly owed under an assignment of an option in which defendant agreed to pay plaintiff an additional sum during the option or any extension thereof upon the condition that a firm financial commitment be obtained for the construction of an apartment complex. *Freeman v. Development Co.*, 56.

Plaintiff recovered purchase price of a building purportedly sold by defendant to plaintiff where defendant did not disclose to plaintiff that he had no right to the building unless it was removed from a third party's land within 30 days. *Wilkins v. Ferrell*, 112.

Findings of fact were not dispositive of the issues raised by the pleadings and evidence in an action for breach of a drywall construction subcontract. *Southeastern Drywall, Inc. v. Construction Co.*, 538.

§ 29. Measure of Damages for Breach of Contract

Trial court did not err in the admission of expert testimony as to the diminution in value of a building improperly constructed based on capitalization of income. *Constructors, Inc. v. Morris*, 647.

CORPORATIONS

§ 1. Corporate Existence

There was sufficient evidence from which the jury could find that two corporate defendants were one and the same and were both liable under plaintiff's contract with one corporate defendant. *Freeman v. Development Co.*, 56.

COURTS

§ 6. Appeals to Superior Court from the Clerk

Trial judge properly considered an appeal from the clerk in his reviewing capacity and the court properly overruled the clerk's conclusions and substituted his own. *In re Moore,* 36.

§ 11.1. Practice and Procedure in District Court

District court had jurisdiction of a suit against an administratrix for a debt owed by deceased. *Turner v. Lea,* 113.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

G.S. 14-177 which provides that the crime against nature is a felony is constitutional. *S. v. Enslin,* 662.

CRIMINAL LAW

§ 3. Attempts

Trial court did not err in failing to include wilfulness in its definition of attempt. *S. v. Bindyke,* 273.

§ 7. Entrapment

Trial court properly submitted defendant's contentions concerning entrapment in a prosecution for solicitation to commit murder. *S. v. Keen,* 567.

§ 9. Aiders and Abettors; Principals in the First Degree

Trial court did not err in failing to charge that in order to aid and abet one must be actually or constructively present during commission of the crime. *S. v. Bindyke,* 273.

Instructions on the law of principals in the first degree were proper. *S. v. Hickson,* 619.

§ 10. Accessory Before the Fact

Armed robbery indictment supported a verdict of accessory before the fact of armed robbery. *S. v. Davis,* 385.

§ 18. Venue

Trial court properly denied defendant's motion for a change of venue based on pretrial publicity. *S. v. Olsen,* 451.

§ 18. Jurisdiction on Appeals from District Court

Defendant had no right to appeal to the Court of Appeals from district court's allowance of the entry of a second nolle prosequi by the State or from the court's failure to rule on defendant's motion to dismiss the charge against him on the ground he had been denied a speedy trial. *S. v. Killian,* 224.

§ 26. Plea of Former Jeopardy

Defendant was not placed in double jeopardy where at the first trial of the case defendant voluntarily consented to a mistrial in order to employ other counsel. *S. v. Deas,* 294.

CRIMINAL LAW — Continued

§ 34. Evidence of Defendants' Guilt of Other Offenses

In a prosecution for larceny of an automobile, evidence that defendants pleaded guilty to possession of marijuana found in the vehicle at the time of their arrest was relevant to establish that defendants were acting jointly in stealing the vehicle. *S. v. Rife*, 85.

Trial court in a prosecution for possession of marijuana did not err in allowing the State to cross-examine defendant concerning other instances of possession of marijuana. *S. v. McNair*, 1.

Defendants' motion for mistrial was properly denied where the district attorney made reference to other offenses of defendants in the presence of the jury. *S. v. Lindsey*, 343.

A witness's testimony concerning defendant's statements about participating in other robberies was admissible to show a general plan or design. *S. v. Holmes*, 581.

§ 38. Evidence of Like Transactions

Trial court did not err in allowing evidence of other transactions between a State's witness, a police officer and defendant. *S. v. Newton*, 277.

§ 42. Articles and Clothing Connected With the Crime

Trial court did not err in allowing evidence concerning powder taken from the clothing of a break-in suspect. *S. v. Erwin*, 301.

Amphetamines sold by defendant were admissible in evidence where the custody of the tablets was established. *S. v. Olsen*, 451.

§ 51. Qualification of Expert

Trial court did not err in finding that a police officer was qualified to testify as an expert in the field of numbers lotteries. *S. v. Walker*, 157.

§ 62. Lie Detector Tests

Defendant was not prejudiced when the district attorney asked him about a lie detector test. *S. v. Heath*, 71.

§ 64. Evidence as to Intoxication

A highway patrolman was not an arresting officer so as to be disqualified from administering a breathalyzer test to a defendant where the patrolman passed an arrest scene because it was on his way to the police station and stopped to move defendant's car out of the way of traffic. *S. v. Dail*, 552.

§ 66. Evidence of Identity by Sight

Trial court erred in failing to make sufficient findings of fact that an in-court identification of defendant was not tainted by the illegality of pretrial photographic identification. *S. v. Moses*, 41.

Trial court did not err in admitting identification evidence concerning defendant by an armed robbery victim though the victim had been unable to identify defendant as he and the sheriff drove alongside defendant's car on the highway. *S. v. White*, 398.

Robbery victim's in-court identification of defendant was based on his observations of defendant when she entered the store. *S. v. Davis*, 385.

Robbery victim's in-court identification of defendant was of independent origin and not tainted by a pretrial photographic identification or by confrontation at the jail. *S. v. Allen*, 623.

CRIMINAL LAW — Continued

In-court identification of defendant was of independent origin and not tainted by a photographic identification. *S. v. Davis*, 256; *S. v. Smith*, 595; *S. v. Hickson*, 619.

Witnesses' in-court identification of defendant was not tainted by an illegal lineup. *S. v. Evans*, 667.

Witness's in-court identification of defendant was proper though the two met by chance at the police station. *S. v. Rimmer*, 637.

Robbery victim's identification of defendant was based on her observations at the crime scene and not on a viewing of defendant in a hospital room. *S. v. Whitehead*, 592.

§ 67. Evidence of Identity by Voice

Robbery victim was properly permitted to testify that the men who robbed him "sounded like black people." *S. v. Phillips*, 5.

§ 75. Voluntariness of Confession and Admissibility

Statements made by defendant, a prison visiting officer, to the prison warden and an SBI agent were not the result of custodial interrogation, and waiver of counsel was not required. *S. v. Archible*, 95.

Statement by defendant that a bedroom in which heroin was found was hers was voluntary. *S. v. Davis*, 181.

Volunteered statements made by defendant during the search of his apartment for narcotics were properly admitted in evidence. *S. v. Samuels*, 77.

Trial court did not err in admitting statements made by defendant to a state trooper who stopped him on the highway where defendant was not under arrest at the time. *S. v. Carlisle*, 23.

