NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHRISTINE F. JONES, ADMINISTRATRIX OF THE ESTATE OF JULIAN VAN JONES v. ANNIE COOPER BESS AND ROBERT ICES BESS

No. 753SC127

(Filed 21 May 1975)

Automobiles § 90— failure to explain law arising on evidence

In an action for the wrongful death of a child who was struck by an automobile while riding his bicycle, the trial court failed to declare and explain the law arising on the evidence in violation of G.S. 1A-1, Rule 51, where the court explained the duties of an automobile operator to maintain a reasonable lookout, to maintain proper control of the vehicle, to sound a horn when passing a bicycle and the duty of care imposed when the operator sees or should see children on or near the road, but the court failed to apply these principles of law to the evidence in that it did not give any guidance to the jury as to what facts, if found by them to be true, would justify answering the issues submitted in the affirmative or the negative.

APPEAL by plaintiff from *Martin (Perry), Judge.* Judgment entered 30 September 1974 in Superior Court, CRAVEN County. Heard in the Court of Appeals 16 April 1975.

This is a civil action wherein the plaintiff, Christine F. Jones, Administratrix of the estate of Julian Van Jones, seeks damages for the alleged wrongful death of her nine-year-old son as a result of his having been struck by an automobile op-

erated by the defendant, Annie Cooper Bess, and owned by her husband, defendant Robert Ices Bess.

In her complaint, plaintiff alleged that her son came to his death as a proximate result of the negligence of the defendants in the operation of their motor vehicle in the following respects:

A. The said defendants were operating said automobile too fast for existing conditions on said highway.

B. The defendants failed to maintain a proper lookout.

C. The defendants failed to operate said automobile at such a speed and in such a manner as to maintain complete control over the operation of said motor vehicle.

D. That the defendants saw plaintiff's intestate riding in a direction of said highway on his bicycle, on a driveway, for a distance of several hundred feet, or by the exercise of reasonable diligence should have seen said child riding said bicycle on said highway on said driveway going in a direction of the said highway, and seeing that plaintiff's intestate was oblivious to her approach, she failed to slacken her speed or to apply brakes, and failed to blow her horn and to give soundly and timely warning of her approach, which she was duty bound to do.

E. That the defendants seeing plaintiff's intestate riding his bicycle, he being a 9 year old boy, along a driveway toward said highway over a distance of several hundred yards, should have slowed the automobile, should have given timely warning with their horn, and should have anticipated that he might ride out into the highway, so said defendants should have slowed the automobile down and even stopped to avoid hitting plaintiff's intestate; but to the contrary, they continued to operate said automobile at the same speed, failed to slacken said speed, failed to apply brakes before striking plaintiff's intestate and failed to blow their horn, and in fact continued on down said highway a distance of 75 feet after striking said child before stopping.

F. The defendants failed to exercise due care in the operation of said motor vehicle.

The defendants filed answer denying negligence and pleaded contributory negligence of plaintiff's intestate in bar of her claim.

At trial, plaintiff's evidence tended to show the following: On 29 June 1970 plaintiff's intestate, Julian Van Jones, and his seven-year-old brother, Michael Jones, visited a neighbor, James Wesley White, on Butler Ford Road in Vanceboro, N. C. White's home was located on a small hill on the east side of Butler Ford Road, which runs in a general north-south direction. Butler Ford Road has an S-curve that breaks into a straightaway approximately 100 yards south of the White's residence. The road remains straight from this point to the plaintiff's residence, which is located on Butler Ford Road approximately an eighth mile north of the White's home. The road is two-lane and has a speed limit of 55 mph.

At about 8:20 p.m. Daylight Savings Time, Julian and his younger brother started home on their bicycles. The day had been clear and there was still sunlight. They coasted down the White's driveway toward Butler Ford Road. The driveway follows the slant of the hill to the road below and cuts into the hill near the highway. Approximately twelve to fifteen feet of the driveway is visible, however, from the road at a point approximately 350 feet south of the driveway. As Michael and Julian coasted down the driveway, the chain came off of Michael's bicycle, and he stopped to fix it. Julian continued down the drive onto the paved portion of the road. The front wheel of Julian's bicycle was on the road and the rear wheel on the driveway when Julian was struck by the defendants' automobile, which was traveling north on Butler Ford Road. Mrs. Bess was going 45 or 50 mph and only swerved about half a foot immediately prior to impact. Mrs. Bess did not sound her horn and did not apply her brakes before hitting the child. There were no other automobiles on the road at the time of the accident.

The plaintiff testified that in August of 1970 Mrs. Bess told her that she had seen the two boys riding down the driveway and thought that Julian would stop before entering the road. When the plaintiff asked Mrs. Bess why she did not sound her horn or try to go around the boy, Mrs. Bess responded, "I just don't know. I guess I just panicked."

The defendants offered evidence tending to show that Mrs. Bess was traveling 35 or 40 mph; that after she rounded the curve south of the White's residence she kept her eyes on the road; that she did not see Michael stop in order to fix his bicycle; that she did not see plaintiff's intestate on the bicycle

until he entered the road; and that rather than her hitting the boy, the child rode his bicycle into her car. Mrs. Bess further denied telling the plaintiff anything different with respect to how the accident occurred and, in fact, stated that when she told the plaintiff that she could not avoid the child, the plaintiff had agreed with her.

Issues of negligence, contributory negligence, and damages were submitted to the jury; and the jury found that the death of plaintiff's intestate was not proximately caused by the negligence of the defendant, Annie Cooper Bess. From judgment entered on the verdict, plaintiff appealed.

Charles William Kafer for plaintiff appellant.

Ward, Tucker, Ward & Smith, P.A. by Michael P. Flanagan for defendant appellees.

HEDRICK, Judge.

The one question for resolution on this appeal is whether the trial judge sufficiently and correctly declared and explained the law arising on the evidence in the case as he is required to do pursuant to G.S. 1A-1, Rule 51. In declaring and explaining the law arising on the evidence in the case "[t]he judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto . . . . " G.S. 1A-1, Rule 51(a), Rules of Civil Procedure. A statement of the contentions of the parties together with a bare declaration of the law in general terms is not sufficient. *Brady v. Smith,* 18 N.C. App. 293, 196 S.E. 2d 580 (1973). "[T]he jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. *Credit Co. v. Brown,* 10 N.C. App. 382, 178 S.E. 2d 649." *Broadnax v. Deloatch,* 20 N.C. App. 430, 201 S.E. 2d 525 (1974). See also, *Smith v. Kappas,* 219 N.C. 850, 15 S.E. 2d 375 (1941).

In the instant case, the trial judge summarized the evidence presented, sufficiently and correctly defined negligence and proximate cause, and explained to the jury that the operator of a motor vehicle has the duty to maintain a reasonable lookout, the duty to maintain proper control of the vehicle, and the duty to sound the horn when attempting to pass another vehicle traveling in the same direction. The court also explained to the jury

the duty of care imposed on an operator of a motor vehicle when he sees or by the exercise of ordinary care should see children on or near the highway. The court then explained to the jury that failure of the defendant to abide by the above rules of the road would amount to negligence and that failure to sound her horn when passing a bicycle would constitute one circumstance to be considered in determining the defendant's negligence.

In our opinion, however, the trial court failed to properly apply these principles of law to the evidence arising in the case in that it did not give any guidance to the jury as "to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative". *Broadnax v. Deloatch, supra.* Nowhere in the charge did the court bring into view for the benefit of the jury the relationship between the evidence adduced at the trial and the issues involved. *Bulluck v. Long,* 256 N.C. 577, 124 S.E. 2d 716 (1962); *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522 (1962). For example, nowhere in his charge did the judge explain to the jury that if they found from the evidence and by its greater weight that the defendant violated any of the rules of the road applicable in this case and that if such violation or any of them was one of the proximate causes of the injury and death of plaintiff's intestate that it would be their duty to answer the first issue (the issue of defendants' negligence) in the affirmative or if they failed to so find that they would answer such issue in the negative.

The failure of the trial judge to sufficiently comply with the mandate of Rule 51(a) in this case is demonstrated by the fact that the jury returned to the courtroom and requested the judge to clarify what constituted negligence on the part of the "driver in this particular situation". Thereafter, the trial judge repeated substantially the instructions earlier given without additions or corrections so as to give the guidance requested by the jury or required by the rule.

For error in the charge, there must be a

New trial.

Judges BRITT and MARTIN concur.

WATSON SEAFOOD & POULTRY COMPANY, INC. v. GEORGE W. THOMAS, INC. AND ROBERT PRIDGEN

No. 754DC83

(Filed 21 May 1975)

Automobiles §§ 20, 90— passing at intersection in city — no notice of city limits

The trial court properly instructed the jury that plaintiff's driver was negligent if he attempted to pass defendant's truck in an unmarked intersection in the City of Rose Hill although the evidence showed that plaintiff's driver could have had no way of knowing and did not in fact know that he was in the city limits.

Judge CLARK dissenting.

APPEAL by plaintiff from *Crumpler, Judge.* Judgment entered 14 October 1974 in District Court, DUPLIN County. Heard in the Court of Appeals 8 April 1975.

This is a civil action for property damage resulting from a collision between a 1973 Chevrolet pickup belonging to the plaintiff and a 1967 GMC tractor trailer belonging to the defendant. In its complaint, plaintiff alleged that defendant Pridgen's negligent operation of the corporate defendant's truck caused a collision on 1 August 1973 resulting in property damage of $2,000 to plaintiff's truck. In their answer defendants denied negligence on the part of Pridgen and alleged contributory negligence on the part of the plaintiff's driver. Plaintiff's driver testified that both he and the defendant's driver were proceeding in the same direction on rural paved road 1146; that he drove up behind defendant's truck, blew his horn, and proceeded to pass; and that as he pulled up beside it, defendant's truck turned left into his truck. The plaintiff's driver also testified that a dirt road intersected the rural paved road on the left, but "[t]here were no regulatory marking of any intersection in that area on the date of the accident" and the area was "really growed up". According to the witness, although there was a "Welcome to Rose Hill" sign on the shoulder of the road, there was no city limits sign in the vicinity of the accident. No evidence was introduced which conflicted with this description of the scene of the accident.

Defendant Pridgen testified that he did not hear the plaintiff blow his horn or see the plaintiff's truck pull out to pass; and that as he approached the intersection he slowed down

and was going only "about ten" miles per hour when he started to make his turn. Pridgen further testified that following the accident he got out of his truck to see if the plaintiff's driver was hurt; and that plaintiff's driver met him and said "Your light's not blinking". An inspection by Pridgen following the accident revealed that his left rear turn signal was not blinking but "the one on the front was blinking".

The Chief of Police of the town of Rose Hill testified that he investigated the accident and that as a result of his investigation he cited the defendant, Pridgen, for improper equipment because his directional signals were not operating properly.

Pridgen waived trial and pleaded guilty to the charge. It was stipulated that the accident occurred within the city. City limit signs had been erected since the accident, although none were present on the date of the accident.

From a jury verdict finding the defendant negligent and the plaintiff contributorily negligent, plaintiff appealed.

Crossley & Johnson, by Robert White Johnson, for plaintiff appellant.

Horton, Conely & Michaels, by Richard B. Conely, for defendant appellee.

MORRIS, Judge.

In its only assignment of error plaintiff contends the trial court erred in its instructions to the jury that it would be negligence to pass in an unmarked intersection in the city of Rose Hill, when all the evidence showed that the plaintiff's driver could have no way of knowing and in fact did not know that he was in the city limits. We disagree. Plaintiff concedes that the charge was substantially in compliance with G.S. 20-150(c).

In *Adams v. Godwin*, 252 N.C. 471, 114 S.E. 2d 76 (1960), the question on appeal was whether the court erred in its charge as to contributory negligence. There the collision occurred in the town of Benson, and it was agreed that no signs had been erected indicating an intersection. Though there was conflicting evidence with respect to where the collision occurred, some of the evidence placed it in the unmarked intersection. Plaintiff there was the following driver as here. Justice Higgins said:

> "G.S. 20-150(c) provides: 'The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the

same direction at any steam or electric railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. For the purposes of this section the word "intersection of highway" shall be defined and limited to intersections designated and marked by the State Highway Commission by appropriate signs, *and street intersections in cities and towns'*. The meaning of the section is that one motorist may not pass another going in the same direction under either of two conditions: (1) At any place designated and marked by the State Highway Commission as an intersection; (2) at any street intersection in any city or town. *Donivant v. Swaim,* 229 N.C. 114, 47 S.E. 2d 707; *Cole v. Lumber Co.,* 230 N.C. 616, 55 S.E. 2d 86; *Levy v. Aluminum Co.,* 232 N.C. 158, 59 S.E. 2d 632." (Emphasis supplied.)

The court had charged the jury that if they were satisfied by the greater weight of the evidence that there were no appropriate signs marking the intersection it would not constitute an intersection within the meaning of the statute and would place no duty on the passing vehicle. With respect to the charge the Court said:

"On the issue of contributory negligence the defendant was entitled to a charge that if the jury should find by the greater weight of the evidence, the burden being on the defendant, that the plaintiff attempted to pass the defendant's truck going in the same direction at a public street intersection, and should further find that the intersection was located within the corporate limits of the Town of Benson, her attempt so to pass would be negligence on her part; and if the jury should further find that such negligence was one of the proximate causes of her injury and damage, then the issue of contributory negligence should be answered, yes; otherwise, no. *Shoe v. Hood,* 251 N.C. 719, 112 S.E. 2d 543."

Here the court charged the jury substantially in accord with the statute and *Adams v. Godwin, supra.*

No error.

Judge VAUGHN concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

The following factual circumstances are noted: (1) The vehicles involved in the collision were proceeding on Rural Paved Road 1146, not one of the main approaches to the City of Rose Hill; (2) no city limit sign had been erected on the road to give notice to motorists that they were approaching or were within the city; (3) the collision occurred just within the municipal boundary in an area void of any structure to indicate an approach to a city; (4) the intersecting city street was a "little", unpaved, dirt road, was "out in farm country", in a corn field, obscured by brush and bushes, and "real hard to see"; (5) no sign designating the intersection had been erected; and (6) the directional signals on corporate defendant's preceding truck were inoperative, and the defendant gave no signal of his intention to make a left turn.

G.S. 20-150(c) and other statutory rules of the road are not unyielding under any and all circumstances, but should receive a reasonable construction and be applied in the light of the facts involved in a particular case. See *Tucker v. Moorefield,* 250 N.C. 340, 108 S.E. 2d 637 (1959); *Weavil v. Trading Post,* 245 N.C. 106, 95 S.E. 2d 533 (1956); 60A C.J.S., Motor Vehicles, § 268 (1969).

G.S. 136-31 provides that local authorities shall cause appropriate signs to be erected and maintained designating residence and business districts, and such other signs as may be deemed necessary to carry out the provisions of G.S. 136-30 to 136-33. It is my opinion that G.S. 20-150(c) contemplates that a motorist have reasonable notice that he is within a municiplity; it was not intended to enlarge the common law duty of due care to that of clairvoyance.

In *Adams v. Godwin, supra,* relied on by the majority, the knowledge of the operator that he was within a municipality was not questioned. It is my opinion that this factual circumstance distinguishes it from this case, and that there was reversible error in the charge to the jury.

STATE OF NORTH CAROLINA v. LIONELL C. SKINNER, JR.

No. 754SC148

(Filed 21 May 1975)

1. **Homicide § 20— three photographs of deceased — admission proper**

The trial court in a murder prosecution did not err in allowing into evidence three photographs of the deceased's body to illustrate the testimony of an SBI agent.

2. **Homicide § 28— defense of accident — instruction proper**

The trial court's instruction on the defense of accident in a murder prosecution did not improperly restrict the jury to the evidence of accident in their deliberation as to whether a reasonable doubt of defendant's guilt existed.

3. **Homicide § 31— verdict of guilty of "manslaughter" — acceptance of verdict proper**

The trial court in a murder prosecution did not err in accepting the verdict of the jury finding the defendant guilty of "manslaughter" without a specification that it was voluntary or involuntary where it was clear from the circumstances that the jury found that defendant was guilty of the crime of voluntary manslaughter.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 19 September 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 April 1974.

Defendant was charged in a bill of indictment with murder in the first degree of Gwen J. Bridges on 5 August 1974. The State, however, elected to seek only a verdict of guilty of murder in the second degree. The defendant pled not guilty to the charge and was tried before a jury.

The State's first witness was David R. Marshall, an agent with the State Bureau of Investigation, who testified that he was called to the Sir Roberts Restaurant in Jacksonville at approximately 12:30 a.m. on the morning of August 5. When he arrived, he observed the body of the deceased lying at an angle in a driveway area between the restaurant and a chain link fence which enclosed an adjacent Plymouth automobile dealership. The deceased had a severe wound in the neck area. Behind the restaurant were several occupied wood-frame houses, a mobile home, and a church. Over defendant's objection, three photographs taken of the deceased's body and the crime scene were introduced to illustrate the testimony of Agent Marshall.

Dr. Walter Gable, the medical examiner for the State in Onslow County and an expert in pathology, testified that he autopsied the deceased's body on August 5 and determined the cause of death to be a gunshot wound to the neck.

Paula Stuckart, a friend of the deceased, testified that on the night of August 4, she and the deceased had ridden their bicycles to the Sir Roberts Restaurant. They went in and ordered a beer and eventually joined a party of Marines. Later the same evening, she and the deceased rode their bicycles to another bar, but thereafter returned to Sir Roberts and rejoined the group of Marines. A couple of the Marines asked if they might ride the bicycles and were given permission. Around 11:30 p.m. the two women left the restaurant and went outside to get on their bikes, but they were not where they left them. They went around to the back of the restaurant and saw the bikes parked in front of a house. The occupants sought to prevent them from taking the bikes, so they went back into the restaurant whereupon all the Marines ran outside and down the alley beside the restaurant leading to the houses. A confrontation between the Marines and a group of blacks occurred in the alley. Some had sticks and there was evidence of a fight. All of a sudden, she noticed a black person holding a gun in front of him and pointing it in the general direction of the restaurant crowd. It went off as the deceased was moving between the two crowds of people and the deceased went down.

Paul R. Grey, a Corporal in the Marine Corps, testified that he was present at the restaurant and at the scene of the shooting on the night in question. He testified that a man, whom he could not identify, came up to the side of the restaurant carrying a double-barrel, sawed-off shotgun. He held the gun out in front of him and fired it. Corporal Grey was approximately nine to twelve feet from the man when the weapon was discharged.

Deputy Sheriff Keith Taylor testified that he went to defendant's home at 3:00 a.m. on the morning of the shooting to question him regarding the shooting. Defendant was not home, so Taylor returned to the office whereupon at 4:30 a.m., the defendant arrived with his mother. After having been advised of his rights and asked some questions, the defendant gave Taylor a statement admitting that he had held the gun when it discharged, but claimed that it was an accident; that he was bumped and his hand must have hit the butt of the gun caus-

ing it to fire. The defendant told Taylor that he had buried the shotgun under the steps of the church behind the restaurant.

Defendant took the stand in his own behalf and testified that he entered the affray because there were mostly women and children living in the area and he was afraid the Marines might hurt them. So, he went out into the woods where the shotgun was cached and returned to the scene of the fight. When he arrived, the Marines, who were carrying sticks, started moving toward the group of blacks. The defendant began backing up, stumbled on someone's foot or a brick, whereupon his finger must have hit the trigger causing the weapon to discharge.

After all the evidence, defendant renewed his motion for judgment as of nonsuit, which was denied. The judge charged the jury on murder in the second degree, manslaughter and involuntary manslaughter. They returned a verdict of guilty of manslaughter and from a judgment sentencing defendant to a term of imprisonment, he appealed.

Attorney General Edmisten by Associate Attorney Joan H. Byers for the State.

Edward G. Bailey for the defendant.

CLARK, Judge.

[1] The defendant contends that the admission of the three photographs of the deceased's body to illustrate the testimony of SBI Agent Marshall was error, not so much because they were gruesome, but because the number admitted was excessive. In *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969), four photographs were admitted depicting the dead body of the victim of an alleged murder and a pool of blood on a bed beside the body of another victim. The court stated that "[t]hese four photographs, which depict substantially the same scene, were competent to illustrate the testimony. Whether all or a less number should have been admitted was for determination by the trial judge in the exercise of his discretion." 275 N.C. at 120. It was only after a number of additional photographs were introduced of the same import that the Supreme Court found abuse. In light of the *Mercer* case, we discern no basis for defendant's claim that the trial court abused its discretion. The photographs were relevant and material to illustrate a witness's testimony with regard to condition of the body, location of the wound, and

depiction of the general scene of the crime. That they were gory or gruesome will not alone render them inadmissible. See *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); and *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969).

[2] In the charge to the jury the trial court instructed upon the defense of accident which arose from the evidence adduced at trial and concluded that portion of his charge as follows:

> "In determining whether you have a reasonable doubt of his guilt, it is proper for you to consider the evidence relating to accident both the evidence of the State as well as or rather the defendant as well as that of the State."

The defendant contends that this instruction improperly restricted the jury to the evidence of accident in their deliberation as to whether a reasonable doubt of defendant's guilt existed. He cites *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895 (1949). However, read contextually, it is clear that this instruction dealt only with the clarification of the evidence of accident and did not purport, as the defendant contends, to restrict the jury to that evidence alone in determining guilt or innocence. The court repeated on some nine other occasions the burden resting upon the State to satisfy them beyond a reasonable doubt of defendant's guilt. In *State v. Braxton, supra,* a reasonable doubt was one defined in pertinent part as one "based upon reason and common sense and growing out of the evidence in the case." This instruction was found prejudicial in that it did not allow the jury to find a reasonable doubt based upon a lack of the evidence. It appears from later cases that it is only when this "growing out of the evidence" language or language of the same import is used that an instruction without adding "or lack of the evidence" will be held prejudicial. *State v. Butler,* 21 N.C. App. 679, 205 S.E. 2d 571 (1974). We find of particular interest a model instruction on the defense of alibi approved by our Supreme Court in *State v. Bridgers,* 233 N.C. 577, 580, 64 S.E. 2d 867, 870 (1951), to wit:

> "... [T]he defendant's evidence of alibi is to be considered by you like any other evidence tending to refute or disprove the evidence of the State. And if upon consideration of all the evidence in the case, including the defendant's evidence in respect to alibi, there arises in your minds a reasonable doubt as to the defendant's guilt, he should be acquitted."

Read contextually, we believe that the charge in the present case substantially complied in principle with that charge suggested above. Consequently, we find no prejudice.

[3] The defendant further contends that the trial court erred in accepting the verdict of the jury finding the defendant guilty of "manslaughter" without a specification that it was voluntary or involuntary. In its charge to the jury, the trial court instructed on the distinctions between "manslaughter" and "involuntary manslaughter," without mentioning the term "voluntary" with refrence to "manslaughter"; and the court fully instructed the jury on the elements of voluntary manslaughter and in the final mandate charged that the jury must find beyond a reasonable doubt all of these factual elements before it could return a verdict of guilty of "manslaughter". In these circumstances, there could be no question that when the jury returned a verdict of guilty of "manslaughter," they found in fact that the defendant was guilty of the crime of voluntary manslaughter. It is well settled in this jurisdiction that the verdict should be taken in connection with the issues being tried, the evidence, and the charge of the court. *State v. Benfield,* 278 N.C. 199, 179 S.E. 2d 388 (1971); *Davis v. State,* 273 N.C. 533, 160 S.E. 2d 697 (1968); *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453 (1967); and *State v. Williams,* 22 N.C. App. 502, 206 S.E. 2d 783 (1974). Read in connection with the instructions, we find no ambiguity in the verdict.

The defendant's remaining assignments of error are without merit. Consequently, in the trial below, we find

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DEBBIE DEMOTT

No. 7418SC961

(Filed 21 May 1975)

1. Prostitution § 1— constitutionality of statutes

G.S. 14-203 defining prostitution and G.S. 14-204 providing that prostitution and various acts abetting prostitution are unlawful are constitutional.

2. **Criminal Law § 7— entrapment — insufficiency of evidence**

The State's evidence did not establish entrapment as a matter of law in a prostitution case, and the question was properly left for determination by the jury.

3. **Constitutional Law § 34; Criminal Law § 26— one act of prostitution — multiple statutory offenses — no double jeopardy**

Where defendant was charged with occupying a place with reasonable cause to know it was to be used for the purpose of prostitution, inviting a person to a place with knowledge that the purpose of such inviting was prostitution, and entering a place for the purpose of prostitution, defendant's constitutional guaranty against multiple punishments for the same offense was not violated, though the three charges grew out of the same transaction, since a bilateral application of the facts required to prove any one of the charges would not necessarily prove either of the others.

4. **Criminal Law § 140; Prostitution § 2— fragmentation of offense into multiple offenses — separate punishment for each violation improper**

Where the Legislature by enacting G.S. 14-204 fragmented the offense of offering the body for sexual hire into multiple substantive offenses, the purposes of such fragmentation were (1) to punish those who, at any stage, engage in the promotion of the enterprise and (2) to make it possible to obtain convictions where, given the nature of the activity, they would otherwise be most difficult to obtain, and the purpose was not to pyramid the punishment; therefore, where defendant was convicted of violations of three sections of G.S. 14-204 and punished separately upon each conviction, judgment is arrested in two of the cases.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 1 August 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 February 1975.

Defendant was tried on three warrants charging violations of three subsections of G.S. 14-204: "(2)," occupying a place with reasonable cause to know it was to be used for the purpose of prostitution; "(4)," inviting a person to a place with the knowledge that the purpose of such inviting is prostitution; "(6)," entering a place for the purpose of prostitution.

The State's evidence tended to show the following.

On the afternoon of 4 January 1974, Robert Gray, an agent of the State Bureau of Investigation, made four telephone calls to defendant at her apartment for the purpose of soliciting defendant to agree to engage in an act of prostitution with him. At approximately 4:30 p.m. Gray telephoned defendant, identified himself as Joe Robbey, and said that he understood that she gave companionship. She replied that she did not give companion-

ship. Gray then said, "call it business or what you like." That conversation terminated when defendant told Gray that she was supposed to have a date to go to a basketball game but that he could call her later.

Gray telephoned defendant again at about 5:20 p.m. He then told her that he worked for an insurance company in Philadelphia, was visiting the Greensboro area, and had been given her name by a mutual friend. Defendant told Gray that she had to be careful since she had recently been "busted" and asked him to call her back a third time.

At 5:45 p.m. Gray placed another call to defendant and asked her, "Do you want to do business?" She replied in the affirmative, but said that her hair was wet and that Gray should call her about 6:30 p.m. in order to set the time. During this conversation defendant asked if their mutual friend who gave Gray defendant's name had mentioned the price. Gray replied that he understood their friend to have said something about $100.00. Defendant responded affirmatively. Defendant made a fourth phone call at 6:35 p.m. and the two agreed to meet at a Hardee's restaurant so that defendant could direct Gray to her apartment.

They met at about 7:30 p.m. as planned and Gray followed defendant to her apartment where he entered at her invitation. Shortly after their arrival, defendant had a telephone conversation in which she said, "I've got a cop in the living room and leave it to a woman's intuition I think I'm going to be busted tonight."

Thereafter, defendant told Gray that he was too young to have to buy a woman and suggested that the two just talk. Gray replied that he had just arrived in town and did not have time to waste going out to try to find a woman. Defendant gave Gray a soft drink and the two talked until about 9:00 p.m. when a female named Jan came into the apartment. During the conversation that followed Jan said that she thought Gray was a "cop." Gray again denied this and told them he was just a businessman.

About 9:20 p.m. Gray told defendant that he was tired and they were "either going to do business or not." Defendant replied, "Well, we will." The pair entered the bedroom. Gray took out his wallet whereupon defendant asked, "Why are you doing that." Gray asked, "Well, do you take credit?" Defendant just

laughed and Gray returned the wallet to his pocket. The pair then undressed and defendant got in the bed. Gray left the bedroom and signaled other officers who were waiting outside the apartment. Defendant was then arrested.

Defendant had previously been arrested at the same apartment on a charge of prostitution. She was convicted on that charge on 18 December 1973.

The jury found defendant guilty as charged and judgments imposing three consecutive sentences of imprisonment were entered.

Attorney General Edmisten, by Associate Attorney Thomas M. Ringer, Jr., for the State.

Chambers, Stein, Ferguson and Lanning, by Jim Fuller, for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that the prostitution statute is unconstitutional on its face for vagueness and overbreadth. G.S. 14-203 defines "prostitution" as follows:

> "The term 'prostitution' shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term 'assignation' shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement."

The statute under which defendant was tried is as follows:

> "14-204. Prostitution and various acts abetting prostitution unlawful.—It shall be unlawful:
>
> (1) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.
>
> (2) To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used

for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

(3) To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

(4) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

(5) To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

(6) To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

(7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever."

At trial, defendant did not raise any question about the constitutionality of the statute. Nevertheless, we have considered the arguments set out in her brief on this question and find those arguments without merit.

[2] Defendant contends that the cases should have been dismissed because the State's own evidence discloses entrapment as a matter of law.

"Entrapment is a defense and prosecution is barred only when it is established that the criminal intent started in the mind of the officer or agent of the State and by him was implanted in the *innocent* mind of the accused, luring him into commission of an offense which he would not otherwise have committed. In this State the burden is on the defendant to establish the defense of entrapment to the satisfaction of the jury." (Emphasis added.) *State v. Salame,* 24 N.C. App. 1, 7, 210 S.E. 2d 77, 81.

The State's evidence did not establish entrapment as a matter of law. The question was properly left for determination by

the jury under instructions to which no exceptions are brought forward on appeal.

[3] Defendant contends that she has been convicted more than once for the same offense in violation of her constitutional guaranty against double jeopardy.

The Legislature by enacting G.S. 14-204 "has set forth in six paragraphs definitions in minute detail of numerous substantive offenses, in the main—specific acts pertaining to aiding and abetting prostitution or assignation. And then the Legislature set forth the all-inclusive section which reads: '7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever.' " *State v. Cox,* 244 N.C. 57, 59, 92 S.E. 2d 413, 415.

The evidence here is that on the evening of 4 January 1974, defendant, for the purpose of prostitution, gave the agent directions to the apartment where she lived, entered the apartment with him, and there offered her body to him for sexual intercourse for the sum of $100.00, all at the agent's request. This evidence is evidence of defendant's guilt of violating the three subsections with which she was charged, and possibly others.

For example, the violation of 14-204(4) was complete when she directed and invited the agent to her apartment for prostitution, the violation of 14-204(6) was complete when she entered her apartment with him for that purpose and, after entering her apartment, she violated 14-204(2) by occupying it for the purpose of prostitution.

The allegations in warrants charging violations or subsections (2), (4) and (6) can be, as here, so cast that neither offense is made an essential element of any other. Here, neither warrant relies on the elements of the offense charged in either of the others. Although the three statutory charges grew out of the same transaction, a bilateral application of the facts required to prove any one of the charges would not necessarily prove either of the others. Defendant's constitutional guaranty against multiple punishments for the same offense has not been violated.

Although not suggested by either party on appeal, we believe there is a reason to modify the judgments entered in the Superior Court when the spirit and intent of the statute is considered.

[4] The statute seeks to punish those who offer their bodies for sexual intercourse for hire and to punish those who, by any means, knowingly aid and promote that activity. The enterprise sought to be proscribed, the offering of the body for hire, has been fragmented into multiple substantive offenses. This fragmentation serves the laudable purpose of not only punishing those who, at any stage, engage in the promotion of the enterprise, but is an obvious prosecutorial aid to those whose responsiblity it is to suppress the vice.

Although the defendant here could have been convicted under even more of the foregoing sections, we do not believe it to have been the legislative intent that she be separately and cumulatively punished under three of them for her conduct with agent Gray on the evening in question. As a practical matter anyone who has violated subsection (7) of G.S. 14-204, which is the gravamen of defendant's offensive conduct, has most likely, in the process of doing so, violated one or more of the other subsections of the statute.

The Legislature, by making each step taken in furtherance of the vice of offering the body for sexual hire a separate crime, has made it possible to obtain convictions where, given the nature of the activity, they would otherwise be most difficult to obtain. It punishes all who aid and abet prostitution by the means set out in the statute or by "any means whatsoever" to the same extent that it punishes those who offer their bodies for that purpose. We believe that this was what the Legislature sought to accomplish rather than to pyramid the punishment. Accordingly, on the facts of these cases, involving this particular statute, we arrest judgment in two of the cases and allow the third to stand.

In No. 74CR21709—No error.

In No. 74CR21710—Judgment arrested.

In No. 74CR21711—Judgment arrested.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROOSEVELT MICHAEL ALEXANDER

No. 7526SC190

(Filed 21 May 1975)

1. **Constitutional Law § 30— 18 months between arrest and trial — no denial of speedy trial**

The trial court did not err in denying defendant's motion to dismiss for the reason that defendant was not afforded a speedy trial where the evidence tended to show that there was a delay of more than 18 months from the date of the alleged offense and the date of trial, defendant made bail on the day of his arrest, for a period of time between his arrest and trial defendant was serving with the Army in Arizona, at no time did defendant move for a speedy trial, and there was no showing that defendant was prejudiced by the delay.

2. **Arrest and Bail § 3; Searches and Seizures § 1— warrantless arrest of automobile passenger — search of passenger proper**

Where an informant who had given reliable information in the past advised an officer as to the make and color of an automobile that would be transporting heroin, where the vehicle would be thirty minutes later, that heroin would be carried by the passenger in the automobile, and that the informant had received the information from another person who was not identified, and where the officer went to the area specified by the informant and at the hour specified saw a vehicle meeting the description provided and occupied by the driver and a passenger, the officer had reasonable ground to believe that the passenger, defendant, was committing a felony and would evade arrest if not immediately taken into custody; furthermore, having made the arrest, the officer properly conducted a search of defendant's person as an incident to the arrest.

ON writ of *certiorari* to review judgment entered by *Copeland, Judge,* on 6 June 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 May 1975.

In a bill of indictment, proper in form, defendant was charged with possession of heroin. He pled 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.

Robert F. Rush for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss for the reason that he was not afforded a speedy trial. This assignment has no merit.

Our courts have said many times that the word "speedy" cannot be defined in specific terms of days, months, or even years, therefore, the question whether a defendant has been denied a speedy trial must be determined in light of the facts in a particular case. The length and cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972), and cases therein cited. *State v. Jackson,* 24 N.C. App. 394, 210 S.E. 2d 876 (1975).

While it appears that in the instant case there was a delay of more than 18 months from the date of the alleged offense and the date of trial, the trial court found, among other things, that defendant made bail on the date of his arrest, that for a period of time between his arrest and trial defendant was serving with the Army in Arizona, and that at no time did defendant move for a speedy trial. There was no showing that defendant had been prejudiced by the delay and his counsel stated that he was relying solely on the length of time between the date of arrest and the date of trial. We hold that the court did not err in denying the motion to dismiss.

[2] By his second assignment of error, defendant contends the trial court erred in failing to suppress as evidence heroin which was found on defendant's person, arguing that the evidence was obtained by an illegal search and seizure. We find no merit in this assignment.

Following a voir dire hearing on defendant's motion to suppress, the court, on evidence presented, found facts summarized as follows: On 28 October 1972, M. F. Greene was a member of the Charlotte Police Department. At 9:00 a.m. on that date, while at his home, he received a telephone call from a person whose voice he recognized. Officer Greene had known this person for a considerable period of time, the person having provided information with respect to many violations of the law; the officer had found the informant reliable and on at least six occasions had obtained convictions of drug law violations on

evidence obtained as a result of the person's information. In this call, the informant advised that a large quanity of heroin would be transported in a green Corvette with black top; that said vehicle would pass from West Boulevard to Merryman Avenue at 9:35 a.m.; that the heroin would be dropped or disposed of in the area of West Boulevard and Merryman Avenue. The informant advised the officer that he had received the information from another person who was not identified and was unknown to the officer. Officer Greene immediately called police headquarters and requested that a car be sent to his home. He then called other police, provided them with the information he had received, and asked them to proceed to Merryman Avenue immediately. On receiving his car, which was unmarked, Officer Greene and a fellow officer proceeded to the intersection of West Boulevard and Merryman Avenue; at 9:35 a.m. he saw a green Corvette with black top turn from West Boulevard onto Merryman Avenue. Officer Greene and his fellow officer pursued the Corvette and it was stopped. The officers advised the two occupants of the car that they had information that there was heroin in the car and they were going to search it. Pursuant to the search, Officer Greene found on the person of defendant, the passenger, a prophylactic containing a substance that was later determined to be 65 percent pure heroin.

The trial judge concluded that the officer had reasonable grounds to believe that the person (defendant) to be arrested had committed a felony and that the person would evade arrest if not taken into custody immediately; that the search that was made of defendant was made incident to a lawful arrest.

Defendant argues that since Officer Greene's informant did not have personal knowledge that there was heroin in the car in question, but was relying on a tip from a person whose reliability was not established, the search of the vehicle and its occupants was illegal. We do not find this argument convincing.

In *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the court held, among other things, that the Federal Constitution does not forbid *all* searches and seizures, only unreasonable searches and seizures, and that there is no ready test for determining reasonableness of a search or seizure other than by balancing the need to search or seize against the invasion which the search or seizure entails.

In *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), federal narcotic agents learned from a re-

liable informant that a man would be arriving in Denver by train from Chicago and would be delivering a shipment of heroin; the man was described in detail but not named; when Draper left the train, the agents saw that he conformed to the description that had been given; thereupon, they stopped, arrested and searched Draper, finding heroin on his person. The court held that the arrest was lawful and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid.

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. " . . . 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 . . . . " *State v. Shore,* 285 N.C. 328, 335, 204 S.E. 2d 682 (1974).

In *State v. Allen,* 282 N.C. 503, 512, 194 S.E. 2d 9 (1973), in an opinion by Justice Branch, the court, in pointing out certain exceptions to the general rule that a valid search warrant must accompany every search and seizure, said:

> "These exceptions arise when the exigencies of the situation call for unorthodox procedures. Such is the case when it is determined to be impractical, in light of all the circumstances, to obtain a search warrant. The courts have recognized three situations which justify application of this principle to a course of conduct ordinarily forbidden by the Fourth Amendment. (One may, of course, submit or consent to a warrantless search or seizure. [Citations omitted.])
>
> "First, a warrantless search and seizure may be made when it is incident to a valid arrest. (Citations omitted.)
>
> "Second, evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. (Citations omitted.)
>
> "Third, a warrantless search of a vehicle capable of movement may be made by officers when they have prob-

able cause to search and exigent circumstances make it impractical to secure a search warrant. (Citations omitted.)"

In *United States v. Hill,* 442 F. 2d 259 (5th Cir. 1971), the court held that government officers, who received information from a reliable informant that non-tax-paid whiskey would be transported on a certain road in a particularly described automobile, and who observed such automobile on the road, had probable cause to believe that the automobile contained non-tax-paid whiskey which they were entitled to seize without a warrant, and the whiskey was admissible in evidence for prosecution for possession and transportation of non-tax-paid whiskey.

While the factual situation in *Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972), was different from that in the case at hand, we think the following language in the majority opinion by Justice Rehnquist (at 147) is relevant here:

"In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized [sic] But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response."

In the case at bar, it is clear that the exigencies of the situation called for "unorthodox procedures" and that the obtaining of a search warrant was impractical. Not only did the informant advise Officer Greene as to the make and color of the automobile that would be transporting heroin, and where the vehicle would be some thirty minutes later, he also stated that the heroin would be carried by the passenger in the automobile. We think that when Officer Greene went to the area specified by the informant, and, at the hour specified, saw a vehicle meet-

ing the description provided and occupied by the driver and a passenger, the officer had reasonable ground to believe that the passenger, defendant, was committing a felony and would evade arrest if not immediately taken into custody. Having made the arrest, the officer properly conducted a search of defendant's person as an incident to the arrest.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. BRISCO LOCKLEAR, ALIAS T-BO

No. 7516SC106

(Filed 21 May 1975)

1. **Conspiracy § 6— conspiracy to break or enter — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of conspiracy to break or enter with intent to commit larceny where it tended to show that defendant was present when four others planned a break-in of a service station for the purpose of stealing cigarettes, defendant told the others he had a key to a bathroom where the cigarettes could be stored and would give them $1.50 for each carton, and defendant disposed of the stolen cigarettes.

2. **Criminal Law § 92— consolidation of charges for trial — five defendants**

The trial court did not err in the consolidation for trial of charges against defendant for conspiracy to break or enter with intent to commit larceny and receiving stolen property, charges against three other persons for conspiracy to break or enter with intent to commit larceny, charges against two of those persons for breaking and entering and larceny, and a charge against a fourth other person for receiving stolen property where the offenses all grew out of the conspiracy to break and enter a service station and were so connected in time, place and circumstances as to constitute one continuous episode. G.S. 15-152.

ON *certiorari* to review the trial of defendant before *Hall, Judge*. Judgment entered 17 May 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 10 April 1975.

This is a criminal prosecution wherein the defendant, Brisco Locklear, was charged in separate bills of indictment, proper in

form, with the felonies of (1) conspiracy to break or enter with the intent to commit larceny and (2) receiving stolen goods having a value of $1,400.00.

The defendant pleaded not guilty and was found guilty on both charges. From a judgment that defendant be imprisoned for not less than six (6) nor more than nine (9) years, he appealed.

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

John C. B. Regan III for defendant appellant.

HEDRICK, Judge.

[1] Defendant contends the trial court erred in denying his motions for judgment as of nonsuit as to the charge of conspiracy to break or enter with the intent to commit larceny.

At the trial, the State offered the testimony of Melvin Watts who stated that on about 30 July 1973 he and a man by the name of Lewis Lowery discussed breaking into a service station located in Robeson County owned by Grover Strickland for the purpose of stealing cigarettes. Later that day, Watts talked with Carl Odis Lowery, Richard Lowery, and John Jones, and they agreed to participate in the theft of the cigarettes. The next morning the four men went to Lewis Lowery's house to further discuss the break-in. The defendant was with Lewis Lowery when they arrived. Lewis Lowery told them that he would sell each carton of cigarettes for $1.50 and that the proceeds would be split five ways. The defendant told Watts that "he had a key for a bathroom for some station that they could deliver the cigarettes to." That night Watts, Richard Lowery, Carl Odis Lowery and John Jones entered Strickland's service station and, among other things, removed eighteen cases of cigarettes. Immediately thereafter, they met the defendant and Lewis Lowery at a designated location "called Five Lakes". Defendant and Lewis Lowery loaded seven cases of the cigarettes into the back of Lowery's pickup truck and carried them "into Pembroke somewhere." They returned about an hour later and carried away the remainder of the cigarettes. The next day the defendant and Lewis Lowery met the other four men, told them that they were only able to receive $1.25 per carton and paid them $135.00 each.

Richard Lowery testified for the State that when he, Melvin Watts, Carl Odis Lowery, and John Jones went to Lewis Lowery's house prior to the break-in, the defendant told them he had a key to a bathroom where the cigarettes could be stored and that he would give them $1.50 for each carton they stole.

Grover Strickland testified that his place of business, a filling station and grocery store, was broken into on the night of 31 July 1973 and that 710 cartons of cigarettes, having a value of approximately $1,600.00, were taken.

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act unlawfully. *State v. Mason,* 24 N.C. App. 568, 211 S.E. 2d 501 (1975); *State v. Miller,* 15 N.C. App. 610, 190 S.E. 2d 722 (1972). "Direct proof of the charge is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside,* 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). The fact that the defendant did not personally participate in the overt act is not material if it is established by competent evidence that he entered into an unlawful confederation for the criminal purpose alleged. *State v. Andrews,* 216 N.C. 574, 6 S.E. 2d 35 (1939).

In view of the aforementioned legal principles, we are of the opinion that when the evidence is considered in the light most favorable to the State it was clearly sufficient to require submission of the conspiracy charge to the jury and to support the verdict.