Trial court did not err in allowing a witness to testify concerning a confession made by defendant though the witness was out of the room for five minutes while defendant continued his confession. *S. v. Kearns*, 445.

Where there was evidence that defendant's confession was not voluntarily and understandingly made, the admission into evidence of the confession for the purpose of impeachment without a determination by the trial court as to its voluntariness was error. *S. v. Langley*, 298.

Statements made by defendant to an undercover agent without the benefit of Miranda warnings were admissible. *S. v. Olsen*, 451.

Trial court properly admitted defendant's in-custody statements made to police officers and a deputy sheriff. *S. v. Davis*, 385.

Juvenile's in-custody statement was improperly admitted where no Miranda warnings were given and the trial court made no findings as to the voluntariness of the statement. *In re Meyers*, 555.

§ 79. Acts and Declarations of Companions, Codefendants and Coconspirators

Trial court in conspiracy case did not err in allowing evidence of conversations which took place between the other conspirators and defendants. *S. v. Lindsey*, 343.

In a joint trial of two defendants trial court did not err in allowing evidence of an attempt by one defendant to influence a juror. *Ibid.*

Trial court did not err in allowing a police officer to testify for corroborative purposes concerning statements made to him by defendant's companion. *S. v. Evans*, 459.

CRIMINAL LAW — Continued

Trial court properly allowed testimony concerning statements made by the witness, defendant and others tending to show that each member of the group planned or consented to the commission of the crimes with which defendant was charged. *S. v. Davis,* 385.

§ 84. Evidence Obtained by Search

Although a codefendant in a robbery case had no standing to object to an illegal search of defendant's car, the codefendant was prejudiced by the State's reference to weapons seized during the illegal search. *S. v. Phillips,* 5.

Officers had reasonable grounds to believe defendant's automobile contained contraband materials used in the operation of a numbers lottery, and officers lawfully searched the automobile without a warrant and seized lottery tickets and money found therein. *S. v. Walker,* 157.

§ 86. Credibility of Defendant and Parties Interested

Trial court did not err in excluding evidence concerning each witness's plea bargain and criminal proclivities where such evidence was merely cumulative. *S. v. Lindsey,* 343.

Trial court erred in allowing cross-examination of defendants concerning convictions or findings of guilty for violation of prison rules. *S. v. Elliott,* 381.

Trial court properly allowed cross-examination of defendant as to his having previously killed a person. *S. v. Parrish,* 466.

§ 88. Cross-examination

In a prosecution for accessory after the fact of armed robbery, trial court properly allowed cross-examination as to distribution of the stolen property. *S. v. Poole,* 715.

§ 89. Credibility of Witnesses; Impeachment

Trial court did not err in refusing to allow defense counsel to cross-examine a State's witness as to the exact times of his prior convictions. *S. v. Fields,* 664.

§ 91. Time of Trial and Continuance

Trial court properly denied defendant's motion for continuance for the purpose of retaining new counsel. *S. v. Samuels,* 77.

Trial court did not err in denying defendant's motion for continuance based on the ground that his counsel was involved in another trial and had no opportunity to prepare. *S. v. Moses,* 41.

Counsel who were appointed for indigent defendants one day before trial was scheduled were excused from filing affidavits showing sufficient grounds for continuance. *S. v. Alderman,* 14.

Trial court properly denied defendant's motion to dismiss charges against him on the ground he was not brought to trial within eight months after giving notice to the solicitor of a request for disposition of the charges against him. *S. v. Watts,* 104.

Trial court did not err in denying defendant's motion for a continuance made after the solicitor read the court calendar containing other charges against defendant in the presence of the jury. *S. v. Curry,* 291.

CRIMINAL LAW — Continued

Trial court did not err in granting a recess rather than a mistrial where the prosecuting witness did not return after the lunch recess. *S. v. Elliott*, 381.

§ 92. Consolidation

Trial court did not err in allowing the consolidation of two cases though one warrant was improperly drawn where the court properly allowed an amendment to the incorrect warrant. *S. v. Carlisle*, 23.

Trial court properly consolidated the cases against two defendants in a conspiracy case. *S. v. Lindsey*, 343.

Indictments charging defendant with felonious breaking and entering and felonious larceny from two service stations on the same night were properly consolidated for trial. *S. v. Caldwell*, 269.

The trial court did not err in consolidating for trial three charges against defendant for armed robbery of two motels and a supermarket on three different dates. *S. v. Davis*, 385.

Trial court properly allowed the State to consolidate for trial four charges of armed robbery. *S. v. Holmes*, 581.

§ 98. Custody of Witnesses

Trial court did not err in denying defendant's request that two witnesses be sequestered. *S. v. Lindsey*, 343.

§ 101. Misconduct Affecting Jury

Trial court did not err in replacing a juror whom defendant had attempted to influence with an alternate. *S. v. Lindsey*, 343.

§ 102. Argument and Conduct of Counsel or Solicitor

Reference to races of the defendant and the prosecuting witness by the solicitor in his jury argument was not prejudicial to defendant. *S. v. Deas*, 294.

Defendant was denied his right to a fair trial when the prosecuting attorney on five occasions referred to the fact that codefendants who were not witnesses had pled guilty to the same charge. *S. v. Atkinson*, 575.

Defendant was not prejudiced by the solicitor's jury argument where the trial court immediately gave a curative instruction. *S. v. Smith*, 595.

§ 107. Nonsuit for Variance

There was no fatal variance between the State's allegations that defendant threatened his victim by telling him that he would take his life and the evidence that defendant threatened only to beat his victim. *S. v. Jacobs*, 500.

§ 112. Instruction on Burden of Proof and Presumptions

Trial court was not required to give instruction on circumstantial evidence absent request therefor. *S. v. Davis*, 181; *S. v. Candler*, 318.

Defendant is entitled to a new trial where the court failed after proper request to explain the law of circumstantial evidence. *S. v. Newton*, 277.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court was not required to define the terms "corroboration" and "substantive evidence." *S. v. Linder*, 474.

CRIMINAL LAW — Continued

Court's charge on acting in concert was supported by evidence that both defendants were in joint possession of recently stolen property and that they acted together in attempting to sell the property. *S. v. Brim*, 709.

§ 121. Instructions on Defense of Entrapment

Trial court did not err in failing to charge on entrapment in narcotics case. *S. v. Greenlee*, 640.

§ 124. Sufficiency and Effect of Verdict in General

In a prosecution upon an indictment charging felonious breaking or entering, larceny and receiving, a jury verdict finding defendant guilty of nonfelonious entry and "not guilty on the other counts" was not ambiguous although the court did not submit the receiving count to the jury. *S. v. Ooten*, 674.

§ 126. Unanimity and Acceptance of Verdict

Trial court did not err in accepting the verdict of the jury while the court reporter was not present to transcribe the form of the verdict. *S. v. Edgerton*, 45.

Trial court did not err in denying defendant's motion for mistrial made on the ground that only 11 jurors decided the case where one juror was unable to hear all the testimony. *S. v. Jacobs*, 500.

§ 128. Mistrial

Trial court did not err in denying defendant's motion for mistrial based on a newspaper article describing other offenses allegedly committed by defendant. *S. v. Trivette*, 266.

§ 131. New Trial for Newly Discovered Evidence

Trial court properly denied defendant's motion for a new trial on ground of newly discovered evidence based on a codefendant's statement at a sentencing hearing that defendant did not participate in the robbery in question. *S. v. Heath*, 71.

Court properly denied defendant's motion for a new trial on the ground of newly discovered evidence based on the victim's opinion formed after the trial that defendant was insane at the time of the crime. *S. v. Hammock*, 97.

§ 134. Requisites of Judgments in General

Defendant in a criminal trespass case was not prejudiced by the trial judge's reference in the judgment and commitment to the wrong statute. *S. v. Edgerton*, 45.

§ 138. Severity of Sentence

Sentence of not less than five nor more than ten years imposed for solicitation to commit murder did not exceed that authorized by law. *S. v. Keen*, 567.

§ 142. Suspended Sentence

Condition of defendant's suspended sentence that his participation in the building or repair trade be limited to employment with others was clearly related to his crime and was not unreasonable and did not violate his constitutional rights. *S. v. Simpson*, 176.

CRIMINAL LAW — Continued

§ 143. Revocation of Suspension of Sentence

At a hearing to revoke the suspension of a prison sentence for the alleged violation of a valid condition of suspension, the court is not bound by strict rules of evidence. *S. v. Simpson*, 176.

In revoking the suspension of sentences in two nonsupport cases, trial court erred in requiring that the sentences run consecutively. *S. v. Pitts*, 548.

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases

Defendant had no right to appeal to the Court of Appeals from district court's allowance of the entry of a second nolle prosequi by the State or from the court's failure to rule on defendant's motion to dismiss the charge against him on the ground he had been denied a speedy trial. *S. v. Killian*, 224.

§ 148. Judgments Appealable

Appeal lies from a juvenile delinquency proceeding in which prayer for judgment was continued. *In re Meyers*, 555.

§ 149. Right of State to Appeal

The State may not appeal from an order setting aside the verdict in a criminal case on the ground it was not supported by the evidence. *S. v. Pinkney*, 316.

§ 155.5 Docketing of Transcript of Record in Court of Appeals

Order extending time to serve case on appeal does not extend the time to docket the appeal. *S. v. Phillips*, 109.

Appeal is dismissed for failure to docket record within 90 days after date of judgment appealed from. *S. v. McCoy*, 669.

Order entered after 90 days had expired does not extend time for docketing record on appeal. *S. v. Clark*, 677.

§ 163. Exceptions and Assignments of Error to Charge

Defendant's assignment of error to the trial court's instructions is without merit where he failed to object or tender request for a proper instruction. *S. v. Middleton*, 632.

Defendant's objection to the trial court's charge is without merit where defendant did not suggest what the court should have charged or request a specific instruction. *S. v. Poole*, 715.

§ 169. Harmless and Prejudicial Error in Admission of Evidence

Defendant was not prejudiced by the admission of evidence concerning his prior convictions for violation of the liquor laws. *S. v. Hammonds*, 617.

§ 181. Post-Conviction Hearing

Trial court in post-conviction hearing erred in placing burden on the State to prove that defendant's guilty plea was voluntarily entered. *S. v. Johnson*, 462.

DAMAGES

§ 7. Liquidated Damages

Defendant was not entitled to withhold liquidated damages for plaintiff's failure to complete a construction project on time where defendant waived any expectation of adherence to the original contract schedule. *Graham and Son, Inc. v. Board of Education,* 163.

Defendant construction lender is entitled to charge plaintiff liquidated damages for loss of servicing the permanent loan with the long-term lender when plaintiff arranged a loan with a different long-term lender. *Longiotti v. Trust Co.,* 532.

§ 13. Competency of Evidence on Issue of Compensatory Damages

Trial court did not err in the admission of expert testimony as to the diminution in value of a building improperly constructed based on capitalization of income. *Constructors, Inc. v. Morris,* 647.

§ 16. Instructions on Measure of Damages

Trial court's instructions on liability for damages to one of peculiar susceptibility were proper. *Hinson v. Sparrow,* 571.

DEATH

§ 3. Wrongful Death

A wrongful death action by a foreign administrator in N. C. will not operate to bar the running of the two-year statute of limitations. *Sims v. Construction Co.,* 472.

No action lies for the wrongful death of a viable unborn seven month old fetus allegedly caused by defendants' negligence in a motor vehicle collision. *Cardwell v. Welch,* 390.

DEEDS

§ 4. Competency of Grantor

Evidence was insufficient to be submitted to the jury in an action to set aside a deed where plaintiff alleged undue influence in its procurement. *Stewart v. Stewart,* 628.

§ 20. Restrictive Covenants as Applied to Subdivision Development

Evidence that one lot in a subdivision was used for a mobile home was insufficient to show such a change in the character of the subdivision as to defeat the purposes of a restrictive covenant forbidding use of lots for trailers. *Van Poole v. Messer,* 203.

Trial court did not err in failing to instruct the jury that it could find plaintiffs waived their right to enforce a restrictive covenant if they "silently acquiesced" in the violation of the covenant. *Ibid.*

DIVORCE AND ALIMONY

§ 8. Abandonment

Trial court's finding of abandonment without justification was supported by the evidence. *Sauls v. Sauls,* 468.

Finding that plaintiff decreased amount of support to his wife and family was insufficient to sustain conclusion that plaintiff had abandoned his wife. *Powell v. Powell,* 695.

DIVORCE AND ALIMONY — Continued

§ 16. Alimony Without Divorce

Trial judge properly considered plaintiff's earning capacity as a teacher in determining the amount of alimony to be awarded her. *Spillers v. Spillers,* 261.

Trial court did not err in refusing to order defendant to continue his membership in a country club for plaintiff's benefit. *Ibid.*

When adultery is pleaded in bar of a demand for alimony pendente lite or alimony, award will not be sustained in absence of a finding on the issue of adultery in favor of the party seeking the award. *Foster v. Foster,* 676.

Trial court erred in basing amount of plaintiff's alimony and child support on his capacity to earn rather than on his actual earnings. *Powell v. Powell,* 695.

Trial court's findings were insufficient to support award of attorney's fees to defendant. *Ibid.*

§ 17. Alimony Upon Divorce from Bed and Board

Trial court's order granting plaintiff a divorce from bed and board and awarding plaintiff alimony was a final order. *Kale v. Kale,* 99.