[2] Defendant next contends that it was error for the court to consolidate for trial his cases with the cases against Carl Odis Lowery, John Jones and Lewis Lowery. The record discloses that Carl Odis Lowery, John Jones, Lewis Lowery, Richard Lowery, Melvin Watts and the defendant were charged in a single bill of indictment with conspiracy to break or enter Strickland's service station with the intent to commit larceny; that Carl Odis Lowery and John Jones were charged in separate bills of indictment with breaking or entering with the intent to commit larceny and larceny; and that the defendant and Lewis Lowery were charged in a single bill of indictment with receiving stolen goods having a value of $1,400.00. All charges except

those against Melvin Watts and Richard Lowery, who testified for the State, were consolidated for trial.

It is well-settled that the question of consolidation is a matter to be resolved in the sound discretion of the trial judge. G.S. 15-152; *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883 (1967); *State v. Arney,* 23 N.C. App. 349, 208 S.E. 2d 899 (1974). Here, the offenses charged all related and grew out of the conspiracy to break and enter Strickland's service station and grocery store on the night of 31 July 1973 and are so connected in time, place, and circumstances as to constitute one continuous episode. In fact, the defendant was indicted in a single bill of indictment with the three other defendants on the conspiracy charge and both he and Lewis Lowery were charged in the same bill of indictment with receiving stolen goods. We are of the opinion and so hold that the trial court did not abuse its discretion in consolidating defendant's trial with the trial of the other defendants.

Defendant had a fair trial free from prejudical error.

No error.

Judges BRITT and MARTIN concur.

AMERICAN BANK AND TRUST COMPANY v. HORACE R. ELZEY AND WIFE, JOANNE A. ELZEY; GERALD L. MILLER AND WIFE, WILMA M. MILLER; AND WARREN LEE SIMMONS AND WIFE, SONJA BILES SIMMONS

No. 7520SC79

(Filed 21 May 1975)

Guaranty— guaranty of payment — failure to collect accounts receivable held as collateral

Failure of a bank to collect accounts receivable held by it as collateral for a loan to a corporation did not constitute a defense to the bank's action against guarantors of payment of the loan.

APPEAL by defendants Horace R. Elzey, Joanne A. Elzey, Gerald L. Miller, and Wilma M. Miller from *Kivett, Judge.* Judgment entered 28 October 1974 in Superior Court, UNION County. Heard in the Court of Appeals 7 April 1975.

This is a civil action wherein the plaintiff, American Bank and Trust Company, seeks to recover from the defendants, Horace R. Elzey and wife, Joanne A. Elzey, Gerald L. Miller and wife, Wilma M. Miller, and Warren Lee Simmons and wife, Sonja Biles Simmons, $7,752.64, plus interest, upon their alleged promises to guarantee payment of certain indebtedness of Simetronics, Inc.

In its complaint plaintiff alleged that on 21 November 1970 the defendants executed "absolute and continuing" guaranty agreements whereby they guaranteed payment of all loans, together with interest, made by plaintiff to Simetronics, Inc. The guaranty agreements provided in part:

> "You [plaintiff] may receive and accept from time to time any securities or other property as a collateral to any such notes, drafts, debts, obligations and liabilities, and may surrender, compromise, exchange and release absolutely the same or any part thereof at any time without notice to the undersigned [defendant] and without in any manner affecting the obligation and liability of the undersigned hereby created.
>
> This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by you against the Borrower or any person, firm or corporation; and the undersigned hereby waives the benefits of all provisions of law for stay or delay of execution or sale of property or other satisfaction of judgment against the undersigned on account of obligation and liability hereunder until judgment be obtained therefor against the Borrower and execution thereon returned unsatisfied, or until it is shown that the Borrower has no property available for the satisfaction of the indebtedness, obligation and liability guaranteed hereby, or until any other proceedings can be had."

Thereafter, plaintiff loaned Simetronics $13,249.80 evidenced by a promissory note for that amount. As collateral for the loan, Simetronics gave plaintiff a security interest in its inventory and accounts receivable. The note became due on 9 February 1972 and Simetronics defaulted in repayment of the loan in the amount of $10,849.48. Upon institution of a lawsuit by another creditor of the corporation, Simetronics was placed in receiver-

ship. Plaintiff "used its best efforts to expedite the administration of the Receivership in order to conserve the assets of Simetronics, Inc., and to realize therefrom as much as possible to apply against the amount due and owing the plaintiff . . . . " Plaintiff realized $850.43 from the receivership and further collected $2,246.41 from certain accounts receivable of Simetronics. After applying all funds received, $7,752.64 plus interest remains due and unpaid on the promissory note.

On 8 January 1973, defendants Elzey and Miller filed answer and admitted all of plaintiff's allegations. As a further answer and defense, the answering defendants alleged:

> "1. Simetronics, Inc., as collateral for the loan described in Paragraph 4 of the plaintiff's Complaint, did give to the plaintiff a security interest in the inventory and accounts receivable of Simetronics, Inc., as the plaintiff alleges in Paragraph 8 of the Complaint.
>
> 2. The plaintiff, while it has collected $2,246.41, has failed to diligently pursue the collection of the said accounts, but has held onto them, refusing to allow the defendants to pursue the collection of these accounts.
>
> 3. As the plaintiff alleged in Paragraph 9 of its Complaint, plaintiff intervened in the Receivership under which Simetronics, Inc., was placed and prevented the Receiver from pursuing the collection of the accounts receivable referred to in Paragraph 8 of the plaintiff's Complaint."

Plaintiff moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c). The trial court granted the motion and entered judgment against the answering defendants in the amount of $7,752.64 plus interest from 5 December 1972. Defendants Elzey and Miller appealed.

Thomas J. Caldwell for plaintiff appellee.

John E. McDonald, Jr., for defendant appellants.

HEDRICK, Judge.

Defendants' exception to the judgment presents for review the face of the record proper, but such review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is in proper

form. *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363 (1968).

A motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), should not be granted unless "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." 5 Wright and Miller, Federal Practice and Procedure § 1368 (1969) (footnotes omitted); *Accord, Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974).

While the allegations in the pleadings and the inferences to be drawn therefrom must be viewed in the light most favorable to the nonmoving party, we find nothing in defendants' further answer and defense which gives rise to a material question of fact or constitutes a defense to plaintiff's claim. At most, defendants' further answer and defense alleges a failure of plaintiff, either on its own or through the receiver, to collect on the accounts receivable held by it as collateral for the promissory note. By the terms of the guaranty agreements executed by each of the defendants and admitted by them in their answer, defendants guaranteed payment and not merely collection of the loan by plaintiff to Simetronics. Therefore, upon default by Simetronics, plaintiff was free to collect the entire amount due from the defendants without obtaining a judgment against Simetronics or exhausting the collateral, the accounts receivable. *Credit Corp. v. Wilson,* 281 N.C. 140, 187 S.E. 2d 752 (1972); 38 Am. Jur. 2d, Guaranty § 114 (1968). In any event, when the defendants have paid Simetronic's obligation to plaintiff under the guaranty agreements, they would be entitled under the agreements to collect the accounts receivable.

The judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIE WASHINGTON ROOK III

No. 7510SC76

(Filed 21 May 1975)

1. **Indictment and Warrant § 14— constitutionality of statute — challenge by motion to quash**

A defendant charged with the violation of a statute or ordinance may challenge the constitutionality of such statute or ordinance by a motion to quash the warrant or indictment.

2. **Automobiles § 134; Constitutional Law § 30— possession of stolen vehicle — "reason to believe" vehicle stolen — no unconstitutional vagueness**

The phrase "or has reason to believe" included in G.S. 20-106 prohibiting receiving, transferring, or having in one's possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken defines and prescribes the boundaries sufficiently distinct to provide an adequate warning as to the conduct it condemns and is not unconstitutionally vague.

3. **Automobiles § 134— possession of stolen vehicle — reason to believe vehicle stolen — sufficiency of evidence**

Evidence was sufficient to establish either knowledge or belief on the part of the defendant of the fact that the vehicle he was driving was stolen by his friends and that they did not have lawful title or possession of the vehicle where such evidence tended to show that defendant, his brother, and friends were at a shopping center, they observed a car which one of the friends talked about stealing, defendant and his brother left the shopping center but the brother returned to the shopping center, the next day the friend who had talked about stealing the car was driving it, and the defendant later drove the car and was apprehended by officers when he did so.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 29 August 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1975.

Defendant was indicted for and convicted of felonious possession of a stolen 1964 Chevrolet vehicle in violation of G.S. 20-106. He was sentenced to serve not less than one day nor more than 18 months in the custody of the Commissioner of the North Carolina Department of Corrections as a "Committed Youthful Offender".

The State's evidence tended to show that a 1964 Chevrolet, belonging to Billy Gene Gibson, was taken from the Mission Valley Shopping Center at approximately 1:00 p.m. on 16 June 1974. The owner had given no one permission to drive his auto-

mobile. Defendant was found by a police officer the next day, 17 June, standing in front of the 1964 Chevrolet with the hood up, working on the car. After questioning by the police officer, defendant ran from the scene but was arrested several hours later.

The defendant offered evidence tending to show that a friend, Cecil Manning, had loaned him the car to go buy beer, that at the time he drove the car he was intoxicated, and that he did not know the vehicle was stolen. Defendant's brother testified that he had taken the car with two other persons, neither of whom was the defendant, on 16 June 1974, for joyride purposes. Defendant's brother stated that he had been convicted of temporary larceny of an automobile in connection with this vehicle.

When the case came on for trial defendant moved to quash the indictment on the grounds that G.S. 20-106 is vague, uncertain, ambiguous, and indefinite so as to deprive the defendant of due process of law. The court denied the motion to quash and after arraignment and plea of not guilty, stated: "Now, Mr. Crumpler, as we decided this morning in connection with this same case, based on the way that the bill of indicement is drawn, I am going to hold the State to proof of actual knowledge. If the State fails to prove that, I am going to enter judgment as of nonsuit in this case. Just so we all understand where we are going."

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

Gregory B. Crampton, for defendant appellant.

MARTIN, Judge.

[1] The bill of indictment charges a violation of G.S. 20-106. A defendant charged with the violation of a statute or ordinance may challenge the constitutionality of such statute or ordinance by a motion to quash the warrant or indictment. *State v. Atlas,* 283 N.C. 165, 195 S.E. 2d 496 (1973).

G.S. 20-106 reads: "Any person who, with intent to procure or pass title to a vehicle which he knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the same from or to another, or who has in his possession any vehicle which he knows or has reason to believe

has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer, is guilty of a felony."

Defendant argues that the language "or has reason to believe has been stolen or unlawfully taken" creates a matter of conjecture as to what is prohibited and is unconstitutionally vague so as to deprive the defendant of due process of law.

Our Supreme Court, speaking through Huskins, J., in *In Re Burrus,* 275 N.C. 517, 531, 169 S.E. 2d 879 (1969), *aff'd.,* 403 U.S. 528, said: "It is settled law that a statute may be void for vagueness and uncertainty. 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' (Citations omitted.) Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. (Citation omitted.)"

In passing upon the constitutionality of this statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision. *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768 (1961). While a criminal statute must be strictly construed, the court should construe it with regard to the evil at which the statute is directed. *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970).

Clearly, the purpose of the statute is to discourage the possession of stolen vehicles by one who knows it is stolen or has reason to believe that it is stolen.

It is within the power of the Legislature to define and punish any act as a crime, unless limited by constitutional provisions imposed by the State and Federal Constitutions. *State v. Hales, supra.* Thus, in constructing the statute it was a matter for the lawmaking body to define and establish the degree of scienter upon which to rest the guilt of the accused.

[2] The inclusion in the statute of the phrase, "or has reason to believe", defines and prescribes the boundaries sufficiently dis-

tinct to provide an adequate warning as to the conduct it condemns.

The evidence tended to show that the owner of the stolen vehicle parked his Chevrolet in the Mission Valley Shopping Center on 16 June 1974 between 1:00 and 3:00 p.m. and that the car could be started without a key being placed into the ignition because it was an older model automobile.

[3] Defendant was with his brother, John Rook, Cecil Manning and other friends at the Mission Valley Shopping Center on 16 June, between 1 and 3 o'clock. They saw the parked car in question on that day, and there had been talk by Cecil Manning of stealing the car. After this talk the defendant and his brother left the shopping center and walked over to his girl friend's apartment, but defendant's brother returned to the shopping center. The next day, Cecil Manning and a friend, Tommy Ashworth, drove up in the gray Chevrolet automobile, the same one that had been at the Mission Valley Shopping Center. Later, the defendant got into the automobile and while going for beer had mechanical difficulty and pulled it over to the side of the road. A police officer saw the defendant working on the car and recognized it as a stolen vehicle. The officer noticed that there was no key in the ignition of the car. Upon the officer's announcement that the car was stolen and that the defendant would have to come with him, the defendant fled the scene and made good his escape in a nearby wooded area.

Clearly, the evidence was sufficient to establish either knowledge or belief on the part of the defendant of the fact that the vehicle he was driving was stolen by his friends and that they did not have lawful title or possession of the vehicle.

The court properly denied the motion to quash the indictment.

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

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CLARA VIRGINIA BARNES

No. 758SC140

(Filed 21 May 1975)

1. **Criminal Law § 122— requiring jury to deliberate further — no coerced verdict**

The trial court in a homicide case did not coerce a verdict when the jury on two occasions returned to the courtroom and indicated that it could not agree on a verdict, on the first occasion the judge excused the jurors for lunch and told them to return at two o'clock and continue their deliberations, on the second occasion the court determined the numerical division to be 10-2 and requested the jury to deliberate a while longer, and the jury returned the verdict thirty minutes later.

2. **Criminal Law § 122— requiring jury to deliberate further — no instruction not to surrender convictions**

The trial court did not err in directing the jury to continue to deliberate without instructing that no juror should surrender his convictions in order to agree on a verdict where the court simply and without comment directed the jury to continue deliberations.

3. **Criminal Law § 126— verdict — guilty of manslaughter with request for mercy**

The trial court did not err in accepting a verdict that the jurors "find the Defendant guilty of voluntary manslaughter and request mercy" since the request for mercy was not part of the verdict and there was nothing to suggest that any juror conditioned his assent thereto upon the judge's acceptance of the request for mercy or that any juror had any doubt as to the guilt of the accused.

ON *certiorari* to review trial before *Rouse, Judge.* Judgment entered 18 October 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 April 1975.

Defendant was indicted for murdering her husband. Upon the call of the case the solicitor announced that the State would not seek a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree or such lesser degree of homicide as the evidence would justify.

The State and defendant stipulated that the deceased died as a result of a stab wound in the neck. Evidence for the State tended to show the following: On 6 August 1974, Wilbur Thomas Kilpatrick, Chief of Police for the Town of Fremont, who knew both defendant and victim, found the victim behind a house on Washington Street. He was dead. There were three knife wounds, one at the base of the head and two in the back of the

left shoulder just below the shoulder blade. There was a trail of blood from the body almost to the corner of Washington and Vance Streets. Queenie Austin, mother of defendant, lives on Vance Street.

Chief Kilpatrick later found defendant at the home of Absolam Bryant and informed her that she was under arrest. He then proceeded to take defendant to the Magistrate's Office in Goldsboro. He read defendant her "rights." Chief Kilpatrick asked defendant for the knife. Defendant told him that she had thrown it away. Defendant further remarked:

> "I was tired of him following me all day . . . If he called anyone to get my children I would kill him. . . I got the ups on him and I pulled the knife out of my pants and I went to work on him. . . I hope he's dead and in hell."

Defendant first told the police chief that she bought the knife but later said she found the knife beside the street.

Defendant offered evidence of a history of violent assaults and other abuse of defendant by her deceased husband. Defendant admitted that she had cut him before. Shortly before the day of the killing defendant and her children had moved into the home of defendant's mother as a result of being chased from their own house by deceased.

According to defendant's evidence, the victim came to the home of defendant's mother, and defendant came out on the porch to talk with him. The victim began hitting defendant on the head and reached back to pick up a bottle. At this point, defendant struck him with a knife she had just picked up. He walked away, and defendant did not know that she had killed him or even hurt him. Defendant observed no blood on him.

In the State's rebuttal evidence, Leroy Evans of the Fremont Police Department testified that defendant told him that she and her husband were involved in a family argument and that she was going to get even with him. He followed her across town to her mother's house where she got the knife and stabbed him. She said she just got the "ups" on him and went to work on him. She said nothing about deceased's having attacked her at the time she stabbed him. Defendant did not appear upset and had no apparent bruises about the face or other signs of having been beaten.

The jury returned a verdict of guilty of voluntary manslaughter and defendant was sentenced to prison for not less than eight nor more than ten years.

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

R. Michael Bruce, for defendant appellant.

VAUGHN, Judge.

The case was clearly one for the jury, and defendant's argument to the contrary is without merit.

Defendant contends that the court failed to define the amount of proof necessary to satisfy the jury that she acted in self-defense. A reading of the charge discloses that the instructions on the burden of proof required of the respective parties were entirely proper. In all material respects the instructions given in this case were identical to those approved in numerous decisions of the Supreme Court.

[1] On two occasions the jury returned to the courtroom and one of the jurors indicated that the jury would not be able to agree on a verdict. On the first occasion the judge made no comment except to excuse the jury for lunch and tell them to come back at two o'clock and continue their deliberation. On the other occasion the judge inquired as to the numerical division. A juror replied, "10-2." The judge's only comment was "Ladies and gentlemen, I'm going to ask you to retire and consider your verdict for a while longer." Thirty minutes later the jury returned the verdict.

Defendant argues that requesting the jury to continue to deliberate after the foregoing tended to coerce them into a verdict. The argument is without merit. The jury deliberated for a total time of less than four hours which is certainly not an unusual length of time when the gravity of the offense and the conflicting inferences arising from the evidence are considered.

[2] Defendant also contends that the court erred in directing the jury to continue to deliberate without telling the jury that no juror should surrender his convictions in order to agree to a verdict. The failure to give an instruction to that effect was the cause of a new trial in *State v. McKissick,* 268 N.C. 411, 150 S.E. 2d 767. Here, however, unlike *McKissick,* the court did not

urge the jury to reach a verdict, give additional instructions on the responsibilities of jurors or suggest the consequences of their failure to agree. He simply and without comment allowed them to continue to deliberate. In this there was no error.

[3] Although he did not raise the issue at trial, defendant now contends the judge should not have accepted the verdict because "the jury had a misapprehension about the effect of the verdict it rendered." We disagree.

The jury returned its verdict, as follows:

> "CLERK: How find you the Defendant, CLARA VIRGINIA BARNES, guilty of second degree murder, or guilty of voluntary manslaughter or not guilty?
>
> JUROR: We find the Defendant guilty of voluntary manslaughter and request mercy."

The jury was polled and each juror was asked the following question:

> "CLERK: You have returned a verdict of guilty to voluntary manslaughter, is this your verdict and do you still assent thereto?"

Each juror answered yes. One juror added, "Yes, with mercy."

The verdict was guilty. The guilty verdict was unequivocal. The return of that verdict ended the jury's role in the proceedings. The recommendation of mercy is no part of the verdict. The question of punishment is for the judge. There is nothing to suggest that any juror conditioned his assent to the verdict upon the judge's acceptance of the recommendation of mercy or, that by making the request, any juror had any doubt about the guilt of the accused.

We find no prejudicial error in the trial and judgment from which defendant appealed.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. GILBERT N. MILLSAPS, JR.

No. 7422SC1027

(Filed 21 May 1975)

1. **Criminal Law § 118— charge on contentions — inaccurate statement — harmless error**

In a prosecution for armed robbery of a Scottish Inn, the court's inaccurate statement while reviewing the contentions of defendant that "he didn't deny going to the Scottish Inn or being there" was not prejudicial error in light of the substantial amount of evidence offered by defendant that he was elsewhere at the time of the robbery, and the court's instructions on alibi and defendant's contention that he was elsewhere.

2. **Criminal Law § 117— instructions — scrutiny of defendant's testimony**

The trial court's instructions on the jury's duty to scrutinize the testimony of defendant were proper.

3. **Criminal Law § 88— cross-examination — repetitious question**

The trial court properly sustained an objection to a repetitious question asked on cross-examination.

4. **Criminal Law § 87— exclusion of testimony — knowledge of witnesses not shown**

The trial court properly sustained an objection to questions asked a robbery defendant's parents as to whether defendant had made any unusual purchases between the date of the crime and his arrest where there was no evidence that the witnesses knew what purchases defendant had made.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 22 August 1974 in Superior Court, IREDELL County. Heard in the Court of Appeals 12 March 1975.

Defendant was tried on two charges of armed robbery. One involved the taking of $2,132.89 owned by Scottish Inns of America, Inc. in Statesville, North Carolina and the other alleged the forcible taking of a handbag and currency having a total value of $170.00 from the person of Martha Strange.

According to the State's evidence, on the night of 20 January 1974, Martha Strange, a desk clerk at Scottish Inns and Richard Pulliam, the night auditor, were behind the desk in the motel lobby. About 10:52 p.m. Mrs. Strange heard footsteps outside. Shortly thereafter two black males, one light-skinned (defendant) and one dark-skinned, entered the well-lighted lobby of the motel. Defendant walked up to Mrs. Strange, pointed

a gun and said, "I want all the money you have." He was across the counter about four feet from her and was wearing white gloves, a light yellow shirt, brown jacket, green slacks and black belt with a double buckle. He weighed about 185 pounds, had freckles, wide nostrils, and was broad through the cheeks. His hair was fixed in a medium bush. He and his partner proceeded to take the money from the cash register and safe and to take Mrs. Strange's purse which contained $132.00.

Based upon Mrs. Strange's description of the robber with the gun, the police constructed a composite photograph of a suspect and later received defendant's name as a suspect. On 24 January police arrested defendant and went to his home. They received permission of defendant and his mother to search the premises. They recovered a pair of white gloves.

Defendant denied going to the Scottish Inn and offered several witnesses whose testimony tended to show that he was elsewhere with friends on the evening of the alleged robberies.

Defendant was convicted of the robbery charge involving the funds of Scottish Inns of America, Inc. and was sentenced to twenty years in prison.

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

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

VAUGHN, Judge.

[1] Defendant contends that the trial court committed error in the charge to the jury. First, defendant claims that the court erred while stating the contentions of defendant when it said:

> "He also denied that he owned a yellow shirt and said he didn't have the gloves; that they were his mother's gloves when presented to him; *that he didn't deny going to the Scottish Inn or being there;* he stated from the time of about 11:15 he was at the Evening Breeze or in the process of helping Morrison get his car out of the ditch." (Emphasis added.)

In support of their argument, defendant cites two portions of the record where defendant specifically denied being at the Scottish Inn on the evening of the robbery.

"Q. Were you ever at the Scottish Inn this occasion?

A. No, I wasn't.

* * *

Q. You don't remember anything about it, but you remember exactly where you were the whole time, is that right?

A. Yes. I told Sgt. Moore all the things I told the jury. I never went to Scottish Inn Motel and never threatened Mrs. Strange or took money away."

A charge must be considered contextually as a whole. *State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705. The statement, " . . . that he didn't deny going to the Scottish Inn or being there," is inaccurate. Preceding this particular statement, however, the court said:

"The defendant testified as he had a right to do, and he had other witnesses testify. He contends that he was not there at all, that is—he contends an alibi.

* * *

An alibi simply means somewhere else. . . The defendant's contention that he was not present and did not participate is simply a denial of the facts essential to the State's case. Therefore, I charge you that if upon considering all the evidence, including evidence with respect to alibi, you have a reasonable doubt as to the defendant's presence or participation in the crime charged, you must find him not guilty.

(3) The defendant testified that on the night of Jan. 24, [the Sunday night in question was 20 January 1974] which was Sunday night, he testified that he was with friends—you will recall his testimony about that."

In the light of the substantial amount of evidence defendant offered in an effort to convince the jury he was elsewhere at the time of the robbery and when the whole charge is considered, it is inconceivable that the jury could have believed that the judge thought defendant did not deny going to the Inn. We also fail to find error so prejudicial as to require a new trial in the court's reference to "Jan. 24" (instead of the correct date, January 20th) or the one occasion when defendant contends the court was mistaken as to the time defendant was "at the Evening Breeze or helping Morrison get the car out."

[2] Defendant also excepts to the following instruction given as to the consideration to be given defendant's testimony:

> "The defendant has gone upon the stand as he had a right to do, and the law imposes on you the duty to scrutinize his testimony and after considering it, to determine the best you can what influence his interest in the result of the prosecution would have upon his testimony, and then give to his testimony that weight and effect which under all the circumstances you in your conscience think it is entitled to."

The foregoing was followed immediately by the instruction that

> "After such scrutiny you are satisfied that the defendant told the truth, it is your duty to give that testimony the same weight and effect which you would give that of any other witness."

The instruction is, of course, correct and the assignment of error based therein is without merit.

[3] The argument in defendant's brief that the court sustained an objection to a question propounded on cross-examination is without merit. The record discloses the following:

> "Q. You said he was from twenty-five to thirty at that time, didn't you?
>
> A. Somewhere in this neighborhood—I can't even tell your age, I'm not a very good judge.
>
> Q. You don't deny you said he was twenty-five to thirty, do you?
>
> OBJECTION as she answered.
>
> OBJECTION SUSTAINED."

The question was repetitious and the objection was properly sustained. Moreover, the trial judge has wide discretion in the control of cross-examination for impeachment purposes.

[4] On direct examination defendant's parents were asked if their son made any unusual purchases between the date of the robbery and the time he was arrested. The State's objections were properly sustained. In the first place there was no evidence that the witnesses knew what purchases defendant had made.

Secondly, the answers the witnesses would have given do not appear in the record. Defendant's Exception No. 7 is also without merit. The court merely sustained an objection to another question calling for substantially the same evidence defendant had previously given.

Defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. ROGER JOHN SNOWDEN II, HAROLD WINTERSON SMITH, AND ALAN GRAHAM FUHRMANN

No. 7410SC981

(Filed 21 May 1975)

1. **Criminal Law § 138— length of sentence — cause not within indictment**

While it is not necessary for the trial judge to state or explain his reasons for the degree of punishment imposed in a particular case, if the record affirmatively discloses that the sentence was imposed for a cause not within the indictment, the judgment will be vacated and the case remanded for resentencing.

2. **Criminal Law § 138— severity of sentence to thwart parole process**

Sentences imposed on three defendants for narcotics offenses must be vacated and the cause remanded for resentencing where the record affirmatively discloses that the severity of the sentences was based on the trial judge's dissatisfaction with the length of time committed offenders remain in prison and his mistaken assumption that the prisoners would automatically be released on parole at the expiration of one-fourth of their sentences.

APPEAL by defendants from *Godwin, Judge.* Judgments entered 14 June 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 12 February 1975.

Alan Fuhrmann was convicted of possession with intent to distribute the controlled substance marijuana and sentenced to prison for a term of not less than two nor more than four years.

Harold Smith was convicted and sentenced to prison for a term of four years for possession with intent to distribute marijuana. A consecutive four-year term was imposed for possession

of lysergic acid diethylamide and another consecutive two-year term for possession of amphetamine.

Roger Snowden was convicted and sentenced to prison for a four-year term for possession with intent to distribute marijuana. A consecutive four-year term was imposed after his conviction for possession of lysergic acid diethylamide. Another consecutive two-year term was imposed after conviction of possession of amphetamine. Another two-year sentence was imposed after his conviction of possession of methylenedioxy amphetamine to run concurrently with the other two-year sentence.

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

Tharrington, Smith & Hargrove, by Roger W. Smith and Wade M. Smith; Kimzey, Mackie & Smith, by Stephen T. Smith, attorneys for defendant appellants.

VAUGHN, Judge.

[1] It is not necessary for the trial judge to state or explain his reasons for the degree of punishment imposed in a particular case. If the punishment is within lawful limits there is a presumption that the judgment and sentence are regular and valid. Where, however, the record affirmatively discloses that the sentence was imposed for a cause not within the indictment, the judgment will be vacated and the case remanded for resentencing. *State v. Swinney,* 271 N.C. 130, 155 S.E. 2d 545. In *Swinney,* defendant had participated in a drinking party with her husband before fatally shooting him. The Supreme Court concluded that the trial judge imposed the sentence, not for involuntary manslaughter, but for defendant's participation in the party. The case was remanded for resentencing.

[2] In the case before us we are faced with a record that affirmatively discloses two reasons for the sentences: a general dissatisfaction with the length of time committed offenders remain in prison, and a mistaken assumption that the prisoners would automatically be released at the expiration of one-fourth of their sentences. For example, in the case of Fuhrmann the following appears: "defendant shall be confined in the State's prison for a term of not less than 2 nor more than 4 years, and shall serve the sentence under the supervision of the department of corrections. *That's worth six months.*" (Emphasis added.) The following also appears: "in order to sentence a man to one

year in prison and feel any confidence that he will serve one year year in prison you have to give him four." There were other statements of like import immediately prior to sentencing.

The legislative, executive and judicial powers of government are separate and distinct. N. C. Const., art. 1, § 6. The Legislature makes the laws. The duties of the judiciary in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination is one of guilt, then to pronounce the punishment prescribed by law. *Jernigan v. State,* 279 N.C. 556, 184 S.E. 2d 259. "The executive branch takes over the custody of the prisoner and effects the judgment with such modifications favorable to the prisoner as the above designated agencies deem for the best interest of the State and the prisoner." *Goble v. Bounds,* 281 N.C. 307, 310, 188 S.E. 2d 347, 349.

The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government.

Moreover, contrary to the assumption expressed in the record by the trial judge, a two to four year sentence is not necessarily just "worth six months." Although a prisoner's case is eligible for review when he has served a fourth of his sentence, the time for release is discretionary.

> "The time of releasing each prisoner eligible for consideration for parole as provided for herein shall be discretionary, and due consideration shall be given to the reasonable probability that the prisoner will live and remain in liberty without violating the law; that the release of the prisoner is not incompatible with the welfare of society, and that the record of the prisoner during his confinement established that the prisoner is obedient to prison rules and regulations, and has shown the proper respect for prison officials, and due regard and consideration for his fellow prisoners; and that the prisoner harbors no resentment against society or the judge, prosecuting attorneys, or jury that convicted the prisoner." G.S. 148-60.

"Whether to release a prisoner before completion of his sentence is a question with many facets. It cannot be answered by rules of law." *Goble v. Bounds, supra.* Certainly it cannot and should not be anticipated with the exactness indicated by the

able and dedicated trial judge as the basis for the imposition of sentences in the cases before us. Just as it was held that a judge could not grant "an anticipatory parole," *State v. Lewis,* 226 N.C. 249, 37 S.E. 2d 691, we hold that the sentencing process may not be expressly employed to thwart the parole process, the responsibility for which is vested in another branch of government.

The sentences imposed are within lawful limits and we, therefore, do not consider whether they are excessive. For the reasons stated, however, we hold that justice requires that the judgments be vacated and the cases remanded for resentencing.

Defendants' remaining assignments of error have been considered. In those, we find no prejudicial error.

Vacated and remanded.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. INNSBRUCK THOMAS BREEZE

No. 7510SC135

(Filed 21 May 1975)

Criminal Law § 34— defendant's intent disputed — evidence as to independent crimes admissible

In a prosecution of defendant for larceny by trick where the evidence tended to show that defendant took the prosecuting witness's money in exchange for cigarettes which he did not deliver, the trial court did not err in allowing witnesses to testify concerning defendant's involvement in two other cigarette sale schemes, though such evidence tended to show that defendant may have been guilty of independent crimes, since such evidence tended to prove the disputed fact as to defendant's intent.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 22 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1975.

Defendant was charged with larceny by trick in violation of G.S. 14-70. 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 four years, defendant appealed.

The evidence for the State tended to show the following: The defendant contacted both Luther Deans and Harry Williamson in March of 1974 and offered to sell them some cigarettes. Neither of them was interested, but Williamson referred the defendant to one James Hall. Defendant and a man named Jimmy contacted Hall and told him that they were "working for a salvage company in Charlotte and they had some cigarettes that were damaged", that "they weren't stolen or anything, but had been in a fire in Charlotte and lots of cartons had been wet and smoke-damaged", that "the insurance claim had been paid off and they were supposed to destroy them", and that they had some 800 cases of cigarettes and would take $22,000.00 for them". Hall accepted the offer and agreed to meet with them on the night of 18 March 1974. Hall then contacted Morris Jones, who agreed to supply the money for the purchase. After Jones obtained the money from a Raleigh bank, he and Hall and a third man drove out to a prearranged location to meet with the defendant. At the meeting Hall took a briefcase containing the money and got into the back seat of a car with the defendant. Jimmy and a man named Bill were in the front seat of the car. Jimmy took the money from Hall, put it in an envelope and supposedly put the envelope in another briefcase and gave the briefcase to Hall. Hall then was instructed to get out and wait for the defendant and Jimmy to take Bill to the truckload of cigarettes. When Bill arrived with the truck, Hall was to inspect the cigarettes and, if he still wanted them, he was to give the briefcase of money to Bill. As soon as Hall got out of the car, however, the three men sped off. Hall and his two companions pursued the car but lost it in the traffic. When the briefcase Jimmy had handed to Hall was opened, it was found to contain only scrap paper.

John Gaskins, an SBI Agent, was called to testify that defendant had admitted having attempted a similar scheme in Charlotte, but the trial court excluded his testimony as irrelevant.

The defendant testified on his own behalf and denied that he had ever met Deans or Williamson. He also denied having confessed to a similar confidence scheme in Charlotte or having been involved in a similar scheme in Durham. The defendant further testified that Hall had planned to trick Jones and had tried to get him involved, but that he had refused to participate.

In rebuttal Rex Holder, a witness for the State, testified that the defendant had offered to sell him smoke-damaged cigarettes in Durham in March of 1974 and that the defendant and a man named Jimmy had switched envelopes on him and cheated him of $6,000. SBI Agent Gaskins was recalled by the State and testified that the defendant had admitted attempting a similar scheme in Charlotte during March of 1974. The testimony of F. L. Benson, a Wake County Deputy Sheriff, was offered to corroborate the SBI Agent's testimony.

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

Lawrence B. Shuping, Jr., for defendant appellant.

MORRIS, Judge.

Both of the assignments of error brought forward and argued in defendant's brief relate to the testimony of witnesses offered by the State in rebuttal. By his first assignment of error defendant contends the trial court erred in allowing rebuttal witnesses Gaskins and Benson to testify as to statements made by defendant regarding any subsequent cigarette sale in Charlotte. In his second assignment of error defendant contends the trial court erred in allowing rebuttal witness Holder to testify regarding any sale of nonexistent cigarettes in Durham. We find no merit in either of the defendant's contentions.

In *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972), defendant had testified on cross-examination, over objection, that he had not gotten the pistol used in the attempted armed robbery for which he was convicted in a previous completed armed robbery of a Little General Store. In rebuttal, the State examined a witness who, over objection, was allowed to testify that he worked at the Little General Store which was robbed by defendant and that in the robbery defendant took the pistol in question and carried it away. In the case before the court defendant had denied any intent to commit a robbery, his defense being that he had asked for a refund for a dime which he had inserted in a machine which did not deliver the merchandise, that prosecuting witness refused to give the refund, and he drew his pistol to obtain the refund, was involved in a fight to get the pistol, and ran. The Court held the cross-examination was not a collateral matter by which the State was bound but was an inquiry tending to establish an essential element of the

crime for which he was being tried; i.e., the intent to deprive the owner of his property permanently and convert the property to defendant's use. Additionally, the Court noted the general rule "that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. Stansbury, N. C. Evidence 2d, § 91. The rule and eight well-defined exceptions to it are thoroughly discussed and documented in a scholarly opinion by Ervin, J., in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). "The second exception to the rule is expressed in *McClain* as follows: '2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.' " *State v. Long, supra,* at 641. The Court held that the rebuttal evidence fell within that exception and was competent as substantive evidence bearing on the criminal intent of defendant.

We think *Long* is apposite to the case before us. Here the defendant testified that Hall had planned to trick Jones and had tried to get him involved, but he had refused and that he had never seen Deans and Williamson. Thus defendant is denying that he had any intent to take the money of the prosecuting witness. Like *Long,* "[h]is intent is a relevant but disputed fact which the challenged evidence tends to prove". It is not inadmissible simply because it tends to show that defendant may have been guilty of an independent crime.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. FREDDIE LEE SELLERS

No. 7526SC81

(Filed 21 May 1975)

Criminal Law §§ 5, 111— result of insanity acquittal — erroneous instructions

In a felonious assault prosecution, an instruction given by the court at the jury's request as to the procedure for psychiatric treat-

ment and restraint in the event of a verdict of not guilty by reason of insanity was inaccurate and could have caused the jury to ignore strong evidence that defendant was not criminally responsible and return a guilty verdict because they believed that an insanity acquittal would free in a short time one who was dangerous to society.

APPEAL by defendant from *Falls, Judge.* Judgment entered October, 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 April 1975.

Defendant pled not guilty to the charge of feloniously assaulting Joan Williams with a screwdriver. The jury returned a verdict of guilty as charged, and from judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney Sandra M. King for the State.

Lawrence W. Hewitt for the defendant.

CLARK, Judge.

The evidence for the State was more than adequate to support the verdict. The defendant offered evidence of insanity, including the testimony of Dr. Robert Rollins, psychiatrist for eight years at Dorothea Dix Hospital, to the effect that it was his opinion that defendant, at the time of the alleged offense, had illusions of persecution and was not able to distinguish right from wrong.

The jury retired after the charge of the court at 10:40 a.m. The record on appeal reveals that immediately after the noon recess the following occurred:

"COURT: Members of the Jury, I am assuming that the Foreman handed the Bailiff here the piece of paper with three questions. Anything I say to any one of you must be said to all. That is why I had to bring all of you together. The first question you ask is if the Defendant is found guilty, is there a provision in sentencing for psychiatric treatment. The second question, if found not guilty, is there a provision by the Court for psychiatric treatment; and the third is repeating the definition of legal insanity.

Now, in answer to your questions, the answer to the first two is yes. If found guilty, there is provision in the sentencing arranging for psychiatric treatment. It is recommendatory only.

The answer to number two is yes. If he is found not guilty by reason of insanity, there is a provision in the statute providing for his incarceration in the mental institution for ninety days and then he is renewed, his inquisition of lunacy is renewed every ninety days.

[The instruction of the trial court relative the jury request for a definition of legal insanity is not herein quoted since it does not affect our decision.]

. . . Now, have I answered your questions?

FOREMAN: Yes, sir.

COURT: All right. If there is anything else that I can help with, I am sitting here and am at your command. Just ask. You may return to the jury room."

The landmark case in North Carolina, relating to the propriety of giving, in a criminal case where the defense of insanity is raised, instructions to the jury as to procedures for restraint in the event of a verdict of not guilty by reason of insanity, is *State v. Bracy,* 215 N.C. 248, 1 S.E. 2d 891 (1939), which was followed by *State v. McSwain,* 15 N.C. App. 675, 190 S.E. 2d 682 (1972). It was held in both cases that the trial court's denial of the jury's request was not error where it asked for information as to whether the defendant would be hospitalized if a verdict of not guilty by reason of insanity was returned.

The *Bracy* and *McSwain* cases, *supra,* follow the majority view that the jury is not concerned with punishment or what happens to the accused after verdict, but is only concerned with matters bearing on guilt or innocence.

The question is discussed in Annot. 11 A.L.R. 3d 737 (1967) where it appears that the courts in several states conclude that the giving of an instruction of this kind is within the discretion of the trial judge; and that the courts in the District of Columbia hold that an instructon is not only proper but necessary. It further appears that those courts, which require or consider proper such instructions, hold that the instructions must be in proper form and must accurately describe the law governing what hospitalization will be given the defendant, and particular instructions given the jury have been approved or disapproved.

At the time of trial and judgment the procedure to be followed upon acquittal of a criminal defendant on grounds of mental illness was set out in G.S. 122-84.1, which became effective upon ratification on 12 April 1974. Briefly, and in part, this statute requires the court to hold the defendant in custody pending a hearing on the issue of whether the defendant is mentally ill and imminently dangerous to himself and others. Institutional restraint follows an affirmative finding. The instructions of the trial court do not accurately describe the procedure prescribed by applicable statutes in effect either at time of trial or after 12 April 1974.

It is noted that *Bracy* and *McSwain* hold that the denial of a jury request for such information is not error, not that it would be prejudicial error if the trial court did comply with the jury request, though certainly this may be implied. Nor do these cases necessarily control where the request for such information is made by either the State or the defendant. The circumstances of a particular case may require that such instructions be given by the trial court. The evidence may be such that giving the requested instruction would be consistent with the general rule, the purpose of which is to enable the jury to base its verdict on the evidence rather than to reach a desired result. However, in the case before us the jury returned a guilty verdict despite strong evidence that the defendant was not criminally responsible, including testimony of the victim that before and at the time of the attack the defendant was acting strangely and told her that she was putting "powders" on him and that the roots were after him.

We conclude that in light of the evidence in this case the instructions of the trial court made at the request of the jury were inaccurate and could have caused the jury to ignore the clear tilt of the evidentiary scales and to find the defendant guilty for the reason that an insanity acquittal would free in a short time one who was dangerous to society.

We order a

New trial.

Judges MORRIS and VAUGHN concur.

LONGLEY SUPPLY COMPANY OF NEW BERN, INC. v. R. L. STYRON AND R. G. STYRON, TRADING AS STYRON PLUMBING, HEATING & AIR CONDITIONING CO.

No. 753SC136

(Filed 21 May 1975)

Partnership § 9— dissolution — liability for accounts payable

Where an agreement for dissolution of a partnership and continuation of the business by one partner was silent as to liability for accounts payable if they exceeded accounts receivable, each partner was required to contribute toward payment of the excess accounts payable incurred to the date of dissolution according to his share of the profits. G.S. 59-66(a).

APPEAL by codefendant R. G. Styron from *Browning, Judge.* Judgment entered 19 August 1974, in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 April 1975.

This civil action was instituted by the plaintiff on 20 March 1974 for the collection of an account against defendants for materials they purchased from plaintiff on open account. The parties stipulated that the plaintiff was entitled to judgment in the amount of $10,433.45, the only issue presented being that raised by the cross-claim of codefendant Ralph G. Styron against codefendant Roma L. Styron for indemnity. This alleged claim was based upon the terms of a written agreement made by the codefendants in dissolving their partnership.

The codefendants are brothers who owned adjacent lots in Morehead City. On one lot stood a service station business and on the other a plumbing business. In August 1972, the brothers decided to divide the two businesses, whereupon they eventually agreed that Ralph Styron would take the service station business and Roma Styron would continue to operate the plumbing business. Roma Styron requested that accountants and attorneys be retained to assist in the division of the properties; Ralph Styron disagreed and prepared the agreement, which made dissolution effective at 5:00 p.m., 7 August 1972. Both codefendants accepted its terms under seal on 17 August.

The agreement called for the deeding over of various buildings and property by one brother and then the other, the pre-

sumed result being to separate the two businesses. Then a clause appears upon which this litigation allegedly depends:

> "6. Roma Styron, T/A Styron Plumbing, Heating & Air Conditioning Company will pay all accounts payable before 5 p.m. August 7, 1972 and collect all accounts receivable before 5 p.m. August 7, 1972. After all accounts payable are paid, then Roma Styron and Ralph Styron will divide equally the balance of the accounts receivable and Roma Styron will collect his and Ralph Styron will collect his."

As it turned out, the accounts payable were in excess of the accounts receivable in an amount at least equal to the sum stipulated as owing plaintiff. The trial court found the defendants jointly and severally liable for the stipulated sum of $10,433.45 with interest from 14 September 1972 and dismissed Ralph Styron's cross-claim for indemnity. From the judgment dismissing the cross-claim, codefendant Ralph Styron appealed.

Henderson, Baxter & Davidson by David S. Henderson and Gerard H. Davidson, Jr., for codefendant-appellant.

Hamilton, Bailey & Fisher by Glenn B. Bailey for codefendant-appellee.

CLARK, Judge.

From a careful review of the terms of paragraph "6" of the dissolution agreement quoted above, it is obvious that its application to any division of funds depended implicitly on there being a surplus of accounts receivable over accounts payable. The second sentence, in particular, points out that the parties to the dissolution were in fact contemplating that there would be excess accounts receivable over accounts payable. Neither paragraph "6" nor any other provision in the contract deals with the reverse situation. Consequently, in view of the contemplation of the parties as is disclosed in paragraph "6" and the absence of other pertinent contract provisions dealing with excess accounts payable, we find simply that the dissolution agreement failed to treat the subject.

We note that the judgment of the trial court finding joint and several liability was based upon the finding that the paragraph in question was ambiguous in that it was susceptible of more than one interpretation. Consequently, it construed the

paragraph against Ralph Styron who prepared it and found that it was contemplated that the brothers would share liabilities as well as profits. Insofar as the judgment was based upon such a finding, we disagree; however, for purposes of liability, we reach the same result. Since the agreement was silent relative to what the parties actually contemplated under an excessive accounts payable predicament and absent any pertinent agreement relating thereto, the appropriate statutory provisions of the Uniform Partnership Act, Chapter 59, Article 2 of the General Statutes apply. Under G.S. 59-66(a), the dissolution of a partnership does not of itself discharge the existing liability of any partner and absent an agreement under G.S. 59-48(1), each partner must contribute towards the losses sustained by the partnership according to his share of the profits. The effect of these provisions creates liability for Ralph Styron, requiring him to contribute his share of the losses incurred to the date of the dissolution.

Lastly, the trial court found joint and several liability with respect to the entire stipulated sum of $10,433.45. This amount, however, was computed effective September 14. Between August 7 and September 14, Styron Plumbing incurred an additional $762.07 of accounts payable due plaintiff. On August 7, the effective date of dissolution, there was only $9,671.38 due. Consequently, codefendant Ralph Styron's obligation for a contributive share should be computed with reference to this latter figure and the judgment of the trial court is so modified.

Affirmed as modified.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLYDE BRYSON CHRISTY

No. 7519SC97

(Filed 21 May 1975)

1. Assault and Battery § 5— intent to kill — inference from circumstances

An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.

2. **Assault and Battery § 14— intent to kill — sufficiency of evidence**

In a prosecution for assault with a deadly weapon with intent to kill, evidence was sufficient to support a jury finding that defendant intended to kill his victim where such evidence tended to show that the victim was in defendant's place of business, the victim, the defendant and others participated in a gambling game, defendant and a third person argued, and defendant shot his victim twice when the victim tried to get another person out of the building.

3. **Criminal Law § 26— double jeopardy — failure of defendant to prove**

Defendant failed to carry his burden of proof that he was subjected to double jeopardy in this prosecution for assault with a deadly weapon with intent to kill.

4. **Criminal Law § 89— testimony that defendant shot victim — admissibility for corroboration**

The trial court did not err in allowing a witness to testify that the victim told her immediately after being shot that the defendant had shot him, since such testimony was admissible to corroborate the testimony of the victim.

5. **Criminal Law § 75— statements prior to Miranda warnings — admissibility**

The trial court did not err in allowing testimony of an officer concerning statements made by defendant without benefit of *Miranda* warnings, though the court did not conduct a *voir dire* hearing to determine voluntariness of the statements, where the evidence tended to show that the statements were not the result of a custodial interrogation and where the defendant took the stand and gave testimony to the same effect as that of the officer.

APPEAL by defendant from *Seay, Judge.* Judgment entered 20 September 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 9 April 1975.

Defendant was charged in a bill of indictment with assault with a deadly weapon with intent to kill one Ray J. Johnson inflicting serious injury not resulting in death. The jury found him guilty as charged.

From judgment entered on the verdict, defendant appealed.

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

Johnson & Jenkins, by Cecil R. Jenkins, Jr., for defendant appellant.

MARTIN, Judge.

Defendant contends that the evidence does not show any intent to kill Johnson and so defendant's motion for nonsuit should have been granted.

[1] The trial court properly instructed the jury that they must find as a fact that defendant Christy had the specific intent to kill Johnson. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972). It is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred. *State v. Thacker, supra.*

[2] There is sufficient evidence in the record from which a jury could reasonably infer that defendant intended to kill Johnson. The evidence for the State tends to show, in summary, that on 4 November 1973 Ray Johnson visited defendant at defendant's place of business known as the "Dug-Out". After his arrival, Johnson participated in a gambling game with a number of persons. Defendant Christy entered the game. Eventually, one Arvil Kerley and defendant argued, but Johnson was not involved in the quarrel. Bobby Stubbs was standing behind Kerley, and Johnson attempted to get Stubbs out of the building. At this time defendant shot Johnson twice, once in the back and once in the stomach. Defendant's witness, William Hurst, testified that defendant went to the front of the building and "snapped" the gun at Johnson with two, three, or possibly five "clicks". According to Hurst, defendant then asked someone about the rest of his bullets and went back into the building. This assignment of error is overruled.

[3] Defendant also assigns as error the trial court's refusal to grant his motion to dismiss for double jeopardy. In support thereof, it is asserted that defendant was acquitted of murder charges resulting from the deaths of Stubbs and Kerley and arising out of the same occurrence in which Johnson was shot. However, defendant acknowledges that there is nothing in the record on appeal to indicate that defendant was found not guilty of the murders of Stubbs and Kerley. The burden is on defendant to plead and to offer evidence to sustain his plea of former jeopardy. *State v. Coats,* 17 N.C. App. 407, 194 S.E. 2d 366 (1973). This assignment of error is overruled.

[4] Johnson testified that after being shot he drove to a nearby trailer and asked Dianne Sexton to call an ambulance. He told Mrs. Sexton that he had been shot by Clyde Christy. For the purpose of corroborating the testimony of Johnson, Mrs. Sexton was permitted to testify that Johnson told her that he had been shot by Christy. There was no error in the admission of her testimony for this limited purpose.

[5] Officer Fite of the Rowan County Sheriff's Office testified that he went to the "Dug-Out" pursuant to a complaint. According to this witness, Christy gave him permission to enter. When asked what had happened, Christy told Officer Fite that "they" were trying to take his money, that he had shot "them", and that he also shot "another one". Defendant contends the trial court erred in admitting the testimony of defendant's statements because at that time defendant had not been informed of his rights under *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). There was no error in the admission of this testimony. Officer Fite testified that Mr. Christy was not under arrest at the time and was not being interrogated. In addition, there is no evidence that defendant had been taken into custody or that he was even suspected of a crime. *Miranda* warnings are only required when the defendant is being subjected to "custodial interrogation". *State v. Chappell,* 24 N.C. App. 656, 211 S.E. 2d 828 (1975). In addition, we would add that defendant took the stand and his testimony was to the same effect as that of Officer Fite. There is no contention that defendant's testimony was compelled by the testimony of Officer Fite. Furthermore, there was ample evidence to carry the question of defendant's guilt to the jury apart from Officer Fite's testimony. Therefore, the absence of a voir dire examination following defendant's objection to the testimony of Officer Fite was not reversible error. *State v. McDaniel,* 274 N.C. 574, 164 S.E. 2d 469 (1968).

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

No error.

Judges BRITT and HEDRICK concur.

CHARLES WILLIFORD v. HELEN MARIE WILLIFORD, ADMINISTRATRIX OF THE ESTATE OF ANTHONY CRAIG WILLIFORD, DECEASED

No. 7511DC102

(Filed 21 May 1975)

Death § 9— abandonment of child — recovery for wrongful death of child

A parent who abandoned his child is precluded by G.S. 31A-2 from participating in proceeds from the settlement of a claim for wrongful death of the child.

APPEAL by plaintiff from *Lyon, Judge.* Judgment entered 19 November 1974 in District Court, HARNETT County. Heard in the Court of Appeals 9 April 1975.

This is a civil action in which plaintiff seeks to obtain one-half of the proceeds held by defendant and received in settlement of a wrongful death claim.

From the pleadings it appears that plaintiff was the father, and defendant was the mother, of the deceased, Anthony Craig Williford. Defendant, as administratrix of her son's estate, received $7,125.00 (or $9,500.00 according to the briefs) as proceeds from the settlement of a claim for the wrongful death of her son. After payment of certain claims, approximately $6,000.00 remained for distribution. Plaintiff claimed that according to the laws of intestacy, one-half of the $6,000.00 belonged to him but that defendant has refused to make payment.

In her answer, defendant alleged that plaintiff had wilfully abandoned his son and had provided neither support nor maintenance for the deceased since January of 1972. This, defendant alleged, constituted an absolute defense under G.S. 31A-2 to plaintiff's claim.

Plaintiff's motion for judgment on the pleadings was denied. The matter was tried before a jury and the following issues were answered by the jury:

"1. Did the plaintiff abandon his minor son, Anthony Craig Williford, as alleged in the Answer?

ANSWER: Yes.

2. If so, did the plaintiff resume his care for his said son for at least a year before his death and continuing until his death, as alleged in the Complaint?

ANSWER: No."

From a judgment that plaintiff recover nothing, plaintiff appealed.

McLeod & McLeod, by Max E. McLeod and J. Michael McLeod, for plaintiff appellant.

Bowen & Lytch, by R. Allen Lytch, for defendant appellee.

MARTIN, Judge.

This appeal raises the question as to whether a parent who abandons a child under G.S. 31A-2 is precluded from participating in proceeds from the settlement of a claim for the wrongful death of the child.

Effective 1 October 1961, the General Statutes of North Carolina were amended by adding Chapter 31A, entitled "Acts Barring Property Rights". G.S. 31A-2 as thereby enacted reads:

> "Acts barring rights of parents.—Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child."

Plaintiff contends that G.S. 31A-2 has no application to recovery for wrongful death and, therefore, does not bar plaintiff's claim. In support thereof, plaintiff cites *Avery v. Brantley,* 191 N.C. 396, 131 S.E. 721 (1926). In *Avery v. Brantley,* plaintiff brought suit to obtain one-half of the money recovered by defendant in an action for the wrongful death of plaintiff's child.

The jury found that plaintiff had wilfully abandoned the care, custody, nurture and maintenance of the child to the mother, and the trial court entered judgment denying recovery for plaintiff. Our Supreme Court reversed the judgment of the trial court saying, "Under the law as written, the father and mother are entitled each to one-half of the recovery."

Avery v. Brantley predates G.S. 31A-2, and in our opinion G.S. 31A-2 acts to preclude a parent who comes within its provisions from sharing in the wrongful death proceeds.

We are aware that the recovery in an action for wrongful death created by and based on G.S. 28-173 is not a general asset of the decedent's estate. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). However, the distribution of whatever recovery is obtained is governed by the provisions of G.S. 28-173. *Brown v. Moore,* 286 N.C. 664, 213 S.E. 2d 342 (1975). "Except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding $500.00, G.S. 28-173 provides that the only persons entitled to receive the damages recovered in a wrongful death action are those entitled to the decedent's personal estate under the Intestate Succession Act." *Bowen v. Rental Co., supra.* Under G.S. 31A-2, plaintiff lost all right to intestate succession in any part of his child's estate. Consequently, he cannot share in any proceeds from a claim for the wrongful death of his child. See also, *Smith v. Exterminators,* 279 N.C. 583, 184 S.E. 2d 296 (1971).

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. TOMMY JONES, ALIAS TOMMY BRYANT

No. 7512SC98

(Filed 21 May 1975)

Criminal Law § 134— sentence as regular youthful offender — finding required as to committed youthful offender

The trial court may consider sentencing a defendant as a "committed youthful offender" as a sentencing option when the defendant is eligible for it, but if the court decides the defendant would not

benefit from such a sentence, he must make a finding which makes it clear that he did consider the option but decided defendant would derive no benefit therefrom; therefore, the trial court in this case erred in sentencing defendant on felonious breaking and entering charges as a "regular youthful offender" without the required finding. G.S. 148-49.4.

APPEAL by defendant from *Smith, Judge.* Judgment entered 3 October 1974, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 April 1975.

Defendant was charged with felonious breaking and entering and felonious larceny. 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 six years as a regular youthful offender for felonious breaking and entering, with vocational or educational training recommended by the court, and a consecutive term of four years as a committed youthful offender for felonious larceny, defendant appealed.

State's evidence tended to show that sometime between 8:00 p.m., Sunday, 24 March 1974 and 7:07 a.m., Monday, 25 March 1974, Willie's Auto Parts, Inc., was broken into and certain merchandise taken, and that defendant had not been given permission to enter the business during the time period in question. A participant in the break-in and larceny testified that the defendant participated in the break-in and larceny of certain items from the store.

Attorney General Edmisten, by Associate Attorney Archie W. Anders, for the State.

Cherry and Grimes, by Sol G. Cherry, for defendant appellant.

MORRIS, Judge.

With commendable candor, counsel for the defendant concedes that in his review of the record he has found no error. He requests however, that we examine the record for error. We have reviewed the organization of the court, the bill of indictment, and the plea, and find no error. With respect to the judgment, however, we find it necessary to remand this case for further proceedings and for resentencing. See *State v. Teat,* 24 N.C. App. 621, 211 S.E. 2d 816 (1975), *cert. den.* 286 N.C. 726 (1975). The judgment in this case provides as follows:

"As to felonious breaking or entering: It is adjudged that the defendant be imprisoned for the term of six (6) years in the North Carolina Department of Corrections as a *regular* youthful offender. This sentence shall be credited with ____ days confinement pending trial. The court recommends he receive vocational or educational training. The Court recommends that this defendant be incarcerated in some prison unit other than the prison unit where Daniel Putchaconis is incarcerated.

As to felonious larceny: It is adjudged that the defendant be imprisoned for the term of four (4) years in the North Carolina Department of Corrections as a *committed* youthful offender. This sentence is to begin at the expiration of the sentence imposed in the first count of felonious breaking or entering." (Emphasis supplied.)

This judgment was entered pursuant to Article 3A, Chapter 148 of the General Statutes (G.S. 148-49.1 through 148-49.9) which is entitled "Facilities and Programs for Youthful Offenders". The Article defines a "youthful offender" as a person under the age of 21 and a "committed youthful offender" as one sentenced under the Article. The purposes of this Article, according to G.S. 148-49.1, are "to improve the chances of correction, rehabilitation and successful return to the community of youthful offenders, sentenced to imprisonment by preventing, as far as practicable, their association during their terms of imprisonment with older and more experienced criminals, and by closer coordination of the activities of sentencing, training in custody, conditional release and final discharge".

The last sentence of G.S. 148-49.4 is as follows:

"If the court shall find that the youthful offender will not derive benefit from treatment and supervision pursuant to this Article, then the court may sentence the youthful offender under any other applicable penalty provision."

In *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975), we said that the General Assembly by this sentence expressed its intent that a youthful offender shall receive the benefits of a sentence as a "committed youthful offender" unless the trial court shall find that he would "not derive benefit from treatment and supervision pursuant to" the statute. Therefore, the trial court may consider sentencing the defendant as a "committed youthful offender" as a sentencing option when

the defendant is eligible for it. If, however, he decides the defendant would not benefit from such a sentence, he must make a finding which makes it clear that he did consider the option but decided defendant would derive no benefit therefrom. He need not support this finding with his reasons therefor. *State v. Mitchell, supra,* at p. 488. Since the trial court sentenced the defendant on the felonious breaking and entering charges as a "regular youthful offender" without the required finding, that judgment must be vacated.

As to felonious breaking and entering—judgment vacated and cause remanded for further proceedings and resentencing.

As to felonious larceny—no error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. BOB T. CHAPMAN

No. 7426SC1038

(Filed 21 May 1975)

Constitutional Law § 31— opportunity to prepare for trial — trial same day indictment returned

Defendant was denied the opportunity fairly to prepare and present his defense to a charge of corporate malfeasance where defendant had been awaiting trial on an indictment for embezzlement for two years, an indictment was returned charging defendant with corporate malfeasance and trial on that charge was held the same day, the court denied defendant's motion for continuance, the State's evidence would have been insufficient to support an embezzlement conviction, the case involved complicated bookkeeping entries over a long period of time, and a defense to the corporate malfeasance charge would have been different than a defense to the embezzlement charge.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 6 August 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 February 1975.

On 7 August 1972 defendant was indicted for embezzlement of funds allegedly entrusted to him by his employer.

On 5 August 1974 a bill of indictment was returned charging defendant with corporate malfeasance in violation of G.S.

14-254. The case was called for trial on that day. Defendant's counsel moved for continuance on the ground that neither he nor his client was prepared for trial on the new charge. The motion was overruled. Trial followed immediately. Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Assistant Attorney General Norman L. Sloan, for the State.

Childers & Fowler, by Henry L. Fowler, Jr., and Frank P. Cooke, for defendant appellant.

VAUGHN, Judge.

The constitutional right of confrontation includes the "opportunity fairly to prepare and present one's defense." *State v. Smathers,* No. 112 (N. C. Sup. Ct., filed 6 April 1975).

The gist of the offense for which defendant (a truck driver) was tried under G.S. 14-254 was his participation in a scheme whereby another employee altered and made false entries in certain records of the company to the end that some of defendant's payroll checks were for a greater amount than he was entitled to receive. There was no evidence that defendant altered any record or turned in false reports. The evidence was that he aided and abetted the other employee in doing so. The evidence was that a number of false entries were made over a considerable period of time. The State used an accountant who had audited certain records of the company, supervising employees and the other offending employee to make out its case. The only evidence from defendant was his testimony to the effect that he knew that he had been overpaid several times, that mistakes in the payments made to drivers were not infrequent and that he had followed established procedures in reporting the overage.

The State's case, among other things, involved reasonably complicated bookkeeping entries made over a long period of time. Defendant may not be able to prepare a defense to refute the State's evidence. It is clear, nevertheless, that by being forced to trial on the very day of the indictment he did not have the opportunity to prepare any defense except a bare denial of the accusation. The right to prepare for trial does not "involve the merits of the defense he may be able to produce." *State v. Smathers, supra.* The trial judge appears to have made his decision to deny the continuance because defendant had been awaiting trial for almost two years on the embezzlement charge

and the State was to use the same evidence that it would have used on trial of the embezzlement charge.

The point is, however, that the State's evidence would not have permitted the case to go to the jury on the embezzlement charge. Defendant was prepared to defend on that charge and his defense was a simple one. He knew the State could not show a misappropriation of any property *entrusted* to him by his employer. Consequently, as counsel attempted to explain to the judge, he had not made any other preparations for trial.

Under the circumstances disclosed by the record we hold that the defendant was not given an opportunity fairly to prepare and present his defense. We need not, therefore, review the other matters assigned as error.

The judgment is vacated and a new trial is ordered.

New trial.

Chief Judge BROCK and Judge MARTIN concur.

CLYDE C. HARTSELL, JR. v. LEWIS CALVIN STRICKLAND

No. 7519SC172

(Filed 21 May 1975)

Automobiles § 62— pedestrian jumping into highway — directed verdict for driver proper

In an action to recover for personal injuries sustained when plaintiff was struck by defendant's automobile, the trial court properly allowed defendant's motion for a directed verdict where the evidence tended to show that plaintiff jumped from the side of the highway into defendant's lane of travel when plaintiff was frightened by a loud noise, defendant was not traveling at an excessive speed, and defendant did not fail to maintain a proper lookout.

APPEAL by plainitff from *Seay, Judge.* Judgment entered 3 December 1974 in Superior Court, CABARRUS County. Heard in the Court of Appeals 6 May 1975.

Plaintiff brought this action to recover damages for personal injuries sustained by him when he was struck by an automobile owned and operated by defendant, Lewis Calvin

Strickland. Judgment was entered allowing defendant's motion for a directed verdict at the close of plaintiff's evidence.

Hartsell, Hartsell & Mills, P.A., by Fletcher L. Hartsell, Jr., for plaintiff appellant.

Williams, Willeford, Boger & Grady, by John Hugh Williams, for defendant appellee.

VAUGHN, Judge.

We find no prejudicial error in the exclusion of one of the witnesses' estimate of defendant's speed. Even if it had been shown that the witness had a reasonable opportunity to judge defendant's speed, the excluded answer was favorable to defendant and not to plaintiff.

The remaining issue is whether the evidence, when considered in the light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference to be drawn therefrom, is sufficient to justify a verdict in plaintiff's favor. The evidence, viewed in this manner, tended to show the following.

At approximately 3:30 on the afternoon of 10 June 1970, plaintiff, a Snap-On-Tool salesman, Don Steele and William Haynes were examining a compressor attached to Steele's pickup truck. Steele's truck was parked on the shoulder of a rural paved road 18 feet in width. The truck was near or on the edge of the pavement. It was facing a southerly direction and was 200 feet to 300 feet from the intersection of Deal Road and Highway 152. The posted speed limit was 55 miles per hour. It was a clear day and there was nothing to obstruct the view between the intersection and where the men were standing.

The men were going to hook up the impact gun to the air compressor to see if the compressor had the necessary volume to work the air gun properly. They cranked up the compressor and began examining it. It built up a head of pressure. Suddenly there was a loud explosion. Plaintiff, who was standing on the edge of the road at the left front of the compressor, was startled by the explosion and jumped backwards about two feet toward the center of the highway. As soon as plaintiff jumped back he was struck by the right front fender of defendant's automobile, which was proceeding in a southerly direction.

While examining the air compressor plaintiff was standing at the left front of the compressor, farthest from the intersection. Steele was beside plaintiff and toward the middle of the compressor, and Haynes was on the same side towards the rear of the compressor and nearest to the intersection. When plaintiff jumped back onto the highway, defendant was approximately within a car length of plaintiff. Defendant stopped his car a few feet from the point of impact after veering to the left partially across the center line of the highway. Plaintiff did not see defendant's automobile before the impact. Prior to impact there was no horn nor other warning that defendant's automobile was approaching. Defendant did not see plaintiff until he was less than one car length away. Defendant did not decrease his speed by applying his brakes until about the time of the collision.

There was no evidence that defendant was travelling at an excessive speed under the existing circumstances. In fact, the evidence tends to negate excessive speed. Prior to the time plaintiff jumped into the path of defendant's car there was no apparant hazard which would have caused a reasonably prudent motorist to have operated at a slower speed than that indicated by the evidence. Plaintiff has not shown that defendant failed to maintain a proper lookout and that such failure was a proximate cause of the accident. That defendant did not sound his horn does not help plaintiff. He did not move onto the highway because he was unaware of defendant's approaching vehicle. His own evidence discloses that his sudden removal from a place of safety onto the highway was the result of an involuntary reaction to the unexpected loud noise. Certainly defendant could not have anticipated that plaintiff would propel himself into the front of defendant's car so suddenly that defendant could do nothing to avoid the accident.

The trial judge correctly concluded that plaintiff's evidence was insufficient to go to the jury.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CLYDE LEROY SIMON

No. 758SC50

(Filed 21 May 1975)

Criminal Law §§ 34, 102— jury argument as to defendant's prior conviction — no prejudicial error

Defendant was not prejudiced by the solicitor's jury argument contending that defendant's admission of an earlier conviction of larceny was admissible for the purpose of showing the identity, motive and mental state of defendant at the time of the commission of the crime for which he was then being tried, particularly since defendant did not request the judge to instruct the jury that the evidence was competent only as it bore on defendant's credibility as a witness.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 31 October 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 March 1975.

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

Evidence for the State tended to show the following. On the afternoon of 4 September 1974, Mabell McNair came home from school. As she entered her yard, she met defendant coming out of her yard. He was carrying a black and white portable television set which Miss McNair recognized as her mother's. She had a brief verbal exchange with defendant and was able to get a close look at him.

As defendant left her yard, Miss McNair ran to the back of her house and observed that the screen in the bathroom window had been removed. The bathroom window was open, and the lock had been removed.

Miss McNair found her sister and informed her of the encounter with defendant. The two sisters looked for defendant, found him, and followed him until they saw him leave the television behind a drugstore. Defendant then went to a nearby pool hall, and Miss McNair's sister called the police. A police officer found the television set behind the drugstore but was unable to locate defendant.

About one week later Miss McNair saw defendant again, and the police were called. Defendant was at a house a couple of doors down from the McNair's house, and Miss McNair identified defendant for the officer who then made the arrest.

Defendant testified that he was not in Goldsboro on 4 September 1974, never removed a television set from the McNair home, and never possessed such a set. On direct examination, defendant testified that he previously had been convicted of larceny of an automobile.

Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Alfred N. Salley, for the State.

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

VAUGHN, Judge.

The evidence was sufficient to go to the jury and defendant's assignment of error based on the denial of his motion for judgment of nonsuit is without merit.

During the solicitor's argument to the jury he referred to defendant's admission of an earlier conviction of larceny. The solicitor was allowed to argue his *contention* that that evidence was admissible for the purpose of showing the identity, motive and mental state of defendant at the time of the commission of the crime for which he was then being tried. Defendant has assigned this argument as error. It is true, of course, that the solicitor's contention as to the application of the law with respect to that particular evidence was incorrect. Nevertheless, the argument of the contention was not error prejudicial to defendant. Moreover, at no time did defendant request the judge to instruct the jury that the evidence was competent only as it bore on defendant's credibility as a witness. When a defendant contends that evidence is competent for one purpose and not for another, it is his duty to request the court to instruct the jury to consider the evidence only for the purpose for which it is competent. The assignment of error is overruled.

Careful consideration of the record before us, including the charge to the jury, has led us to conclude that defendant's trial was free from prejudicial error.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ROGER LEE VAIL

No. 753SC144

(Filed 21 May 1975)

1. **Criminal Law § 118— statement of contentions**

The trial judge is not required to give the contentions of the parties, but when he does state the contentions of the State on a particular aspect of the case, it is error to fail to state defendant's opposing contentions arising out of the evidence, or lack of evidence, on the same aspect of the case.

2. **Criminal Law § 118— instructions — use of word "contends" — failure to state defendant's contentions**

Where the trial court did not state the contentions of the State but used the word "contends" in referring to the evidence for the purpose of explaining the law applicable thereto, the court did not err in failing to state the contentions of defendant.

APPEAL by defendant from *Martin (Perry), Judge.* Judgment entered 8 August 1974, in Superior Court, PITT County. Heard in the Court of Appeals 15 April 1975.

To charges of breaking or entering a grocery store in Farmville and larceny therefrom, defendant pled not guilty.

The State's evidence tended to show that Sgt. W. B. Barber of the Farmville Police Department, investigated a break-in at Heath's grocery, where he found the back door prized open, and a drawer from the cash register and a money bag from the unlocked safe were missing. His investigation led to defendant, who was confronted and advised of his rights against self-incrimination. He signed a written waiver and made a full confession, which was reduced to writing. After voir dire, the trial court found the confession admissible, and no error is assigned to this ruling. After confession, defendant led the officer to stolen money, which he had hidden in his grandfather's house.

Defendant testified that he was coerced into signing a statement which he did not make; that he won $62.00 that night playing poker; and that he knew nothing about the break-in and larceny.

The jury found defendant guilty as charged, and from judgment imposing consecutive prison sentences, defendant appealed.

Attorney General Edmisten by Assistant Attorney General James L. Blackburn for the State.

William E. Grantmyre for defendant appellant.

CLARK, Judge.

We find that the only assignment of error which merits discussion relates to the charge of the trial court in stating the contentions of the State and failing to give the contentions of the defendant.

[1] The trial judge is not required by G.S. 1-180 or other law to give the contention of the parties; but when he does state the contentions of the State on a particular aspect of the case, it is error to fail to state defendant's opposing contentions arising out of the evidence, or lack of the evidence, on the same aspect of the case. *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1962); *State v. Lane,* 18 N.C. App. 316, 196 S.E. 2d 597 (1973).

[2] In his charge to the jury the trial judge made no attempt to present fully the theories or contentions of either the State or the defendant. We find twice in the charge the use of the word "contends", both occurring in a single paragraph when the trial judge defined the elements of breaking or entering.

It is apparent that the word "contends" was used by the trial court in referring to a limited portion of the State's evidence for the purpose of making an explanation of what constituted a "breaking" and what constituted an "entry", or a recital of what the State's evidence "tended to show" as to that phase of the case in order properly to explain and apply the law thereto. It is noted that the defense was alibi, and that there was no conflicting evidence as to the break-in and entry of the store building. The trial judge did not invade the province of the jury with respect to inferences to be drawn from the facts in evidence. While we do not approve the use of the words "contends and says" in referring to the evidence for the purpose of explaining the law applicable thereto, we find that under the circumstances of this case, there was no prejudicial error.

Judges MORRIS and VAUGHN concur.

PEARL W. TOWNSON v. W. D. TOWNSON

No. 751DC108

(Filed 21 May 1975)

Divorce and Alimony § 16— alimony without divorce — findings required

Under G.S. 50-16.3(a) it must appear that the wife is the dependent spouse, that she is entitled to the relief she demands, and that she is without means to subsist during the pendency of the action, and the trial court is required only to find the ultimate facts and need not include evidentiary or subsidiary facts required to procure the ultimate facts.

APPEAL by defendant from *Walker, Judge.* Order entered 12 November 1974 in District Court, CHOWAN County. Heard in the Court of Appeals 9 April 1975.

Plaintiff-wife brought this action against defendant-husband for alimony without divorce. After hearing on plaintiff's motion for alimony pendente lite, the trial court, after finding facts and making conclusions of law, ordered that defendant pay to plaintiff the sum of $250.00 per week in alimony pendente lite, pay her drug, medical, and hospital bills, her counsel fees, and deliver to her an automobile and other personal property. Defendant excepted and appealed.

Earnhardt & Busby, P.A. by Wiley J. P. Earnhardt, Jr., for plaintiff.

White, Hall, Mullen & Brumsey by Gerald F. White for defendant.

CLARK, Judge.

From a careful examination of the record, we find that the court's findings of fact to which defendant excepts are supported by the evidence. We find those assignments of error are without merit.

Defendant contends that the findings of the trial court do not support the order in that the court failed to make any findings as to plaintiff's living expenses and as to her reasonable needs, relying on *Painter v. Painter*, 23 N.C. App. 220, 208 S.E. 2d 431 (1974). In the *Painter* case the trial court found that the plaintiff-wife and her daughter had living expenses of $400.00 per month, and it was remanded for that the wife's expenses

alone were not set out and there was no finding that the daughter was incapable of self-support; and the ruling therein is limited by the facts of the case, it being obvious that the controlling factor was the failure to separate the support needs of the wife and child.

Under G.S. 50-16.3(a), it must appear that the wife is the dependent spouse; that she is entitled to the relief she demands; and that she is without means to subsist during the pendency of this action. See also 2 R. Lee, N. C. Family Law, § 138 (1963). And the trial court is required only to find the ultimate facts and need not include evidentiary or subsidiary facts required to procure the ultimate facts. *Medlin v. Medlin,* 17 N.C. App. 582, 195 S.E. 2d 65 (1973).

We hold that the trial court's findings of fact, some of which are found in so-called "Conclusions of Law", included the required ultimate facts, and the order of the trial court is

Affirmed.

Judges MORRIS and VAUGHN concur.

SMITH'S CYCLES, INC. v. AMERICAN HONDA MOTOR CO., INC., AND CROWN PONTIAC, INC.

No. 7518SC170

(Filed 21 May 1975)

Appeal and Error § 6— interlocutory order — no appeal

Order denying defendants' motion to dismiss an action for an injunction pending final determination of plaintiff's petition before the Commissioner of Motor Vehicles under G.S. 20-305(5) and transferring the cause to the superior court of Wake County where an appeal from the order of the Commissioner is pending is interlocutory and not appealable.

APPEAL by defendant American Honda Motor Co., Inc. (Honda), from *Collier, Judge.* Order entered 27 January 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 May 1975.

The order appealed from is summarized in pertinent part as follows:

The cause came on for hearing on plaintiff's motion for a "new" injunction against defendants and on defendants' motions to dismiss the action for lack of jurisdiction over the subject matter and for failure to state a claim. The court found the following facts:

Plaintiff is a franchisee of defendant Honda and a dealer in the Honda motorcycle line-make in the Greensboro area. Defendant Honda is the U. S. distributor of Honda motorcycles and parts. On 14 October 1974 defendants entered into a franchise agreement whereby defendant Crown would sell Honda motorcycles in the Greensboro area. On 25 July 1973, defendant Honda notified plaintiff of its intentions to grant a new franchise in the Greensboro area to a franchisee other than defendant Crown; however, defendant Honda did not issue any new notification of the 14 October 1974 franchise grant to defendant Crown. On 19 October 1974 plaintiff filed a petition with the North Carolina Commissioner of Motor Vehicles pursuant to G.S. 20-305(5). On 8 November 1974 plaintiff instituted this action asking for injunctive relief restraining and enjoining defendant Honda from sales or services to defendant Crown. A temporary restraining order was issued, followed by a preliminary injunction granting plaintiff injunctive relief until five days after the rendition of a decision by the commissioner in the proceeding before him. On 5 December 1974 the commissioner entered an order dismissing plaintiff's petition "for lack of jurisdiction", and on 13 December 1974 plaintiff filed suit in the Superior Court of Wake County "in effect appealing the order of the Commissioner". On the same day an order staying the commissioner's order was entered.

The order then provides:

> The Court is of the opinion that the preliminary injunction of November 22, 1974, expired by its own terms December 10, 1974, and that Defendant Honda should now be enjoined from dealing with Defendant Crown until the petition before the Commissioner is finally determined. The Court concludes that jurisdiction for further proceedings herein is in the Superior Court of Wake County by reason of G.S. 143 (sic). The Court concludes that this Court had jurisdiction under G.S. 1-485 of matters ancillary

to the petition before the Commissioner of Motor Vehicles until the filing of the appeal in the Superior Court of Wake County December 12, 1974. The Court concludes it now has jurisdiction to transfer this matter to the Superior Court of Wake County.

NOW THEREFORE IT IS ORDERED that the motions of Defendants be and same are hereby denied and this matter shall be transferred by the Clerk to the Superior Court of Wake County.

Dameron, Turner, Enochs & Foster, by James R. Turner, for plaintiff appellee.

Allen, Steed and Pullen, P.A., by Arch T. Allen, III, for defendant appellant.

BRITT, Judge.

The order from which defendant Honda attempts to appeal is interlocutory, therefore, it is not appealable. Rule 4, Rules of Practice in the Court of Appeals of North Carolina. While the trial court opined that defendant Honda should be enjoined from dealing with defendant Crown until the petition before the Commissioner of Motor Vehicles is finally determined, it entered no order to that effect.

On the same date that defendant Honda docketed its appeal, it also filed a petition for a writ of certiorari, contending it will suffer substantial harm unless the order is reviewed by this court prior to a judgment on the merits. We find no merit in the petition.

Appeal dismissed and petition for writ of certiorari denied.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE BOB LUNSFORD

No. 754SC164

(Filed 21 May 1975)

Assault and Battery § 5; Criminal Law § 26; Robbery § 6— armed robbery — assault with deadly weapon — same occurrence — arrest of judgment

A defendant who was convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the

assault conviction when both offenses arose out of the same occurrence, since assault with a deadly weapon is a lesser included offense within the crime of armed robbery.

ON writ of *certiorari* to review judgments by *Martin (Robert M.) Judge,* entered 28 October 1973 in Superior Court, ONSLOW County. Heard in the Court of Appeals 6 May 1975.

By separate indictments, proper in form, defendant was charged with (1) armed robbery and (2) assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. Both offenses allegedly occurred on 6 September 1973 and Diane Jo Albertson was the alleged victim.

A jury found defendant guilty of armed robbery and assault with a deadly weapon. From judgments imposing prison sentence of not less than 20 nor more than 25 years on the armed robbery charge, and a sentence of two years (to run concurrently with the other sentence) on the assault with a deadly weapon charge, defendant appealed.

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

Cameron and Collins, by E. C. Collins, for defendant appellant.

BRITT, Judge.

Defendant assigns numerous errors to the admission of certain testimony and the court's instructions to the jury. We have carefully considered each of these assignments, but find no merit in any of them.

Defendant assigns as error the entry of judgment on the verdict of assault with a deadly weapon returned by the jury. This assignment has merit.

The evidence tended to show that the robbery in question was perpetrated by defendant and one Louis Vega; that Vega was the one that entered the store, robbed the female clerk with the aid of a pistol, and shot her during the course of the robbery, causing superficial injuries; and that defendant was the "get-away-man", waiting in a car while Vega committed the robbery. Principal testimony against defendant was provided by Vega.

In *State v. Richardson,* 279 N.C. 621, 628, 185 S.E. 2d 102 (1971), opinion by Chief Justice Bobbitt, the court said:

> The crime of robbery includes an assault on the person. *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in G.S. 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. 14-87.
>
> If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, as in *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964), and *State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970), and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested. In such case, the armed robbery is accomplished by the assault with a deadly weapon and *all* essentials of this assault charge are essentials of the armed robbery charge. However, if a defendant is convicted simultaneously of armed robbery and of *felonious* assault under G.S. 14-32(a), neither the infliction of serious injury nor an intent to kill is an essential of the armed robbery charge. A conviction of armed robbery does not establish a defendant's guilt of felonious assault.

In the case at bar, defendant was convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arose out of the same conduct. Consequently, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested.

In No. 73-CR-14647 (armed robbery case), no error.

In No. 73-CR-14685 (assault case), judgment arrested.

Judges PARKER and VAUGHN concur.

MANSFIELD M. DENDY v. JAMES P. WATKINS

No. 7512SC134

(Filed 21 May 1975)

1. **Rules of Civil Procedure § 56— negligence cases — summary judgment**
Summary judgment is appropriate in negligence cases only in exceptional circumstances.

2. **Automobiles § 62— striking pedestrian — summary judgment**
The trial court erred in granting summary judgment for defendant in a pedestrian's action to recover for injuries sustained when he was struck by defendant's car while crossing a highway at a point which was not an intersection or crosswalk.

APPEAL by plaintiff from *Lanier, Judge.* Judgment entered 22 November 1974 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 April 1975.

Action to recover damages for personal injuries sustained by plaintiff which plaintiff alleges were proximately caused by negligence of defendant. Plaintiff, while crossing a street on foot, was hit by an automobile driven by defendant. Defendant denies that he was negligent and alternatively argues that plaintiff was contributorily negligent. Based upon the pleadings, a portion of the adverse examination of plaintiff, an affidavit by defendant and the investigating police officer's testimony, the trial court allowed defendant's motion for summary judgment.

According to the portion of plaintiff's adverse examination in the record, at approximately 5:00 p.m., on 6 April 1970, plaintiff prepared to cross Raeford Road, or U. S. 401, on foot at a location which was not an intersection or crosswalk. He was some thirty feet from the intersection of Raeford Road and Emerline Avenue. There were three lanes of traffic moving in one direction, median, then traffic moving in the opposite direction. Traffic in the first two lanes was backed up to Emerline Avenue. Automobiles in the third lane were backed up to within a couple of car lengths of where plaintiff crossed. Plaintiff observed no oncoming traffic when he began to cross the road. He crossed the first two lanes between the stopped cars. Before attempting to cross the third lane he looked to the left and saw no oncoming cars. The traffic light was red. He looked again and began walking across the third lane to the median. When plaintiff was one step, or three or four feet, from the median the traffic light changed from red to green. He looked to the left

again and then heard a car turning a corner. He could hear the effect of pressure on the tires. When he first saw defendant's car it was approximately fifteen feet from him and defendant was applying the brakes. The car had not come from straight down Raeford Road. The right front fender of defendant's car struck plaintiff's left leg.

In the affidavit submitted to the court, defendant said that he was proceeding down Raeford Road in the left lane, i.e., the lane next to the median, or the third lane which plaintiff was to cross. Defendant was driving at a speed of about thirty miles per hour in a forty mile per hour speed zone. It was about 4:45 p.m., the weather was fair, and the lighting conditions were good. The traffic light at the Fairfield-Raeford Road intersection was in the process of changing from red to green. Traffic in the middle and right lanes, i.e., the first two lanes, was backed up past the Emerline Avenue-Raeford Road intersection. There was no traffic ahead of defendant in the left lane. After defendant had travelled some one hundred feet beyond the Emerline-Raeford intersection, traffic in the two lanes to the right of defendant began moving. Plaintiff suddenly darted in front of an automobile which was moving in the center lane of traffic and was a short distance away from the right front of defendant's automobile. Defendant slammed on brakes and turned his vehicle to the left toward the median, but was unable to avoid striking plaintiff with the right front fender of his automobile.

Officer J. B. De Vane of the Fayetteville Police Department, the investigating officer at the scene of the accident, testified that skid marks made by defendant's car totalled forty-two feet, thirty-nine feet before the point of impact and three feet after the area where the impact occurred.

Doran J. Berry, for plaintiff appellant.

Nance, Collier, Singleton, Kirkman & Herndon, by Rudolph G. Singleton, Jr., for defendant appellee.

VAUGHN, Judge.

The only question on appeal is whether defendant's motion for summary judgment should have been granted by the trial court. Summary judgment is granted only where the moving party shows that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823.

[1] Summary judgment is appropriate in negligence cases only in exceptional circumstances. In *Page v. Sloan,* 281 N.C. 697, 706, 190 S.E. 2d 189, 194, the Supreme Court wrote:

> "While our Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, 'we start with the general proposition that issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.' 6 Moore's Federal Practice (2d ed. 1971) § 56.17[42] at 2583; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1958) § 1232.1, at 106. It is only in exceptional negligence cases that summary judgment is appropriate. *Rogers v. Peabody Coal Co.,* 342 F. 2d 749 (C.A. 6th 1965); *Stace v. Watson,* 316 F. 2d 715 (C.A. 5th 1963). This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969).
>
> Moreover, the movant is held by most courts to a strict standard in all cases; and 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' 6 Moore's Federal Practice (2d ed. 1971); § 56.15[3], at 2337; *United States v. Diebold, Inc.,* 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962)."

[2] We hold that this case is not one of those exceptional negligence cases in which the judge, solely on the basis of the materials before him, could properly grant summary judgment. The judgment is reversed and the case is remanded.

Reversed and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES EMANUEL CARTER

No. 7511SC22

(Filed 21 May 1975)

Homicide § 30— failure to submit involuntary manslaughter

The trial court in a homicide case did not err in failing to submit to the jury an issue of involuntary manslaughter where all the evidence tended to show that defendant intentionally shot the victim and defendant contended he acted in self-defense.

APPEAL by defendant from *Chess, Judge.* Judgment entered 17 October 1974 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 18 March 1975.

Defendant was tried upon an indictment charging him with the murder of James Coleman. When the case was called for trial, the District Attorney announced that the State would ask for a verdict of guilty of murder in the second degree or manslaughter as the evidence might warrant.

The State's evidence tended to show the following. On 7 August 1974, Coleman was in the mess hall at J. N. Johnson Labor Camp. Coleman had engaged in an argument with Lucious Brown, one of the workers at the camp. Defendant entered the mess hall and walked up to Coleman, who was standing by the jukebox. Defendant talked to Coleman about threats Coleman had made. Following a verbal exchange between Coleman and defendant, defendant fired a shot into the floor. He then fired a second shot which entered Coleman's upper left chest, causing his death. Defendant was approximately six to eight feet from the deceased when he fired the fatal shot. After he shot Coleman defendant said, "I didn't mean to shoot that high, I meant to hit him in the leg."

Defendant contended that he acted in self-defense. He testified that Coleman turned towards him with an open knife in his hand, and defendant fired a shot into the floor. Then Coleman leaped towards him and defendant fired the second shot. Defendant testified that "I did not intend to kill him. I was just trying to stop him because he was just about to get on me with that knife to stab me."

The jury found defendant guilty of voluntary manslaughter and judgment imposing a prison sentence was entered.

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

T. Yates Dobson, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant contends that the court erred in failing to submit and instruct the jury on the lesser included offense of involuntary manslaughter.

> " 'Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty.' 4 Strong, N. C. Index 2d, Homicide, § 6, p. 198; *State v. Lawson,* 6 N.C. App. 1, 169 S.E. 2d 265 (1969)." *State v. Dameron,* 15 N.C. App. 84, 88, 189 S.E. 2d 522, 524.