§ 18. Alimony Pendente Lite

The trial court erred in denying plaintiff alimony *pendente lite* based on a finding that plaintiff failed to show that she is substantially dependent on defendant for maintenance and support since the court ignored the alternative method given to plaintiff to prove that she is a dependent spouse. *Loflin v. Loflin,* 103.

Trial court properly concluded that plaintiff was not a dependent spouse and thus not entitled to alimony pendente lite. *Orren v. Orren,* 106.

§ 21. Enforcing Alimony Payment

Evidence supported court's determination that defendant's failure to make support payments was wilful. *Thompson v. Thompson,* 79.

A court order requiring defendant to secure payment of temporary alimony by means of a deed of trust did not give to plaintiff a fixed or permanent interest or any right to the entire proceeds of a foreclosure sale. *Johnson v. Johnson,* 448.

§ 23. Child Support

In determining a motion for modification of a child support order, the court could consider changes in circumstances only since entry of the most recent order. *Shipman v. Shipman,* 213.

Where, by terms of a consent judgment, defendant father agreed to pay an amount for support of a child until a certain date and thereafter to pay $2000 per year for college expenses up to four years, the father's obligation to provide support by payment of college expenses did not end when the child reached majority at age 18. *White v. White,* 150.

Plaintiff's obligations undertaken in a separation agreement to make monthly support payments for his children and contribute toward their preparatory education did not terminate when each child became 18 years of age, and order requiring plaintiff to provide funds for private schools did not violate either the N. C. or U. S. Constitutions. *Carpenter v. Carpenter,* 235.

DIVORCE AND ALIMONY—Continued

Plaintiff physician failed to show substantial change of circumstances in his earning capacity such as to entitle him to a reduction in the amount of child support payments. *Ibid.*

Court properly required plaintiff to pay a fee to defendant's attorney in a hearing on plaintiff's motion to reduce child support and educational payments. *Ibid.*

Trial court erred in entering an order for child support without making findings as to the ages and circumstances of the children. *Ramsey v. Todd,* 605.

Plaintiff was obligated by separation agreement to apply alimony toward support of the children of the parties. *Pruneau v. Sanders,* 510.

There was sufficient showing of changed circumstances to support increase in amount of child support ordered by a Virginia decree. *Ibid.*

There was a sufficient showing of changed circumstances to support reduction of defendant's child support payments. *Springs v. Springs,* 615.

§ 24. Child Custody

Evidence that the mother had remarried was insufficient to show a substantial change of circumstances requiring the court to modify child custody order. *King v. Allen,* 90.

Trial court properly modified child custody decree by providing time, place and conditions for exercise of visitation privileges. *Pruneau v. Sanders* 510.

Findings that defendant is a fit person to have custody of the children and that plaintiff is a fit person to have visitation rights are insufficient to sustain an award of custody. *Powell v. Powell,* 695.

DURESS

Defendant's refusal to allow plaintiff to regain possession of his car until plaintiff signed a paper writing releasing defendant from liability for poor workmanship and a promissory note for the balance due for the original work constituted duress of goods. *Adder v. Holman & Moody, Inc.,* 588.

Where plaintiff stood to lose $70,000 in a standby fee with a prospective permanent lender unless defendant construction lender gave up its interest in the transaction between plaintiff and its original permanent lender, requirement by defendant that plaintiff pay it $27,000 in liquidated damages before defendant would release such interest did not amount to economic duress. *Longiotti v. Trust Co.,* 532.

ELECTIONS

§ 14. Primary Elections

Appeal from a superior court judgment refusing to order a new primary election to select a nominee to run for alderman in the November 1974 general election is dismissed as moot. *Little v. Board of Elections,* 304.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

Evidence was sufficient for jury where it showed defendant was given money to purchase corporation stock but he did not do so and did not return the money. *S. v. Hitt,* 216.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

Power company's choice of a route for an electric transmission line across respondent's property will not be interfered with on appeal. *Power Co. v. Ribet,* 87.

§ 2. Acts Constituting a Taking

Denial of plaintiffs' access to a highway interchange ramp and erection of a fence between the ramp and plaintiffs' property did not entitle plaintiffs to compensation. *Hudson v. Board of Transportation,* 435.

§ 7. Proceedings, Generally

Trial court had no authority to allow the filing of an answer in a city's condemnation action after the time for filing answer provided by statute had passed. *City of Greensboro v. Irvin,* 661.

§ 13. Actions by Owner for Compensation or Damages

In an action started by landowner under G.S. 136-111, it was proper for the trial judge without a jury to determine whether an interest in plaintiff's property had been taken. *Lautenschlager v. Board of Transportation,* 228.

EVIDENCE

§ 11. Communications with Decedent

A surviving tenant by the entirety is the "survivor of a deceased person" within the meaning of the dead man's statute in an action which attacks the validity of the deed by which the tenancy by the entirety was created. *Gribble v. Gribble,* 366.

In a breach of contract action in which plaintiffs contended defendant's deceased husband acted for himself and as agent for defendant, the dead man's statute applied to exclude testimony by plaintiffs concerning personal transactions between them and deceased agent. *Ibid.*

§ 29. Accounts and Private Writings

Dun and Bradstreet reports were properly excluded where they were not authenticated. *H-K Corp. v. Chance,* 61.

§ 41. Nonexpert Opinion Evidence as Invasion of Province of Jury

Testimony that higher construction of a floor would have allowed more drainage did not invade province of jury. *Constructors, Inc. v. Morris,* 647.

EXECUTION

§ 1. Property Subject to

Church property is not exempted from sale under execution. *Electrical Contractor, Inc. v. Baptist Church,* 563.

EXECUTORS AND ADMINISTRATORS

§ 3. Appointment of Ancillary Administrators

Trial court in wrongful death action properly refused to substitute for nonresident administratrix a resident administrator who qualified after expiration of statute of limitations. *Sims v. Construction Co.*, 472.

§ 5. Attack on Appointment

Trial court did not err in declaring legally incompetent the executor named in deceased's will because he worked as a CPA for a corporation whose chief executive officer might have to be sued by the estate. *In re Moore*, 36.

§ 18. Claim Against Estate

District court had jurisdiction of a suit against an administratrix for a debt owed by deceased. *Turner v. Lea*, 113.

FALSE PRETENSE

§ 2. Indictment and Warrant

An indictment charging that defendant falsely represented himself to be working for an insurance company was sufficient to charge defendant with false pretense under G.S. 14-100. *S. v. Simpson*, 176.

§ 3. Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution for obtaining money by false pretense by falsely representing that real property was not subject to any encumbrances. *S. v. Wallace*, 360.

FIDUCIARIES

A family relationship does not raise a presumption of fraud or undue influence. *Gribble v. Gribble*, 366.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for Debt of Another

Evidence was sufficient for submission to the jury on the issue of whether defendant's oral promise to stand good for the printing of catalogues for a school of heavy equipment came within the "main purpose rule" and thus was not within the statute of frauds. *Studio, Inc. v. School of Heavy Equipment*, 544.