There is no evidence that the shooting of Mr. Coleman by defendant was unintentional. Nor is there evidence that it was the result of culpable negligence or misadventure. All the evidence tended to show that defendant did intentionally shoot the victim. The State presented evidence that defendant, after firing the fatal shot from a range of some six to eight feet away said, "I didn't mean to shoot that high, I meant to hit him in the leg." Defendant's own testimony disclosed that he did intend to shoot the victim in self-defense. Accordingly, the trial court correctly charged the jury and the appeal is without merit.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JOSEPH EDWARD KING

No. 7428SC1003

(Filed 21 May 1975)

Homicide § 19— self-defense — deceased's character as a violent man — permissible rebuttal limited to reputation for peace and quiet

When and after evidence as to the character of deceased as a violent and dangerous man is offered by defendant and admitted by the court, the State may then offer evidence in rebuttal, but such evidence must be in rebuttal and limited to the general reputation of the deceased for peace and quiet; therefore, defendant is entitled to a new trial where the court allowed the State, over defendant's timely objections, to ask witnesses about deceased's general reputation in the community.

ON *certiorari* to review trial before *Martin, (Harry C.), Judge.* Judgment entered 21 February 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 February 1975.

Defendant was tried for the murders of Donald McMahan and Jim Surrett. The jury could not agree on a verdict in the case involving Surrett. The verdict was guilty of voluntary manslaughter in the shooting of McMahan. Judgment was entered imposing a prison sentence of not less than 14 nor more than 17 years.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Robert S. Swain, for defendant appellant.

VAUGHN, Judge.

Defendant did not deny the shootings but contended that he believed his actions necessary in order to save himself and his wife from death or great bodily harm. The reasonableness of that belief was one of the critical issues the jury had to resolve. Defendant offered evidence as to the character of the deceased as a violent and dangerous man and that defendant knew this. "When and after such evidence is offered by the defendant and admitted by the court, the State may then offer evidence in rebuttal, but such evidence must be in rebuttal and limited to the general *reputation of the deceased for peace and quiet.*" (Emphasis added.) *State v. Champion,* 222 N.C. 160, 161, 22 S.E. 2d

232, 233. Evidence of the general good character of the deceased is incompetent and the admission of it constitutes prejudicial error. *State v. Champion, supra; State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48.

In the case before us the State, in rebuttal, called a number of witnesses and asked them about the deceased's "general reputation in the community." Despite defendant's timely objections the improper questions and the incompetent answers were allowed. In this case there can be little doubt that the error in doing so was prejudicial to defendant.

Defendant has brought forward numerous other exceptions, some of which appear to have merit. Since, however, there must be a new trial we need not discuss them as they may not recur. *State v. Champion, supra.*

New trial.

Chief Judge BROCK and Judge MARTIN concur.

CITY OF ASHEBORO v. JOHN R. AUMAN AND NORA AUMAN

No. 7519SC194

(Filed 21 May 1975)

Municipal Corporations § 30— zoning — prohibition of mobile homes

Provision of a zoning ordinance prohibiting mobile homes in a certain area was violated even though the wheels and tongue of the mobile home have been removed and a foundation has been erected.

APPEAL by defendants from *Long, Judge.* Judgment entered 18 December 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 8 May 1975.

The plaintiff City started this action on 7 May 1974 for a permanent injunction to prohibit defendants from allowing a mobile home to remain in an area prohibited by ordinance. On 18 December 1974, the court concluded that there was no genuine issue of material fact and that plaintiff was entitled to judgment as a matter of law. Plaintiff's motion for summary judgment was allowed and judgment allowing the injunctive relief was entered.

Smith and Casper, by Archie L. Smith, for plaintiff appellee.

Bell, Ogburn & Redding, by Deane F. Bell and William H. Heafner, for defendant appellants.

VAUGHN, Judge.

Pre-trial stipulations establish the following. The ordinance was adopted pursuant to statute. On 1 May 1973, defendants purchased a two-bedroom used Embassy mobile home, a mobile home within the definition of the ordinance. Defendants thereafter moved the mobile home into an area forbidden by the zoning ordinance and have since occupied it as their residence. The wheels and tongue have since been removed and a foundation has been erected.

Notwithstanding defendants' contention to the contrary, we hold that the mere removal of the wheels, tongue and the erection of a foundation did not raise a material issue of fact necessary to a determination of the case. Defendants' original violation was effectively stipulated. We hold, as a matter of law, that the stipulated changes in the mobile home did not change the nature of the offending use of the property.

Defendants' arguments that the court should have declared the ordinance unconstitutional are overruled.

The judgment from which defendants appeal is affirmed.

Affirmed.

Judges BRITT and PARKER concur.

WILLIAM FRANKLIN SPENCER v. WACHOVIA BANK AND TRUST COMPANY, N. A.

No. 7521DC25

(Filed 21 May 1975)

Negligence § 29— injury in drive-in window drawer — negligence — contributory negligence

In an action to recover for injuries sustained when plaintiff's hand was caught in a drawer at a drive-in window at defendant's bank,

plaintiff's evidence was sufficient to be submitted to the jury on the issue of the negligence of defendant's employee in closing the drawer when she knew or should have known that plaintiff's hand was in the drawer and did not disclose that plaintiff was contributorily negligent as a matter of law.

APPEAL by plaintiff from *Leonard, Judge.* Judgment entered 20 September 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 18 March 1975.

The action is to collect damages for injuries allegedly received when plaintiff's hand was caught in a drawer at a drive-in window at defendant's bank.

Defendant's motion for a directed verdict was allowed at the close of plaintiff's evidence.

David H. Wagner and Curtiss Todd, for plaintiff appellant.

John E. Hodge, Jr., for defendant appellee.

VAUGHN, Judge.

The credibility of plaintiff's evidence is a matter for resolution by the jury and not by the trial judge or this court. When the evidence is considered in the light most favorable to plaintiff it would permit, but by no means require, a finding that plaintiff suffered some injury because of the negligence of defendant's employee in closing the drawer when she knew or should have known that plaintiff's hand was in the drawer. Plaintiff's evidence does not compel a finding of contributory negligence as a matter of law. This, too, is a question for the jury.

The judgment from which plaintiff appealed is reversed and the case is remanded.

Reversed and remanded.

Judges MORRIS and CLARK concur.

State v. Walton; State v. Gregory

STATE OF NORTH CAROLINA v. WILLIAM JUNIOR WALTON

No. 751SC212

(Filed 21 May 1975)

APPEAL by defendant from *Lanier, Judge.* Judgment entered 7 November 1974 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 8 May 1975.

Defendant was charged in a bill of indictment with armed robbery. After a plea of not guilty, defendant was tried before a jury and found guilty of common law robbery. From judgment entered upon the verdict, defendant appealed.

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

Frank B. Aycock, Jr., for defendant appellant.

MARTIN, Judge.

Counsel for defendant admits that he is unable to find prejudicial error in the trial. We have carefully examined the record and are also of the opinion that defendant has received a fair trial free from prejudicial error.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. SAINT LUKE GREGORY, JR.

No. 751SC168

(Filed 21 May 1975)

APPEAL by defendant from *Cohoon, Judge.* Judgment entered 4 December 1974 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 6 May 1975.

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

C. Everett Thompson, for defendant appellant.

BRITT, PARKER and VAUGHN, Judges.

No error.

THOMAS L. NORRIS, JR., ADMINISTRATOR OF THE ESTATE OF MARSHALL PARKER; SUSAN W. HARTSOG, EXECUTRIX OF THE ESTATE OF RALPH HARTSOG; NANCY M. JOHNSON, ADMINISTRATRIX OF THE ESTATE OF CAROL K. JOHNSON; JUDITY M. MACHADO, ADMINISTRATRIX OF THE ESTATE OF JOSE R. MACHADO v. INSURANCE COMPANY OF NORTH AMERICA

No. 7418SC1059

(Filed 4 June 1975)

1. Insurance §§ 4, 63— aircraft insurance — binder

There was ample evidence to support a jury finding that a legally effective binder for aircraft insurance was in existence on the date the aircraft crashed where it tended to show that the treasurer of the corporate lessee of the aircraft called an agent authorized to bind defendant insurer and told him to bind coverage effective on a date some three weeks prior to the crash, the agent in turn instructed defendant insurer to bind coverage as of that date, the particular type and amount of coverage had been discussed previously between officials of the lessee and the agent and between the agent and defendant insurer's underwriter, and the underwriter went forward with preparation of the policy on a form customarily used by defendant insurer for writing aircraft insurance policies and mailed this to the agent even before receiving the signed application for the insurance.

2. Insurance §§ 4, 63— aircraft insurance — binder — terms

Where there is no standard form of aircraft insurance prescribed by statute, and in the absence of an express agreement to the contrary, the terms and provisions of a binder or temporary contract of aircraft insurance are those of the policy ordinarily used by the insurance company to cover similar risks.

3. Insurance §§ 4, 63— aircraft insurance — binder — delivery of aircraft

Delivery of an airplane on the exact date the parties to an insurance contract expected delivery to occur was not a condition precedent to the effectiveness of a binder for insurance on the airplane, but the binder became effective on the date of actual delivery, and the evidence was sufficient to support a jury finding of delivery where it tended to show that the pilot of the purchaser's lessee flew the airplane away from the seller's premises with all equipment called for in the purchase order installed in the airplane and with no restrictions placed by the seller upon use of the airplane.

4. Insurance § 63— aircraft insurance — admitted liability coverage — meeting of the minds

The jury could find that there was a meeting of the minds of the parties before an airplane crash that the amount of the admitted liability coverage for the airplane was to be $100,000 per seat where there was evidence tending to show that, although an employee of an agent representing defendant insurer told defendant's underwriter by telephone that the admitted liability coverage should be $50,000 per seat

and the policy mailed by the underwriter before he received the written application showed that amount, the agent at all times had a clear understanding with officials of the prospective insured that the coverage was to be $100,000 per seat, the application prepared by the agent showed $100,000 per seat coverage, as soon as the agent received the written policy three days before the airplane crashed he notified defendant of the mistake in the amount of the admitted liability coverage shown on the policy, and on the day of the crash defendant's underwriter confirmed to the agent there was no problem as to the amount of coverage and that "you have got the $100,000."

5. Insurance § 63— aircraft liability insurance — insurable interest — ownership

Declaration in an aircraft insurance policy that the named insured is the sole owner of the aircraft applied only to insurance against physical damage to the aircraft itself, and ownership was not necessary to the establishment of an insurable interest in the aircraft for purposes of liability insurance coverage.

6. Insurance § 63— aircraft liability insurance — ownership — absence of bill of sale, registration with F.A.A. — delivery

Even if ownership of an aircraft by the named insureds was a condition of liability insurance coverage on the aircraft, execution of a bill of sale by the seller, recordation of ownership with the Federal Aviation Agency as provided for in 49 U.S.C. § 1403(a), and registration of the aircraft pursuant to 49 U.S.C. § 1401 were not essential to a transfer of ownership, and the evidence was sufficient to support a jury finding that insureds, the purchaser and lessee, had become owners of the aircraft under G.S. 25-2-401(2) where it tended to show that the seller had fully completed all work called for in the purchase order and that it unconditionally delivered the aircraft to the lessee's pilot who flew it away from the seller's premises.

7. Insurance § 63— aircraft insurance — substitute aircraft

The evidence was sufficient to support a jury finding that an airplane was being temporarily used as a "Substitute Aircraft" within the meaning of an aircraft liability policy at the time it crashed where it tended to show that the airplane was furnished by the seller of the insured airplane for use by insureds, it was "another fixed wing aircraft" of the type to meet policy requirements for a "Substitute Aircraft," the airplane described in the policy had been placed in normal use by the insureds in that it had been used to transport an employee of the insured lessee, and the insured airplane had been "withdrawn from normal use" because of its "repair" or "servicing" in that it had been returned to the seller so that a radio master switch could be installed and a circuit altered to allow use of a different type of boom mike than that for which it was originally designed; the fact that insureds had been notified on the day before the substitute airplane crashed that the repairs and servicing of the insured airplane had been completed does not require a finding that the insured plane was, as of the moment of such notification, no longer "withdrawn from normal use" since insureds had a reasonable time after such notification to pick up the insured airplane and the airplane they were using in its

place was still being "temporarily used as a substitute for such aircraft" during that time.

APPEAL by plaintiffs from *Wood, Judge.* Judgment entered 18 July 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 March 1975.

Civil action to recover $400,000.00 under a contract of insurance, Policy No. ANM 17 97 05.

On 13 December 1971 a Beech Baron Aircraft, Federal Aviation Certificate No. N4877J, crashed near Douglas Airport, Charlotte, N. C. Plaintiffs' intestates, Marshall Parker, Ralph Hartsog, Carol K. Johnson and Jose R. Machado, all employees of Knit-Away, Inc., were killed in the crash. The aircraft which crashed, No. N4877J, belonged to Air Service, Inc., and was not the aircraft described in the policy. Plaintiffs alleged that it was loaned to Knit-Away by Air Service while final repairs and servicing were made to the new Beech Baron Aircraft No. N9280Q, the aircraft identified in the insurance policy, and plaintiffs contend that the crashed aircraft was a "substitute aircraft" under the following language of paragraph 10 of the policy:

"10. *Temporary Use of Substitute Aircraft.*

While the aircraft described in this policy is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded under Coverages D, E, F, G and H of this policy with respect to such aircraft applies with respect to another fixed wing aircraft, certificated by the Federal Aviation Agency and of no greater seating capacity, not owned by the named insured, while temporarily used as the substitute for such aircraft."

Coverage G of the policy provided that the insurance company should pay on behalf of the insured all sums which the insured shall become liable to pay as damages because of bodily injury, including death resulting therefrom, sustained by any person and arising out of the ownership, maintenance or use of the aircraft as described in the policy. The policy contained an "Admitted Liability Endorsement" by which the defendant insurance company (INA) and the named insured agreed that INA's limit of liability under Coverage G for each person shall be offered in payment by INA in full settlement of any claim be-

cause of bodily injury resulting in loss of life sustained by a passenger carried in an insured aircraft whether or not the insured is legally liable in respect of such claim. In substance, the effect of the Admitted Liability Endorsement is that the estate of a passenger who is killed in an insured aircraft may elect to accept a specified amount as death benefits under the policy in lieu of prosecuting a wrongful death claim based on negligence. Plaintiffs have made such an election in this case, and consequently this action is based on the contract contained in the policy.

The policy named Knit-Away as the named insured in the "Declarations" and by endorsement named Richard Bruce as an additional insured "as respects his liability as lessor." Plaintiffs seek recovery from defendant INA under the policy and particularly under the Admitted Liability Endorsement thereto in the sum of $100,000.00 for each plaintiff.

INA filed answer to which it denied liability and alleged that the policy sued on was not delivered to any insured thereunder at the time of the accident, that it was not countersigned and otherwise issued as required by the terms of the policy and the application therefor, that Knit-Away did not have an insurable interest in the aircraft described in the policy, and that the policy was not in effect on 13 December 1971. INA also contends that if the policy was in effect, it did not insure the airplane which crashed on 13 December 1971.

Plaintiffs' evidence showed: In early October 1971, officials of Knit-Away, a textile manufacturing company, negotiated with Air Service, an airplane selling and servicing company located at Greensboro, for the purchase of a new aircraft. As result of these negotiations, Richard P. Bruce, the President of Knit-Away, signed a purchase order dated 14 October 1971 by which he agreed as an individual to purchase from Air Service a new Beechcraft Airplane, Model 58 Baron, No. N9280Q. The purchase price of the airplane, with additional specified optional equipment to be installed, was $116,650.00. Bruce gave Air Service his personal check for $5,000.00 to cover the deposit required by the purchase order and agreed to pay the balance of $111,650.00 in cash. At the time the purchase order was signed, aircraft No. N9280Q was registered to Air Service and was in its possession at Greensboro, where it remained while Air Service was engaged in installing in it the additional optional equipment specified in the purchase order.

On 24 November 1971 Bruce, as lessor, and Knit-Away, as lessee, entered into a written lease agreement by which Bruce leased the new aircraft to Knit-Away for a term of 36 months commencing on 24 November 1971. The lease provided that the lessee should keep the leased aircraft insured during the term of the lease against liability for bodily injury and property damage and that the insurance policy or policies should name the lessee and lessor as insured. Prior to 24 November 1971 officials of Knit-Away had conferred with Murray M. White, Jr., an insurance agent and broker and President of Murray M. White, Incorporated, of High Point, and had obtained from him quotations for insurance coverage on the aircraft. White represented INA as an independent agent and had authority to bind INA and to write policies on risks that INA found acceptable. After talking with Knit-Away officials about the coverage on the aircraft, White talked with Paul Chapoton, a Marine and Aviation Underwriter employed by INA. On 26 October 1971 Chapoton wrote a letter to White in which he confirmed a quotation of rates for various coverages on the aircraft, including a quotation of rates for admitted liability coverage. This letter stated that the quotation given was "based upon Mr. Bruce purchasing the aircraft, and then leasing it to his company." Just prior to 22 November 1971, Tom Foreman, the Treasurer of Knit-Away, called White and told him that they were going to accept delivery of the aircraft on 24 November and asked White to bind coverage on that date. White wrote INA and told them to bind coverage as of 24 November. On 6 December 1971 White forwarded the application for the policy to INA and asked them to go ahead and issue the policy in accordance with the enclosed application. The application was signed by Marshall Parker, pilot for Knit-Away, was dated 2 December 1971, requested insurance from 24 November 1971 to 24 November 1972, and applied for $5,000,000.00 single limit coverage, passengers included, and for $100,000.00 per seat guest voluntary settlement or admitted liability coverage.

On 10 December 1971 White received from INA policy ANM 17 97 05, a copy of which was introduced in evidence. This shows a policy period from 24 November 1971 to 24 November 1972 and describes the covered aircraft as a 1972 Beech Baron, Federal Aviation Agency Certificate No. N9580Q. (In a final pretrial order all parties stipulated that the reference in the policy should have been to No. N9280Q and that the reference in the policy is changed to so indicate for the purposes of this

trial.) The parties stipulated that on or about 1 December 1971 Brenda Coggins, an employee of Murray M. White, Inc., told Paul Chapoton of INA in a telephone conversation that the admitted liability endorsement in the policy should be $50,000.00 per seat, that the policy was forwarded to Murray White, Inc., on 7 or 8 December 1971, and that the application and the policy apparently crossed in the mails. The policy shows $50,000.00 per seat admitted liability insurance. When White received the policy on 10 December 1971 he phoned INA and told them that the policy was "written incorrectly because the admitted limits should have been $100,000.00 as per the application." White testified that he talked with Chapoton again on Monday, 13 December 1971, the date of the crash, and reminded him of the telephone call on Friday, 10 December, and of the fact that the admitted liability endorsement was incorrect in the policy and that $100,000.00 per seat admitted liability coverage had been ordered, to which Chapoton responded: "No problem; you have got the $100,000.00."

After the crash White billed Knit-Away for $2,951.00 as the premium for the insurance coverage, and Knit-Away paid White that amount. This premium was based on $100,000.00 per seat admitted liability coverage. White in turn accounted to INA for the $2,951.00 he collected from Knit-Away, less his 15 percent commission. In June 1973 INA tendered repayment to Knit-Away of $2,462.00, the amount of the premium shown in the policy, which premium was based on admitted liability coverage of $50,000.00 per seat. Knit-Away refused to accept the repayment tendered by INA.

After Bruce signed the purchase order dated 14 October 1971 for purchase of the new plane, No. N9280Q, from Air Service, Air Service proceeded with the work of installing in the plane the additional equipment called for in the purchase order. Air Service promised delivery of the plane on 5 November 1971, but fell behind schedule because of problems in getting equipment. As a result, the promised delivery date slipped to 24 November 1971. On that date the work was still not completed. On Monday, 6 December 1971, Marshall Parker, the pilot for Knit-Away, and Richard Austin, the sales representative for Air Service, jointly flew the new plane. At that time all of the equipment was on the airplane and in working order. On the afternoon of 7 December 1971 Parker left Greensboro in the new airplane, N9280Q. In this regard Austin testified:

"I made no restrictions on his use of the aircraft at the time he left on December 7th. The equipment as per the list was installed and there were no restrictions as to his use."

On Thursday morning, 9 December 1971, the new aircraft, N9280Q, was back on the ramp of Air Service. On the following day, 10 December 1971, employees of Air Service installed in the new plane a radio master switch and modified a circuit so that a boom mike of a different type than they had wired for would be operable. The radio master switch was not a part of the original order. The wiring for the boom mike was, but it did not work with Parker's personal microphone. This work was accomplished on Friday, 10 December 1971. On Sunday, 12 December 1971, Austin, the sales representative of Air Service, test flew the new plane, N9280Q, for the purpose of checking it following the installation of the master relay and master radio switch. Following this test flight, Austin telephoned Marshall Parker and told him the plane was acceptable if he wanted to use it. On Monday, 13 December 1971, the date that aircraft N4877J crashed near Charlotte, the new aircraft, N9280Q, was still sitting on the ramp of Air Service at Greensboro. The only time between 9 and 13 December 1971 when N9280Q left the premises of Air Service was when Austin test flew it.

The airplane which crashed, N4877J, had been loaned by Air Service to Knit-Away around the last of November 1971, when Air Service delivered that plane to Marshall Parker at Raleigh. Parker had permission of Air Service to use N4877J until the new plane was ready. Plane N4877J was on the premises of Air Service on Tuesday, 7 December, and Wednesday, 8 December 1971. It was not there on 10 December 1971. Austin had obtained permission from the President of Air Service for Marshall Parker to fly the plane, N4877J, while Air Service was installing the radio master relay or speaker relay in the new plane. The airplane, N4877J, crashed at Charlotte at 9:00 a.m. on 13 December 1971.

Other evidence will be referred to in the opinion.

At the close of plaintiffs' evidence, the court allowed the defendant's motion under Rule 50 for a directed verdict and dismissed plaintiffs' action.

Poyner, Geraghty, Hartsfield & Townsend, by Marvin D. Musselwhite, Jr., John L. Shaw and Cecil W. Harrison, Jr.; and W. Pinkney Herbert, Jr., P.A. by W. Pinkney Herbert, Jr., and J. Michael Booe, for plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson, by W. F. Maready and Robert J. Lawing, for defendant appellee.

PARKER, Judge.

The sole question brought forward on this appeal is whether the court erred in granting defendant's motion for a directed verdict. Plaintiffs contend that their evidence, when taken as true and when considered in the light most favorable to them, was sufficient to require submission of this case to the jury. We agree.

Defendant contends the directed verdict in its favor was properly entered on the grounds, first, that plaintiffs' evidence was insufficient to show any contract of insurance was in effect at the time of the accident, and, second, if plaintiffs' evidence was sufficient to show the insurance was in effect, it did not insure the airplane which crashed. We first examine the contention that plaintiffs' evidence was insufficient to show a valid contract of insurance was in effect at the time of the accident.

The written policy, which bore the designation "Aircraft Policy ANM 17 97 05," was on a printed form of defendant INA. The printed attestation clause which immediately precedes the facsimile signatures of the President and of the Secretary-Treasurer is as follows: "In Witness Whereof, the company has caused this policy to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company." No countersignature of any authorized agent appears on the declarations page of the printed policy. There was evidence that Murray M. White was an authorized agent of INA and that the policy was in his possession when the fatal crash occurred on 13 December 1971. White testified that he forwarded the policy to Knit-Away on 7 January 1972 with a covering letter which bore his authorized signature, that the policy was not signed by him "through oversight," and that it was his "intention to forward a signed insurance policy." There is authority to the effect that "as countersigning is an evidence of delivery, it seems that a delivery by letter would be sufficient." 1 Couch, Insurance 2d, § 8:17, p. 367.

There is also authority that "when the countersignature though made is delayed, the insurer is liable for the loss sustained prior to countersignature," 1 Couch, Insurance 2d, § 8:14, p. 365; Annot., 22 A.L.R. 2d 984, 987 (1952); *see Pruitt v. Insurance Co.*, 241 N.C. 725, 86 S.E. 2d 401 (1955). We do not, however, base our decision here upon a determination that the policy, as a completed document, was effective as of the date of the crash. In our opinion there was ample evidence to support a jury finding that a legally effective "binder" for the insurance was in existence on that date.

[1, 2] "In insurance parlance, a 'binder' is insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued, or until insurer gives notice of its election to terminate. The binder may be oral or in writing." *Moore v. Electric Co.*, 264 N.C. 667, 673, 142 S.E. 2d 659, 664 (1965). Here, there was evidence that on 22 November 1971 the Treasurer of Knit-Away called Murray White, who was an agent authorized to bind the defendant, INA, and told him to bind coverage effective 24 November 1971. There was evidence that White in turn instructed INA to bind coverage as of that date. There was also evidence that the particular type and amount of coverage had been discussed previously between officials of Knit-Away and White and between White and Chapoton, the underwriter employed by INA. That Chapoton considered the coverage bound is shown by the fact that he went forward with the preparation of the policy on the INA form customarily used by it for writing policies of aircraft insurance and that he mailed this to White even before receiving the signed application. We hold the evidence sufficient to support a jury finding that a legally effective "binder" or temporary contract of insurance was in effect when the fatal crash occurred. Where, as here, there is no standard form of aircraft insurance prescribed by statute, and in the absence of an express agreement to the contrary, the terms and provisions of such temporary contract of insurance are those of the policy ordinarily used by the insurance company to cover similar risks. 43 Am. Jur. 2d, Insurance, § 219, p. 280. This was the form sent by Chapoton to White and which, after the crash, White forwarded to Knit-Away. Even though not countersigned "on the declarations page," it was competent in evidence to show the terms and provisions of the temporary contract of insurance or "binder."

[3] Defendant contends that any binder for insurance was conditioned upon Knit-Away accepting delivery of the insured aircraft on 24 November 1971, that the evidence shows that it did not accept delivery on that date or at any time thereafter, and that for these reasons no binder became effective. We do not agree. While the aircraft was not delivered on 24 November 1971, there was evidence from which the jury could find that it was unconditionally delivered by the seller, Air Service, and accepted by Knit-Away on 7 December 1971. On that date the pilot for Knit-Away flew the plane away from the seller's premises at Greensboro with all equipment called for in the purchase order installed in the plane and with no restrictions placed upon his use of the aircraft by the seller. From this the jury could find that a final unconditional delivery of the plane had been made by the seller and accepted by Knit-Away, the lessee from the purchaser, at least as of 7 December 1971. We find nothing in the conduct of the parties as shown by the evidence in the record before us to support defendant's contention that any insurance binder could become effective, if at all, only on condition that delivery of the plane be accepted by Knit-Away exactly on 24 November 1971. On the contrary, the more reasonable interpretation of the conduct of the parties is that the prospective insureds, Bruce as owner and Knit-Away as lessee, wanted insurance coverage, and INA agreed to provide such coverage, from the instant the plane was delivered by the seller, and that although all parties expected this to occur on 24 November 1971, they were not making delivery as of that exact date a condition precedent to any binder for insurance ever becoming effective.

[4] Defendant contends that the binder was not effective because there was no meeting of the minds of the parties as to the amount of the admitted liability coverage. In this connection the parties stipulated that on or about 1 December 1971 Brenda Coggins, an employee of Murray M. White, Inc., told Chapoton of INA in a telephone conversation that the amount of the admitted liability coverage should be $50,000.00 per seat. The policy No. ANM 17 97 05 as prepared and mailed by Chapoton before he received the written application showed that amount. There was ample evidence, however, that White, an authorized agent representing INA, at all times had a clear understanding with the officials of Knit-Away that the coverage was to be in the amount of $100,000.00 per seat, and the application dated 2 December 1971 which was prepared by White, agent for INA,

and signed by Parker, agent for Knit-Away, showed $100,000.00 per seat coverage. White had authority to bind INA, and all of the evidence shows that he and the officials of the insured, Knit-Away, were in complete agreement as to the amount of the coverage. In addition, White testified that as soon as he received the written policy on 10 December 1971, three days before the crash, he notified INA of the mistake in the amount of the admitted liability coverage shown in the policy and on the day of the crash Chapoton confirmed to him there was "no problem" as to the amount of coverage and that "you have got the $100,000.00." Viewing the evidence in the light most favorable to the plaintiffs, as we are bound to do in reviewing the trial judge's order which granted defendant's motion for a directed verdict, it is clear that the jury could legitimately find from the evidence that there was a meeting of the minds of the parties before the crash that the amount of the admitted liability coverage was to be $100,000.00 per seat.

[5] Finally defendant contends there was no valid contract of insurance in effect because the named insureds, Bruce and Knit-Away, did not have an insurable interest in the aircraft identified in the policy, No. N9280Q, at the time of the crash. In support of this contention defendant points to the evidence that no bill of sale for the aircraft was executed by the seller, Air Service, and the aircraft was never registered in the name of Bruce or Knit-Away with the Federal Aviation Agency. However, in the present case we are concerned only with liability insurance coverage, and "[t]he insurable interest in such cases is to be found in the interest that the insured has in the safety of those persons who may maintain, or the freedom from damage to property which may become the basis of, suits against him in case of their injury or destruction." 3 Couch, Insurance 2d, § 24:159, p. 273; Annot., 1 A.L.R. 3d 1193 (1965). Thus, "[a]n insurable interest in the property covered by liability insurance is usually not required, in the same sense as in property insurance, since the risk insured against is not based on ownership of property, but upon loss and injury caused by its use for which the insured might be liable." 7 Appleman, Insurance Law and Practice, § 4253, p. 11. In general, therefore, the trend of modern court decisions is to hold that for purposes of vehicular liability insurance "no legal or equitable interest in the insured vehicle *as property* is necessary, but it is enough that the insured may be held liable for damages incident to its operation and use." Annot., 1 A.L.R. 3d 1193, § 3, p. 1197 (1965).

Defendant points to the following language in Item 8 of the Declarations of Policy No. ANM 17 97 05:

> "Item 8. (a) Except with respect to bailment, lease, conditional sale, mortgages, or other encumbrance the named insured is the sole owner of the aircraft; . . ."

immediately below which appears:

> "Exception, if any, to (a) or (b) *none.*"

Defendant contends this language in the Declarations imposes a contractual requirement that ownership of the aircraft must be vested in the insureds as a condition precedent to imposing any liability upon the insurer, citing *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972). That case is distinguishable. In *Younts*, which involved an automobile liability policy, the policy provided that the insurance company should pay on behalf of the insured all sums which the insured should become legally obligated to pay arising out of the ownership, maintenance or use of the "*owned* automobile." 281 N.C. at 585. Stressing this provision, our Supreme Court held that the policy in that case was a contract between the insurance company and the owner of the vehicle involved and that since the person against whom plaintiff had obtained judgment was not the owner, plaintiff could not recover from the insurance company. In the policy before us in the present case, the defendant insurance company agreed to pay under Coverage G of the policy all sums which the insured should become legally obligated to pay arising out of the ownership, maintenance or use of the aircraft *"as described in this policy."* (Emphasis added.) Thus, the language in which the effective insuring agreement is expressed in the policy before us does not limit the agreement to one between the insurer on the one hand and the owner of the vehicle insured on the other, at least insofar as the liability insurance provided by Coverage G is concerned. In our opinion Item 8(a) of the Declarations quoted above is relevant to the insurance provided by Coverages A, B and C in the policy, which provided insurance against physical damage to the insured plane itself. For that type of coverage, ownership of the insured property is relevant to show an insurable interest. For the reasons stated above, ownership is not as relevant to establish an insurable interest in the case of liability insurance coverage.

[6] Furthermore, if it be conceded *arguendo* that ownership in the named insureds of the aircraft described in the policy

was a condition to any obligation on the part of defendant insurance company even insofar as liability insurance coverage is concerned, there was in this case sufficient evidence from which the jury could find that the insureds, Bruce as lessor and Knit-Away as lessee, had become the owners of the aircraft described in the policy at the time the crash occurred. As above noted, there was evidence that by 7 December 1971 the seller, Air Service, had fully completed all work called for in the purchase order and that on that date it unconditionally delivered the plane to Knit-Away's pilot, who then took the plane and flew it away from the seller's premises. G.S. 25-2-401(2) contains the following:

> "(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place. . . ."

Execution of a bill of sale by the seller and recordation of ownership with the Federal Aviation Agency as provided for in Title 49 U.S.C. § 1403(a) was not essential to transfer of ownership. *See* Annot., 22 A.L.R. 3d 1270 (1968). Subsection (c) of 49 U.S.C. § 1403 expressly provides that "[n]o conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof. . . ." The clear implication of this language is that the conveyance, even though not recorded, is valid as against the person making the conveyance and against any person having actual notice thereof. Moreover, although 49 U.S.C. § 1403 is controlling over state laws as to the manner in which recordation of conveyances and encumbrances on aircraft are to be made, state law is to be applied in determining the inherent validity of such conveyances and encumbrances. *See* cases cited in Annot., 22 A.L.R. 3d 1270, § 4, p. 1277, *et seq.* In this State a bill of sale or other document is not necessary to transfer of title to personal property, at least absent some statute, such as our motor vehicle law, applicable to the particular type of property involved. We have no statute applicable particularly to aircraft, and we find G.S. 25-2-401(2) above cited, which is applicable to sales of "goods" generally, to be here controlling.

Defendant's argument that the insureds, Bruce and Knit-Away, were not the owners of the aircraft described in the policy because it was not "registered" in the name of either as required by 49 U.S.C. § 1401 is not persuasive. Subsection (f) of § 1401 expressly provides that "[r]egistration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue." Moreover, whether the purchased aircraft could, or could not, be lawfully operated prior to its registration by its owner as provided in Title 49 U.S.C. § 1401(a) simply has no bearing on the question of defendant's liability under its contract of insurance. Nothing in that contract, as evidenced by the Policy ANM 17 97 05, excludes liability on the part of the insurer for any unlawful operation by reason of failure to comply with the registration requirements of 49 U.S.C. § 1401. Additionally, we point out that the newly purchased plane was not the plane which crashed and was not being then operated.

Evidence that following the crash Bruce, the purchaser, agreed with Air Service, the seller, to forfeit his $5,000.00 down payment and to allow Air Service to sell the plane No. N9280Q to another is not controlling on the question of ownership of the plane at the time of the crash. Bruce testified that after the crash "there was a great reluctancy to fly by most employees of Knit-Away," and for that reason he met with the President of Air Service in January 1972 and agreed for them to sell the airplane. This evidence confirmed, rather than negatived, the prior ownership in Bruce at the time of the crash.

[7] We hold plaintiffs' evidence sufficient to show a valid contract of insurance in effect at the time of the crash. We now examine defendant's contention that the evidence failed to show that the aircraft which crashed was a "Substitute Aircraft" within the meaning of that contract.

There was evidence that the plane which crashed, N4877J, was the same model and type and of no greater seating capacity than the plane, N9280Q, described in the policy. There was evidence that it was certificated by the Federal Aviation Agency and that it was not owned by the named insured. Thus, from the evidence the jury could find that N4877J was "another fixed wing aircraft" of the type to meet the requirements of paragraph 10 of the policy conditions for being a "Substitute Aircraft." There was evidence from which the jury could find that prior to the crash of N4877J, plane N9280Q had been placed

in "normal use" by the insureds. The policy provided that the purposes for which the plane described therein was to be used was "Industrial Aid," which was defined in the policy as "personal, pleasure, family and business uses, and transportation of executives, employees, guests and customers, excluding any operation for which a charge is made." As heretofore noted, there was evidence that on 7 December 1971 Marshall Parker, an employee of the named insured, Knit-Away, accepted unconditional delivery of N9280Q and flew away in it from the seller's premises at Greensboro. Clearly, that flight alone involved transportation of an employee, one of the uses within the policy definition of "Industrial Aid" use. If the defendant insurance company desired the words "normal use" as contained in paragraph 10 of the policy to have a more restricted meaning than the broad definition of "Industrial Aid" use, which was the stated purpose for which the insured aircraft was to be used as set forth in the policy, then clearly it was incumbent upon the insurance company, which drafted the policy, to make that more restricted meaning clear. It is an established rule of construction that an insurance policy prepared by the insurer is to be construed most liberally in favor of the insured. and in case of ambiguity a construction will not be adopted that will defeat recovery if the policy is susceptible of a meaning that will permit recovery. 43 Am. Jur. 2d, Insurance, § 271, p. 329, *et seq.*

There was also evidence from which the jury could find that at the time of the crash, the plane N9280Q had been "withdrawn from normal use" because of its "repair" or "servicing" within the meaning of paragraph 10 of the policy. Our Supreme Court stated in *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E. 2d 571 (1971), speaking concerning a substitution provision in a policy of automobile liability insurance, that such a provision should be construed liberally in favor of the insured if any construction is necessary and that the terms of such a provision should be given their everyday man-in-the-street understood meaning. The evidence in the present case shows that by 9 December 1971 N9280Q was returned to Air Service so that a radio master switch could be installed and a circuit altered in order to allow a boom mike of a different type than that for which it was originally designed to be operable. These operations constituted "repair" and "servicing" within the everyday man-in-the-street understood meaning of those terms. That these operations had been completed on Friday, 10 December 1971,

and that Richard Austin, an employee of Air Service had checked them out and had notified Marshall Parker on Sunday afternoon, 12 December 1971, that the work had been satisfactorily completed, does not require a holding that the plane N9280Q was, as of the moment of such notification, no longer "withdrawn from normal use." The more reasonable construction of paragraph 10 is that the insureds should have a reasonable period of time after being notified that repair and servicing of their plane had been completed within which to pick it up and that in the meantime the plane which they were using in its place was still being "temporarily used as the substitute for such aircraft" within the meaning of paragraph 10.

We hold that plaintiffs' evidence was sufficient to support a jury finding that at the time the crash of N4877J occurred on the morning of 13 December 1971, it was being temporarily used as a "Substitute Aircraft" for the plane described in the policy within the meaning of paragraph 10 of the policy.

Accordingly, the judgment appealed from which allowed defendant's motion for a directed verdict is

Reversed.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF: DAVID THOMAS GREER, JR., AND ALLISON GREER

No. 753DC119

(Filed 4 June 1975)

1. **Divorce and Alimony § 22— child custody — pendency of action**

A divorce action is pending for the purpose of determining custody and support until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur.

2. **Courts § 14— concurrent jurisdiction — court first acquiring jurisdiction**

Where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it.

3. **Divorce and Alimony § 22— child custody — "neglected" children — assumption of jurisdiction improper**

The District Court, Pitt County, did not have the right to assume custody jurisdiction of two minor children upon its finding that they

were "neglected" children as defined in G.S. 7A-278(4) to the exclusion of the District Court, Watauga County, which had previously acquired such custody jurisdiction in a divorce and custody proceeding of the children's parents, since there was no evidence and no factual finding to support the conclusion of the District Court, Pitt County, that the children were "neglected."

APPEAL by R. L. Allison and wife, Lena R. Allison, and Marion Allison Greer from *Wheeler, Judge.* Order entered 4 October, 1974 in District Court, PITT County. Heard in the Court of Appeals 11 April 1975.

The record of the case on appeal consists primarily of the various orders of the Superior Court, Watauga County, and the District Courts sitting in Watauga and Pitt Counties, with no summary of any evidence on which the various trial courts based their findings of facts. The following statement of factual circumstances is derived entirely from these orders.

On 12 November 1968 in a divorce and custody proceeding entitled "David Thomas Greer, Sr. vs. Marion Allison Greer and Roby Greer and wife, Ruth G. Greer, and Robert L. Allison and wife, Lena R. Allison," the Superior Court of Watauga County entered an order awarding custody of David Thomas Greer, Jr., (now age 14) and Allison Greer (now age 13), children born of the marriage of David Thomas Greer, Sr., and Marion Allison Greer, as follows: to their maternal grandparents Robert L. Allison and wife, Lena R. Allison, who reside in Alleghany County, during the school year; and to their paternal grandparents, Roby Greer and wife, Ruth G. Greer, who reside in Watauga County, during the summer vacation each year and during the Thanksgiving and Christmas holidays. The order recites that David Thomas Greer, Sr., and his divorced wife, Marion Greer, had agreed previously in writing to such custody and that neither party had any criticism of the treatment the children had received while living with the grandparents. On appeal this Court affirmed the order in *Greer v. Greer*, 5 N.C. App. 160, 167 S.E. 2d 782 (1969).

The children's mother has been a schoolteacher in Alleghany County since the 1968 divorce; their father is, and has been for several years, a practicing attorney in Pitt County. At the end of the school term in May, 1974, the children did not go to stay with their paternal grandparents in nearby Watauga County, but instead were taken by their father for a "visit" with him in Pitt County. The children have remained with the father since

May. It appears that the paternal grandparents in Watauga were aged and infirm, but the record otherwise gives us no explanation for the apparent transfer of summer custody from them to the father in Pitt County. In any event, it does not appear that there had been any amendment to, or any motion to amend, the original 1968 custody order of the Superior Court in Watauga County.

On 9 August 1974, five days before the opening of the Sparta school which the children had been attending, the District Court, Pitt County, on motion of an attorney for the minor children, entered an order temporarily restraining David Thomas Greer, Sr., from returning the children to their maternal grandparents, and the court set the hearing on 21 August 1974 to determine if the temporary order should be made permanent. It does not appear where, how, or why the children acquired this attorney or other attorneys who represented them in subsequent proceedings. The hearing was held, after continuance, on 28 August 1974. On the following day the District Court ordered the Pitt County Social Services Department to conduct an investigation into the surroundings of the two said minor children.

The following occurred on 2 September 1974: (1) The District Court, Pitt County, entered its order, pursuant to the 28 August hearing, finding that the District Court of Pitt County did not have jurisdiction, and dissolving the restraining order; (2) the Pitt County Social Services Department filed a Petition in the District Court alleging that "the children were subject to such serious neglect as might endanger their mental and emotional health and morals," and that the best interests of the children required that placement be had in the home of the children's father pending further orders of the Court; and (3) the District Court, Pitt County, entered an immediate custody order placing the children in the custody of the Pitt County Social Services Department to be placed in a licensed foster home or in the home of the father as deemed appropriate, pending the hearing on the merits.

On 3 September 1974, pursuant to order entered on 20 August to show cause why David Thomas Greer, Sr., should not be adjudged in contempt, the Superior Court, Watauga County, on condition that the father deliver the children to the home of the maternal grandparents on or before 7 September, con-

tinued the hearing until 11 September and transferred the cause to the District Court of Watauga County.

On 5 September, the District Court, Pitt County, entered an order restraining the father from taking the children out of Pitt County.

At the 11 September 1974 hearing in the District Court, Watauga County, the Court found that the custody order of the District Court, Pitt County, entered on 3 September was subordinate to the previously existing custody order entered in the Superior Court, Watauga County, in 1968, that the father was in contempt and committed him to jail for a term of twenty days beginning on 16 September 1974; provided that if he delivered the children to the home of the maternal grandparents by 15 September he would be relieved of reporting to jail until further orders of the court.

On 13 September 1974, the District Court, Pitt County, entered an order which recited that at hearing of the motion of the attorneys for David Thomas Greer, Sr., to allow him to return the children to the maternal grandparents in Alleghany County, it was directed that the cause be transferred to said county, and that the father return the children. On the same day a motion was made by a caseworker for the Pitt County Department of Social Services to set aside the foregoing order on the grounds that the father was not the custodian of the children and the Department had no notice of the hearing. Again on the same day the District Court entered an order vacating the foregoing order and setting the cause for hearing on 4 October 1974.

On 4 October 1974, the attorney for the maternal grandparents and the mother of the minor children made a special appearance and plea in abatement, praying that the cause be transferred to the District Court of Watauga County, but the District Court of Pitt County found that the children were in the County, had been found to be neglected as defined by G.S. 7A-278(4), and that the court had juvenile jurisdiction; on motion of the attorney for the children that the court enter a "temporary order of custody," the court concluded that the children were neglected in that they "do not receive proper care or supervision from their mother . . . and live . . . in an environment injurious to their welfare." The court ordered that the children remain in the custody of the Pitt County Department of Social Services.

From this order the maternal grandparents, R. L. Allison and Lena Allison, and the mother, Marion Greer, appealed.

Holshouser & Lamm, by Charles C. Lamm, Jr., for appellants.

Beaman, Kellum & Mills, by Norman B. Kellum, Jr., for appellees.

CLARK, Judge.

At issue is whether the District Court, Pitt County, had the right to assume custody jurisdiction of the minor children, David Thomas Greer, Jr., and Allison Greer, upon its finding that they were "neglected" children as defined by G.S. 7A-278(4), to the exclusion of the District Court, Watauga County, which had acquired previously such custody jurisdiction in a divorce and custody proceeding of the children's parents.

[1] The original custody jurisdiction of the Superior Court of Watauga County is not questioned. That court transferred the cause to the District Court of that county by its order entered 3 September 1974. The custody jurisdiction of the court lasts as long as the action is pending. *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906 (1948). The custody order entered by the Superior Court of Watauga County in 1968 was not a final adjudication and could be modified upon application of either parent. *Peoples v. Peoples,* 8 N.C. App. 136, 174 S.E. 2d 2 (1970). It has long been the rule in this State that a divorce action is pending for the purpose of determining custody and support until the death of one of the parties or the youngest child born of the marriage reaches the age of maturity, whichever event shall first occur. *Weddington v. Weddington,* 243 N.C. 702, 92 S.E. 2d 71 (1956); *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 183 (1948); *Johnson v. Johnson,* 14 N.C. App. 378, 188 S.E. 2d 711 (1972).

In *Johnson v. Johnson, supra,* it is said that in enacting G.S. 50-13.1, *et seq.,* effective 1 October 1967, the legislature sought to bring together in one act all statutes relating to child custody and support. In *Tate v. Tate,* 9 N.C. App. 681, 177 S.E. 2d 455 (1970), it was held that G.S. 50-13.5(f), relating to venue, contemplates only the institution of an action for custody and support, and does not affect the situation where custody and support have already been determined and one of the parties seeks a modification of the order.

But the District Court, Pitt County, takes the position that it obtained "exclusive" jurisdiction and venue for determining custody of the children under the provisions of G.S.7A-277, *et seq.*, on the grounds that the children were "neglected" and found within the county. We do not agree. On 2 September 1974, a juvenile petition was filed by a caseworker for the Pitt County Social Services Department; she alleged on information and belief that the children were "subject to such serious neglect as might endanger their mental and emotional health." Thereupon and thereafter the District Court, Pitt County, assumed jurisdiction on the ground that the children were neglected as defined by G.S. 7A-278(4) as follows:

> " 'Neglected child' is any child who does not receive proper care or supervision or discipline from his parent, guardian, custodian or other person acting as a parent, or who has been abandoned, or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law."

The District Court order appealed from, entered 4 October 1974, finds that the court acquired juvenile jurisdiction because it was found that the children were "neglected children" in the previous hearings of September 2 and September 5. Examination of the orders entered after these hearings reveals that the order entered after hearing on September 2 merely repeats the language contained in the juvenile petition of the caseworker that the "child is in danger, or subject to such serious neglect as may endanger his health or morals," and the order of 5 September was entered after a hearing which consisted of considering the report submitted by a child psychologist which "pointed up grave dangers to the mental health and emotional stability of the children."

Neither of the above two orders recites any factual basis for a determination that the children were "neglected" as defined by G.S. 7A-278(4); nor does it appear why the so-called neglect was discovered after visiting with their father for more than three months and only a few days before the day in which the original order of 1968 directed that they be returned to their maternal grandparents in Sparta to attend school. Since the District Court was assuming jurisdiction on the basis that "neglected children" were found in Pitt County, where they had been living with their father for about three months, it is the natural

assumption that they were neglected there by their father, and there is nothing in the September 2 and September 5 orders of that court to refute that assumption. However, the order appealed from, makes findings of fact, based on the testimony of the two children and the "corroborating" testimony of the social worker and child psychologist from Pitt County, that assails the moral character of the mother, and that the maternal grandparents, custodians under the original 1968 court order, are old and do not want the children "to make any noise because of Mr. Allison's bronchial condition."

Thus, on such testimony and findings the District Court, Pitt County, again determined that it had jurisdiction on the grounds that the children were "neglected" as defined by G.S. 7A-278(4).

Jurisdiction and procedure statutes applicable to juveniles (now G.S. 7A-277 through 7A-289, effective 1 October 1969) have been amended and rewritten over the years, but for many years the statutes assigning juvenile jurisdiction (formerly G.S. 110-21, now G.S. 7A-279) contain the same "exclusive original jurisdiction" language. Nevertheless, it has been held that the jurisdiction statute applicable to juveniles places no limitation upon the jurisdiction previously conferred by statute upon the Superior Court to issue writs of *habeas corpus* and to determine the custody of children of separated parents, and that if either parent had proceeded under that statute in the Superior Court to obtain custody, the jurisdiction for that purpose would have appertained to that court, to the exclusion of the Juvenile Court. *In Re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564 (1944); *McEachern v. McEachern,* 210 N.C. 98, 185 S.E. 684 (1936). And in *In Re Cranford,* 231 N.C. 91, 56 S.E. 2d 35 (1949), it was held that the recently enacted amendment to G.S. 50-13, providing that either parent may institute a proceeding in the Superior Court to obtain custody, restricted the jurisdiction of the Juvenile Court granted by G.S. 110-21.

[2] It is the general rule that where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it. *Becker v. Becker,* 273 N.C. 65, 159 S.E. 2d 569 (1968); *Hall v. Shippers Express,* 234 N.C. 38, 65 S.E. 2d 333 (1951); *Allen v. Insurance Co.,* 213 N.C. 586, 197 S.E. 200 (1938).

[3] There appears to be no evidence and no factual finding to support the conclusion of the District Court, Pitt County,

that the children were "neglected," and this Court had no lawful authority to usurp the custody jurisdiction of the District Court, Watauga County. It is obvious that the purpose of the proceedings in Pitt County was to determine custody of the minor children, a determination that should be made by the court in Watauga County which had and still has custody jurisdiction. Justice to all parties is best served when one judge is able to see the matter whole. *In re Custody of King,* 3 N.C. App. 466, 165 S.E. 2d 60 (1969).

It should be noted that in this case where only the question of custody is involved, if the factual circumstances justified a finding of "neglect," it is our opinion that the District Court, Pitt County, could properly assume jurisdiction and temporary custody of the children for the limited purpose of returning them to the proper custodian or the proper court; and in some cases involving delinquent, dependent, neglected, or undisciplined children the District Court where the children are found may assume custody jurisdiction under G.S. 7A-277, *et seq.,* even where another court has custody jurisdiction under G.S. 50-13.1, *et seq.*

We find no legal justification for the orders of the District Court, Pitt County, restraining the father from returning the children to Watauga County; apparently the purpose was not the protection of the children but rather the protection of the father against punishment for contempt in the Watauga Court.

The District Court Division under G.S. 7A-244 has jurisdiction over child custody. In the exercise of this jurisdiction no other Division in the General Court of Justice has a more awesome, difficult, or important task. Every determination of custody of children should be based on an in-depth consideration of all the evidence offered by the litigants and evidence sought and admitted by the court. Jurisdictional controversies between the courts should be avoided in these cases involving the welfare and protection of children with the view of reaching both a timely and just decision.

We vacate the Order of the District Court, Pitt County, entered 4 October, 1974, and we direct the court *forthwith* to enter an order returning the children, David Thomas Greer, Jr., and Allison Greer, to the custody of their maternal grandparents, Robert L. Allison and wife, Lena R. Allison, in Sparta, North Carolina, pending a hearing in the District Court, Watauga

County, upon application of any interested party or parties or hearing by the court *ex mero motu* on the question of custody in the light of present circumstances.

Vacated and remanded.

Judges PARKER and VAUGHN concur.

WILSON COUNTY BOARD OF EDUCATION v. WILSON COUNTY BOARD OF COMMISSIONERS

No. 757SC45

(Filed 4 June 1975)

1. **Schools § 5— budget requests — line by line review by county commissioners**

A board of county commissioners has the right to consider budget requests submitted by a board of education on a line by line basis regardless of whether an additional tax levy is necessary to furnish the funds requested.

2. **Schools § 5— budget request dispute — appeal to superior court — insufficiency of findings**

Where a dispute between the county board of education and the county commissioners as to the amount of a locally funded salary supplement for the superintendent of schools was appealed to the superior court pursuant to G.S. 115-87, the superior court erred in merely finding that the amount requested by the board of education was not unreasonable and concluding that the board of education was in the best position to determine the reasonableness of a salary supplement which did not require an additional tax levy since the court was required to find facts as to the amount of the current expense fund and whether the disputed amount is a necessary item in the maintenance of the schools.

APPEAL by respondent from *Fountain, Judge.* Judgment entered 17 October 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 20 March 1975.

On 9 April 1973, the Wilson County Board of Education, acting in accordance with the directives of G.S. 115-39, elected a Superintendent of Schools for a four-year term beginning 1 July 1973. The Board of Education duly filed a certificate of election with the State Superintendent of Public Instruction, entered into a contract with the newly elected Superintendent, and

filed a copy of the contract with the State Superintendent of Public Instruction, all as required by G.S. 115-39. Among other things, the contract provided that "[i]n addition to the salary paid the Superintendent from State funds, the Superintendent shall receive annually from local funds as a supplement thereto the amount of $6500.00 plus cost of living increases annually." The Board of Education presented its "1973-74 Budget Request," dated 30 April 1973, to the Wilson County Board of Commissioners. The Budget Request contained, in the current expense fund, an item of $6500 for the Superintendent's salary. The Board of Commissioners reduced the amount to $5000, and this action was not challenged by the Board of Education.

In 1974 the General Assembly granted a 7½% pay raise to all teachers employed by the school systems in the State. In May 1974, the Board of Education, as required by G.S. 115-80, submitted its "Budget Request" to the County Commissioners. Included in the current expense fund was an item of $7500 as supplement for the Superintendent. By letter, the Board of Education was reminded that the Commissioners had specifically requested that increases in the current expense fund budget requests be limited to 5% and the Board of Education was requested to resubmit their current expense fund budget request. In compliance with the cost of living increase provision in its contract with the Superintendent, the Board of Education applied the 7½% formula to the $6500 salary supplement, and in the revised current expense fund budget submitted to the County Commissioners the amount of local supplement requested for the Superintendent's salary was $6,984.

At its 1 July 1974 meeting, the Board of Commissioners adopted its budget for the 1974-75 fiscal year. The budget included a locally funded supplement of $5250 to the salary of the Superintendent, but the Board approved the total amount of the current expense fund of $806,542. The $806,542 had included the $6984 figure, and the Board of Commissioners requested the Board of Education "to indicate to which line item(s) the remaining $1,734 should be applied".

The Board of Education, acting under the provisions of G.S. 115-87, requested a joint meeting of the two boards for the purpose of considering the disputed item "carefully and judicially". The joint meeting was held on 19 August 1974 and resulted in a tie vote, the majority Board of Commissioners voting to leave the item in dispute at $5250 and the members of

the Board of Education present voting unanimously to allow the item of $6984 as requested by the revised budget. As the result of the tie vote, the matter was submitted to the Clerk of the Superior Court acting as arbitrator. The Clerk held a hearing at which both parties were represented by counsel who tendered written briefs and made oral arguments. On 23 August 1974 the Clerk entered his "arbitration decision" in which he concluded that the Board of County Commissioners had the authority to reduce the amount of a salary supplement which the County Board of Education contracts to pay to its Superintendent of Schools and further that the Board of County Commissioners has the authority to modify a budget submitted by the County Board of Education so long as the total current expense budget does not exceed the unit's per capita allotment of funds.

From this decision, the Board of Education appealed and filed its petition in the Superior Court requesting that the court declare (1) that it has the legal right and responsibility to enter into a contract with a Superintendent providing for the payment of a supplement from local funds without the approval or disapproval of the County Commissioners, particularly where the payment of the supplement is to come from current expense funds apportioned on a per capita student basis, and (2) in the alternative, that the amount of the supplement agreed to be paid by it to the Superintendent is not unreasonable, requires no additional tax levy, and that the denial of the budgeted request is arbitrary and without basis and the amount requested be restored in full.

The Board of Commissioners answered admitting the right of the Board of Education to contract with a Superintendent but denying the right of the Board of Education to bind the tax-levying authority to pay any supplement from local funds without first obtaining the approval of the County Commissioners.

The court heard the matter upon the pleadings and the written briefs and oral arguments of counsel. The court found facts, among which are the following (numbered in accordance with the court's judgment) :

"11. . . .

The Respondent having approved on overall budget for the Current Expense Fund for the Petitioner for the fiscal year beginning on 1 July, 1974 in the sum of $806,542.00, there

is no dispute between the Petitioner and the Respondent, which if decided in favor of the Petitioner, would require the Respondent to levy additional taxes in order to raise the funds necessary to pay the supplement of the Superintendent of the Petitioner in full as requested by the Petitioner. That the dispute between the Petitioner and Respondent concerns not the overall budget for the Current Expense Fund in the sum of $806,542.00 but how $1,734.00 of said budget should be applied and the failure of the Respondent to permit the Petitioner to pay its Superintendent pursuant to its contract.

12. That the amount of the Superintendent's supplement requested by the Petitioner and contracted to be paid by the Petitioner with its Superintendent is not unreasonable and no facts have been presented by the Respondent or otherwise appear which would justify a finding that the supplement to be paid pursuant to the contract is unreasonable and which would justify placing the Petitioner in a position of not being able to comply with its contract with its Superintendent.

13. The Court further finds as a fact that the only dispute existing between the Petitioner and the Respondent concerns the Current Expense Fund and not the amount thereof and that there is no dispute concerning the amount of the capital outlay fund and the debt service fund.

14. The Court further finds as a fact that once the amount of the Current Expense Fund is determined and apportioned to the Petitioner along with the other administrative units in Wilson County that the Board of Education is in the best position to determine how the Current Expense Funds and budget so apportioned should be best spent so long as it is done in a reasonable manner (G.S. 115-27 providing that the Board of Education of each county in the state, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools and their respective administrative units.)"

Upon the facts found the court entered the following conclusions of law:

"1. That for the fiscal year beginning on 1 July, 1974, the Superintendent's salary supplement as requested by the Petitioner in the sum of $6,984.00 is not unreasonable and the payment of the same does not require the Respondent to levy additional taxes.

2. And that the contract between the Petitioner and the Superintendent dated 9 April, 1973 complies with the provisions of G.S. 115-39 and is not unreasonable on its face.

3. That the Petitioner, the Wilson County Board of Education, is a body corporate and has the general control and supervision of all matters pertaining to the public schools in its administrative unit (G.S. 115-27) and is in the best position to determine the reasonableness of a salary supplement to be paid to its Superintendent which does not require the levying of additional taxes but which shall be paid from apportioned Current Expense Funds.

4. That the intent of Chapter 115 and specifically the provisions of G.S. 115-87 is to avoid dominance by either the County Board of Commissioners or the School Board over the other and that the failure on the part of the Respondent to approve an additional $1,734.00 from an apportioned approved Current Expense Fund to be applied to a Superintendent's Salary supplement pursuant to a contract between the Petitioner and its Superintendent (who is not an employee of the Wilson County Board of Commissioners) where no additional tax levy is required, places the Wilson County Board of Education in a subservient position to the Wilson County Board of Commissioners.",

and ordered that the Board of Commissiners not prohibit the payment of supplement in the amount of $6984 and that the budget be changed to reflect the restoration of that amount in full to the line item 611.1 in the current expense fund.

The Board of County Commissioners appealed.

Connor, Lee, Connor, Reece & Bunn, by David M. Connor, for petitioner appellee.

Carr, Gibbons and Cozart, by F. L. Carr, for respondent appellant.

CLARK, Judge.

At the outset we think it pertinent to point out that we find no clear present statutory authority or court decisions supporting the position of either of the parties. We find it necessary, in order to reach a conclusion with respect to the merits of the case, to consider the legislative history of the pertinent statutes and the decisions of the court interpreting those statutes.

Article IX, § 2, of the Constitution of North Carolina requires that "[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools which shall be maintained at least nine months in every year" and provides further that "[t]he General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate".

In compliance with the mandate of the Constitution, the General Assembly enacted Chapter 115, General Statutes of North Carolina. Section 1 of Article I thereof provides for a "General and uniform system of schools" throughout the State and for the operation in every county and city administrative unit of "uniform school term of nine months, without the levy of a State ad valorem tax therefor". Section 9 of Article I defines the "tax-levying authorities" as the board of county commissioners with special provisions for transfer of that authority to the county commissioners by the governing board of a city or town when the boundaries of its city administrative unit are coterminous with or situated wholly within that incorporated city or town.

Article 5 of Chapter 115 establishes county and city boards of education, and they were given general control and supervision over all matters pertaining to the public schools in their respective units, except such matters, the control and supervision of which was assigned by the General Assembly to the State Board of Education or other authorized agency. See *Kirby v. Board of Education,* 230 N.C. 619, 55 S.E. 2d 322 (1949).

Article IX, § 7, of the Constitution of North Carolina, appropriates all penalties, forfeitures, and fines for violation of the criminal laws collected in the several counties for the establishment and maintenance of the public schools.

It is abundantly clear that from the beginning of the public school system in this State, the duty of providing necessary funds for the operation of schools has rested on the county commissioners.

The General Assembly of 1901 provided for a State fund for the public schools which is to be distributed among the counties. The General Assembly further provided that if the tax levied for the support of public schools generated insufficient funds to maintain one or more schools in each district for four months, "then the board of commissioners of each county shall levy annually a special tax to supply the deficiency . . . ", "and the funds thus raised shall be expended in the county in which collected, in such manner as the county board of education may determine for maintaining the public schools for four months at least in each year." Ch. 4, "An Act to Revise and Consolidate the Public School Law", § 6, Pell's Revisal of 1908, Vol. 2, Ch. 89, § 4112. That Act also required the county board of education to "submit" to the county commissioners "an estimate of the amount of money necessary to maintain the schools for four months". In *Collie v. Commissioners,* 145 N.C. 170, 59 S.E. 44 (1907), the Court declared the statute to be constitutional and valid, even though the tax levied exceeded the limitation prescribed in Article V of the Constitution of North Carolina, holding that the county commissioners were required to levy the taxes requested by the board of education and found by the county commissioners to be necessary for the operation of the schools for the term required by law. In the *Collie* case, there was no disagreement with respect to the amount necessary to operate the school for the constitutional term. However, in *Board of Education v. Commissioners,* 150 N.C. 116, 63 S.E. 724 (1909), this was not the case. The Board of Education of Cherokee County submitted to the county commissioners their estimate of the amount necessary to operate the schools for four months. The Board of Education estimated that it would take the sum of $15,190 to run the schools for the fiscal year, "based upon the following items of expenditure for teachers, building, commissioners and contingent funds . . . " Included in the request was this statement:

> "We estimate that we will receive from the State of North Carolina on the first $100,000 about $660. We also estimate that we will receive in fines and forfeitures about $250, making a total of $9,674.49. Therefore, in order for us to

> have four months of school in the county it will require an extra levy, over and above the 18 cents on the $100 worth of property and $1.50 on each taxable poll, of a sum sufficient to raise $4,515.51. We therefore respectfully request that your honorable body do make a sufficient levy, in addition to the 18 cents on the $100 worth of property and $1.50 on the poll, sufficient to raise the further sum of $5,515.51, to be used as a supplemental and special tax, in order to run each public school in Cherokee County for four months for the school year beginning 1 July, 1908, and ending 30 June, 1909. In order to raise this sum of money, we are of the opinion that you are required to levy as a supplemental and special tax about 16 cents on the $100 worth of property in the county. If we had not had the $3,450.72 on hand the first of last July it would have been impossible for us to have run the schools four months during the school year 1907-'08. This year there would be no surplus fund on hand, owing to the fact that considerable building has been done and the patrons of the schools are demanding a higher grade of teachers, which necessarily demands higher pay."

The county commissioners considered the request, approved it in part, but refused to provide all the funds requested. The Board of Education sought, by petition for writ of mandamus, to compel the commissioners to levy a tax sufficient to comply with the request in full. The county commissioners took the position that they had the duty of determining what funds were necessary. The Superior Court refused to issue the writ, and the Supreme Court affirmed. In affirming, the Court, through Hoke, J., (later C.J.), said:

> "One of the more usual definitions of the term 'submit' is to 'commit to the discretion or judgment of another', and the term 'estimate' tends to show that the action of the board of education was intended, at most, to have only persuasive force, and, taken together, 'to make an estimate of the amount and submit it to the board of county commissioners', clearly shows that it was submitted for their consideration only, and that the determination of the question was with them. *School District v. Omaha,* 39 Neb. 745." *Board of Education v. Board of Commissioners, supra,* at 127.

Chief Justice Clark, in a vigorous dissent, noted that when the commissioners refuse to levy the tax necessary to give the four months' schooling required by Constitution, the injury and wrong done is irreparable unless the State can, through its courts, enforce the constitutional guarantee. He said:

> "The statute does not contemplate that the estimate of the county board of education is conclusive as to the amount that the county commissioners shall levy, any more than that the estimate of the county commissioners is final. To hold the former might unduly burden the county. To accept the latter would destroy the constitutional guarantee of four months' schooling."

The 1909 General Assembly repealed § 4112 of the Revisal of 1905 of North Carolina, and enacted in its place the following (quoted in pertinent part):

> "On or before the first Monday in June of each and every year the county board of education of each county shall ascertain the amount of money that will be needed to maintain the public schools of such county for four months during the succeeding school year. The board of education, using as a basis the receipts for school purpose during the current school year ending June thirtieth, shall ascertain the amount that will be available for school purposes from the regular school tax, from fines and penalties and from the amount appropriated under section four thousand and ninety-seven of the Revisal of one thousand nine hundred and five of North Carolina (the annual per capita appropriation to the county from the special state appropriation for public schools). If the amount to be received is less than the amount ascertained to be needed, the board of education shall submit a statement of the above facts to the board of county commissioners of such county; and it shall be the duty of the board of county commissioners to levy a special tax on all property and polls in said county to supply one-half the deficiency for the support and maintenance of the public schools of such county for four months. . . . This tax shall be levied and collected as other county taxes are levied and collected, and the funds thus raised shall be expended in such manner as the county board of education may determine for maintaining one or more public schools in each school district for four months in each year. The calculation of the amount that will be necessary shall state

separately the amounts needed for supervision, for administration, for buildings and repairs, for expenses (this to be itemized) and for salaries of teachers. . . . The county board of education shall further state the number of teachers . . . and the salary of each teacher . . . . In the event of a disagreement between the county board of education and the board of county commissioners *as to the rate of tax to be levied,* the county board of education may bring an action in the nature of mandamus against the board of county commissioners to compel the levy of such special tax . . . , and it shall be the duty of the judge hearing the same *to find the facts as to the amount needed and the amount available from the sources herein specified, which finding shall be conclusive, and to give judgment* requiring the county commissioners to levy the sum which he shall find necessary to maintain the schools for four months in said county." (Emphasis supplied.) Ch. 508, Public Laws of North Carolina 1909.

The statute was again repealed and a substitute therefor enacted by the General Assembly of 1913. The only pertinent change was that the board of education, in the event the amounts received and to be received from the listed sources available to the board of education should be less than that required, is to submit to the county commissioners "an *itemized* statement of the amounts needed for supervision, for administration, for buildings and repairs, for salaries of teachers, and for all other expenses allowed by law." (Emphasis supplied.) In the provision with respect to disagreement the board of education is allowed to bring action in the nature of mandamus not only in the event of disagreement with respect to the rate of tax to be levied, but also in the event of disagreement "as to the amount of the deficiency to be supplied for a four months school". See Gregory's Supplement to Pell's Revisal, Vol. III, § 4106(a) (8) 1913.

The 1919 General Assembly rewrote the education statutes and the provision for submission of a budget and the provision for procedure in event of disagreement were separated, although the provisions remained essentially the same. See Consolidated Statutes of North Carolina, Annot. (1919), Vol. II, §§ 5486, 5487. See also § 5488, which provides:

"In the event of a disagreement between the county board of education and the board of county commissioners as to

the amount to be provided by the county for the maintenance of a six months school term, and as to the rate of tax to be levied therefor, or in the event of the refusal of any board of county commissioners to levy said tax, the county board of education shall bring action in the nature of a mandamus against the board of county commissioners to compel the levying of such special tax under the provisions of this article entitled Mandamus of the chapter on Civil Procedure. And it shall be the duty of the judge hearing the same to find the facts as to the amount needed and the amount available from the sources herein specified, which findings shall be conclusive, and to give judgment requiring the county commissioners to levy the sum which he finds necessary to maintain the schools for six months in every school district in the county. Any board of county commissioners failing to obey such order and to levy the tax shall be guilty of a misdemeanor and shall be prosecuted therefor in the superior court."

The 1923 General Assembly rewrote the statute with respect to disagreements so that it read as follows:

"In the event of a disagreement between the county board of education and the board of county commissioners *as to the amount of salary fund* or the fund necessary to pay interest and installments on bonds, notes, and loans, the county board of education and the board of county commissioners shall sit in joint session, and each board shall have one vote on the *question of the adoption of these amounts* in the budget. A majority of the members of each board shall cast the vote for each board. In the event of a tie, the clerk of the superior court shall act as arbitrator upon the issues arising between said two boards, and shall render his decision thereon within ten days. But either the county board of education or the board of county commissioners shall have the right to appeal to the superior court within thirty days from the date of the decision of the clerk of the superior court, and it shall be the duty of the judge hearing the case on appeal *to find the facts as to the amount of the salary fund* and the fund necessary to pay interest and installments on bonds, notes, and loans, which findings shall be conclusive, and he shall give judgment requiring the county commissioners to levy the tax which will provide *the amount of the salary fund* which he

finds necessary to maintain the schools for six months in every school district in the county and the amount necessary to pay interest and installments on bonds, notes, and loans. Any board of county commissioners failing to obey such order and to levy the tax ordered by the court shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

In case of an appeal to the superior court, all papers and records relating to the case shall be considered a part of the record for consideration by the court.",

and with respect to jury trial,

"The county commissioners shall have the right to have the issues tried by a jury, as to the amount of the teachers' salary fund and the operating and equipment fund, which jury trial shall be set at the first succeeding term of the superior court, and shall have precedence over all other business of the court: Provided, that if the judge holding the court shall certify to the governor, either before or during such term, that on account of the accumulation of other business, the public interests will be best served by not trying such action at said term, the governor shall immediately call a special term of the superior court for said county, to convene as early as possible, and assign a judge of the superior court or an emergency judge to hold the same, and the said action shall be tried at such term. There shall be submitted to the jury for its determination the *issue as to what amount is needed to maintain the schools for six months,* and they shall take into consideration the amount needed and the amount available from all sources as provided by law. The final judgment rendered in such action shall be conclusive, and the county commissioners shall forthwith levy taxes in accordance with such judgment; otherwise those who refuse so to do shall be in contempt, and may be punishable accordingly: Provided, that in case of a mistrial or an appeal to the supreme court which would result in a delay beyond a reasonable limit for levying the taxes for the year, the judge shall order the commissioners to levy for the ensuing year a rate sufficient to pay interest and installment on notes, loans and bonds, and to produce, together with what may be received from the state public school fund and from other sources, an amount for the teachers' salary fund equal to the amount of this fund for

the previous year." (Emphasis supplied.) Consolidated Statutes of North Carolina, 1924, Vol. III, §§ 5608 and 5609.

The statute was construed by the Court in *In Re Board of Education,* 187 N.C. 710, 122 S.E. 760 (1924). The commissioners and the board of education were in disagreement over the May budget for the school year 1923. All matters in controversy had been settled by agreement except one item in the salary fund; to wit, the salary to be paid the Superintendent of Public Instruction of Yadkin County. The board of education had fixed his salary at $3,000. The commissioners presented a counter budget fixing it at $2,000. The matter was referred to the clerk, over the objection of the board of education. The clerk fixed the salary at $2600 and $400 for expenses. Both boards appealed to the Superior Court. The county commissioners took the position that the issue should be decided by a jury. To this position the board of education objected. The court, upon agreed facts, refused a jury trial and affirmed the clerk. Both boards again appealed. Chief Justice Clark wrote the opinion for a unanimous Court. He noted that the statute required that the May budget prepared by the board of education should contain three separate school funds: (a) a salary fund, (b) an operating and equipment fund, and (c) a fund for the repayment of all notes, loans and bonds and that "[t]he salary fund shall include the salaries of all superintendents, principals, supervisors, teachers of all sorts, the per diem of the county board of education, and the salaries of all other officials authorized by law". The Court quoted the statutory provisions with respect to disagreement and noted that in *Board of Education v. Comrs.,* 182 N.C. 571, 109 S.E. 630 (1921), the commissioners had taken the position that the statute was not constitutionally valid because it made the finding of the judge conclusive and thereby denied the right of trial by jury but that the court there held the statute to be constitutionally valid. The statute required that the salary fund include the salary of the superintendent and further provided for the procedure in event of disagreement "as to the amount of the teachers salary fund". The machinery in the event of disagreement provided for a jury trial if demanded by the commissioners. Therefore, the Court held, the court erred in refusing to submit the matter to the jury. The opinion does not disclose whether an additional tax levy would be required. It is abundantly clear, however, that only one item of the salary fund was before the clerk and the superior court and considered on appeal by the Supreme Court.

The 1925 General Assembly made only minor changes in the statute, primarily designating the salary fund as the same fund as the operating or equipment fund. N. C. Cumulative Statutes 1925, § 5608. The 1927 General Assembly by amendment replaced "teachers' salary fund and the operating equipment fund" with the words "current expense fund" and the words "interest and installment on notes, loans and bonds" were replaced with the words "the debt service fund".

The school laws were again rewritten by the 1955 General Assembly, and it is those statutes, which we must now interpret. The 1955 Act was made effective 26 May 1955, and made no substantial change in the budgetary methods or in the procedure to be employed in the event of disagreement. However, there are some changes which, we think, merit discussion.

G.S. 115-80 requires the board of education to file a countywide current expense budget, a supplemental tax budget, a capital outlay budget, and a debt service budget. The budget requests are to be filed with the county commissioners on or before the fifteenth day of June and all funds necessary to operate the schools are to be requested, whether the funds are from State or local sources, but no funds are to be allotted for providing instruction for more than 180 days—either from State or local sources.

> "The countywide current expense fund shall include all funds for current expenses levied by the board of county commissioners in any county to cover items for current expense purposes, and also all fines, forfeitures, penalties, poll and dog taxes, nontax funds, or any other funds, to be expended in the current expense budget. . . "

It further provides that it "shall be the first duty of county and city boards of education and the board of county commissioners" to provide adequate funds for plant maintenance and the items under fixed charges not provided from State funds in order to protect and preserve the investment of administrative units in school plants. However, if the board of education can by economic management properly maintain the plants for use at all times for an amount less than that placed to the credit of the school fund by law, "it shall be in the discretion of such board of education *with the approval of the board of county commissioners to use such excess to supplement any item of*

expenditure in its current expense fund." (Emphasis supplied.) There is a further provision:

> "Notwithstanding any other provisions of this Chapter, when necessity is shown by county and city boards of education, or peculiar local conditions demand, for adding or supplementing items of expenditure in the current expense fund, including additional personnel and/or supplements to the salaries of personnel, the board of county commissioners may approve or disapprove, in part or in whole any such proposed and requested expenditure. *For those items it approves, the board of county commissioners shall make a sufficient tax levy to provide the funds:* Provided, that nothing in this Chapter shall prevent the use of federal or privately donated funds which may be made available for the operation of the public schools under such regulations as the State Board of Education may prescribe." (Emphasis supplied.)

G.S. 115-87 provides the "Procedure in cases of disagreement or refusal of tax-levying authorities to levy taxes" as follows:

> "In the event of a disagreement between the county or city boards of education and the tax-levying authorities as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, *or any item of either fund,* the chairman of the county or city board of education and the presiding officer of the tax-levying authorities shall arrange for a joint meeting of said boards within one week of the disagreement. *At such joint meeting, the budget or budgets over which there is disagreement shall be gone over carefully and judiciously item by item.* If agreement cannot be reached in this manner, the board of education whose budget is in question and the tax-levying authorities shall each have one vote on the question of the adoption of these amounts in the budget. A majority of the members of each board shall cast the vote for each board.
>
> In the event of a tie, the clerk of the superior court shall act as arbitrator upon the issues arising between such boards and he shall render his decision thereon within five days, but either the board of education or the tax-levying authorities shall have the right to appeal to the superior court within 10 days from the date of the decision of the

clerk of the superior court, and it shall be the duty of the judge hearing the case on appeal to find the *facts as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, which findings shall be conclusive, and he shall give judgment requiring the tax-levying authorities to levy the tax which will provide the amount of the current expense fund, the capital outlay fund, and the debt service fund, which he finds necessary to maintain the schools in the administrative unit.* In case of an appeal to the appellate division which would result in a delay beyond a reasonable limit for levying the taxes for the year, the judge shall order the tax-leving authorities to levy for the ensuing year a rate sufficient to pay the debt service fund, and to produce, together with what may be received from the nine months' school fund and from other sources, an amount for the current expense fund and the prorated part of capital outlay fund equal to the amount of these funds for the previous year. Also, in case of an appeal, all papers and records relating to the case shall be considered a part of the record for consideration by the court.

The tax-levying authorities shall forthwith levy the taxes according to the judgment rendered and upon refusal to do so, the members of said authority shall be in contempt and may be punished accordingly." (Emphasis supplied.)

Although the Court had, in interpreting the previous statutes, made it applicable to disagreement as to *any item* of a fund, the Legislature by the 1955 Act specifically so provided, and additionally provided that at the joint meeting the two boards should go over "carefully and judiciously *item by item*" (emphasis supplied) the budget or budgets over which there is disagreement. In *Administrative Unit v. Commissioners of Columbus*, 251 N.C. 826, 830, 112 S.E. 2d 539 (1959), Justice Rodman, speaking for the Court, and referring to the 1955 Act and particularly the budgetary and disagreement provisions, said:

"The basic philosophy with respect to the operation of our school system remains. It is the duty of the board of education to evaluate their needs, apply to the board of county commissioners for funds to supply the needs, and when funds are appropriated, to spend the same within the designated classification, current expenses and capital out-

lay, as will best serve school needs. It is the duty of county commissioners to study the request for funds filed with them by the board of education and to provide by taxation such funds, and only such funds, as may be needed for economical administration of schools. G.S. 115-80."

[1] We think it abundantly clear from the statutory provisions and their history and from the interpretation placed thereon by the Supreme Court that the county commissioners have the right, indeed the duty, to consider the budget requests submitted by the board of education on a line by line basis. Certainly there can be no doubt but that this must be done where the requests of the board of education, if granted, would require an additional tax levy. We think the statutes clearly imply this as a requirement even where no additional tax levy is necessary. G.S. 115-80 clearly provides that where the board of education is able to maintain the school plants for an amount less than that which has been placed to the credit of the school fund by law, the board may, in its discretion, use the excess to supplement any item of expense in its current expense fund, but only *with approval of the county commissioners.* We think it meet and proper that the commissioners consider the budgets on a line by line basis. The board of commissioners are the representatives of the taxpayers in levying the tax, collecting the revenue therefrom, and spending it—all in the manner which will best suit the needs and interests of all the taxpayers. One of their duties is to provide the funds *necessary* to operate the public schools for nine months, but *only such funds as are needed for the economical administration of the schools.* They can only fulfill their duty to the taxpayers by considering closely all budgets presented to them as requests for funds. The statute requires the itemization of the budget requests and we think the General Assembly intended that each item be considered by the county commissioners, regardless of whether additional tax levy is necessary.

We have found no case where the procedure in event of disagreement has been employed where no additional tax levy is required to furnish the funds requested. Indeed G.S. 115-87 requires the judge on appeal to "give judgment requiring the tax-levying authorities to levy the tax" necessary to provide the amount he finds necessary to maintain the schools. Other provisions with respect to ordering a tax levy pending appeal and providing for punishment by contempt of the tax-levying

authorities if they fail to comply are included in the statute. However, the statute is entitled "Procedure in cases of disagreement *or* refusal of tax-levying authorities to levy taxes". (Emphasis supplied.) It clearly and unequivocally states that the procedure set out is to be used "[i]n the event of a disagreement between the county or city boards of education and the tax-levying authorities as to the amount of the current expense fund, the capital outlay fund, and the debt service fund, or *any item of either fund*". (Emphasis supplied.) Further, at the joint meeting of the two boards they are to go over carefully and judiciously the item or items in dispute and attempt to reach agreement. If they cannot, then each board has one vote "on the question of adoption of these amounts in the budget". We are of the opinion that the General Assembly has provided the mechanics for arriving at a settlement of disagreements with respect to any item of the budget which is not approved by the county commissioners.

Inherent in the failure of the commissioners to approve an item is, of course, their conclusion that it is not needed for the economical administration of the schools. Failure to approve an item would necessarily reduce the total amount of the budget in which the item appears. This the Commissioners, in the case before us, failed to do. Instead they approved the total amount of the current expense fund and advised the Board of Education that the Board of Education should advise the Board of Commissioners to which item they would add the excess in the salary item. If the amount of the salary item was not approved, the deficiency should have been deducted from the total of the current expense budget. That this is the direction of the statute is further demonstrated by the directions to the Superior Court.

[2] In the event of an appeal to the superior court, the judge is directed by the statute to "find the facts as to the *amount* of the current expense fund, the capital outlay fund, and the debt service fund, which findings shall be conclusive, and he shall give judgment requiring the tax-levying authorities to levy the tax which will provide the *amount* of the current expense fund, the capital outlay fund, and the debt service fund, *which he finds necessary to maintain the schools in the administrative unit.*" (Emphasis supplied.) Here, the trial judge did not find facts as to the amount of the current expense fund, but did find that there was no dispute as to the amount thereof. He did not find the salary item a *necessary* item in the maintenance of the

schools but found that the amount requested was not unreasonable and concluded that the Board of Education "is in the best position to determine the reasonableness of a salary supplement to be paid to its Superintendent which does not require the levying of additional taxes but which shall be paid from apportioned Current Expense Funds". Upon the record before us we do not quarrel with the finding or the conclusion. However, the court failed to "find the facts as to the amount of the current expense fund" nor did he make any findings or conclusions with respect to whether the disputed amount is needed for the maintenance of the schools. We note that G.S. 115-88 provides for a jury trial upon the demand of the county commissioners. The issues to be tried are "as to the *amount* of the current expense fund . . . " and the statute states with particularity and definiteness and without ambiguity that "[t]here shall be submitted to the jury for its determination the issue as to what amount is *needed* to maintain the schools, and they shall take into consideration the *amount needed* and the amount available from all sources as provided by law". (Emphasis supplied.) Certainly it is the intent of the General Assembly that the issue for determination shall be the same whether the determination be by the court or by a jury. It may well be that the judge, in his deliberation, considered the matter on the basis of need of the disputed item for the maintenance of the schools, but the record does not so indicate.

The matter must be remanded for proceedings in the Superior Court not inconsistent with this opinion.

Judges MORRIS and VAUGHN concur.

BETTY LOU BRITT v. BRIAN B. BRITT, THOMAS O. BRITT, MALCOLM V. BRITT, AND W. A. BASON

No. 7510SC133

(Filed 4 June 1975)

1. Mortgages and Deeds of Trust § 26— foreclosure sale — unsigned notice of publication

Foreclosure sale was not invalid because the notice of publication filed in the office of the clerk of court was unsigned, and summary judgment was not improperly granted for defendants in an action to set aside foreclosure on that ground where defendants filed with their

motion for summary judgment the affidavit of a newspaper publisher that notice of foreclosure was actually published in a newspaper on four specified dates. G.S. 45-21.33.

2. **Fraud § 9; Rules of Civil Procedure § 9— fraud — insufficiency of allegations**

In an action to set aside a foreclosure sale, plaintiff's allegations were insufficient to state a claim for relief based on fraud where she merely alleged that she signed the deed of trust at her husband's request, that she does not believe that the deed of trust secures any obligation, that the two payees of the note secured by the deed of trust were acting as agents for her husband and agreed to cancel the deed of trust at his request, and that the three conspired to defraud the husband's creditors and plaintiff, but plaintiff failed to allege in what respects she was induced to sign the deed of trust or upon what representations she relied, to what extent the husband was indebted at that time, or whether the payees had knowledge of an intent by the husband to defraud his creditors and plaintiff. G.S. 1A-1, Rule 9(b).

3. **Mortgages and Deeds of Trust § 26— notice of foreclosure sale — due process**

Notice of a foreclosure sale posted at the courthouse door and in a newspaper as provided by statute is sufficient to meet due process requirements.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 3 January 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1975.

This action was instituted to have set aside foreclosure proceedings under a deed of trust. Plaintiff alleged that the deed of trust was not supported by consideration, but was a fraud upon her and upon her husband's creditors; that the affidavit with respect to publication of notice of foreclosure was not signed and, therefore, there was no compliance with G.S. 45-21.33; that the plaintiff had no actual or constructive notice of the foreclosure sale and that she was deprived of her property without due process of law as required by Article I, Section 19, of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States; and that the amount bid for the property at the sale was grossly inadequate. She further prayed that the court enjoin the transfer of the property described in the deed of trust and enjoin any further foreclosure proceedings pursuant to G.S. 45-21.34. Defendants Brian B. Britt, Thomas O. Britt, and Malcolm V. Britt are brothers. Defendant W. A. Bason was the trustee named in the deed of trust. Plaintiff and Brian B. Britt were husband and wife at the time of the execution of the

deed of trust, and the property was owned by them as tenants by the entirety. Defendants Thomas O. Britt and Malcolm V. Britt were the payees of the note which the deed of trust secured.

Defendants answered, denying the allegations of fraud, insufficiency of bid, lack of notice but admitting the execution of the note and deed of trust, admitting the foreclosure, and averring that a deed from the trustee to defendants Thomas O. Britt and Malcolm V. Britt had been duly recorded in the office of the Register of Deeds of Wake County. Defendants, in their answers, moved to dismiss, under Rule 12(b) (6), for failure to state a claim upon which relief can be granted. The motion, as to each defendant, was denied. Defendants then filed a motion for summary judgment, under Rule 56. The defendants filed with the motions the affidavit of the General Manager of Gold Leaf Publishers, Inc., certifying that the notice of foreclosure was published in The Zebulon Record on 1, 8, 15 and 22 March 1973. Plaintiff filed no affidavits and presented no evidence. The court, "after a review of the pleadings in this action and the Affidavit of Kenneth F. Wilson and hearing the argument of counsel", allowed the motion, dismissed the action, and directed the Clerk to cancel the notice of lis pendens filed in the matter. The judgment found that "there is no genuine issue as to any material fact as to any liability of the defendants . . . to the plaintiff and there is no basis in fact or in law to support or substantiate any claim by the plaintiff against the defendants . . . " Plaintiff appealed.

Clayton, Myrick, McCain & Oettinger, by Grover C. McCain, Jr., for plaintiff appellant.

H. Spencer Barrow, for defendants Thomas O. Britt and Malcolm V. Britt, appellees.

Gulley and Green, by Jack P. Gulley, for defendant Brian B. Britt, appellee.

William A. Bason, Trustee, in Propria Persona, defendant appellee.

MORRIS, Judge.

The only question raised by plaintiff's appeal is whether the court properly allowed defendants' motion for summary judgment. The purpose of the motion for summary judgment

is to determine prior to trial whether there is any genuine issue with respect to any material fact and, if not, to provide for an early and effective disposition of the matter.

> "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem,* 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972), pet. reh. den. 281 N.C. 516 (1972).

G.S. 1A-1, Rule 56(e), provides that when a motion for summary judgment is made and supported by affidavits and other papers as provided in section (c) of the 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."

The parties apparently agree that there were three bases for the motion for summary judgment considered by the court: (1) the filing of an unsigned affidavit of publication; (2) allegations of fraud, and (3) lack of notice.

[1] Plaintiff does not contend that there was no notice published in accordance with the terms of the deed of trust and G.S. 45-21.16. Her contention is that the sale is invalid because the affidavit of publication filed in the office of the Clerk was unsigned and, therefore, there was no compliance with G.S. 45-21.33. The plaintiff concedes that the trustee filed in the office of the Clerk what purported to be an affidavit of publication. This paper was unsigned although it contained a jurat of a notary public that the affiant swore to it and subscribed it before her. Attached thereto was a copy of the notice of sale indicating that it had been published on 1, 8, 15 and 22 March 1973. With the motion for summary judgment, defendants filed the affidavit of the General Manager of the publisher that the notice of foreclosure was actually published on 1, 8, 15 and 22 March 1973 and a copy of the notice was attached. Any objection plaintiff may have is cured by the filing of his affidavit, particularly in view of the fact that she does not dispute the

fact that the notice was published. We think the purpose of the statute is to have in the files of the Clerk proof that the foreclosure sale was properly conducted and that the notice was published. In this situation we do not agree with plaintiff that the fact that a properly *signed* affidavit was not filed within 30 days of the sale invalidates the sale. It is obvious that the failure of the publisher to sign the affidavit was a mere oversight or clerical error. In our opinion, this was corrected by the filing of the affidavit properly signed which was accepted by the court, (see G.S. 1A-1, Rule 60) particularly where, as here, there is, and can be, no dispute about the actual publication as required by the instrument and the statute.