GAMBLING

§ 3. Lotteries

Warrant charging defendant sold tickets and tokens to be used in a numbers "lottery" was sufficient to charge violation of G.S. 14-291.1 without alleging there was to be a "drawing or paying at any time, either within or without the State." *S. v. Walker*, 157.

Trial court did not err in finding that a police officer was qualified to testify as an expert in the field of numbers lotteries. *Ibid.*

GUARANTY

In bank's action against the guarantor of a loan, trial court erred in striking defendant guarantor's defense that the bank acted fraudulently in failing to inform defendant of facts which materially increased his risk. *Trust Co. v. Akelaitis,* 522.

HIGHWAYS AND CARTWAYS

§ 5. Rights of Way

Denial of plaintiffs' access to a highway interchange ramp and erection of a fence between the ramp and plaintiffs' property did not entitle plaintiffs to compensation. *Hudson v. Board of Transportation,* 435.

HOMICIDE

§ 9. Self-defense

In the exercise of his lawful right of self-defense, a person may kill if he believes it to be necessary and has reasonable ground for his belief. *S. v. Shelton,* 207.

§ 21. Sufficiency of Evidence and Nonsuit

Issue of voluntary manslaughter by reason of excessive force in self-defense was a question for the jury. *S. v. Locklear,* 74.

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where death resulted from drowning. *S. v. Bledsoe,* 32.

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where defendant shot and killed a bar owner. *S. v. Curry,* 291.

The crime of solicitation to commit murder is complete with the solicitation even though there could never have been an acquiescence in the scheme by the one solicited. *S. v. Keen,* 567.

§ 26. Instruction on Second Degree Murder

Defendant's conviction of voluntary manslaughter rendered harmless the submission of the greater charge of second degree murder to the jury. *S. v. Wynn,* 625.

§ 28. Instructions on Defenses

Where defendant offered evidence of self-defense, trial court erred in failing to give instructions on that defense. *S. v. Shelton,* 207.

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreement

Trial court did not err in allowing plaintiff to amend her complaint to include defendant's arrearages in support payments from the time plaintiff filed the action until the date of trial. *McKnight v. McKnight,* 246.

§ 12. Revocation and Rescission of Separation Agreement

Plaintiff's right to support provided for in a separation agreement survived the absolute divorce between the parties. *McKnight v. McKnight,* 246.

HUSBAND AND WIFE — Continued

Trial court erred in entering summary judgment in an action to enforce a provision of a separation and property settlement agreement where the jury was presented the question whether the parties had renewed their marital relations. *Newton v. Williams*, 527.

INDICTMENT AND WARRANT

§ 12. Amendment

Trial court did not err in allowing the consolidation of two cases though one warrant was improperly drawn where the court properly allowed an amendment to the incorrect warrant. *S. v. Carlisle*, 23.

Trial court properly allowed amendment of a warrant where the offense charged was not changed. *S. v. Jacobs*, 500.

INFANTS

§ 2. Liability on Contracts

A genuine issue existed relative to defendant's disaffirmance of any contractual obligations incurred during his minority by accepting benefits under an automobile liability policy. *Insurance Co. v. Chantos*, 482.

§ 9. Custody of Minor

Evidence supported the court's findings in a proceeding in which the court awarded custody of a child to its maternal uncle and aunt. *Roberts v. Roberts*, 198.

Evidence was sufficient to support trial court's finding that the mother was unfit to have custody of the minor child. *In re Edwards*, 608.

Action is remanded where the trial court awarded custody of a child to a person not a party to the action. *Ibid.*

§ 10. Commitment of Minor for Delinquency

Appeal lies from a juvenile delinquency proceeding in which prayer for judgment was continued. *In re Meyers*, 555.

Juvenile's in-custody statement was improperly admitted where no Miranda warnings were given and the trial court made no findings as to the voluntariness of the statement. *Ibid.*

INJUNCTIONS

§ 12. Temporary Orders

Plaintiff lienholder was not entitled to a preliminary injunction restraining execution sale of the property to satisfy a judgment obtained by a prior lienholder. *Waff Bros., Inc. v. Bank*, 517.

Trial court properly granted preliminary injunction restraining defendants from obstructing a roadway over their lands. *Pruitt v. Williams*, 376.

INSANE PERSONS

§ 1. Commitment to Hospital

Trial court erred in ordering the respondent to be committed to a mental health care facility where there was no finding that respondent was dangerous to herself or that danger was imminent. *In re Carter*, 442.

INSANE PERSONS — Continued

Involuntary commitment of a prison inmate to a mental hospital was supported by finding that she suffers from mental illness resulting in her refusal to eat which makes her imminently dangerous to herself. *In re Mostella,* 666.

Respondent in a proceeding for involuntary commitment to a mental health care facility was not entitled to a trial by jury. *In re Taylor,* 642.

Evidence was sufficient to support trial court's finding that respondent was imminently dangerous to himself and others. *Ibid.*

A 15 year old child committed to a mental health care facility by his mother was entitled to due process procedures at the earliest possible time after admission. *In re Long,* 702.

INSURANCE

§ 2. Brokers and Agents

Evidence was sufficient for the jury to find defendant insurance agents were negligent in procuring purported fire insurance for plaintiff which was not valid and which was the result of fraud by a general agency in another state. *Kaperonis v. Underwriters,* 119.

§ 50. Accident Insurance—Proximate Cause

Evidence supported trial court's determination that insured suffered "an accidental fall" and that her death "was solely as a direct result thereof" within the meaning of an accident policy. *Williams v. Insurance Co.,* 505.

§ 79. Liability Insurance Generally

Plaintiff was not entitled to recover under an automobile policy for a trailer which plaintiff sold but in which plaintiff retained a security interest. *Moser v. Insurance Co.,* 309.

§ 87. Omnibus Clause: Drivers Insured

Driver who was given permission to drive from the original permitteeson of insured was a driver in lawful possession of the vehicle. *Insurance Co. v. Chantos,* 482.

§ 112. Subrogation of Liability Insurer

For plaintiff to invoke the reimbursement provision of an automobile liability insurance policy against defendant who was the "insured" referred to in the policy it would be necessary that defendant actively seek protection under the policy. *Insurance Co. v. Chantos,* 482.

§ 125. Fire Insurance—Location of Property

Fire insurance policy covering a house "while located or contained as described in this policy . . . but not elsewhere" did not cover a fire loss which occurred after the house had been moved from the described location. *Blue Cross and Blue Shield v. Insurance Co.,* 578.

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Board

Board of Alcoholic Control may require the holder of a distillery representative's permit to produce relevant business books and records even

INTOXICATING LIQUOR — Continued

though the Board lacks traditional probable cause, but the Board must give permittee notice and an opportunity to be heard before it can revoke a permit for failure to produce records as ordered. *Myers v. Holshouser*, 683.