[2] Next, defendants contend that there is no genuine issue of material fact with respect to fraud. As to this, neither party filed supporting affidavits. Defendants contend that plaintiff alleges that the deed of trust was executed for the purpose of defrauding the "creditors of Brian B. Britt and the plaintiff", placing upon this allegation the interpretation that the fraud was being perpetrated upon the creditors of *both* Brian Britt and plaintiff and contending that she has alleged she was a beneficiary of and party to the fraud. While this allegation is certainly susceptible of the interpretation given it by defendants, another allegation clarifies it, we think. The plaintiff subsequently alleged that the defendants "conspired to place a fraudulent deed of trust on the subject property described above with the express intent to defraud the creditors and wife of Brian B. Britt". We think this allegation clearly indicates that plaintiff intended the complaint to allege a fraud upon plaintiff as well as the creditors of defendant Brian B. Britt, however inartfully it may be drafted. Even so, she alleges only that she signed the deed of trust solely because her husband requested her to do so and not because she was indebted to anyone, that she does not believe the deed of trust secures any note or obligation, that she believes that defendants Thomas O. Britt and Malcolm V. Britt were acting as agents for Brian B. Britt and agreed to cancel the deed of trust at his request, and that the three conspired to defraud his creditors and her. Although the new civil rules adopt the practice of notice pleading, G.S. 1A-1, Rule 9(b), specifically provides that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Here plaintiff fails to allege in what

respects she was induced to sign the deed of trust, or upon what misrepresentations she relied. She only alleges that she signed the deed of trust at the request of her husband. She did not allege to what extent he was indebted at the time, nor whether the other defendants had knowledge of his intention to defraud his creditors and the plaintiff. We cannot see how any agreement of her husband's brothers to cancel the deed of trust at his request could amount to a fraud upon her. It is true that plaintiff might have been lulled into a false sense of security by the earlier denial by the court of defendants' motion to dismiss for failure to state a claim upon which relief could be based. Nevertheless, plaintiff failed to move the court for permission to amend her complaint, even after she became aware of the position of defendants with respect to her allegations.

[3] Finally plaintiff contends that there is a genuine issue of fact as to notice and the insufficiency of the bid at foreclosure. Plaintiff recognizes the well-established principle that mere inadequacy of the bid at foreclosure is not sufficient, standing alone, to set the sale aside. She contends, however, that the alleged gross inadequacy of the bid when coupled with the alleged lack of constitutional notice is sufficient and presents a genuine issue of material fact. In *Huggins v. Dement,* 13 N.C. App. 673, 187 S.E. 2d 412 (1972), appeal dismissed 281 N.C. 314 (1972); appeal dismissed cert. denied 409 U.S. 1071, 34 L.Ed. 2d 659, 93 S.Ct. 677 (1972), we held that in a foreclosure sale, notice of sale posted at the courthouse door and in a newspaper as provided by statute is sufficient to meet due process requirements. See also *Woodell v. Davis,* 261 N.C. 160, 134 S.E. 2d 160 (1964), and *Hodges v. Wellons,* 9 N.C. App. 152, 175 S.E. 2d 690 (1970), cert. denied 277 N.C. 251 (1970). Here there is no contention that notice was not given in accordance with the terms of the deed of trust or in accordance with the statute. We are not unaware of *Turner v. Blackburn,* 389 F. Supp. 1250 (W.D.N.C. 1975), but we do not consider that case determinative of this question nor binding on this Court. We note also that in a more recent decision the Texas Court of Civil Appeals has held that action taken by the trustee pursuant to a power of sale contained in a deed of trust does not constitute state action, and that the Texas statute regulating such sales which requires that the sale be made in the county where the realty is situate and that written notice of sale be posted for three consecutive weeks prior to the sale in three public places in the county but does not require personal notice

or hearing, is not unconstitutional. *Armeta v. Nussbaun,* 519 S.W. 2d 673 (Texas Civ. Ct. App. 1975). The Court suggested that the question is analogous to those situations challenging the constitutionality of the self-help provisions of the Uniform Commercial Code and noted that six Courts of Appeals have held that self-help repossession without notice or hearing constitutes insufficient state action to raise a due process question. The circuit courts so holding are the second, third, fifth, sixth, eighth and ninth. In any event, we consider *Huggins v. Dement, supra, Woodell v. Davis, supra,* and *Hodges v. Wellons, supra,* determinative of this question. Having thus disposed of the contention of lack of constitutional notice, we find the only remaining contention of plaintiff to be the contention with respect to insufficiency of the sales price. She properly concedes that this question, standing alone, can avail her nothing.

For the reasons set out, we hold that motion for summary judgment was properly allowed.

Affirmed.

Judges VAUGHN and CLARK concur.

HYDE INSURANCE AGENCY, INC. v. DIXIE LEASING CORPORATION

No. 7528SC150

(Filed 4 June 1975)

1. **Rules of Civil Procedure § 56— summary judgment — findings of fact**

If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper.

2. **Rules of Civil Procedure § 56— summary judgment — findings of fact**

Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment.

3. **Insurance § 5— discriminatory rates — agreement between insured and agency — estoppel of agency**

If defendant insured agreed to delay cancellation of automobile liability, general liability and workmen's compensation insurance until plaintiff agency could resubmit a bid for such coverage upon plaintiff's agreement to waive the short rate premium that would otherwise have

been due by reason of cancellation by the insured, and if the insured did not thereby knowingly accept a reduction in premium prohibited by statute, plaintiff agency will not be allowed to plead the illegality of its agreement and benefit from its own wrongdoing to the detriment of defendant. G.S. 58-44.5.

ON writ of *certiorari* to review an order entered by *McLean, Judge.* Order entered 20 November 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 17 April 1975.

Plaintiff seeks to recover premiums for insurance coverage which it obtained from Travelers Insurance Company to provide coverage for defendant. Binders were issued by plaintiff to defendant on 7 September 1973, and the premiums were paid by plaintiff to Travelers Insurance Company on the September and October open account of plaintiff with Travelers Insurance Company. No policies were ever delivered by plaintiff to defendant, but copies of the declarations pages of each policy were delivered by plaintiff to defendant on 15 January 1974, some two and one-half months after their cancellation by defendant. Plaintiff has fully accounted to Travelers Insurance Company for premiums for coverage of defendant from 7 September 1973 to 1 October 1973 and now seeks to recover the amount of those premiums from defendant. Defendant does not deny existence of the insurance coverage secured by plaintiff, but it does deny liability for the amount of premiums alleged by plaintiff.

The trial judge heard the matter upon plaintiff's motion for summary judgment. After considering the pleadings, interrogatories, and request for admissions, the trial judge found facts as follows (We rearranged the chronological order of No. 5.):

"1. That on or before the 7th day of September, 1973, the plaintiff and the defendant entered into a contract whereby the plaintiff agreed to obtain certain insurance coverage for the defendant for one year from that date and the defendant agreed to pay an annual premium therefor to plaintiff in the amount of $46,010.00.

"5. That pursuant to that agreement, the plaintiff did provide general liability insurance, workmen's compensation insurance and automobile liability insurance for the defendant as called for by the agreement between the plaintiff and the defendant from 7 September 1973 to 1 October 1973.

"2. That said insurance coverage consisted of Automobile Liability Insurance covering defendant's fleet of trucks, automobiles, physical damage insurance for said trucks, Workmen's Compensation, and General Liability Coverage.

"3. That the agreement between the plaintiff and the defendant required a short rate premium in the event the insured cancelled the coverage.

"4. That the short rate premium due by reason of the cancellation at the request of the insured for the insurance here involved for the period here involved is $7,851.00.

"6. That subsequent to the providing of said insurance coverage for the defendant by the plaintiff, the defendant alleges that the defendant through its agents notified the plaintiff that the defendant had received a lower bid for similar insurance coverage and that the defendant would have to cancel his coverage as provided by plaintiff.

"7. That the defendant further alleges that the plaintiff thereupon requested that the defendant delay cancellation until the plaintiff had a chance to resubmit a bid for said insurance coverage and in exchange for such delay, the defendant alleges that the plaintiff offered to waive the short rate premium which would otherwise have been due by reason of cancellation by the insured.

"8. That subsequent to the alleged modification of the contract, cancellation was effected on the 1st day of October upon request of the insured, the defendant herein."

Defendant tendered the sum of $2,718.63 as its total liability and confessed judgment in that amount.

Defendant alleged, and its answers to interrogatories tended to show, as follows:

"1. On or about September 7, 1973, the Plaintiff agreed to apply for insurance coverage on behalf of the Defendant based on a proposal which had been submitted to Defendant, said proposal calling for insurance coverage on Defendant's business with an annual premium of $46,010.00 to be paid for said coverage.

"2. That within 4 or 5 days following Plaintiff's agreement to apply for coverage on behalf of Defendant as re-

ferred to above, the Defendant notified Plaintiff that a competing agency had offered to provide identical coverage for an amount substantially less than the amount quoted by Plaintiff.

"3. That at the time Defendant notified Plaintiff as referred to in Paragraph 2 above, the Defendant likewise requested that Plaintiff cease in its efforts to place coverage with a company represented by Plaintiff and Defendant offered to pay Plaintiff for any costs of coverage which had accrued prior to the notification referred to.

"4. That Plaintiff, by and through its agents, requested that Defendant refrain from taking immediate action relative to Defendant's notification as referred to above in order that Plaintiff might have an opportunity to submit an additional proposal competitive with the proposal referred to at the time of Defendant's notification of Plaintiff.

"5. That as consideration for Plaintiff's request that Defendant delay acceptance of the second proposal, the Defendant offered to charge Defendant for coverage no more than the pro rata daily rate of coverage during the period of delay.

"6. That on or about October 1, 1973, the Plaintiff notified the Defendant that it was unable to obtain coverage for Defendant which was competitive with the second proposal referred to above, whereupon Defendant tendered payment for coverage for the period from September 7, 1973, to October 1, 1973.

"7. That as a result of the matters and things herein alleged, the Defendant is indebted to Plaintiff for not more than the sum of $2,718.63 and Defendant hereby tenders said sum and confesses judgment in that amount."

From the foregoing the trial judge concluded that the agreement alleged by defendant constituted an agreement for discrimination in rates which is proscribed by statutes; i.e., General Statutes 58-44.3, 58-54.4(8)c., 58-131.18, 58-248.2, and 97-104.2, and therefore void and unenforceable as being contrary to public policy. He concluded that defendant had raised no genuine issue as to a material fact and that plaintiff was entitled to judgment for the sum of $7,851.00 as a matter of law.

Defendant appealed.

VanWinkle, Buck Wall, Starnes, Hyde & Davis, by Albert L. Sneed, Jr., for the plaintiff.

McGuire, Wood, Erwin & Crow, by James P. Erwin, Jr., and Charles R. Worley, for the defendant.

BROCK, Chief Judge.

[1, 2] After the hearing on plaintiff's motion for summary judgment under Rule 56, the trial judge proceeded to make what he termed "Findings of Fact." Summary judgment should be entered only where there is no genuine issue as to any material fact. If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. The "Findings of Fact" entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decision. *See Lee v. King,* 23 N.C. App. 640, 643, 209 S.E. 2d 831 (1974); *Eggimann v. Board of Education,* 22 N.C. App. 459, 464, 206 S.E. 2d 754 (1974); 6 Moore's Federal Practice ¶56.02[11] (2d ed. 1974).

It should be noted at the outset that this is not a controversy between an insurer and an insured. The insurer, Travelers Insurance Company, is not a party to this action. The controversy here is between what appears to be a corporate insurance agent or broker and an insured.

Plaintiff contends it is entitled to recover the short rate premium because defendant cancelled the policy. Defendant contends it is obligated to pay only the pro rata daily rate of the annual premium in accordance with plaintiff's agreement. Plaintiff contends that, if it should be determined that plaintiff made such an agreement, an agreement to accept less than the short rate premium is unenforceable because it is forbidden by statute. The trial judge ruled with the plaintiff. We reverse.

The prohibition against discrimination in rates, as provided by G.S. 58-44.3, 58-44.5, 58-54.4(8)c., 58-131.18, 58-248.2, and

97-104.2, is directed to insurers, agents, brokers, and other representatives of insurers. Only one of the above sections of the statutes, G.S. 58-44.5, mentions the insured. It provides that an insured shall not *knowingly* receive or accept a prohibited reduction of premium. There is nothing in the record presently before us which suggests that defendant knew the premium rate promised by plaintiff was a prohibited rate. The sanctions provided by statutes for violations of the antirebate provisions are directed to the insurers, agents, brokers, or other representatives. The statutes do not declare that contracts in violation of the antirebate provisions are void. *See Headen v. Insurance Co.*, 206 N.C. 270, 173 S.E. 349 (1934); *McNeal v. Insurance Co.*, 192 N.C. 450, 135 S.E. 300 (1926); *Gwaltney v. Assurance Society*, 132 N.C. 925, 44 S.E. 659 (1903).

> "The fact that an antirebate statute has been violated does not vitiate the contract of insurance, nor entitle the insurer to obtain a reformation of the contract. In the absence of a legislative expression of intent to the contrary, an insurer cannot—at least, as against an innocent insured who is not in pari delicto—accept and retain benefits, and then plead as a defense its own violation of a statute prohibiting the granting of discriminations as to rates, as by setting up that such contract is void for discrimination. For the courts are not disposed to go beyond the expressed intention of the legislature and declare a forfeiture of policies when the legislature has not done so. In other words, the insurer cannot say that the contract of insurance is void because of a violation of an antirebate statute for the purpose of defeating the insured, and thus take advantage of its own wrong." 5 Couch on Insurance 2d § 30:64 (2d ed. 1960) (Footnotes omitted.).

In the case presently before us, the defendant has fully performed its part of the alleged contract by allowing plaintiff to continue coverage as requested by plaintiff and has offered to pay at the rate agreed to by plaintiff. The benefit to plaintiff was an opportunity to compete with the coverage offered to defendant by Allstate Insurance Company. Plaintiff's ultimate inability to offer competitive coverage does not alter the fact that defendant forewent the opportunity to cancel plaintiff's coverage at the time it first notified plaintiff to cancel its coverage.

The Supreme Court of North Carolina, in *Robinson v. Life Co.*, 163 N.C. 415, 79 S.E. 681 (1913), quoted, with approval from Vance's Treatise on Insurance, as follows:

> " 'When, however, the statutes imposing conditions upon doing business by the foreign insurer merely prohibit the making of the contract without compliance with their terms, the question as to the rights of the parties becomes of much greater difficulty. In accordance with the general rule that a contract that is prohibited is illegal, and therefore void, it would follow that neither one of the parties would take any rights under the contract, or could enforce the agreement against the other. Yet to apply this general doctrine to a contract made under such circumstances as usually attend the making of a contract of insurance would work great hardship and be manifestly unjust. The party insured cannot, without great difficulty, discover whether the insurer has complied with all the statutory requirements or not; and while it is true that the statutes imposing these conditions upon the insurer are public acts, and therefore presumed to be known to all, yet it would be unreasonable to require that every person to whom a corporate insurer offers a contract of insurance should make an exhaustive investigation in order to discover whether his cocontractor has been fully qualified to make the agreement that is proposed, which is a question of fact. It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability under the contract by pleading his own infraction of law. The same principle of estoppel, however, does not apply when the insurer is endeavoring to enforce some right under the contract against the insured. The plaintiff, not having legally qualified himself to make the contract under which he sues, has no standing in law or equity when he attempts to enforce it.' " 163 N.C. at 421-422.

The Court went on to say:

> "The citation from Vance marks the difference in the relations of the parties to the contract under these circumstances, and demonstrates that they are not in equal fault.

"It is there said 'that the insured has the right to assume that the insurer has complied with all the requirements of the law,' and that 'the latter will be estopped to escape liability under the contract by pleading his own infraction of law,' and that the insured may maintain an action upon the contract when the insurer cannot." 163 N.C. at 422.

[3] We think the foregoing rationale is sound and that it is applicable to the case *sub judice*. If the defendant can establish the contract as alleged by it, and if there is no showing that defendant knowingly accepted a prohibited premium rate, the plaintiff should not be allowed to plead the illegality of its contract and benefit from its own wrongdoing to the detriment of the defendant.

We are unable to reconcile the calculations by defendant of the amount due, under the agreement it alleges, with the pleadings and interrogatories. However, we leave that calculation to the finders of the facts in the event defendant is successful in establishing the agreement it alleges.

We hold that plaintiff has failed to show that there is no genuine issue as to a material fact and that the granting of plaintiff's motion for summary judgment was error.

Reversed and remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. BEN FRANK SCOTT AND EULA MAE JACOBS

No. 7516SC203

(Filed 4 June 1975)

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

The State's evidence was sufficient for the jury in a prosecution for first degree murder of the femme defendant's husband where it tended to show that femme defendant owned a .22 pistol and stated many times that she was going to kill her husband, femme defendant stated that she would get some insurance if her husband were dead, the male defendant's car was at femme defendant's house almost daily during the two weeks prior to decedent's death, defendants and decedent

were together on the night of the death, five shots were heard at decedent's home about midnight, 35 minutes later defendants arrived at the home of the femme defendant's niece, the femme defendant was wearing a nightgown, the femme defendant gave the male defendant six or seven .22 cartridges, the femme defendant was crying and very nervous, an unidentified male called the sheriff's department from a pay telephone at 3:10 a.m. and told the dispatcher that someone was hurt at decedent's home, the male defendant was seen in a pay telephone booth at the time of the call, defendants left the next day to go see a lawyer, the femme defendant's .22 pistol was missing after the killing, decedent died from wounds from .22 bullets, and femme defendant was the beneficiary of $21,000 of insurance on the life of decedent.

2. **Criminal Law § 116— defendant's failure to offer evidence — incomplete instruction**

The trial court committed prejudicial error in instructing the jury that defendants elected, as they had a right to do, not to offer evidence without further instructing the jury that defendant's failure to offer evidence should not be considered against them.

Judge PARKER dissenting.

APPEAL by defendants from *Clark, Judge.* Judgments entered 25 October 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 May 1975.

Defendants Ben Frank Scott (Scott) and Eula Mae Jacobs (Eula Mae) were charged in separate indictments with the first-degree murder of Wallace Jacobs (Jacobs), Eula Mae's husband, on 19 June 1974. They pleaded not guilty, the jury returned verdicts of guilty of second-degree murder, and from judgments imposing prison sentences of not less than 25 nor more than 30 years, they appealed.

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

I. Murchison Biggs & Associates, by I. Murchison Biggs, for defendant appellant Scott.

Musselwhite, Musselwhite & McIntyre, by Fred L. Musselwhite and C. S. McIntyre, Jr., for defendant appellant Jacobs.

BRITT, Judge.

[1] Defendants contend that the trial court erred in not allowing their motions for nonsuit. The State's evidence (defendants presented no evidence) tended to show:

Ida Mae Locklear testified: On 16 June (1974) she drove Eula Mae to get some beer. On that occasion Eula Mae had a gun which she fired into the ground and stated that she was going to kill Jacobs.

Anderson Locklear testified: Eula Mae is his wife's aunt. Defendants came to his home in Cumberland Mills, near Fayetteville, on 17 June 1974 at approximately 2:45 p.m. While there Eula Mae took a .22 pistol "out of her bosom . . . held it side the car, and shot it 3, 4 times." Scott left about 3:05 p.m. Eula Mae spent the night, leaving the next morning at approximately 7:00 or 7:30 a.m. and returning to Pembroke.

Dorothy Locklear testified: She lives about 100 yards from the Jacobs home. Between January and June (of 1974) she heard Eula Mae state 12 or 15 times that she was going to kill him (referring to Jacobs). In the spring, she took Eula Mae to Lumberton where Eula Mae bought a box of .22 shells. In the first part of June, Eula Mae stated that she was "going to kill that [S.O.B.] of mine" and that while she was talking to Dorothy she had a .22 pistol "in her bosom." Eula Mae stated that if Jacobs were dead she could get some insurance. When she stopped talking to Dorothy, she left and started shooting the gun. During the two weeks prior to 18 and 19 June, Scott's car (a 1965 white Ford) was at Jacobs' house 10 or 12 times. His car was there almost daily. On 18 June, she first observed Scott's car at the Jacobs home around 2:00 p.m. and saw Scott with Eula Mae around 3:00 to 4:00 p.m.

Lefty Lee Cummings testified: Eula Mae is his mother and Jacobs was his stepfather. He worked at Spring Mills in Wagram. On 18 June, at approximately 6:00 p.m., while getting his pajamas out of his dresser drawer at the Jacobs home, he saw a .22 pistol in the drawer. He went to bed and later Scott woke him up and told him to get ready for work. When he left for work at 11:10 p.m. on 18 June, Eula Mae, Scott, and Jacobs were all in the house. Earlier that day, Jacobs had slapped his mother, hit her in her rib cage, and told her never to return to the house. He saw his mother shoot the .22 pistol two or three times during the three-week period prior to Jacobs' death. She had owned the .22 pistol approximately one year.

Dorothy Locklear testified: At approximately 11:20 p.m. on the night of 18 June 1974 (Tuesday), Scott's white car was still parked at the Jacobs house. At midnight she heard five shots but went back to sleep.

Anderson Locklear testified: At approximately 12:35 a.m. Tuesday night or Wednesday morning, 19 June 1974, defendants arrived at his home in Cumberland Mills. It takes approximately 30 to 35 minutes to drive from the Jacobs home to his home. He heard Scott tell Eula Mae to "[g]ive me them things you got," and he saw Eula Mae give him six or seven .22 cartridges out of her handbag. Scott then left but returned later that day (Wednesday morning) at about 11:00 a.m. or 12:00 noon. On the same day Eula Mae was taken to see a doctor in Pembroke.

Annie Jane Locklear, Anderson's wife and Eula Mae's niece, gave testimony similar to that of her husband. She further testified: She heard Eula Mae provide Scott with a telephone number and tell him to contact her son Lefty. The number provided was that of Annie Jane's neighbor. Eula Mae was dressed in her nightclothes when she arrived at Annie Jane's house. Scott left about 5 or 10 minutes later. Annie Jane described her aunt as "crying, shaking, very, very nervous." She told defendants that the law was coming for them. When Eula Mae and Scott left on Wednesday, Scott was going to take Eula Mae to see a lawyer.

Lefty Lee Cummings testified: At around 2:00 or 2:15 a.m. (on 19 June 1974) Scott "showed up" at the plant (at Wagram) and told him that Eula Mae had gone to Fayetteville and gave him a phone number. Scott told him to call the number and not to go home when he got off work but to go to his aunt's house. He arrived back at his home at about 6:00 a.m., looked in his dresser drawer and the .22 pistol was gone.

Andrew Cummings testified: Eula Mae is his mother and he works at the Osterneck Plant in Lumberton. He got off work on the morning of 19 June at 3:01 a.m. As he was leaving work in his car, he saw Scott in a pay telephone booth (in Lumberton) at 3:09 a.m.

Gerald Martin testified: He is a dispatcher for the Robeson County Sheriff's Department. On the morning of 19 June 1974, at approximately 3:10 a.m., he received a phone call from an unidentified male subject asking that police go to Wallace Jacobs' house in the Pembroke area, advising that there had been a break-in and someone was hurt. (A telephone operator testified that this call came from a pay telephone in Lumberton.)

Bobby Honeycutt testified: He is a Deputy Sheriff of Robeson County. On the morning of 19 June, he arrived at the home of Wallace Jacobs at approximately 3:30 a.m. He found that the screen had been torn out, apparently from the inside, and the window was open about 12-18 inches. He found Wallace Jacobs' nude body on the floor in the kitchen with an air rifle across his arm. (Later testimony by Hubert Stone indicated that a box of pellets were in his hand.)

Hubert Stone testified: He is a deputy sheriff and detective with the Robeson County Sheriff's Department, having been employed by the department for 21 years. He went to the Wallace Jacobs home on the morning of 19 June 1974. He observed the body of Jacobs and saw wounds about his head and body—one wound about the size of a .22 bullet behind his right ear and another wound about the size of a .22 bullet just below the left side of his nose. He also found two holes about the size of a .22 bullet in the wall, found one spent .22 cartridge, two .22 calibre bullets in a dresser drawer, and a box of .22 bullets in a closet where a woman's clothes were hanging. Scott and Eula Mae were arrested on 19 June. The gun was never found.

Dr. Marvin Thompson testified: He is a pathologist at Southeastern General Hospital in Lumberton. He examined the body of Wallace Jacobs subsequent to 19 June 1974. In his opinion the death of Jacobs was caused by gunshot wounds.

W. W. Wallace testified: He is employed by Kanawha Insurance Co., Lancaster, S. C., as Vice President. At the time of Wallace Jacobs' death, his company had policies outstanding on the life of Jacobs providing death benefits approximating $21,000 with Eula Mae as the beneficiary.

Clearly, the evidence was sufficient to survive defendant Jacobs' motion for nonsuit. While the case presented against defendant Scott was not as strong, we think that when the evidence admitted against Scott is considered in the light most favorable to the State, and giving the State the benefit of every reasonable inference fairly deducible therefrom, it was sufficient to survive his motion for nonsuit. We hold that the court did not err in overruling the motions.

[2] Defendants assign as error a portion of the trial court's instructions to the jury. As stated above, neither defendant introduced evidence. In its jury charge, after summarizing the evidence presented by the State, the court gave the following

instruction: "The defendant Scott elected, as he had the right to do, not to offer evidence. The defendant Jacobs elected, as she had the right to do, not to offer evidence."

Defendants contend an almost identical instruction was held to be prejudicial error, requiring a new trial, in *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974). As was true in *Baxter,* defendants in the case at hand made no request for an instruction concerning their failure to offer evidence, and there was no other statement in the charge with respect thereto.

We find it impossible to distinguish the instant case from *Baxter,* therefore, we have no alternative to granting the defendants a new trial. However, in fairness to the able judge who presided over the trial of the case *sub judice,* we point out that this case was tried at a session of the court commencing on 14 October 1974, and that the opinion in *Baxter,* while filed on 10 October 1974, had not been published in the Advance Sheets nor otherwise given general circulation prior to the date the jury was charged in this case.

We do not discuss the other questions argued in the briefs as they probably will not arise at a retrial.

For the reason stated, defendants are granted a

New trial.

Judge VAUGHN concurs.

Judge PARKER dissents.

Judge PARKER dissenting: I agree that the State's evidence was sufficient as to each of the defendants to withstand their motions for nonsuit and that these motions were properly denied. However, because I cannot see how the jury could possibly have been misled to defendants' prejudice by the mere statement in the trial judge's charge, which was made immediately following his summation of the State's evidence, that defendants elected, as they had a right to do, not to offer evidence, and because I most respectfully hope that our Supreme Court will reexamine its holding in *State v. Baxter,* I dissent from the award of a new trial in this case.

STATE OF NORTH CAROLINA v. JAMES LOUIS BUIE

No. 7520SC179

(Filed 4 June 1975)

Criminal Law §§ 9, 10— aiding and abetting — accessory before the fact — sufficiency of evidence

Defendant could not be convicted as a principal of the crimes of breaking and entering, larceny and attempted safecracking where the State's evidence tended to show only that defendant and the State's witness planned for the witness and three others to break into a building to steal tools, while the four men were in the building one of them attempted to break open the safe, the others told him to forget the safe, the four men took tools to a place 300 feet from the building, the witness telephoned defendant, who was at home a quarter of a mile away, and defendant picked up the men and tools in his vehicle; however, the evidence would be sufficient to support a conviction of defendant for accessory before the fact of the crimes of breaking or entering and larceny but not for accessory before the fact of attempted safecracking.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 6 December 1974 in Superior Court, MOORE County. Heard in the Court of Appeals 7 May 1975.

To charges of (1) breaking or entering and (2) larceny of tools pursuant thereto in one indictment, and (3) attempted safecracking in another indictment, the defendant pled not guilty.

The State's evidence tended to show that all offenses occurred on the night of 11 August 1974 in a building of Riddle Equipment Co., Inc., a dealer in farm tractors and related supplies. George Dowdy, charged in the same indictments but not tried as a codefendant, testified that he was a part-time employee of the Company; that about three days before 11 August defendant told him the defendant and three other guys needed some tools and asked if the witness would help him. Dowdy agreed to do so, and defendant told him that the three guys would meet Dowdy about midnight at the sawdust pile located about 300 feet from the company building. Dowdy met them as planned, and the four men went to the building and entered after cutting a hole in the roof. While three of them were getting tools and putting them in boxes, the fourth man, named John, began trying to open the safe with a sledgehammer and chisel. John was told by the others to leave the safe alone; that they

had gotten the tools they wanted. The four men left with the tools and went back to the sawdust pile. The others asked Dowdy to call the defendant, and Dowdy left them and walked about a quarter of a mile to a store, where he made a telephone call to defendant and asked him to pick them up at the sawdust pile. Defendant lived about a quarter of a mile from the company building. He drove his vehicle to the sawdust pile; the tools were put in the back of the car, and defendant drove away with the others in the car. Defendant testified and denied that he planned with Dowdy to get the tools but did admit receiving a telephone call from him about 3:00 a.m.

The jury found the defendant guilty of the three offenses as charged, and from judgments imposing imprisonment on the breaking or entering and larceny charges and probation on the attempted safecracking charge, defendant appealed.

Attorney General Edmisten by Associate Attorney Joan H. Byers for the State.

Chambers, Stein & Ferguson by Charles L. Becton for defendant appellant.

CLARK, Judge.

The defendant was convicted as a principal of the crimes of breaking or entering, felonious larceny, and attempted safecracking, though he was not actually present at the scene of the crimes. There are two exceptions to the rule that an accused cannot be convicted as a principal when he is not actually present at the scene. First, if the defendant was constructively present when the crime was committed and aided or abetted the others in the commission of the crime, he would be a principal in the second degree and equally guilty with the others. *State v. Mitchell,* 24 N.C. App. 484, 211 S.E. 2d 645 (1975). Second, the accused would be guilty as a principal when he causes a crime to be committed through an innocent agent, that is, one who is not himself legally responsible for the act, *i.e.,* a mental defective. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970).

There is no evidence in this case that Dowdy or any of his partners in crime were innocent agents. Nor is there sufficient evidence to support a finding that the defendant was an aider and abettor and, therefore, guilty as a principal in the second degree, because the evidence, considered in the light

most favorable to the State, does not support the defendant's constructive presence. At the time of the perpetration of the crimes the defendant was in his home about a quarter of a mile away. While actual distance from the crime scene is not always controlling in determining constructive presence, the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime. *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Chastain,* 104 N.C. 900, 10 S.E. 519 (1889); *State v. Alston,* 17 N.C. App. 712, 195 S.E. 2d 314 (1973); *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972).

We conclude, therefore, that under this evidence, the defendant could not be guilty as a principal of either the crime of breaking or entering or larceny or attempted safecracking. However, there is evidence sufficient to support a conviction for accessory before the fact to breaking or entering, and for accessory before the fact to felonious larceny. The crime of accessory before the fact is a lesser offense of a felony charged in the bill of indictment, and a defendant may be convicted of accessory before the fact on an indictment charging the principal crime. G.S. 15-170; *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).

An accessory before the fact is defined in G.S. 14-5 as one who shall "counsel, procure or command any other person to commit any felony." G.S. 14-6 provides for the punishment of accessories before the fact. " 'There are several elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime.' " *State v. Bass,* 255 N.C. 42, 51, 120 S.E. 2d 580, 587 (1961), quoting 22 C.J.S., Criminal Law, § 90, at 269 (1961). See also *State v. Williams,* 208 N.C. 707, 182 S.E. 131 (1935); *State v. Mann,* 2 N.C. 4 (1781).

On the charge of attempted safecracking the evidence shows that the defendant asked Dowdy to help him get some tools; that they planned for Dowdy and others to break into the Riddle Equipment Co. building to steal tools; that while

the four men were in the building, one of the four, John, got a sledgehammer, chisel and torch, and while the other three were gathering up tools, attemped to break open the safe; after the three men had put the tools in boxes, they told John to forget the safe, which he apparently did. We find that the defendant is not criminally responsible for the acts of the one, John, since it was the independent product of his mind, foreign to the common design and plan to break into the building and steal tools. Safecracking (G.S. 14-89.1) is a separate and distinct crime, usually requiring special implements or explosives and particular skills. The maximum punishment under the statute exceeds that of breaking or entering combined. Under these circumstances the attempted safecracking was outside, and not incidental to, the scope of the plan to steal tools.

The rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act must be shown to have been done in furtherance or in prosecution of the common object and design for which the parties were combined. 21 Am. Jur. 2d, Criminal Law, § 132 (1965); 15A C.J.S., Conspiracy, § 74 (1967); *People v. Werner,* 16 Cal. 2d 216, 105 P. 2d 927 (1940).

On the charge of attempted safecracking (74CR6017), the judgment is vacated.

On the charges of breaking or entering and larceny (74CR6016), the cause is remanded so that the District Attorney, should he elect to do so, may try defendant under the original bill of indictment for the offense of being an accessory before the fact to breaking or entering and for the offense of accessory before the fact to larceny.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY RAY SHAW

No. 756SC183

(Filed 4 June 1975)

1. **Receiving Stolen Goods § 5; Larceny § 6— value of stolen goods — purchase price — relevancy — appraisal**

The State's evidence was insufficient to support a verdict that defendant received stolen goods (a watch and diamond ring) having

a value in excess of $200.00 where the owner testified that the watch was worth about $50.00 and that her husband paid $200.00 for the ring nine years before and a jeweler testified that he appraised the ring at $85.00 since (1) the owner's testimony as to the price her husband paid for the ring nine years before was irrelevant in determining its market value at the time of the theft absent some evidence regarding the condition of the ring and the circumstances of its purchase and (2) any probative force of the owner's testimony was negated by the positive evidence of the jeweler that he appraised the ring at $85.00.

2. Receiving Stolen Goods § 7— insufficient evidence of felony — verdict treated as misdemeanor receiving

Where the evidence was insufficient to support a jury finding that the value of stolen property was in excess of $200.00, a jury verdict finding defendant guilty of feloniously receiving the stolen property must be treated as a verdict finding defendant guilty of misdemeanor receiving.

APPEAL by defendant from *Copeland, Judge.* Judgment entered 12 December 1974 in Superior Court, HALIFAX County. Heard in the Court of Appeals 13 May 1975.

This is a criminal prosecution wherein the defendant, Jerry Ray Shaw, was charged in a bill of indictment, proper in form, with feloniously receiving a rifle, a man's white gold wristwatch, and a "1/5 of a carat diamond ring with white gold band the personal property of Tiny Wages having a value of in excess of two hundred dollars . . . " knowing the same to have been stolen.

Upon the defendant's plea of not guilty, the State offered evidence tending to show the following: On 16 July 1974 Rufus Hobbs went to the home of Mrs. Tiny Wages in Roanoke Rapids to mow the lawn. Mrs. Wages left home and Hobbs entered the house. He stole a rifle, a man's wristwatch, and a diamond ring. Immediately thereafter Hobbs took the ring and watch to the home of the defendant and asked him if he wanted to buy "some stolen stuff". The defendant purchased the watch and the ring for $5.00 each.

With respect to the value of the watch and ring, Mrs. Wages testified "that the watch was in working order and worth about $50.00; and that she had worn the ring for nine years and that her husband had paid $200.00 for it."

The State offered the testimony of Elmo Garner, a jeweler in Roanoke Rapids, who stated that the defendant brought the

ring to his store to be appraised on 17 July 1974. The jeweler recognized the ring and called the police. Mr. Garner testified with respect to the value of the ring that "the ring was used and that he appraised it at $85.00."

Defendant offered no evidence.

The jury returned a verdict of "guilty of receiving stolen property with a value of more than $200.00 knowing the same to have been stolen." From a judgment imposing a prison sentence of not less than seven nor more than ten years, defendant appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General Conrad O. Pearson for the State.

H. P. McCoy, Jr., for defendant appellant.

HEDRICK, Judge.

Based on numerous exceptions in the record to questions asked and remarks made by the trial judge, the defendant contends the trial court expressed an opinion on the evidence in violation of G.S. 1-180. Suffice it to say, we have carefully examined each exception upon which these assignments of error are based and find no impropriety whatsoever by the questions asked or remarks made by the trial judge. These assignments of error have no merit.

Next, defendant contends the evidence was not sufficient as to the value of the items allegedly received by the defendant to support the verdict of feloniously receiving stolen goods having a value of more than $200.00. There is no evidence in the record that the defendant received the rifle described in the bill of indictment. The State prosecuted the defendant solely on the theory that he received stolen goods (the ring and watch) having a total value in excess of $200.00. The only evidence in the record as to the value of the property in question is as follows: With respect to the watch and ring, Mrs. Wages testified that the watch was "worth about $50.00" and "that her husband had paid $200.00" for the ring. Mr. Elmo Garner, the jeweler, testified that the ring "was used and that he appraised it at $85.00". Considering the testimony of Mrs. Wages as to the value of the watch and Mr. Garner as to the value of the ring in the light most favorable to the State, the evidence is sufficient to support a finding by the jury that the stolen articles at the

time of the theft had a fair market value of $135.00. *State v. McCambridge,* 23 N.C. App. 334, 208 S.E. 2d 880 (1974); *State v. Dees,* 14 N.C. App. 110, 187 S.E. 2d 433 (1972). It remains for us to determine, however, whether the testimony of Mrs. Wages that her husband paid $200.00 for the ring nine years before the theft is of sufficient probative value to support a finding by the jury that the combined value of the watch and the ring at the time of theft was in excess of $200.00.

As used in G.S. 14-72(a) for determining whether the crime is a felony or a misdemeanor, the word "value" means the fair market value of the stolen item at the time of the theft. *State v. Dees, supra; State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968).

> "[I]n the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market—its 'market value' or its 'reasonable selling price', at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny . . . . It has been ruled that the actual value of the thing wrongfully appropriated, rather than the intention of the taker with respect to value, determines the grade of larceny." 50 Am. Jur. 2d, Larceny, § 45, pp. 209-211 (1970) (footnotes omitted).

The rules which are used to establish value in civil cases have been held applicable in determining the value of stolen property in criminal actions. 50 Am. Jur. 2d, supra; 52A C.J.S., Larceny, § 118 (1968). In land condemnation proceedings, whether the price paid for the property has any probative force in determining value is dependent upon the similarity of conditions at the time of purchase and at the time of the acquisition. *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761 (1963). In larceny cases, it has even been held that a verdict finding a defendant guilty of a felony, supported only by the testimony of the owner as to what he paid for the stolen property when new, could not be sustained when contradicted by the testimony of a qualifed merchant as to its market value. 52A C.J.S., Larceny, § 133 (1968).

"A verdict or finding as to value may be based on evidence of the price which the owner had paid for stolen property shortly before its theft, or which had been received since the theft for it, or for property of the same kind, or which accused had refused to take for it; but on the other hand it has been held that a conviction of grand larceny or a felony cannot be sustained by evidence of the price which the owner had paid for the stolen property before its theft or by evidence of the price for which he had sold it after the theft." 52A C.J.S., Larceny, § 133 at p. 664 (footnotes omitted).

Except for the testimony of Mrs. Wages that she had worn the ring for nine years and the testimony of the jeweler that the ring was "used", the record is silent as to the condition of the ring at the time of the larceny or at the time it was purchased by Mrs. Wages's husband. The record is also silent as to the circumstances under which Mr. Wages purchased the ring, which occurred at least nine years prior to the theft. It is a matter of common knowledge that the market value of items and articles of personal property can appreciate and depreciate rapidly depending upon a myriad of circumstances.

[1] In the absence of some evidence regarding the condition of Mrs. Wages's ring and the circumstances of its purchase, we are of the opinion that Mrs. Wages's testimony as to the price her husband paid for the ring nine years prior to its theft was totally irrelevant in determining the market value of the ring at the time of the larceny. Moreover, any probative force of such testimony was negated by the positive evidence of the jeweler, a State's witness, that he had appraised the ring at $85.00. Thus, we are of the opinion that the evidence adduced at trial is not sufficient to support the verdict that the defendant received stolen goods having a value in excess of $200.00.

[2] The trial judge correctly instructed the jury that before it could find the defendant guilty of either receiving stolen goods having a value in excess of $200.00 or the lesser included offense of misdemeanor-receiving, it must find that: (1) the ring and watch were stolen by someone other than the defendant; (2) the defendant received the property; (3) the defendant, when he received the property, knew that it was stolen; (4) the defendant received the property with a dishonest purpose; and (5) the property had a value in excess of $200.00, or that if the jury found that the property did not have a value of $200.00 the

jury could find him guilty only of misdemeanor-receiving. Since the only difference between the elements of felonious and nonfelonious receiving of stolen goods in this case is whether the items received by the defendant had a value in excess of $200.00 at the time of the larceny, it is obvious that the jury by its verdict of guilty found all of the facts necessary to support a verdict of misdemeanor-receiving (G.S. 14-72(a)). Because the evidence here is not sufficient to support a finding that the watch and the ring had an aggregate value in excess of $200.00 at the time of the larceny, the verdict must be considered as one finding the defendant guilty of misdemeanor-receiving; and when so considered, we find no prejudicial error in defendant's trial. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966).

Since prison sentence imposed is in excess of that prescribed for a violation of G.S. 14-72(a), the judgment is vacated and the cause is remanded to the superior court for the entry of judgment for misdemeanor-receiving.

Vacated and remanded for judgment.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. EARL LEE WARD

No. 7529SC191

(Filed 4 June 1975)

1. Homicide § 28— self-defense — instructions — right to stand ground

The trial court in a homicide case erred in failing to instruct the jury that defendant had no duty to retreat but could stand his ground and shoot his assailant in self-defense if he had a reasonable belief that he was about to be killed or suffer great bodily injury where defendant's evidence tended to show that during the evening of his death deceased had been carrying a .32 caliber pistol in his back pocket, deceased pointed the gun at defendant on several occasions and threatened to kill him, deceased hit defendant over the head with the pistol on one occasion, defendant followed deceased into a bedroom after being told by deceased that he could sleep there, when he entered the bedroom deceased said, "I will blow your brains out" and reached into his back pocket, and defendant thereupon shot deceased.

2. Homicide § 28— self-defense — instructions — aggressor or excessive force

The trial court in a homicide case erred in instructing the jury that the burden was on defendant to satisfy it that he was not the aggressor and that he would be guilty of manslaughter if he was the aggressor or used excessive force in repelling an assault though he was otherwise acting in self-defense where there was no evidence in the record that defendant was the aggressor.

ON *certiorari* to review the trial of defendant before *Rouse, Judge.* Judgment entered 19 December 1973 in Superior Court, McDOWELL County. Heard in the Court of Appeals 7 May 1975.

This is a criminal prosecution wherein the defendant, Earl Lee Ward, was charged in a bill of indictment, proper in form, with first degree murder. Immediately prior to arraignment, however, the State announced that it had elected not to prosecute the defendant for first degree murder but that it would prosecute him "on the charge of second degree murder or manslaughter, as the evidence might warrant."

Defendant entered a plea of not guilty and the State offered evidence tending to show the following: In the early morning hours of 6 March 1972, Wayne Morrow, Rex Lewis, Clifford Anderson, Joel Lewis, and the defendant had occasion to be in a mobile home located on Stacy Hill Road in McDowell County. Morrow had been living in the mobile home for approximately two months. Shortly after 1:00 a.m., Morrow announced that he was going to bed. On the way to his bedroom, he and the defendant had a brief argument. Morrow then went into the bedroom and began to prepare for bed. Several minutes later, the defendant went to the bedroom and asked Morrow "where he [the defendant] was going to sleep." Morrow replied that the defendant would have to make his "own damn arrangements". Clifford Anderson thereupon offered to take the defendant home, but the defendant responded, " . . . I ain't going nowhere. This is my place." Shortly thereafter, Anderson heard a gunshot. He ran to the bedroom and saw the defendant with a gun in his hand. The gun was pointed at Morrow, and he heard Morrow say to the defendant, "Barney . . . you have done it, you have shot me." Anderson, Rex Lewis, and the defendant carried Morrow into the living room, and Anderson called an ambulance. Several minutes later David Sigmon, a deputy sheriff of McDowell County, arrived at the trailer. Sigmon entered the mobile home and saw Morrow lying on the living room

floor. When he was unable to receive any response from Morrow, he looked at Rex Lewis and Clifford Anderson and asked, "What happened?" The defendant responded, "I shot him." Sigmon thereupon asked where the gun was and the defendant pointed to a .25 caliber pistol lying on a bar which separated the living room and the kitchen. Mack Autrey, a deputy sheriff of McDowell County, later discovered a .32 caliber revolver under the mattress of the bed in the bedroom in which Morrow was shot. Morrow died as a result of the gunshot wound.

The defendant offered evidence tending to show that he owned the mobile home and that he had given Morrow permission to stay there for several weeks. Morrow had no particular bedroom in the trailer. On the night of 5 March 1972, Morrow had been carrying a .32 caliber pistol in his right rear pocket, had pointed the pistol at the defendant on several occasions and had threatened to kill him. Morrow had also hit the defendant over the back of the head with the pistol. When Morrow began to go to bed, he and the defendant had a brief argument. Morrow finally said, "Go ahead and sleep with me", and the defendant went into the bedroom. As soon as the defendant entered the room, Morrow said, "I will blow your brains out", and reached into his back pocket. Thinking that Morrow was reaching for his pistol and was going to kill him, the defendant shot Morrow in self-defense.

The jury found the defendant guilty of voluntary manslaughter. From a judgment imposing a prison sentence of not less than twelve (12) nor more than eighteen (18) years, defendant appealed.

Attorney General Rufus Edmisten by Assistant Attorney T. Buie Costen for the State.

Story, Hunter & Goldsmith, P.A., by C. Frank Goldsmith, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Based on exceptions duly noted in the record, the defendant contends that the trial court failed to declare and explain the law arising on the evidence with respect to a substantial feature of his claim of self-defense. The defendant argues that under the evidence of this case it was the duty of the court to instruct the jury that the defendant was under no duty to retreat

but could stand his ground and kill Morrow if necessary to save his life or protect his person from great bodily harm.

It is well-settled that where a man is without fault and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat, but may stand his ground and kill his assailant if necessary to save his own life or protect his person from great bodily harm. *State v. Washington,* 234 N.C. 531, 67 S.E. 2d 498 (1951); *State v. Bryant,* 213 N.C. 752, 197 S.E. 530 (1938). It is likewise well-settled that this necessity may be real or apparent. *State v. Washington, supra; State v. Terrell,* 212 N.C. 145, 193 S.E. 161 (1937). The determinative question is whether upon the facts and circumstances as they appeared to the defendant at the time a man of ordinary firmness would regard the necessity as real, and this question is generally to be decided by the jury. *State v. Washington, supra; State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519 (1944); *State v. Marshall,* 208 N.C. 127, 179 S.E. 427 (1935).

In the present case, the defendant's evidence tended to show that during the evening the deceased had been carrying a .32 caliber pistol in his back pocket; that on several occasions the deceased had pulled the gun out of his pocket, pointed it at the defendant and had threatened to kill him, and that on one occasion the deceased had hit the defendant over the head with the pistol. The evidence also tended to show that the defendant followed the deceased into the bedroom after being told by the deceased that he could sleep there, that when he entered the bedroom the deceased said, "I will blow your brains out" and reached into his back pocket, and that the defendant thereupon shot the deceased.

Yet, nowhere in his charge did the judge instruct the jury that the defendant, if he had a reasonable belief that he was about to be killed or suffer great bodily injury, he had no duty to retreat but could stand and shoot his assailant in self-defense. Since this was a substantial feature of defendant's defense, it was error for the court not to instruct the jury on this aspect of the case, even in the absence of a special request therefor. *State v. Miller,* 267 N.C. 409, 148 S.E. 2d 279 (1966); *State v. Washington, supra; State v. Godwin,* 211 N.C. 419, 190 S.E. 761 (1937); *State v. Thornton,* 211 N.C. 413, 190 S.E. 758 (1937).

[2] Additionally, the defendant contends the court erred to his prejudice when it instructed the jury with respect to self-

defense that the burden was on the defendant to satisfy it that he was not the aggressor and that if the jury believed that he was the aggressor or used excessive force in repelling an assault, though it found he was otherwise acting in self-defense, he would be guilty of manslaughter. We agree. There is no evidence in the record that the defendant was the aggressor. Indeed, the defendant's evidence tends to show that the deceased was the aggressor up to the instant the defendant fired the fatal shot. Since the jury found the defendant guilty of manslaughter, it seems likely, under the circumstances in this case, that the jury believed the defendant acted in self-defense but used excessive force or that he, the defendant, was the aggressor. We cannot assume that the jury was more discriminating than the judge and ignored the erroneous instruction while applying the correct one. Thus, the error in giving the instruction complained of was prejudicial.

Defendant has other assignments of error which we need not discuss since they are not likely to occur upon retrial.

For errors in the charge, there must be a

New trial.

Chief Judge BROCK and Judge MORRIS concur.

J. PRESTON ANDREWS, EDNA ANDREWS, LIZZIE ANDREWS AND CARRIE ANDREWS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 7514DC225

(Filed 4 June 1975)

Insurance § 137; Limitation of Actions § 12; Rules of Civil Procedure § 15— action on fire policy — statute of limitations — amendment of complaint — relation back

In an action on a policy of fire, windstorm and hail insurance, plaintiffs' amendment of their complaint more than a year after the loss related back to the time of filing of the original complaint within the one-year limitation provided in the policy where the original complaint stated a claim for relief but alleged the number of a policy which had been cancelled prior to the loss and the amendment alleged the correct number of an identical policy in effect at the time of the loss. G.S. 1A-1, Rule 15(c).

APPEAL by plaintiffs from *Moore, Judge.* Judgment entered 23 October 1974 in District Court, DURHAM County. Heard in the Court of Appeals 14 May 1975.

On 25 January 1972 plaintiffs commenced an action to recover for damages to certain buildings owned by them. The damages were allegedly caused by a windstorm and rain which occurred on 26 January 1971.

Plaintiffs alleged that they were insured against the loss by defendant. They particularly alleged the policy number (342471) and attached the first page of the policy to the complaint as Exhibit "A".

On 13 March 1972 defendant filed an answer. In response to the paragraphs in plaintiffs' complaint alleging the issuance of the policy insuring the described property against the specified loss, defendant admitted issuing "an insurance policy insuring property as described therein" and that its policy "insures property described therein against damage by fire, windstorm, and hail and other causes." Defendant further admitted that it believed that the roof of the residence of J. Preston Andrews was damaged slightly by wind and the interior received some damage on 26 January 1971.

On 28 March 1972 defendant filed a request for plaintiffs to admit that the numbered policy of insurance as alleged in the complaint had been cancelled effective 12 August 1968.

On 14 April 1972 plaintiffs moved for leave to amend the complaint, stating that:

> "2. At the time the plaintiffs' complaint was filed as aforesaid, the plaintiffs were under the impression that the policy number of the insurance policy upon which the complaint is based was 342471, and therefore so alleged, attaching a copy of the first page of said policy to the original complaint. Ordinarily, the plaintiffs' fire and other casualty insurance policies are held by the defendants' local agent in Durham, N. C., and therefore, the plaintiffs did not have a copy of any other policy which might have been in effect at the time of the damage alleged in the original complaint. That subsequent to the filing of the complaint, it was brought to the plaintiffs' attention that in fact a similar and almost identical policy was in effect at the time of the damage alleged in the complaint, but that said policy

was identified by a different policy number than the one alleged in the original complaint. Upon learning of said fact, the plaintiffs searched through their valuable papers and could find no other insurance policy in effect at that time, other than the one alleged in the original complaint.

At that time the plaintiff, J. Preston Andrews, notified the defendant's local agent in Durham, N. C., I. H. Terry, and was informed by Mr. Terry that in fact a copy of another policy was being held by Mr. Terry and that said policy held by Mr. Terry was the one in fact in effect at the time of the damage alleged in the original complaint.

3. Plaintiffs further aver that the incorrect statement of the policy number in the original complaint was a good faith mistake, and was caused by the fact that the plaintiffs had no copy of any other policy which may have been in effect at the time in question, in their possession."

The motion was allowed and on 19 May 1972 plaintiffs filed an amended complaint wherein they struck out paragraph 4 of the original complaint and the attached Exhibit "A" and substituted in lieu thereof the following:

"4. That on or about June 18, 1969, the defendant issued an insurance policy insuring the plaintiffs' above described dwelling, personal property and furnishings contained therein, and said other buildings, as described on the first page of said insurance policy, said policy number being 349191; a copy of the first page of said policy as attached hereto as Exhibit 'A' and is incorporated herein."

Except for the policy number and date of issuance, the new Exhibit 'A' was, in all material respects, identical to the one attached to the original complaint.

Defendant admitted paragraph 4 of the amended complaint.

Defendant pled as a defense the following provision of the policy:

" 'Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity unless . . . commenced within twelve months next after inception of the loss."

The case came on for trial on 21 October 1974.

Plaintiffs offered evidence tending to show that plaintiffs' property suffered some loss by windstorm, that plaintiffs immediately notified defendant's agent Terry and that subsequently a Mr. Early, a claims adjuster for defendant, made an investigation and thereafter told plaintiffs that the paperwork had been completed and that he would be back the following week with the check. Thereafter the adjuster advised plaintiffs that the claim appeared to be too high.

Defendant offered evidence tending to show that plaintiffs' loss from the storm was not as extensive as claimed by plaintiffs.

At the end of all the evidence the court granted defendant's motion for directed verdict.

Powe, Porter, Alphin & Whichard, P.A., by Charles R. Holton, for plaintiff appellants.

Spears, Spears, Barnes, Baker and Boles, by Alexander H. Barnes, for defendant appellee.

VAUGHN, Judge.

We find no merit in defendant's contention that the court could have properly dismissed the action on the grounds that plaintiffs failed to show an insurable interest in the property.

We now consider whether the court should have, as it apparently did, dismissed the action because it was not started within one year of the loss. The "Standard Fire Insurance Policy for North Carolina" must include the following:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless . . . commenced within twelve months next after inception of the loss." G.S. 58-176.

The loss occurred on 26 January 1971. Plaintiffs' original suit was started on 25 January 1972. Defendant contends that suit on the policy actually in effect was not commenced until 19 May 1972, the date plaintiffs filed the amended complaint which was more than one year after the loss.

G.S. 1A-1, Rule 15(c) provides that:

> "(c) Relation back of amendments.—A claim asserted in an amended pleading is deemed to have been interposed

at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

In substance, the original complaint gave defendant fair notice that plaintiffs claimed that:

(1) plaintiffs owned certain described buildings;

(2) the buildings were damaged by a storm on 26 January 1971;

(3) defendant had issued a policy to insure plaintiffs against the described loss;

(4) a policy issued by defendant was in effect at the time of the loss;

(5) plaintiffs had notified defendant of the loss;

(6) after notice and demand, defendant refused to pay the claim;

(7) defendant was indebted to plaintiffs for the amount of the loss;

(8) they were entitled to and demanded judgment in the amount of the loss.

The original complaint, therefore, would not have been subject to dismissal for failure to state a claim upon which relief can be granted. It contained a " . . . statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) A demand for judgment for the relief to which he deems himself entitled." G.S. 1A-1, Rule 8. These are the same matters plaintiffs undertook to prove under the pleadings as amended.

When served with plaintiffs' original complaint defendant knew that plaintiffs claimed a loss to the premises for which they contended defendant was liable. It knew that a policy numbered as alleged in the complaint had been cancelled but also knew that except for the number, it did insure the described premises under a policy as alleged in the complaint. This was

adequate notice to allow them to meet the claim as amended. In no way could they have been prejudiced by plaintiffs' mistakingly pleading the number which defendant had affixed to the agreement to insure the premises. It was, therefore, error to dismiss the action and the judgment must be reversed.

Reversed.

Judges BRITT and PARKER concur.

OBIE G. HILL v. DAVID RAY JONES AND H. R. JONES TOOL & SUPPLY COMPANY

No. 7518DC180

(Filed 4 June 1975)

Costs § 3— personal injury action — attorney fee — prior trial, appeal, retrial — necessity for findings of fact

The trial court in a personal injury action involving a recovery of $2,000.00 or less has authority under G.S. 6-21.1 to award a reasonable attorney fee for services rendered in a prior trial, an appeal to the Court of Appeals and the retrial; however, the court must make some findings of fact to support the award although the findings may be limited to the quantity and quality of all the services rendered by the attorney until final determination of the action.

APPEAL by defendants from *Fowler, Judge.* Judgment entered 22 October 1974 in District Court, GUILFORD County. Heard in Court of Appeals 7 May 1975.

This appeal is limited to that part of the judgment which awards an attorney's fee of $1,000.00 to Hubert E. Seymour, Jr., counsel for plaintiff.

This action was instituted by plaintiff in the Guilford County District Court to recover property damages to his automobile. At trial during the 17 September 1973 Session, the Court granted defendants' motion for directed verdict at the conclusion of plaintiff's evidence. Plaintiff appealed to the North Carolina Court of Appeals, which in 22 N.C. App. 189, 205 S.E. 2d 737, remanded the case for new trial. At trial during the 23 September 1974 Session of Guilford County District Court the jury awarded plaintiff the sum of $379.24, the amount prayed for.

Therefore, Hubert E. Seymour, Jr., filed a motion under G.S. 6-21.1 for the award of a fee as plaintiff's counsel for the two trials in District Court and the appeal, alleging that he had expended over thirty hours of time which was reasonably worth $1,500.00. Without finding facts, the judgment provided for an attorney's fee of $1,000.00.

Defendants appealed contending that the District Court had no right to award a fee for the first trial or the appeal and that the sum awarded was excessive.

Hubert E. Seymour, Jr., for plaintiff.

Henson, Donahue & Elrod by Joseph E. Elrod III and Kenneth R. Keller for defendants.

CLARK, Judge.

G.S. 6-21.1 provides as follows:

> "In any personal injury or property damage suit, . . . instituted in a court of record, where the judgment for recovery of damages is two thousand dollars ($2,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs."

The statute creates an exception to the general rule that attorney's fees are not allowable as part of the costs in civil actions. *City of Charlotte v. McNeely,* 281 N.C. 684, 190 S.E. 2d 179 (1972). "The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson,* 284 N.C. 236, 239, 200 S.E. 2d 40, 42, *aff'g,* 18 N.C. App. 599, 197 S.E. 2d 624 (1973).

Under the statute the judge presiding in the court which enters the judgment for recovery "may, in his discretion, allow a reasonable attorney fee." Neither the judge presiding at the

first trial nor the Court of Appeals on appeal has authority to allow the fee because no final judgment for recovery has been entered. If the judge presiding in the court where judgment for recovery was entered has no authority to award a reasonable attorney fee for services rendered in the first trial and on appeal to the Court of Appeals, the obvious purpose of the statute would be defeated; the payment by the plaintiff of his attorney out of his recovery of $379.24 for services rendered in the first trial and on appeal would not be "economically feasible". Annot., 18 A.L.R. 3d 1074, 1104 (1968).

Though generalizations are difficult in view of varying state statutory provisions providing for compensation of attorneys, it is generally held that the presiding judge may award compensation for legal services rendered on appeal. See Annot., 18 A.L.R. 3d 1074, 1096 (1968).

Where the statute provides for the award of "a reasonable attorney fee" the court has a large measure of discretion in fixing or recommending the amount to be paid. *Hicks v. Albertson, supra;* Annot., 18 A.L.R. 3d 1074, 1104 (1968).

While it may be inferred that the District Court based its award of the attorney fee on the written motion filed by plaintiff's attorney wherein he requested payment for services rendered in the first trial, on appeal, and in the second trial, expending over thirty hours of time, the judge presiding made no findings of fact upon which the determination of the requisite reasonableness could be based. We have required such findings by the courts in determining reasonable counsel fees in domestic relations cases, *Rickenbaker v. Rickenbaker,* 21 N.C. App. 276, 204 S.E. 2d 198 (1974); *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971), and also in condemnation cases. *Redevelopment Comm. v. Weatherman,* 23 N.C. App. 136, 208 S.E. 2d 412 (1974); *Redevelopment Comm. v. Hyder,* 20 N.C. App. 241, 201 S.E. 2d 236 (1973).

We hold that in awarding reasonable counsel fees under G.S. 6-21.1, the judge presiding must make some findings of fact to support the award. Since the statute determines the nature of action and limits the amount involved, the findings of fact may be limited to the quantity and quality of all the services rendered by the attorney for his client until the final determination of the action for which the judge presiding, in his discretion, allows an attorney fee. In this case, if the judge

presiding in the Guilford County District Court awarded the fee to plaintiff's attorney for his services in the preparation of pleadings, preparation for trial and jury trial at the 17 September 1973 Session of the District, for his preparation of appeal records and brief and his argument on his appeal to the Court of Appeals after the District Court granted defendants' motion for directed verdict, and for preparation for trial and jury trial at the 23 September 1974 Session of District Court, all of which services were skillfully and efficiently performed, then the judge presiding should have made such findings of fact to support the award.

Further, we hold that the judge presiding in the Guilford County District Court may, in his discretion, allow a fee to plaintiff's attorney for his services rendered to his client on this appeal. If so, he should find facts to support the award.

This cause is remanded to the District Court of Guilford County for findings of fact and the award of an attorney fee to plaintiff's attorney consistent with this opinion.

The judgment is

Modified and remanded.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM FRANKLIN THOMPSON

No. 7527SC206

(Filed 4 June 1975)

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

The State's evidence was sufficient for the jury in a prosecution for second degree murder of defendant's wife where it tended to show that defendant and his wife were having marital difficulties, defendant bought a pistol, defendant stated he was going to kill his wife, a witness heard a commotion in defendant's house followed by a gunshot, after which defendant came to the door and stated his wife had been shot, defendant told a hospital technician and a detective that he had shot his wife, and the victim's death was caused by a gunshot wound in her head.

2. Homicide § 17— evidence of threats

The time of defendant's threat to kill his wife was sufficiently established to permit the admission of evidence of the threat where the

evidence showed defendant's wife was killed on Saturday, 15 June 1974, and a witness testified defendant made the threat about the middle of June on a Thursday night.

3. Criminal Law § 162— failure to object to evidence

An objection to the admission of evidence is necessary to present a contention that the evidence was incompetent.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 24 October 1974 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 15 May 1975.

Defendant was indicted for the first-degree murder of his wife, Mary Diane Thompson (Diane). When the case came on for trial, the district attorney announced that the State had elected to try defendant for second-degree murder. He pled not guilty. The jury returned a verdict of guilty of second-degree murder and from judgment imposing prison sentence of not less than 20 nor more than 25 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles R. Hassell, Jr., for the State.

Bell & Lang, by Thomas R. Bell, Jr., for the defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to allow his motion to dismiss interposed at the close of all the evidence. When considered in the light most favorable to the State, as we are required to do, the evidence presented by the State and defendant tended to show:

Diane's death occurred on Saturday afternoon, 15 June 1974. For some period of time prior thereto, she and defendant were having marital difficulties. When defendant went home on Wednesday night (June 12), Diane was not there. The next day he purchased a .32 cal. H & R revolver from George Cherry for $70 and that night went looking for Diane. Among other places, he went to the home of Pamela Hickman, Diane's cousin, and when Pamela told defendant she had not seen Diane, defendant said "he was going to have to get prepared for a funeral because . . . he was going to kill Diane." Defendant then went to the home of Diane's parents where he found her and succeeded in getting her to return home.

On Friday defendant was fired from his job. On Saturday morning he slept late while Diane went to her work at P. P. & G. Company. Around 10:00 a.m. defendant's friend, Ernest Chapman, went to defendant's home and woke him up. They proceeded to drink several beers after which Chapman carried defendant to a hardware store where defendant purchased a box of .32 bullets. Around 3:20 that afternoon, Chapman carried defendant to Diane's place of employment to pick her up but she rode home with some other people. Chapman then carried defendant to his home where defendant went inside, leaving Chapman outside. A little later, Chapman heard a commotion in the house, followed by a gunshot, after which defendant ran to the door and said, "My wife has been shot."

Chapman carried defendant and Diane to the Cleveland Memorial Hospital. Upon arrival at the hospital, defendant went to the emergency room and told Grace Sain, a hospital technician, that he had shot his wife and wanted help for her. While Diane was being taken into the emergency room, Mrs. Sain called a doctor and the Shelby Police Department. Detective Boyes of the Shelby P. D. arrived at the hospital at 4:49 p.m. and, as he entered the door, defendant went up to him and said: "Take me, I shot her. Go ahead and lock me up." Boyes then took defendant to an adjoining room and advised him of his rights. On cross-examination Boyes testified that defendant told him that he and his wife were fighting and the gun went off. On redirect examination, without objection, Boyes testified that defendant stated that people had told him his wife was "running around on him," that they had fought the day before, that they had fought that day (Saturday) when she got off from work, and that they were in the bedroom when he shot her with a .32 H & R. While at the hospital, defendant gave police permission to go to his home and get the gun.

Dr. McMurry arrived at the emergency room at 5:05 p.m. and, upon examination of Diane, determined that she was dead. He found a small round opening just under her nose but no exit opening. He opined that Diane died as the result of a gunshot wound of her head.

Later that afternoon or evening, police went to defendant's home and found a .32 cal. H & R revolver lying on a bedroom floor. The gun was fully loaded, with one bullet having been fired. Without objection, the pistol and bullets were admitted into evidence.

As a witness for himself, defendant testified that he purchased the gun on Thursday (before the killing on Saturday); that he bought it for his wife's protection. That he was showing the gun to her on Saturday when a struggle took place and the gun went off; that he had no intention of shooting her. Defendant also presented evidence as to his character.

We hold that the evidence was sufficient to survive the motion to dismiss and the assignment of error is overruled.

[2] By his second assignment of error defendant contends the court erred in admitting into evidence prior threats made by defendant when the time of such threats had not been established. This assignment is without merit. The evidence tends to show that the killing occurred on Saturday, 15 June 1974. The witness Pamela Hickman testified that she saw defendant about the middle of June on a Thursday night at which time defendant stated to her ". . . that he was going to have to get prepared for a funeral because he said that he was going to kill Diane." The evidence considered as a whole tends to show that the witness was referring to the Thursday before the killing. The evidence was competent to show defendant's state of mind. 4 Strong, N. C. Index 2d, Homicide, § 17 (1968).

By his third assignment of error, defendant contends the court erred in admitting into evidence the results of a search of defendant's home, arguing that the search was illegal. We find no merit in the assignment.

[3] The evidence which defendant challenges by this assignment is the pistol which police recovered and a photograph taken of the room where the pistol was found. We find it unnecessary to pass upon the question of whether the police, because of permission given by defendant, were justified in entering defendant's home. Page 38 of the record reveals that while an exception is noted to the action of the court in admitting photographs (including the challenged photograph) and the instruction that they were being admitted to illustrate testimony, no objection appears. Page 40 of the record reveals that State's exhibits 6 (pistol bullets) and 1 (pistol) were offered and admitted into evidence but no objection appears. An objection to the admission of evidence is necessary to present a contention that the evidence was incompetent. *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643 (1966). The assignment of error is overruled.

We have considered the other assignments of error argued in defendant's brief but find them likewise to be without merit and they are overruled.

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

No error.

Judges CLARK and ARNOLD concur.

HILL TRUCK RENTALS, INC. v. HUBLER RENTALS, INC.

No. 7526DC222

(Filed 4 June 1975)

Rules of Civil Procedure § 56— partial summary judgment — counterclaim raising genuine issues of material facts

The trial court properly entered partial summary judgment for plaintiff on a claim for rent for one truck leased to defendant but erred in entering partial summary judgment for plaintiff on a claim for rent for a second truck where plaintiff also asked for damages caused by defendant's failure to return the second truck in the same condition it was received and defendant pleaded a counterclaim for failure to provide a truck in good condition and repair which raised genuine issues of material facts. G.S. 1A-1, Rule 56(d).

APPEAL by defendant from *Robinson, Judge.* Judgment entered 22 January 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 May 1975.

In this action plaintiff seeks to recover rent for two trucks leased to defendant, for damages allegedly caused to one of the trucks, and for attorney fees. The complaint alleges:

From 23 April 1974 through 18 June 1974, plaintiff leased an International Harvester truck, vehicle number 8100, to defendant pursuant to terms and conditions set forth in rental agreements marked Schedule A attached to, and made a part of, the complaint. Plaintiff complied with the terms of the agreements but defendant breached the agreements by failing to pay $724.53 rent due thereunder.

From 23 April 1974 through 20 June 1974, plaintiff leased a second International Harvester truck, vehicle number 8101,

to defendant pursuant to terms and conditions set forth in rental agreements marked Schedule B attached to, and made a part of, the complaint. Plaintiff complied with the terms of said agreements but defendant breached the agreements in the following respects: By failing to pay $833.03 rent due; by failing to return the vehicle in the same condition it was received, namely, returning the vehicle with a blown engine, resulting in plaintiff being damaged by loss of the vehicle for three weeks, $390.00, and a repair bill for $1,230.68.

Plaintiff prayed for recovery in amount of $3,178.24 ($724.53 plus $833.03 plus $390.00 plus $1,230.68), and for costs and reasonable attorney fees in amount of $1,058.35.

Defendant filed answer admitting that it leased the two trucks from plaintiff and that "a rental sum is due plaintiff by defendant" for each truck. However, as to vehicle number 8101, defendant pleaded a further answer and counterclaim in which it alleged that plaintiff breached the agreement by failing to provide defendant with a truck in good condition and repair; that because of the breach the truck became inoperable on 18 June 1974, requiring defendant to procure a replacement vehicle at additional expense and causing defendant to incur expense and inconvenience in having plaintiff's truck towed and returned to plaintiff's place of business in Charlotte.

Defendant prayed that plaintiff recover nothing, that defendant recover $500.00 "for costs of replacement, towing, loss of income, plus interest from June 18, 1974."

Plaintiff filed a reply to the counterclaim and thereafter moved for partial summary judgment for $1,557.56, said amount representing the claims for rent, together with interest thereon from 20 June 1974, and collection costs incurred by plaintiff, including attorney fees "which the Court may deem properly allocable to this portion of the claim." Plaintiff accompanied its motion for summary judgment with an affidavit and also asked that its verified complaint, together with the attached schedules, be treated as an affidavit. Defendant filed no response to the motion for summary judgment and presented no affidavit or other material.

Following a hearing on the motion, the trial court determined that there was no genuine issue of fact to be submitted as to the amounts due under the rental agreements, that plaintiff was entitled as a matter of law to recover on those claims,

and that as to the claims of plaintiff for unpaid rental "there is no just reason for delay, and that as to those claims, final judgment should be entered." From judgment providing that plaintiff recover $1,557.56 with interest from 20 June 1974 until paid, defendant appealed.

Edwards, Davis, Postlethwait, Potter & Dunn, by Ronald H. Davis and J. Thomas Dunn, Jr., for the defendant appellant.

Farris, Mallard & Underwood, P.A., by E. Lynwood Mallard, for the plaintiff appellee.

BRITT, Judge.

Defendant contends the court erred in rendering partial summary judgment for plaintiff. We hold that summary judgment was proper as to plaintiff's claim for rent for vehicle number 8100, but that the court erred in entering summary judgment as to the claim for rent of vehicle number 8101.

G.S. 1A-1, Rule 56(d) allows the trial court to grant a partial summary judgment. In this case the partial summary judgment entered was *final,* therefore, defendant had a right to appeal.

The complaint clearly alleged two separate claims, one for rent due on vehicle number 8100 and the other for rent due on vehicle number 8101. The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists, and, if not, whether the moving party is entitled to judgment as a matter of law. *Schoolfield v. Collins,* 12 N.C. App. 106, 182 S.E. 2d 648 (1971).

With respect to the claim for rent for vehicle number 8100, defendant admitted "that a rental sum is due plaintiff" and pleaded no counterclaim as to that claim. At the hearing, the court had before it the verified complaint with Schedule A made a part of it, showing that plaintiff was entitled to recover $724.53. When defendant did not respond to the motion for summary judgment, by affidavits or otherwise, but rested on the general denial in its answer as to the amount of rent due, it failed to show that a genuine issue existed as to rent due plaintiff for vehicle number 8100. G.S. 1A-1, Rule 56(e).

The situation was different as to plaintiff's claim for rent of vehicle number 8101. As to this claim, plaintiff not only asked

for $833.03 rent, but asked for damages sustained by reason of defendant's failure to return the vehicle in as good order and condition as defendant received it. In its answer and counterclaim, while admitting "a rental sum is due plaintiff," defendant pleaded a counterclaim which raised genuine issues of material facts that would preclude summary judgment in favor of plaintiff.

For the reasons stated, the judgment appealed from is vacated. This cause is remanded to the district court for entry of judgment consistent with this opinion as to plaintiff's claim for rent of vehicle number 8100. As to plaintiff's claim for rent of vehicle number 8101, the cause will stand for trial upon the issues raised in the pleadings.

Judgment vacated and cause remanded.

Judges PARKER and VAUGHN concur.

JACQUELINE H. ROBINSON v. MARVIN WILLIAM ROBINSON

No. 7523DC192

(Filed 4 June 1975)

Divorce and Alimony § 18— alimony pendente lite — award unsupported by evidence

Finding that defendant has a present monthly net income of $658.52 will not support an award of alimony *pendente lite* of $938.00 per month; nor could such an award be properly based on defendant's earning capacity rather than his actual earnings where the court did not find as a fact that he was not in good faith exercising his earning capacity to the fullest extent to meet his financial obligations.

APPEAL by defendant from *Davis, Judge.* Judgment entered 13 December 1974 in District Court, WILKES County. Heard in the Court of Appeals 7 May 1975.

This is a civil action wherein the plaintiff, Jacqueline H. Robinson, seeks alimony without divorce and counsel fees from the defendant, Marvin William Robinson, her husband. The matter was heard on plaintiff's motion for alimony pendente lite, counsel fees, and possession of the home and furnishings.

The trial court made the following pertinent findings of fact:

"4. The defendant earns a monthly net income of $658.52, and annual bonuses depending on prevailing economic conditions affecting the housing market. During the year 1973, the defendant earned in excess of $15,000.00."

"17. The plaintiff and the defendant reside in a home at Oakwoods Country Club Development which costs (sic) approximately $80,000.00 to construct. Said house is encumbered with mortgages in the sum of approximately $78,000.00. There is litigation pending on a purported lien against said real property in the amount of approximately $10,073.92."

"19. The monthly mortgage payments on the aforesaid mortgages amount to approximately $818.00."

"20. The plaintiff has no other place in which to reside than the aforesaid house."

"21. At the time of their separation, the plaintiff's and the defendant's home was fully furnished with furniture and household goods. The plaintiff is in need of possession of said furniture and household goods."

"25. The defendant's reasonable and necessary living expenses amount to approximately $300.00 per month."

"28. The defendant is capable of making support payments to the plaintiff."

The court concluded, among other things, that the "conduct of the defendant toward the plaintiff constitutes constructive abandonment," that the "defendant is physically and financially able to provide adequate support and maintenance for the plaintiff," and that the "plaintiff is entitled to possession of all furniture and home furnishings owned by the plaintiff and the defendant at the date of their separation." The court thereafter entered an order that the plaintiff have possession of the home and furnishings, that the defendant pay $30.00 per week for the support and maintenance of the plaintiff as alimony pendente lite, that the defendant pay the $818.00 monthly mortgage payments on the house and lot, and that the defendant pay plaintiff's counsel a fee of $500.00 at the rate of $100.00 per month. Defendant appealed.

No counsel appearing for plaintiff appellee.

McElwee, Hall & McElwee, by William H. McElwee III, for defendant appellant.

HEDRICK, Judge.

Defendant brings forward and argues assignments of error relating to the admission of evidence, the sufficiency of the evidence and findings to support any award of alimony pendente lite, the sufficiency of the findings to support the award of an attorney's fee in the amount of $500.00, and the sufficiency of the findings to support an award of alimony pendente lite in the amount of $938.00 per month. Assuming that the evidence and findings are sufficient to support an award of alimony pendente lite, we discuss only whether the findings relating to defendant's earnings are sufficient to support the award of alimony pendente lite in the amount of $938.00 per month.

G.S. 50-16.3(b) provides that the amount of alimony pendente lite shall be determined in the same manner as alimony. G.S. 50-16.5(a) provides:

> "Alimony 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 ours.]

While the judge made no definitive finding regarding defendant's estate, the record demonstrates clearly that the defendant must make any payments ordered from his present net earnings of $658.52 per month. Since the trial court found as a fact that the defendant had an income in 1973 in excess of $15,000.00, we assume the judge based the amount of the award on what he considered to be the defendant's "earning capacity" rather than present earnings.

> "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." *Robinson v. Robinson,* 10 N.C. App. 463, 468, 179 S.E. 2d 144, 147 (1971) (citation omitted).

Here, the trial court did not find as a fact that the defendant was not in good faith exercising his earning capacity to the fullest extent to meet his financial obligations. Indeed, the findings show that the defendant works regularly at the job he has held for many years and that he had a net income of $658.52 per month when the order was entered.

It is obvious, therefore, that the finding that the defendant has a present monthly net income of $658.52 will not support the award of alimony pendente lite in the amount of $938.00 per month.

Since there must be another hearing, we do not discuss the other assignments of error, which are not likely to occur at the next hearing. For the reasons stated, the order is vacated and the cause is remanded to the district court for a new hearing and new findings.

Vacated and remanded.

Chief Judge BROCK and Judge MORRIS concur.

JACK D. SMITH v. FORD MOTOR COMPANY, THOMAS M. KEESEE, SR., JAMES K. DOBBS AND CLOVERDALE FORD, INC.

No. 7521SC185

(Filed 4 June 1975)

1. Master and Servant § 10— employment for indefinite period — termination at will

A pre-incorporation agreement did not employ plaintiff for a definite term and did not give plaintiff the right to acquire control of the corporation after 60 months where it provided that plaintiff would be employed as president and general manager of an automobile dealership, that three individuals would purchase 60% of the corporate stock and defendant and another would purchase 40% of the stock, that the corporation was given an option to purchase the 60% of stock held by the three individuals after 60 months, that plaintiff's employment could be terminated if it proved unsatisfactory to the other stockholders or to the Ford Motor Company, and that plaintiff's stock should be sold at book value to another stockholder upon

termination of his employment; therefore, plaintiff's employment could be terminated at will by the other stockholders.

2. **Contracts § 32— wrongful interference — insufficiency of complaint**

Plaintiff failed to state a claim against Ford Motor Company for wrongful interference with a contract in which plaintiff was employed by a corporation as the president and general manager of a Ford dealership where the agreement, which was incorporated in the complaint, provides that plaintiff's employment may be terminated by the corporation if it should prove unsatisfactory in the opinion of the Ford Motor Company.

3. **Conspiracy § 2— civil conspiracy — legal act**

Plaintiff failed to state a claim for relief against defendants on the ground of civil conspiracy where the complaint discloses that the act they committed was a lawful one.

ON writ of *certiorari* to review order entered by *Exum, Judge.* Order entered 31 December 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 May 1975.

This action arose out of an agreement entered into 18 May 1971 pursuant to which the parties formed a corporation, Cloverdale Ford, Inc., to operate an automobile dealership. It was provided that James K. Dobbs, Jr., Thomas M. Keesee, and Frank Goodwin (jointly referred to as "H-D-O") would subscribe to and purchase for $120,000 cash 60% of the capital stock of the corporation and that Jack D. Smith and James W. Davis (referred to as "operators") would subscribe to and purchase for $80,000 cash the remaining 40% of the stock. After 60 months the corporation was to have the option of purchasing all of the capital stock owned by H-D-O.

Jack D. Smith was to be employed as president and general manager. The agreement further provided in paragraph 8 that

> "if Jack D. Smith, in his position as President and General Manager of the Corporation, shall prove to be unsatisfactory in the opinion of H-D-O and James W. Davis, or the Ford Motor Company from the standpoint of profits earned or the manner of operation of the Corporation, the employment of Jack D. Smith as President and Manager may be terminated by the corporation. Upon such termination the Operator agrees to sell to James W. Davis the capital stock owned by him at book value of such stock at the end of the month preceding such termination and for cash."

Smith managed the dealership until 24 April 1974 when the board of directors voted to terminate his employment. Before

that time he had participated in the Ford Dealer Alliance, an organization discouraged by Ford Motor Company.

Plaintiff Smith then filed suit seeking actual and punitive damages for alleged wrongful acts as follows: (1) wrongful, malicious and unlawful interference by Ford Motor Company with plaintiff's contractual rights under the agreement of 18 May 1971; (2) unfair trade practices in violation of G.S. 75-1.1 by Ford Motor Company; (3) conspiracy among Ford Motor Company and defendants Dobbs and Keesee to wrongfully terminate plaintiff's employment; (4) breach of contract by Dobbs and Keesee; and (5) breach of contract by Cloverdale Ford, Inc. Attached to the complaint was a copy of the pre-incorporation agreement.

Defendants Cloverdale, Keesee and Dobbs filed motions under G.S. 1A-1, Rule 12(b)(6), to dismiss the complaint for failure to state a claim for relief. Defendant Ford Motor Company also moved to dismiss and filed an answer denying material allegations in the complaint, alleging plaintiff's breach, and incorporating a franchise agreement between Ford Motor Company and Cloverdale Ford, Inc., whereby Ford reserved the right to cease doing business with any dealer.

The trial court granted all motions to dismiss. From the order dismissing his complaint, plaintiff appealed to this Court.

Hatfield and Allman, by Weston P. Hatfield, James W. Armentrout, and R. Bradford Leggett, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by W. P. Sandridge, Jr., for defendant appellees Cloverdale Ford, Inc., Thomas M. Keesee, Sr., and James K. Dobbs.

Hudson, Petree, Stockton, Stockton & Robinson, by J. Robert Elster and W. Thompson Comerford, Jr., for defendant appellee Ford Motor Company.

ARNOLD, Judge.

Plaintiff contends that the agreement of 18 May 1971 creates in him the right to acquire control of Cloverdale Ford, Inc., at the end of sixty months. He further contends that the employment provisions of the agreement are for a definite term. Consequently, he argues, defendants Keesee, Dobbs, and Cloverdale should be required to show good faith and reasonable

cause in terminating the agreement, and an allegation of bad faith states a claim for relief against them. With respect to defendant Ford Motor Company, plaintiff contends that Ford had no absolute right to terminate the dealership, was not shown to have acted in good faith, and wrongfully interfered in and conspired with the other defendants to breach the May 18 agreement. (He abandoned his unfair trade practices claim on appeal.) Thus, plaintiff contends, it was error to grant all defendants' motions under G.S. 1A-1, Rule 12(b)(6). We disagree.

In *Sutton v. Duke,* 277 N.C. 94, 102, 176 S.E. 2d 161, 166 (1970), the North Carolina Supreme Court stated the general rule: "If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed." *Accord, Powell v. County of Haywood,* 15 N.C. App. 109, 189 S.E. 2d 785 (1972). *See also* 1 McIntosh, N. C. Practice 2d (Phillips Supp. 1970) § 970.40. In the case at bar, the preincorporation agreement constitutes part of the complaint, and discloses a defense which defeats the claim.

[1] Under Paragraph 8 the corporation was given the power to terminate Smith's employment, should it prove unsatisfactory in the opinion of H-D-O, Davis or Ford, whereupon Smith agreed to sell his stock at book value to Davis. Having contributed 19.5% of the capital, Smith was only a minority shareholder in the corporation. The corporation's option to buy out H-D-O's stock at the end of 60 months cannot be construed to guarantee to plaintiff the right, as a stockholder, to acquire H-D-O's interest in the corporation at the end of five years: the agreement specifically provided for the disposal of plaintiff's stock in case of termination. Nor can the agreement be construed to secure plaintiff's employment for a definite period. Since plaintiff's employment was for an indefinite period, it could be terminated at will by defendants Keesee, Dobbs and Cloverdale. *Scott v. Burlington Mills,* 245 N.C. 100, 95 S.E. 2d 273 (1956); *Howell v. Credit Corp.,* 238 N.C. 442, 78 S.E. 2d 146 (1953); *see also Tuttle v. Lumber Co.,* 263 N.C. 216, 139 S.E. 2d 249 (1964). Their motions to dismiss were properly granted.

[2] Plaintiff contends that the franchise agreement alleged in Ford's answer provides for arbitration of a decision to terminate a dealership and does not give Ford the right to terminate at will. This distinction is immaterial. It is true that "an action

in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party [citations omitted]." *Childress v. Abeles,* 240 N.C. 667, 674, 84 S.E. 2d 176, 181 (1954). It is also true that the fact that plaintiff's contract was terminable at the will of H-D-O is not necessarily available to Ford as a defense. *Id.* at 678, 84 S.E. 2d at 184. Nevertheless, while not a party to the May 18 agreement, Ford certainly was not an outsider. *See Kelly v. Harvester Co.,* 278 N.C. 153, 179 S.E. 2d 396 (1971); *Wilson v. McClenny,* 262 N.C. 121, 136 S.E. 2d 569 (1964). The agreement refers repeatedly to Ford and in Paragraph 8 provides that Smith's employment may be terminated by the corporation should he prove to be unsatisfactory in the opinion of Ford. Clearly, plaintiff has failed to state a claim against Ford on grounds of wrongful interference with the contract.

[3] Notwithstanding the possibility of merit in plaintiff's allegations of an agreement among all defendants to terminate his employment, he has failed to state a claim for relief against them on grounds of civil conspiracy, for on its face his complaint discloses that the act they committed was a lawful one. *See Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 266 (1949).

The order of the trial court is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. DELORES MARIE PERRY

No. 7510SC146

(Filed 4 June 1975)

Criminal Law § 26; Narcotics § 5— double jeopardy — distribution and possession of drugs

Defendant was not subjected to double jeopardy when she was convicted of distribution of heroin and cocaine and possession of the same heroin and cocaine notwithstanding defendant first made the agreement to sell the drugs and then obtained the drugs.

ON writ of *certiorari* to review proceedings before *Bailey, Judge.* Judgment entered 31 October 1973 in Superior Court, WAKE County. Heard in the Court of Appeals 16 April 1975.

State v. Perry

Defendant entered pleas of not guilty to two indictments charging her with possession of controlled substances with intent to distribute, and to two indictments charging her with the distribution of controlled substances. The jury returned verdicts of guilty as charged to all four indictments. From judgments sentencing her to imprisonment: (1) for a term of five years for possession with intent to distribute heroin, (2) for a concurrent term of five years for possession with intent to distribute cocaine, (3) for a term of not less than two nor more than five years for distribution of cocaine, and (4) for a concurrent term of not less than two nor more than five years for distribution of heroin, defendant appealed.

State's evidence tended to show that the defendant agreed to sell to an undercover narcotics agent 15 bags of heroin for $75; that the agent paid the defendant and then took her to three addresses in the City of Raleigh in search of her contact; that while they were thus engaged, the defendant also agreed to get for the agent as much cocaine as she could for $225 which amount of money the agent paid the defendant. They could not locate defendant's contact, whom she called "Biscuit," so defendant told the agent to wait at a certain address until someone came back with the contraband and that she was going to take her children swimming. The agent did as directed, and waited in front of the house for some 30 minutes. The person did not come, so after a discussion with another officer and after waiting awhile, he went to look for defendant. He found her car parked on Bragg Street and parked behind her. He got out and went up to her car, saw there was someone with her and was introduced to "Biscuit". Defendant told the agent that she and Biscuit were going right then to get the "stuff" and directed him to wait at that location. He did and in a short while defendant returned in her car and she was alone. She parked in front of the agent with the front of her car facing the front of his car. When the agent started to get out of his car, defendant motioned for him to stay in the car and for the informant who was with the agent to come to her car. He did so and got in the car with defendant. Then he got out of the car, walked around to the driver's side, and received from defendant a yellow napkin, which the informant handed directly to the agent. Enclosed in the napkin were 15 small clear cellophane bags, containing a white powder and two larger bags containing a white powder. From the time the defendant handed the napkin to the agent's companion until his companion handed

the napkin to him, the napkin never left the agent's sight. The parties stipulated that a chemical analysis would show that the packets contained heroin and cocaine, respectively.