JUDGMENTS

§ 29. Meritorious Defense

In determining whether defendant has a meritorious defense, the court should determine only whether defendant has, in good faith, presented by his allegations, prima facie, a valid defense and should not resolve the controverted factual allegations. *Bank v. Finance Co.*, 211.

JURY

§ 1. Right to Trial by Jury

Defendant was not entitled to a jury trial in a criminal contempt proceeding based on his failure to make child support payments ordered by the court. *Thompson v. Thompson*, 79.

Trial court did not err in denying defendant's motion for mistrial made on the ground that only 11 jurors decided the case where one juror was unable to hear all the testimony. *S. v. Jacobs*, 500.

Respondent in a proceeding for involuntary commitment to a mental health care facility was not entitled to a trial by jury. *In re Taylor*, 642.

§ 3. Number of Jurors

Defendant was not prejudiced when the court allowed the alternate juror to go into the jury room with the other jurors where the alternate did not participate in the deliberations. *S. v. Bindyke*, 273.

§ 5. Personal Disqualifications

Trial court did not err in failing to allow defendant to remove certain jurors because they knew the solicitor or a witness or were related to people in the field of law enforcement. *S. v. Poole*, 715.

§ 7. Challenges

Trial court properly denied defendant's challenges of jurors for cause based on alleged unfavorable pretrial publicity. *S. v. Olsen*, 451.

LANDLORD AND TENANT

§ 6. Use and Occupation of Leased Property

Defendant did not breach its lease agreement with plaintiff when it converted from a full-scale service station to a convenience store selling gasoline. *Samia v. Oil Co.*, 601.

§ 13. Expiration of Term

By exercising its option to occupy all of the premises of lessee, sublessee did not thereby forfeit the general right of termination given both parties by their contract. *Aydin Corp. v. Telegraph Corp.*, 427.

LARCENY

§ 6. Competency and Relevancy of Evidence

Testimony that defendant offered to sell witness a chain saw was admissible as circumstantial evidence that defendant was guilty of larceny though there was no evidence the chain saw was the same one stolen. *S. v. Brim*, 709.

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of felonious larceny as an aider and abettor. *S. v. Curry*, 101.

State's evidence was insufficient for the jury in a prosecution for larceny of a television set where it tended to show defendant took the set for the purpose of coercing the owner to pay him money and intended to hold the set only until the owner paid. *S. v. Watts*, 194.

Evidence was sufficient for jury in a prosecution for breaking and entering a pharmacy. *S. v. Erwin*, 301.

Evidence that defendant drove a car to place where stolen goods were hidden was insufficient for jury in a prosecution for breaking and entering and larceny. *S. v. McKinney*, 283.

Trial court erred in denying defendant's motion for nonsuit in a prosecution for larceny of furniture where defendant was in lawful possession of the furniture at the time of the taking. *S. v. Bailey*, 412.

Evidence was sufficient for the doctrine of possession of recently stolen property to apply in this prosecution for larceny, but the evidence was insufficient to convict defendant of felonious larceny and the verdict must be treated as a verdict of guilty of misdemeanor larceny. *S. v. Lilly*, 453.

State's evidence was sufficient for the jury in a prosecution of three defendants for larceny of an automobile under the doctrine of possession of recently stolen property. *S. v. O'Donald*, 598.

State's evidence was sufficient for jury under doctrine of possession of recently stolen property although defendant offered evidence stolen property was lawfully acquired from a man at a poolroom. *S. v. Brim*, 709.

§ 8. Instructions

Court did not err in failure to submit lesser offenses in prosecution for larceny by breaking and entering a service station. *S. v. Crowe*, 420.

Trial court's instruction that defendant would be guilty of larceny if he took and carried away without the owner's consent specified property "or other items of personal property" did not allow the jury to convict defendant upon finding he had stolen property not mentioned in the indictment. *S. v. Brim*, 709.

Trial court correctly instructed jury as to presumption arising from possession of recently stolen property. *Ibid.*

MASTER AND SERVANT

§ 49. "Employees" Within Meaning of Workmen's Compensation Act

Decedent was not an employee within the meaning of the Workmen's Compensation Act when he was shot and killed during a robbery while operating the cash register at defendant's store where he had been dis-

MASTER AND SERVANT — Continued

missed as an employee and knew that the district manager who allowed him to work in the store exceeded his authority in doing so. *Lucas v. Stores,* 190.

§ 60. Personal Missions

Plaintiff's accident did not arise out of and in the course of his employment when he was injured in an automobile accident while driving from a job site to his home for the purpose of appearing in traffic court. *Larue v. Austin-Berryhill, Inc.,* 408.

§ 96. Review in Court of Appeals

Upon appeal from the Industrial Commission the Court of Appeals does not have the right to weigh the evidence and decide the issue on the weight it gives the evidence. *Shook v. Construction Co.,* 231.

MECHANICS' LIENS

§ 1. Nature and Extent

Defendant's lien for work done on plaintiff's car was terminated when defendant voluntarily relinquished possession of the car to plaintiff after completion of the work. *Adder v. Holman & Moody, Inc.,* 588.

MONOPOLIES

§ 2. Agreements Unlawful

Where a third party sold the products of plaintiff oil company on premises subleased from defendant oil company, defendant's cancellation of the sublease of the third party and entry of a new sublease, after which the third party began selling the products of defendant oil company, did not constitute an unlawful restraint of trade. *Oil Co. v. Oil and Refining Co.,* 82.

MUNICIPAL CORPORATIONS

§ 6. Municipal Governing Boards, Meetings and Records

City council conducted hearings investigating corruption in the police department had authority to adopt rules providing for live radio and television coverage. *Leak v. High Point City Council,* 394.

§ 29. Nature and Extent of Municipal Police Power

Where plaintiff did not seek judicial review of an administrative decision ordering the demolition of buildings declared unfit for human habitation, plaintiff could not collaterally attack such decision by an independent action seeking injunctive relief. *Axler v. City of Wilmington,* 110.

§ 30. Zoning Ordinances

Closing of a restaurant business to the general public for remodeling did not constitute a discontinuance of a nonconforming use within the meaning of a zoning ordinance. *Diggs v. City of Wilson,* 464.

§ 42. Claims Against Municipality for Personal Injury

Plaintiff's claim against the city for personal injuries was properly dismissed where she failed to notify the city council. *Miller v. City of Charlotte,* 584.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offense

Defendants could not be convicted of possession of heroin and possession of same heroin with intent to manufacture and sell. *S. v. Harris*, 404.

§ 4. Sufficiency of Evidence

In a prosecution for possession of heroin, credibility of the State's case was not destroyed by conflicts in evidence as to whether heroin was seized before or after defendant was placed in jail. *S. v. Vance*, 92.

Evidence was sufficient to raise an inference that defendant possessed heroin hidden in an artificial potted plant located in her bedroom. *S. v. Davis*, 181.

State's evidence was sufficient for the jury in a prosecution for possession and distribution of heroin. *S. v. Greenlee*, 640.

PARENT AND CHILD

§ 1. The Relationship Generally

Parent's right to bring up a child as he chooses is not absolute. *In re Long*, 702.

§ 7. Duty to Support

Where, by terms of a consent judgment, defendant father agreed to pay an amount for support of a child until a certain date and thereafter to pay $2000 per year for college expenses up to four years, the father's obligation to provide support by payment of college expenses did not end when the child reached majority at age 18. *White v. White*, 150.

N. C. law was applicable in an action by plaintiff who was a resident of S. C. to recover child support from defendant who was a resident of N. C. *Shaw v. Shaw*, 53.

Defendant father was under no obligation to support his 18 year old son. *Ibid.*

Plaintiff's obligations undertaken in a separation agreement to make monthly support payments for his children and contribute toward their preparatory education did not terminate when each child became 18 years of age. *Carpenter v. Carpenter*, 235.

§ 9. Prosecution for Nonsupport

Evidence was sufficient to support the trial court's findings that defendant failed to support his illegitimate children. *S. v. Pitts*, 548.

PARTNERSHIP

§ 1. Nature, Requisites and Distinctions

Credit applications signed by defendant's son showing defendant as a partner in the son's clothing business were inadmissible to show defendant was a partner in the business. *H-K Corp. v. Chance*, 61.

Plaintiff's evidence was insufficient to establish that defendant was a partner in fact or by estoppel in a retail clothing business operated by defendant's son. *Ibid.*

PATENTS

§ 2. Licensing, Contracts, Royalties

In an action to recover under a contract settling plaintiffs' claims against defendant for patent infringement, defendant may not properly assert defenses or counterclaim that patent is not valid or was not infringed. *Carding Specialists v. Gunter & Cooke,* 491.

PENSIONS

The eligibility date for computing plaintiff's benefits under a non-contributory profit sharing trust for defendant's employees was the date plaintiff submitted his letter of resignation. *Ashe v. Motor Lines,* 657.

PHYSICIANS AND SURGEONS

§ 16. Sufficiency of Evidence of Malpractice

Trial court erred in entering summary judgment for plastic surgeon on claim based on misrepresentations and warranties but properly entered summary judgment on claims based on negligent post-operative care and battery. *Butler v. Berkeley,* 325.

PROCESS

§ 9. Personal Service on Nonresident Individuals in Another State

Trial court did not acquire in personam jurisdiction over a corporation which had no contacts within this State. *Andrews v. Sodibar Systems,* 372.

§ 13. Service on Agent of Foreign Corporation

Foreign corporation was subject to in personam jurisdiction in this State in an action to reform a contract with a basketball player entered in this State. *Munchak Corp. v. Caldwell,* 652.

PROPERTY

§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property

State's evidence was sufficient for the jury on the issues of defendant's guilt of felonious conspiracy to damage real and personal property and attempt to damage personal property. *S. v. Bindyke,* 273.

State's evidence was sufficient for the jury in a prosecution for wantonly damaging real property. *S. v. Candler,* 318.

A sentence of six months was the maximum term that could be imposed for wilful damage to personal property where there was no jury finding that the damage exceeded $200. *S. v. Tanner,* 251.

Offense of discharging a firearm in a city is embraced within the offense of wilful damage to personalty by shooting out an automobile window, but offense of damage to personalty is not included within elements of discharging firearm into an occupied vehicle. *Ibid.*

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers to Private Individuals

The one-year statute of limitations applied in an action against a sheriff for neglect of a prisoner. *Williams v. Adams,* 475.

QUASI CONTRACTS

§ 2. Action to Recover on Implied Contract

Evidence was sufficient to support verdict for plaintiff against defendant on the theory of quantum meruit in an action to recover an amount allegedly owed under an assignment of an option. *Freeman v. Development Co.*, 56.

RAPE

§ 10. Competency and Relevancy of Evidence of Carnal Knowledge of Female Under Twelve Years

Doctor's testimony that a child had been molested, if erroneous, was harmless beyond a reasonable doubt. *S. v. Fields*, 664.

§ 11. Sufficiency of Evidence of Carnal Knowledge of Female Under Twelve

Evidence was sufficient to be submitted to the jury in a prosecution for carnal knowledge of a female under the age of 12. *S. v. Bryan*, 233.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for jury in a prosecution for felonious conspiracy to receive stolen goods. *S. v. Newton*, 277.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 2. Property

Church property is not exempted from sale under execution. *Electrical Contractor, Inc. v. Baptist Church*, 563.

ROBBERY

§ 2. Indictment

Armed robbery indictments clearly negated the idea that defendants took their own property and were sufficient as to ownership. *S. v. Phillips*, 5.

Armed robbery indictment supported a verdict of accessory before the fact of armed robbery. *S. v. Davis*, 385.

§ 4. Sufficiency of Evidence and Nonsuit

Accomplice's testimony was sufficient for the jury in an armed robbery case. *S. v. Phillips*, 5.

Evidence was sufficient in an armed robbery prosecution to support a jury verdict finding that defendant aided and abetted another in the commission of the crime where it tended to show that defendant drove the getaway car. *S. v. Logan*, 49.

State's evidence was sufficient for the jury on issues of defendant's guilt of armed robbery of two motels and of accessory before the fact of armed robbery of a supermarket. *S. v. Davis*, 385.

Evidence was sufficient to show that firearm was used in robbery. *S. v. Evans*, 459.

ROBBERY — Continued

Evidence was sufficient for the jury in an armed robbery prosecution. *S. v. Holmes*, 581.

Evidence was sufficient to support a guilty verdict in a prosecution for being an accessory after the fact of armed robbery. *S. v. Poole*, 715.

§ 5. Instructions

Defendant who drove the getaway car in an armed robbery is entitled to a new trial where the court did not define aiding and abetting. *S. v. Logan*, 49.

Trial court properly charged that the doctrine of possession of recently stolen property was applicable to armed robbery. *S. v. Hickson*, 619.

RULES OF CIVIL PROCEDURE

§ 15. Amended and Supplemental Pleadings

Distinction between amendments and supplemental pleadings. *McKnight v. McKnight*, 246.

§ 24. Intervention

The successful bidder at an auction sale could intervene to contest a motion to enjoin conveyance of the property which was the subject of the sale. *Bank v. Robertson*, 424.

§ 42. Consolidation

Trial court properly consolidated four cases involving one accident and properly ordered trial of issues of negligence and contributory negligence only. *Wood v. Brown*, 241.

§ 49. Verdicts

Where defendants did not object to issue submitted and did not request the court to submit a second issue, they waived their right to have the second issue passed on by the jury. *Van Poole v. Messer*, 203.

§ 50. Motion for Directed Verdict

It is improper to direct a verdict in favor of the party having the burden of proof only when the party's right to recover depends upon the credibility of his witnesses. *Freeman v. Development Co.*, 56.

An order denying a motion for directed verdict following a mistrial is not appealable. *Samia v. Oil Co.*, 601.

§ 52. Findings by the Court

In issuing a preliminary injunction, trial court was not required to make findings of fact and conclusions of law. *Pruitt v. Williams*, 376.

§ 54. Judgments

Judgment from which original defendants purported to appeal which adjudicated the rights of fewer than all of the parties was interlocutory and not appealable. *Leasing, Inc. v. Dan-Cleve Corp.*, 18.

Trial court's order dismissing plaintiff's claim against two defendants adjudicating fewer than all the claims of all the parties was interlocutory and was not appealable. *Durham v. Creech*, 721.

§ 55. Default Judgment

Order setting aside an entry of default is interlocutory and therefore not appealable. *Acoustical Co. v. Cisne and Associates*, 114.

RULES OF CIVIL PROCEDURE — Continued

Entry of default may be set aside without findings of excusable neglect and meritorious defense. *Ibid.*

§ 65. Injunctions

Trial court complied with Rule 65 by clearly stating the reasons for the issuance of the preliminary injunction. *Pruitt v. Williams*, 376.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers had reasonable grounds to believe defendant's automobile contained contraband materials used in the operation of a numbers lottery, and officers lawfully searched the automobile without a warrant and seized lottery tickets and money found therein. *S. v. Walker*, 157.

Evidence found on defendant's person while he was being examined at a hospital was admissible in a prosecution for manslaughter. *S. v. Courtney*, 351.

§ 2. Consent to Search Without Necessary Warrant

Defendant did not consent to a search of his car where officers told defendant after they arrested him that they had a warrant to search his car and he told them to go ahead. *S. v. Phillips*, 5.

Evidence supported findings that sheriff had probable cause to search vehicle and that defendant consented to the search. *S. v. White*, 398.

§ 3. Requisites and Validity of Search Warrant

An affidavit was sufficient to support issuance of a warrant to search defendant's premises for marijuana. *S. v. McNair*, 1.

Officer's affidavit based on information received from a confidential informant was insufficient to support issuance of a warrant to search defendant's car for a pistol taken in a robbery. *S. v. Phillips*, 5.

Fact that affidavit for a warrant to search for heroin was executed at 7:45 p.m. and defendant brought heroin to the premises at 9:30 p.m. did not subject the warrant to quashal on the ground the affiant misrepresented to the magistrate that heroin was on the premises. *S. v. Vance*, 92.

Affidavit of a police officer based on information from a confidential informant was sufficient to support issuance of a warrant to search defendant's apartment for stolen goods. *S. v. Caldwell*, 269.

Where a search warrant is valid on its face, defendant may not attack the allegations or the credibility of the affiant or his informant in the voir dire hearing on defendant's motion to suppress the evidence. *S. v. Harris*, 404.

Search warrant was not invalidated by the fact that the magistrate and the affiant signed the warrant in the space provided for the other. *S. v. Brannon*, 635.

Search warrant was not invalid though the record indicated that the affidavit was actually signed subsequent to the signing of the search warrant. *Ibid.*

§ 4. Search Under the Warrant

Officers' seizure of other items in defendant's apartment was proper though the warrant provided for a search for marijuana. *S. v. McNair*, 1.

SHERIFFS AND CONSTABLES

The one-year statute of limitations applies in an action against a sheriff for neglect of a prisoner. *Williams v. Adams*, 475.

TELEPHONE AND TELEGRAPH COMPANIES

§ 5. Prosecution for Obscene or Threatening Calls

There was no fatal variance between the State's allegation that defendant threatened his victim by telling him that he would take his life and the evidence that defendant threatened only to beat his victim. *S. v. Jacobs*, 500.

TRESPASS

§ 13. Prosecutions for Criminal Trespass

State's evidence was sufficient for the jury in a criminal trespass case. *S. v. Edgerton*, 45.

It was not necessary for the court in a trespass case to charge the jury that the State had to prove defendants entered the property "without a license therefor." *Ibid.*

TRESPASS TO TRY TITLE

§ 1. Nature and Essentials of Right of Action

Trial court did not err in failing to submit an issue of title by adverse possession where defendants admitted plaintiff's title in their lands. *Creasman v. Wells*, 645.

TRIAL

§ 3. Motion for Continuance

Trial court did not err in denying plaintiff's motion for continuance on the ground that plaintiff was unable to attend trial because he was in prison. *Wood v. Brown*, 241.

§ 8. Consolidation of Actions for Trial

Trial court did not abuse its discretion in consolidating for trial four cases involving one automobile accident. *Wood v. Brown*, 241.

§ 40. Form and Sufficiency of Issues

Where defendants did not object to issue submitted and did not request the court to submit a second issue, they waived their right to have the second issue passed on by the jury. *Van Poole v. Messer*, 203.

§ 52. Excessive or Inadequate Award

Evidence supported jury verdict for plaintiffs in an action for breach of contract for plaintiffs to serve as caretakers of defendant's campgrounds. *Fox v. Camp Yonahlossee*, 107.

TRUSTS

§ 10. Termination of Trust and Distribution of Corpus

Widow could renounce gifts in residuary trust and accelerate distribution of the residuary trust principal to testator's children. *Bank v. Foster*, 430.

UNJUST ENRICHMENT

Plaintiff was entitled to compensation for office improvements provided by him which inured to the benefit of defendant. *Stauffer v. Owens*, 650.

WATERS AND WATERCOURSES

§ 1. Surface Waters

Evidence was insufficient to support a cause of action for diversion of the natural flow of surface water onto plaintiff's property by building a concrete driveway. *Speight v. Griffin*, 222.

Evidence that plaintiff paved a portion of its tract and thereby increased flow of water onto defendants' land was insufficient for the jury to find that plaintiff wrongfully diverted surface waters onto defendants' land. *Lease Properties v. Shingleton*, 287.

§ 7. Marsh and Tide Lands

Application for a permit to dredge a boat basin and canal on Bogue Banks is remanded for a new hearing. *In re Appeal of Seashell Co.*, 470.

WEAPONS AND FIREARMS

Offense of discharging a firearm in a city is embraced within the offense of wilful damage to personalty by shooting out an automobile window, but offense of damage to personalty is not included within elements of discharging firearm into an occupied vehicle. *S. v. Tanner*, 251.

WILLS

§ 34. Fees, Life Estate, and Remainders

Language used by testator gave to his wife a fee simple interest in his property. *Roethlinger v. Roethlinger*, 226.

§ 60. Renunciation and Acceleration

Widow could renounce gift in residuary trust and accelerate distribution of the residuary trust principal to testator's children. *Bank v. Foster*, 430.

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