A senior agent with the State Bureau of Investigation, to whom the agent reported, corroborated the agent's testimony.

The defendant offered no evidence.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

Tharrington, Smith & Hargrove, by Roger W. Smith, for defendant appellant.

MORRIS, Judge.

On appeal defendant argues that each of the prosecutions for possession with intent to distribute and distribution of heroin, and for possession with intent to distribute and distribution of cocaine exposed her to two punishments for one offense. More specifically she argues that there should have been only two charges: (1) distribution of heroin, and (2) distribution of cocaine, because the possession of these controlled substances was merged into and became an integral part of the two sales. Defendant attempts to distinguish the cases of *State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701 (1973), and *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1972); by arguing that here she made the agreement to sell the drugs and then got the drugs, whereas in *State v. Thornton* and *State v. Cameron,* the defendants had the drugs when the sale was made. We find no merit in defendant's contention.

Here the evidence shows that the defendant agreed to sell the undercover agent the drugs and that she was paid in advance. Later she obtained the drugs and returned. She parked her car in front of the agent's car and motioned for his companion to come to her car, which he did. The defendant then delivered the drugs to him and he gave the drugs directly to the agent. Obviously, the defendant had the drugs in her possession from the time she obtained them until she delivered them to the agent's companion. As we noted in *State v. Brown,* 20 N.C. App. 71, 72, 200 S.E. 2d 666, 667 (1973):

> " . . . Our Supreme Court has held, however, that possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and

each may be punished as provided by law, *even where the possession and distribution in point of time were the same. State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701; *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481." (Emphasis supplied.)

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. ACESUS WILSON

No. 7512SC244

(Filed 4 June 1975)

Assault and Battery § 5; Robbery § 5— indictment for attempted common law robbery — conviction of assault with deadly weapon inflicting serious injury

A defendant tried upon an indictment charging attempted common law robbery could not be convicted of assault with a deadly weapon inflicting serious injury since that offense is not a lesser included offense of attempted common law robbery because neither the infliction of serious injury nor the use of a deadly weapon is an essential ingredient of attempted common law robbery.

APPEAL by defendant from *Walker, Judge.* Judgment entered 12 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 May 1975.

Defendant was charged in separate bills of indictment with the felonies of (1) attempted common law robbery, and (2) assault with a deadly weapon inflicting serious injury. The offenses allegedly occurred in the same day and Simon Eddie was the alleged victim of both offenses. Defendant pled not guilty.

Evidence presented at trial tended to show: At around 9:45 a.m. on 25 October 1974, Mr. Eddie was working in his store. Defendant entered the store, carrying a white plastic bag under his arm, inquired as to certain merchandise, but left without purchasing anything. Approximately two minutes later, he reentered the store running, with a .45 calibre gun which he pointed at Mr. Eddie and said, "This is a holdup". He proceeded to hit Mr. Eddie on his head with the gun at least seven or eight times, rendering Mr. Eddie unconscious. When

the victim regained consciousness, he observed that defendant was standing near the front door. Mr. Eddie then jumped up and reached for his gun which was beside the cash register. As defendant ran toward him, Mr. Eddie knocked the gun from defendant's hand, grabbed his own gun, and shot at defendant several times as he ran out the door. One or two of Mr. Eddie's shots struck defendant. Defendant fell a short distance from the building, Mr. Eddie disarmed him, and kept him "covered" until police arrived. As a result of being struck by defendant, Mr. Eddie received head injuries requiring medical attention.

At the close of all the evidence, defendant renewed his motions made at the close of the State's evidence for nonsuit of both charges. The court granted the motion as to the assault charge on the ground that "assault on a person" is a lesser included offense of common law robbery and attempted common law robbery.

The court instructed the jury that they might return one of the following verdicts: guilty of attempted common law robbery; or, guilty of assault with a deadly weapon inflicting serious injury; or, guilty of assault with a deadly weapon; or, guilty of assault inflicting serious injury; or, guilty of simple assault; or, not guilty.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury and the court entered judgment imposing prison sentence of not less than two nor more than five years, with credit to be given for 111 days defendant spent in jail awaiting trial. Defendant moved for arrest of judgment, the motion was overruled and defendant appealed.

Attorney General Edmisten, by Associate Attorneys Jesse C. Brake and G. Jona Poe, Jr., for the State.

H. Gerald Beaver, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the court to grant his motion to arrest the judgment, contending that assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted common law robbery. The assignment must be sustained.

In *State v. Stepney,* 280 N.C. 306, 318, 185 S.E. 2d 844 (1972), Justice Huskins, speaking for the court, said: " . . . It is only when *all* essentials of the lesser offense are included among the essentials of the greater offense that the law merges them into one and treats the less serious charge as a 'lesser included offense'."

In *Stepney,* the court held that an assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of the armed robbery charge. See also, *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971).

In *State v. Stewart,* 255 N.C. 571, 572, 122 S.E. 2d 355 (1961), the court defined common law robbery as " . . . 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." Neither infliction of serious injury nor the use of a deadly weapon is an essential ingredient of common law robbery or attempted common law robbery.

For the reasons stated, we hold that the court erred in submitting the charge of assault with a deadly weapon inflicting serious injury as a lesser included offense of attempted common law robbery.

Judgment arrested.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRANKIE MILLER

No. 757SC195

(Filed 4 June 1975)

1. Jury § 7— number of peremptory challenges

The trial court in a common law robbery case did not err in not allowing defendant more than six peremptory challenges. G.S. 9-21(a).

2. Criminal Law §§ 34, 96— evidence showing prior crimes — withdrawal — admission upon cross-examination

Error in the admission of testimony tending to show that defendant at a given time was in jail was cured when the trial court sustained defendant's objection and instructed the jurors not to consider

the testimony; furthermore, defendant rendered such testimony harmless when he admitted upon cross-examination that he had a criminal record and had served time in prison.

3. **Criminal Law § 46— escape from jail — evidence of flight**

The trial court did not err in admitting evidence that defendant escaped from jail while awaiting trial and instructing the jury on flight since flight may be considered by the jury in connection with other circumstances in passing on guilt; furthermore, any error in the admission of the evidence was rendered harmless when defendant admitted on cross-examination that he had escaped from jail.

4. **Criminal Law § 97— refusal to allow recall of witnesses, call of witness not in court**

The trial court in a common law robbery case did not abuse its discretion in refusing to permit defendant to recall witnesses who had already testified and to call numerous other witnesses who were not in court and some of whom were in other cities.

APPEAL by defendant from *Webb, Judge.* Judgment entered 10 October 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 13 May 1975.

Defendant was tried on a bill of indictment charging common law robbery of Una M. Bartholomew on 7 December 1972. He pled not guilty. The jury returned a verdict of guilty as charged and from judgment imposing prison sentence of 10 years, he appealed.

Attorney General Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

Vernon F. Daughtridge for the defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court abused its discretion in not allowing him more than six peremptory challenges. The assignment has no merit. G.S. 9-21(a) allows a defendant to challenge peremptorily without cause six jurors "and no more". *See also State v. Fuller,* 114 N.C. 885, 892, 19 S.E. 797 (1894). The assignment is overruled.

[2] By the second assignment of error argued in his brief, defendant contends the trial court erred in allowing into evidence testimony by State's witnesses as to defendant's prior criminal convictions and by denying defendant's motion for a mistrial based upon such testimony. The testimony complained of tended

to show that defendant at a given time was in jail somewhere else. The trial judge sustained defendant's objection and upon motion to strike instructed the jurors not to consider that testimony. It is well established in this jurisdiction that if the court properly withdraws incompetent evidence from jury consideration, and instructs the jury not to consider it, this cures error in its admission in all but exceptional circumstances. *State v. Carnes,* 18 N.C. App. 19, 195 S.E. 2d 588 (1973). Furthermore, in taking the witness stand and admitting under cross-examination that he had a criminal record and that he had served time in prison, defendant rendered harmless the challenged testimony. 3 Strong, N. C. Index 2d, Criminal Law, § 169 (1967). The assignment has no merit and is overruled.

[3] By the third assignment of error argued in his brief, defendant contends the court erred in (1) admitting evidence showing that he escaped from the Wilson County Jail while awaiting trial and (2) instructing the jury on the question of flight. The assignment is without merit. Assuming, *arguendo,* that the court erred in admitting the evidence, the error was rendered harmless when defendant took the witness stand and on cross-examination admitted escaping from the jail. 3 Strong, *supra.* Furthermore, it is well settled that "[f]light is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt". *State v. Sheffield,* 251 N.C. 309, 313, 111 S.E. 2d 195 (1959).

[4] By his final assignment of error, defendant contends the court erred in not allowing him to recall certain witnesses and to call additional witnesses. The record reveals that after defendant had called six witnesses, testified twice himself (against his counsel's advice), and his counsel had informed the court that defendant's evidence was all in, defendant then insisted on recalling certain witnesses who had already testified, and in calling numerous other witnesses who were not in court at the time, several of whom were in other cities. Defendant had not advised his counsel about the additional witnesses and refused to tell the court what he wanted to show by them. We find no merit in the assignment. To permit defendant to recall witnesses who had already testified, and to recess the trial while other witnesses were summoned, were matters within the discretion of the trial judge and are not reviewable absent a showing of abuse of discretion. *State v. Stewart,* 16 N.C. App. 419,

192 S.E. 2d 60 (1972); 2 Strong, N. C. Index 2d, Criminal Law, § 91 (1967). The assignment of error is overruled.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. BOBBY ALEX MOORE

No. 7519SC16

(Filed 4 June 1975)

Assault and Battery § 15— defense of accident — failure to instruct

In a felonious assault prosecution wherein defendant contended the victim was shot when a third person accidentally hit a shotgun held by defendant, the trial judge violated G.S. 1-180 where he failed to charge on the legal principles applicable to the defense of accidental shooting and failed to apply the law to the evidence giving rise to such defense in his final mandate.

APPEAL by defendant from *Seay, Judge.* Judgment entered 21 August 1974 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 18 March 1975.

This is a criminal prosecution wherein the defendant, Bobby Alex Moore, was charged in a bill of indictment, proper in form, with assaulting Patricia Diane Paxton with a deadly weapon with intent to kill inflicting serious injury.

The State offered evidence which, among other things, tended to show the following: On 16 June 1974 the defendant, Patricia Diane Paxton, Donna Lynn Edlum, and several other persons had occasion to gather at a mobile home on Whiskey Road in Montgomery County. After a short period of time, the defendant got a sawed-off shotgun from one of the rooms of the trailer and loaded it with a shell which he took from out of one of his pockets. About fifteen minutes later, the defendant followed Patricia Paxton and Donna Edlum into one of the bedrooms because "he was going to make sure . . . [the girls] did not talk about him." When the defendant reached the bedroom

door, he pulled the shotgun "from his belt" and pointed it at Miss Edlum. After she told the defendant to put the gun away before someone got hurt, he pointed the gun at Patricia Paxton. As Patricia turned and attempted to step aside, the defendant fired the gun, hitting her in the right hip and right hand.

The defendant, testifying in his own behalf, stated that when he went to the bedroom to talk with the two girls he saw a shotgun lying on the floor by the bed. He had not had the gun at any earlier time and did not know that it was loaded. Defendant picked up the shotgun and pointed it at the wall. As he was "waiving it [the gun] around", Donna Edlum hit the shotgun, causing it to fire.

Defendant further offered the testimony of Miss Edlum, who stated that the defendant pointed the gun at her and that she told him to "quit playing with the gun before somebody gets hurt." She then slapped the gun with her hand and that is "what made the gun go off." When she hit the shotgun, it "turn[ed] in the direction Patricia was." The defendant had not pointed the gun at Patricia and had not done anything to indicate that he was mad at her.

The jury found the defendant guilty of assault with a deadly weapon inflicting serious injury. From a judgment that he be imprisoned for not less than five (5) nor more than ten (10) years, defendant appealed.

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

S. H. McCall, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant contends the trial court failed to declare and explain the law arising on the evidence presented by him which tended to show that the shooting was accidental, a violation of G.S. 1-180. This assignment of error is sustained.

> "G.S. 1-180 requires that the trial judge fully instruct the jury as to the law based on the evidence in the case. It is the duty of the court to charge the jury on all substantial features of the case arising on the evidence without special request therefore. (Citations omitted.) And all defenses presented by defendant's evidence are substantial

features of the case. (Citations omitted.)" *State v. Dooley*, 285 N.C. 158, 163, 203 S.E. 2d 815, 818 (1974).

Here, defendant's entire defense was his contention that the shot which struck Patricia Paxton was accidentally fired when Donna Edlum hit the shotgun with her hand. This was a substantial feature of the case and defendant was entitled to an instruction thereon withous special request. *State v. Douglas*, 16 N.C. App. 597, 192 S.E. 2d 643 (1972). Nowhere in his instructions did the trial judge charge the jury on the legal principles applicable to defendant's defense of an accidental shooting nor did he apply the law to the evidence giving rise to this defense in his final mandate. This error by the trial judge was not cured by the mere statement in several portions of the charge that the State had to prove the defendant "intentionally and without justification" assaulted Patricia Paxton by shooting her with a shotgun. See *State v. Dooley, supra; State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969).

Defendant has other assignments of error which we do not discuss in view of the fact that they may not arise upon retrial of the case.

New trial.

Judges BRITT and MARTIN concur.

JAMES F. RORIE v. KENNETH G. BLACKWELDER AND WIFE, BARBARA A. BLACKWELDER

No. 7526SC208

(Filed 4 June 1975)

Rules of Civil Procedure § 54— judgment not adjudicating rights of all parties — interlocutory order — no right to appeal

Judgment dismissing plaintiff's claim and retaining jurisdiction for the purpose of adjudicating defendants' counterclaim is interlocutory and not presently appealable since it adjudicates the rights and liabilities of fewer than all the parties and contains no determination by the trial judge that there is no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 19 December 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1975.

The court entered summary judgment for defendants on plaintiff's claim and ordered "that jurisdiction be retained for the purpose of adjudication with respect to defendants' counterclaim."

Plaintiff appealed.

Scarborough, Haywood & Merryman by Charles B. Merryman, Jr., for plaintiff appellant.

Horack, Talley, Pharr & Lowndes by Travis W. Moon for defendant appellees.

HEDRICK, Judge.

Although neither party has raised the question, it is clear that the judgment from which the plaintiff purports 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, which 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, crossclaim, or third-party claim, or when multiple parties are involved, the court *may enter a final judgment* as to one or more but fewer than all of the claims or parties *only if there is no just reason for delay and it is so determined in the judgment.* Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In the absence of entry of such a final judgment,* any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise* except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before

the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

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 from which the appeals were taken 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".

In the present case, the judgment dismissing plaintiff's claim adjudicates "the rights and liabilities of fewer than all the parties" and expressly retains jurisdiction "for the purpose of adjudication with respect to defendants' counterclaim" without providing "no just reason for delay". Therefore, the order from which plaintiff purports to appeal is interlocutory and not appealable. *Leasing, Inc. v. Dan-Cleve Corp., supra,* and *Arnold v. Howard, supra.* It is significant that Rule 54(b) specifically provides that:

"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* . . . . 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.)

Applying the foregoing portion of Rule 54(b) to the present case, the order dismissing plaintiff's claim is, therefore, subject to revision at any time before the entry of judgment adjudicating defendants' counterclaim. See, *Durham v. Creech,* filed in the Court of Appeals, 21 May 1975. For the reasons stated, the appeal is dismissed.

Appeal dismissed.

Chief Judge BROCK and Judge MORRIS concur.

LOWE'S OF WINSTON-SALEM, INC. v. MORRIS JULIAN THOMPSON AND MARY KATHRYN THOMPSON

No. 7521DC169

(Filed 4 June 1975)

Rules of Civil Procedure § 52; Trial § 58— nonjury trial — failure to find facts

In an action to recover for building materials used by a builder in the construction of a house for defendants which was tried upon the facts by the court without a jury, the trial court's statements in its order dismissing plaintiff's claim that plaintiff had failed to carry its burden of proof and that defendants were not indebted to plaintiff were not findings of fact within the meaning of G.S. 1A-1, Rule 52(a)(1), and the court erred in dismissing the claim without making findings of fact determinative of the issues raised at the trial.

APPEAL by plaintiff from *Leonard, Judge.* Judgment entered 2 December 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 6 May 1975.

This is a civil action instituted by the plaintiff against the defendants alleging that various building materials were sold on open account to a construction company for use in the construction of a house owned by defendants. Plaintiff's complaint further alleges that said construction company became unable to pay for said materials, and that it reached an agreement with defendants for payment of said materials. Defendants filed answer denying plaintiff's allegations. Trial was had without jury. Both plaintiff and defendants offered evidence. At the conclusion of the presentation of the evidence, the trial court entered an order in pertinent part as follows:

"[A]nd it appearing to the court and the court, after reading the pleadings, hearing testimony and arguments of counsel, finds that plaintiff has failed to carry its burden in proving the obligation of defendants for money due; and it further appearing to the court that the issue and answer raised by the pleadings and testimony should be as follows:

Are the defendants indebted to the plaintiff?

Answer: No;

And it further appearing therefore that this action should be dismissed:

It is therefore ORDERED, ADJUDGED AND DECREED that this action should be and the same is hereby dismissed,

and the plaintiff shall have and recover nothing of the defendants."

Plaintiff appealed.

Drum and Liner by Bruce C. Fraser for plaintiff appellant.

Nelson, Clayton & Boyles by Laurel O. Boyles for defendant appellees.

HEDRICK, Judge.

G.S. 1A-1, Rule 52(a)(1), Rules of Civil Procedure provides: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

Plaintiff contends the trial court failed to make any findings of fact to support its order dismissing plaintiff's claim. We agree.

The pleadings raise genuine issues of material fact. Even though the record before us does not contain the evidence offered at trial, it is clear that the case was "tried upon the facts", that both parties offered evidence, and that the court considered such evidence in arriving at its order dismissing plaintiff's claim. Thus, under the circumstances here presented, the trial judge's statements that the plaintiff had failed to carry its burden in proving the obligation of defendants for money due and that the defendants were not indebted to the plaintiff in any amount are not findings of fact within the meaning of Rule 52(a)(1). See *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). Because the trial judge failed to make findings of fact determinative of the issues raised at trial, we cannot ascertain whether he applied appropriate principles of law in entering the order appealed from.

For the reasons stated, the order is vacated and the clause is remanded to the district court for a

New trial.

Chief Judge BROCK and Judge MORRIS concur.

WILLIAM JAMES WALTON v. WESTA LLOYD AND RUBY B. LLOYD

No. 7510DC219

(Filed 4 June 1975)

Trover and Conversion § 2— conversion of property — sufficiency of findings

The trial court's findings of fact support its judgment for plaintiff in an action to recover for the conversion of property plaintiff had placed in premises leased from defendants.

APPEAL by defendant Westa Lloyd from *Barnette, Judge.* Judgment entered 27 November 1974 in District Court, WAKE County. Heard in the Court of Appeals 14 May 1975.

Plaintiff brought this action seeking to recover the value of personal property allegedly converted by defendants. In his complaint plaintiff alleged that he and defendants entered into a lease agreement on 11 June 1968 and that he took possession of and placed fixtures and equipment on the premises for the operation of an establishment called the "Grand Prix Restaurant." Shortly thereafter a receiver was appointed to manage the business while litigation was pending between plaintiff and one James W. Smith. An order was entered on 9 July 1969 adjudicating ownership of the business and its assets in plaintiff. He immediately made demand upon defendants for possession of the premises and its contents. Defendants refused and on 16 September 1971 plaintiff filed suit.

The action was dismissed for failure to prosecute, but that judgment later was set aside. The cause came on for hearing. The court found that defendants had taken possession of the leased premises and plaintiff's personal property worth $2,500.00 at the time of taking and converted it to their own use. From judgment for plaintiff in the amount of $2,500.00, with interest, defendant gave notice of appeal.

Ellis Nassif for plaintiff appellee.

W. G. Parker for defendant appellant.

ARNOLD, Judge.

In the record on appeal, defendant has attempted to group seven assignments of error based on his exception to the judgment. The question before us therefore is whether error of law

appears on the face of the record proper. *See Clark v. Richardson*, 24 N.C. App. 556, 211 S.E. 2d 530 (1975); *Moore v. Strickland*, 23 N.C. App. 732, 209 S.E. 2d 830 (1974). The trial court's findings of fact support the judgment. No error appears on the face of the record. The judgment is

Affirmed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. CEPHUS GREGGS, JR., AND DON L. PITT

No. 752SC241

(Filed 4 June 1975)

APPEAL by defendants from *Lanier, Judge.* Judgments entered 16 January 1975 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 28 May 1975.

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

Hutchins, Romanet, Hutchins & Thompson, by Robert Wendel Hutchins, for the defendants.

BROCK, Chief Judge, PARKER and HEDRICK, Judges.

No error.

IN THE MATTER OF TIMOTHY LEON BARBER

No. 7521DC167

(Filed 4 June 1975)

APPEAL by respondent from *Alexander, Judge.* Judgment entered 19 December 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 6 May 1975.

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

Samuel J. Villegas for respondent appellant.

BRITT, PARKER, and HEDRICK, Judges.

No error.

Lofton v. Lofton

LARRY LOFTON, ADMINISTRATOR OF THE ESTATE OF DOUG LOFTON; LARRY LOFTON, INDIVIDUALLY, AND WIFE, JOY LOFTON; AND SANDRA LOFTON SMITH, ADMINISTRATRIX OF THE ESTATE OF BETTIE LOFTON; AND SANDRA LOFTON SMITH, INDIVIDUALLY AND HUSBAND, SHERRILL SMITH v. ROBERT LOFTON, A MINOR

LARRY LOFTON, ADMINISTRATOR OF THE ESTATE OF DOUGLAS LOFTON; LARRY LOFTON, INDIVIDUALLY, SANDRA LOFTON SMITH, ADMINISTRATRIX OF THE ESTATE OF BETTIE LOFTON AND SANDRA LOFTON SMITH, INDIVIDUALLY v. ROBERT LOFTON, A MINOR, SANDRA LOFTON SMITH, GUARDIAN FOR ROBERT LOFTON; AND TRUSTEES OF OHIO HIGHWAY DRIVERS' WELFARE FUND

LARRY LOFTON, ADMINISTRATOR OF THE ESTATE OF DOUGLAS LOFTON; LARRY LOFTON, INDIVIDUALLY; SANDRA LOFTON SMITH, ADMINISTRATRIX OF THE ESTATE OF BETTIE LOFTON; AND SANDRA LOFTON SMITH, INDIVIDUALLY v. ROBERT LOFTON, A MINOR, SANDRA LOFTON SMITH, GUARDIAN FOR ROBERT LOFTON; AND UNIVERSITY LIFE INSURANCE COMPANY OF AMERICA

No. 7519DC234

(Filed 18 June 1975)

1. **Insurance § 35— involuntary manslaughter — right to life insurance proceeds**

A person who has been convicted of involuntary manslaughter of another has not been convicted of a "wilful" killing within the meaning of G.S. 31A-3(3)a and thus is not a "slayer" who is barred by G.S. Ch. 31A from receiving the proceeds of a life insurance policy on the life of deceased.

2. **Descent and Distribution § 6; Insurance § 35— acts barring property rights — G.S. Chapter 31A**

The provisions of G.S. Ch. 31A do not completely supplant the common law principle prevailing in N. C. that a person should not be allowed to profit by his own wrong; G.S. 31A-15 preserves the common law, both substantively and procedurally, as to all acts not specifically provided for in Ch. 31A.

3. **Insurance § 35— killing of insured — right to life insurance proceeds — admissibility of criminal conviction**

In a civil action to determine the right of a beneficiary who has caused the death of an insured to receive the proceeds of a policy of insurance on his life, the record of the beneficiary's conviction of a "wilful and unlawful killing" is admissible to establish the disqualification of the beneficiary to receive the proceeds under Ch. 31A; however, when the wrongdoer is not disqualified by Ch. 31A from receiving

the insurance proceeds, and the common law must be relied on for such disqualification, the record of a criminal conviction of the wrongdoer for a crime not amounting to a "wilful and unlawful killing," such as a conviction for involuntary manslaughter, is not admissible, and it is necessary to prove at the trial the factual circumstances relating to the killing from which the court can determine the issue.

4. **Insurance § 35— killing of insured — right to insurance proceeds — disqualification under common law**

Evidence not objected to that a defendant beneficiary had been convicted of the involuntary manslaughter of the insured is sufficient to support the court's conclusion that defendant is disqualified under the common law from receiving the proceeds of the insurance policy.

5. **Descent and Distribution § 6— murder of parents by child — child not convicted and hence not a "slayer"**

A minor child was not convicted by a court of competent jurisdiction of killing his parents and was not a slayer as defined by G.S. 31A-3(3)a and therefore barred from sharing in any of the property or benefits resulting from the death of his parents where the minor was adjudged a delinquent child in a juvenile proceeding upon the finding of the district court that the "child did wilfully and with malice aforethought murder his mother and father."

6. **Descent and Distribution § 6— murder of parents by child — disqualification under common law from inheriting**

In an action to have minor defendant barred from inheriting or receiving any property or benefits on account of the death of his parents, the trial court had before it sufficient established facts to support its conclusion that defendant was disqualified under common law from inheriting where the court had before it a judicial admission that defendant had wilfully shot and killed his parents, and also had before it, by stipulation, the order of a district court judge in a juvenile proceeding in which the judge made a determination that defendant did wilfully and with malice aforethought murder his parents.

APPEAL by defendant Robert Lofton from *Montgomery, Judge.* Judgment entered 20 December 1974 in District Court, ROWAN County. Heard in the Court of Appeals 27 May 1975.

These are three civil actions seeking to have defendant Robert Lofton (Robert), a minor, barred from inheriting or receiving any property or benefits on account of the death of his parents. The actions were instituted by the personal representatives and certain other children of the deceased parents who allege that Robert, who was not quite 14 years of age at the time, unlawfully shot and killed his parents.

All surviving children of the decedents are parties to the actions. The actions involve title to real estate which was held by decedents as tenants by the entirety, title to a mobile home

and other personalty, and certain insurance and other benefits payable by reason of the death of decedents.

On motion of Robert's guardian ad litem and attorney, the three actions were consolidated for trial and heard without a jury. The court made extensive findings of fact including the following (summarized) which are pertinent to the questions presented by this appeal:

(1) Prior to and up until 23 December 1973 Robert lived with his father and mother in a mobile home which was situated near Rockwell in Rowan County.

(2) On 23 December 1973, Robert, then 13 years and 9 months of age, willfully, unlawfully and wrongfully shot and killed his father and his mother. (Exception noted to this finding.)

(3) In a juvenile proceeding held in district court on 11 February 1974 Robert was adjudged a "delinquent child," as a result of allegations and proof offered to the court to establish the aforesaid wrongful acts with regard to the death of Robert's parents; that Robert was committed to a Youthful Offender Facility, as provided by law, at Swannanoa, N. C., and he is still in the custody of the State of North Carolina as a "delinquent child."

(4) In said juvenile proceeding, Judge Hammond made the following entry:

> Upon hearing oral evidence the Court finds the following facts beyond a reasonable doubt: That on or about the 23rd day of December, 1973, this child did willfully [sic] and with malice aforethought murder his mother and father. That he is a delinquent child as alleged in the petition.
>
> It is now therefore ordered that he be committed to the custody of the North Carolina Board of Youth Development for an indeterminate period in accordance with the statutes. It is recommended to the Department that it take a close look at the facts of the case and the reports which are contained in the file and that it retain him at Swannanoa Center for extensive evaluation before making any other placement. . . .

(5) Robert's parents died simultaneously.

The court made numerous conclusions of law which include the following:

1. That in each of the three civil actions the defendant Robert Lofton is a "slayer" as defined in G.S. 31A-3, having admitted in open Court that he did on or about the 23rd day of December, 1973,

EXCEPTION No. 9.

willfully and with malice and aforethought, murder his father and mother, Douglas Lofton and Bettie Lofton; that as a "slayer" under the provisions of G.S. 31A-3 the said Robert Lofton is subject to the forfeiture provisions of Chapter 31A-11 of the General Statutes relative to insurance benefits and is subject to the forfeiture provisions of Chapter 31A-4 of the General Statutes relative to the forfeiture of real and personal property; that G.S. 31A-15 sets forth the intention and purpose of the North Carolina General Assembly in adopting this statute entitled "Acts Barring Property Rights," and the General Assembly directed that the chapter should be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrongdoing.

2. That it is a long standing position of the State of North Carolina, regardless of statute, that no person should be entitled to profit from his own wrongdoing, and where by virtue of rules of law property, either real or personal, would come to one who has been guilty of killing his predecessor in title, it is held by the North Carolina Courts that the wrongdoer would only hold bare legal title to the share of property, real or personal, that would come from the wrongdoer's victims to him and so under the common law of this state, if it were determined that G.S. 31A would not apply, still Robert Lofton would be only the constructive trustee of any title to property which he received from his mother or his father

EXCEPTION No. 10

and as the constructive trustee he would hold title to the property for the benefit of Larry Lofton and Sandra Lofton Smith in the manner and form as hereinafter set forth.

The court further concluded as a matter of law that Robert was barred from receiving any property left by, or benefits pay-

able by reason of the death of, his parents and adjudged that the property and benefits accrue to the other heirs of law of the decedents.

Robert appealed.

Carlton, Rhodes and Thurston, by Richard F. Thurston, for plaintiff appellees.

Kluttz and Hamlin, by Richard R. Reamer, for defendant appellant.

BRITT, Judge.

The trial court held that Robert was barred from inheriting any property from, or receiving any benefits accruing because of the death of, his parents, by reason of (1) the provisions of G.S. Ch. 31A and (2) the common law of our State. Plaintiffs contend that they are entitled to an affirmance of the judgment if either (1) or (2) applies.

The recent case of *Quick v. Ins. Co.*, 287 N.C. 47, 213 S.E. 2d 563 (1975), provides considerable guidance for us in the disposition of this appeal. In that case the court either established or reiterated the following principles of law:

[1] 1. A person who has been convicted of involuntary manslaughter of another has not been convicted of a "willful" killing within the meaning of G.S. 31A-3(3)a and thus is not a "slayer" who is barred by G.S. Ch. 31A from receiving the proceeds of a life insurance policy on the life of the deceased.

[2] 2. The provisions of G.S. Ch. 31A do not completely supplant the common law principle prevailing in North Carolina that a person should not be allowed to profit by his own wrong. G.S. 31A-15 preserves the common law, both substantively and procedurally, as to all acts not specifically provided for in Ch. 31A.

[3] 3. In a civil action to determine the right of a beneficiary who has caused the death of an insured to receive the proceeds of a policy of insurance on his life, the record of the beneficiary's conviction of a "wilful and unlawful killing" is admissible to establish the disqualification of the beneficiary to receive the proceeds under Ch. 31A; however, when the wrongdoer is not disqualified by Ch. 31A from receiving the insurance proceeds, and the common law must be relied on for such disqualification,

the record of a criminal conviction of the wrongdoer for a crime not amounting to a "wilful and unlawful killing," such as a conviction for involuntary manslaughter, is not admissible, and it is necessary to prove at the trial the factual circumstances relating to the killing from which the court can determine the issue.

[4] 4. Evidence not objected to that a defendant beneficiary had been convicted of the involuntary manslaughter of the insured is sufficient to support the court's conclusion that defendant is disqualified under the common law from receiving the proceeds of the insurance policy.

[5] First, we consider whether Robert is barred by G.S. Ch. 31A from sharing in any of the property or benefits involved in these actions. To be barred by the statutes, he must be a "slayer" as defined by G.S. 31A-3(3). Under this section there are four subsections and subsections b, c and d clearly are inapplicable. G.S. 31A-3(3)a defines a slayer as "Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the wilful and unlawful killing of another person; . . . . " The question then arises as to whether Robert has ever been *convicted* by a court of competent jurisdiction as a principal or accessory before the fact of the willful and unlawful killing of his parents? Our research impels a negative answer.

G.S. 31A-3(3)a envisions a conviction of unlawful homicide. In this State, any unlawful homicide is or may be punishable by imprisonment in the State's prison, hence, it is a felony. G.S. 14-1, 14-17, 14-18. Article I, § 24, of our State Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo."

In *Smith v. Thomas,* 149 N.C. 100, 101, 62 S.E. 772 (1908), Justice Walker, writing for the court, declared that the word *convicted* means, in law, " . . . [T]he ascertainment of the defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury or, under our Constitution and statute, by the judgment of a justice of the peace, where a jury trial is waived, provided the justice has final jurisdiction of the offense. . . . "

We hold that the finding made by District Court Judge Hammond that "this child (Robert) did wilfully and with malice aforethought murder his mother and father" did not constitute a conviction as envisioned by G.S. 31A-3(3)a, therefore, the "barring" provisions of Ch. 31A do not apply.

[6] We now consider whether Robert is barred by the common law from sharing in any of the property or benefits involved in these actions.

In *Garner v. Phillips,* 229 N.C. 160, 47 S.E. 2d 845 (1948), decided prior to the enactment of G.S. Ch. 31A in 1961, the question was presented as to whether a 16-year-old boy who allegedly murdered his parents was barred from inheriting a share of their property. The court, in an opinion by Justice (later Chief Justice) Devin, said (pp. 161-2):

> It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong, or acquire property as the result of his own crime. (Citations.)
>
> True, we have no statute in North Carolina which in express terms destroys the right of inheritance under the canons of descent, or bars the devolution of title as heir to one who has murdered the ancestor from whom derived, but the rule seems to have been established in this jurisdiction that in such case equity will impress upon the legal title so acquired a constructive trust in favor of those next entitled and will exclude the murderer from all beneficial interest in the lands descending to him from his victim. . . .

We hold that the principle stated in *Garner,* upon a proper establishment of facts, would apply to the case at hand. That brings us to the final question of whether the court, as was true in *Quick,* had before it sufficient established facts to support its conclusion that Robert was disqualified under common law from sharing in the property and benefits involved in these actions.

In the original answers filed, Robert's guardian ad litem admitted that Robert had unlawfully and willfully shot and killed his parents. However, prior to trial the guardian ad litem was permitted to delete those admissions and plead instead allegations to the effect " . . . that the defendant Robert Lofton admits that he willfully shot and killed his father and mother but he denies that his acts in so doing were unlawful for the

purposes of determining the outcome of these three actions. . . . " The record contains a stipulation that at trial the evidence included a review by the court of the juvenile proceeding conducted by Judge Hammond but due to the confidential nature of the material contained in the record of the proceeding, counsel for plaintiffs and defendants consider it necessary to stipulate in this record only the juvenile order. The order entered by Judge Hammond contained a finding, as fully set forth above, that Robert "did wilfully and with malice aforethought murder his mother and father."

No case from this jurisdiction has been cited, and our research fails to disclose one, that provides an explicit answer to the question with which we now labor. Plaintiffs do cite the New York case of *In re Sengillo's Estate,* 206 Misc. 751, 134 N.Y. S. 2d 800 (1954).

Considering the fact that the trial court had before it a judicial admission that Robert had willfully shot and killed his parents, and also had before it, by stipulation, the order of Judge Hammond in which he made a determination that Robert "did wilfully and with malice aforethought murder" his parents, we hold that the trial court's conclusion that Robert was disqualified to share in the property and benefits involved in these actions was sufficiently supported. *Quick v. Ins. Co., supra.*

For the reasons stated, the judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

CITY OF DURHAM v. LYCKAN DEVELOPMENT CORPORATION; CENTRAL CAROLINA BANK & TRUST COMPANY, TRUSTEE; AND SECURITY SAVINGS & LOAN ASSOCIATION

No. 7514SC215

(Filed 18 June 1975)

1. Rules of Civil Procedure § 7— motions — failure to state rule number — absence of prejudice

Plaintiff was not prejudiced by defendant's failure to state the number of any rule under which it was proceeding as required by Rule 6 of the General Rules of Practice for the Superior and District

Courts where defendant complied with the requirements of G.S. 1A-1, Rule 7(b)(1), that the motion be made in writing, state the grounds therefor and set forth the relief or order sought.

2. **Process § 12; Rules of Civil Procedure § 4— domestic corporation — service on unknown person**

The trial court did not err in concluding that process was not properly served on the corporate defendant by leaving a copy of the summons and complaint in the office of an officer, director, or managing agent with the person who is apparently in charge of the office within the purview of G.S. 1A-1, Rule 4(j)(6)a where the court found that the president of the corporation was not in the county when process was purportedly served, the corporation was using the residence of its president as its temporary place of business, a deputy sheriff delivered process at that address to a male person who answered the doorbell and represented himself to be the president of the corporation and whose identity is unknown, and the process was delivered at 5:45 p.m. after the corporation's normal business hours.

3. **Eminent Domain § 7; Process § 3— eminent domain — date of service of process — waiver — petition for disbursement of funds**

In an eminent domain proceeding, defendant did not waive its right to contest the date of service of process on it by filing a petition for disbursement of the funds deposited by plaintiff with the court.

4. **Eminent Domain § 7— insufficient service on landowner — petition for withdrawal of funds — answer filed within one year**

In an eminent domain proceeding wherein process was not properly served on the corporate defendant, the court properly determined that defendant's answer was filed in apt time where it was filed within 12 months from the time defendant petitioned the court for withdrawal of the funds deposited by plaintiff with the court.

5. **Eminent Domain § 6— map showing floodway zones — evidence of value**

The trial court in an eminent domain action erred in the exclusion of a map prepared by the U. S. Corps of Engineers depicting floodway zones for the land in question and surrounding areas where the genuineness of the map was stipulated and the information on the map was relevant and material to the issue of damages.

APPEAL by plaintiff from order entered by *Clark, Judge,* on 10 January 1974 and judgment entered by *Hall, Judge,* on 19 December 1974; and appeal by defendant Lyckan Development Corporation (hereinafter referred to as defendant) from order entered by *Clark, Judge,* on 15 January 1974, in Superior Court, DURHAM County. Heard in the Court of Appeals 14 May 1975.

This is an eminent domain proceeding by plaintiff to acquire certain land owned by defendant for purpose of constructing a sewage pump station thereon.

Complaint was filed and summons issued on 8 August 1972 at 12:25 p.m. At the same time plaintiff filed a declaration of taking and notice of deposit and deposited with the court the sum of $5,000.00, the amount plaintiff estimated the property to be worth. The summons was returned by the sheriff with notation that it had been served on "Mr. Lyckan," President of Lyckan Development Corporation, at 1008 North Guthrie Avenue, Durham, N. C., at 5:45 p.m. on 8 August 1972.

On 23 August 1972, defendant, through its attorney, petitioned the court for disbursement of the $5,000.00 placed on deposit, as a credit against just compensation to be determined later. The court entered an order allowing the distribution.

On 20 August 1973 defendant corporation filed its answer. On 17 September 1973 plaintiff filed motion asking that the answer be stricken and that final judgment be rendered in its favor, for the reason that the answer was not filed within 12 months of the date of service of process. On 23 October 1973 defendant corporation filed a motion in the cause asking that the complaint be dismissed for numerous reasons, including a contention that service of process was defective. On 10 and 13 December 1973 Judge Edward B. Clark conducted a hearing on plaintiff's 17 September 1973 motion and defendant corporation's 23 October 1973 motion. On 10 January 1974 Judge Clark entered an order containing findings of fact, conclusions of law, and adjudication as follows:

FINDINGS OF FACT

1. This action is an eminent domain proceeding instituted by Plaintiff pursuant to the procedures of Article 9 of Chapter 136 of North Carolina General Statutes as authorized by Chapter 506, Session Laws of 1967.

2. This action was instituted on August 8, 1972 by the filing of Plaintiff's verified Complaint, and declaration of taking and notice of deposit. On said date Plaintiff filed with Superior Court of Durham County the sum of $5,000. as estimated just compensation for the taking of Defendant's property.

3. The Defendant, Lyckan Development Corporation, was incorporated under the laws of the State of North Carolina on or about the 2nd day of November, 1959; and that, as of the date of the filing of this action, the registered

office of said corporation was 1008 North Guthrie Avenue, Durham, North Carolina, and the registered agent of the corporation was Terry Chronaki.

4. On August 8, 1972, 1008 North Guthrie Avenue was the address of a residential dwelling in which Terry Chronaki, his sister, Irene Chronaki, and his uncle, Emanual Chronaki lived.

5. The word Lyckan is a Swedish word meaning "good luck" and was chosen as the name of the corporation at the suggestion of an incorporator of the corporation who was of Swedish descent; and that at no time since the corporation's formation has there been any person associated with the corporation with the name of Lyckan.

6. That on the face of the Summons of record in this matter it appears that service of process was purportedly made by service upon a Mr. Lyckan, President of the defendant corporation, but that no evidence has been presented which indicates the existence of a person named Mr. Lyckan.

7. On August 8, 1972, the officers of Lyckan Development Corporation consisted of Terry Chronaki, Irene Chronaki and Bessie Chronaki and that these same persons were also the only shareholders and directors of the corporation; and there were no other employees or agents of the corporation on August 8, 1972.

8. During August of 1972, the Defendant, Lyckan Development Corporation, was in the process of moving its primary place of business located at 509 Morgan Street, Durham, North Carolina, because such address had been taken for redevelopment purposes and therefore the corporation was using the residence of the president temporarily as a primary place of business.

9. On August 8, 1972, at approximately 5:45 P.M. Durham County Deputy Sheriff C. W. Harris delivered a copy of the Summons and the Complaint filed in this action to a male person who was present at 1008 North Guthrie Avenue, Durham, North Carolina; however, there has been no evidence produced tending to establish the identity of this male person and the identity of this male person is unknown.

10. That 5:45 p.m. is after normal business hours for the business which was being conducted at 1008 North Guthrie Avenue, Durham, N. C.

11. That the President of the defendant corporation, Terry Chronaki, was not present at 1008 North Guthrie Avenue at 5:45 p.m. on August 8, 1972, and indeed was not present within Durham County when service of process was purportedly made upon the unknown male person at 1008 North Guthrie Avenue in Durham, North Carolina, at approximately 5:45 p.m. on August 8, 1972.

12. There has been no Alias and Pluries Summons issued in this action since the original Summons was issued on August 8, 1972.

13. On August 23, 1972, the Defendant, Lyckan Development Corporation filed a petition to withdraw the $5,000 theretofore deposited with the Clerk of Court by the Plaintiff; and the said deposit was thereafter paid to the Defendant, Lyckan Development Corporation on August 29, 1972.

14. No further pleading was had in this case until August 20, 1973 when Defendant, Lyckan Development filed an Answer in this case.

15. That on or about September 17, 1973, the Plaintiff filed a Motion to strike the Answer of Defendant Lyckan Development Corporation on grounds that the Answer was not filed within the 12 months of the date of service; and thereafter on October 23, 1973, the Defendant Lyckan Development Corporation, filed a Motion requesting, among other things, that the Complaint be dismissed for insufficiency of the service of process.

CONCLUSIONS OF LAW

1. The Defendant, Lyckan Development Corporation, was not properly served in this action for the reason that delivery of Summons and Complaint to an unknown person who was at the registered office of the defendant corporation (which was also a residence for 3 persons) is not service on one "apparently in charge of the office" of an officer, director, or managing agent of the defendant corporation as required by North Carolina General Statutes, Section 1A-1, Rule 4(j) (6) a.

2. The Defendant, Lyckan Development Corporation, by petitioning the Clerk of Court on August 23, 1972, to release the $5,000 deposited by the Plaintiff was estopped from challenging the jurisdiction of this court or denying service of process except as to any purported service prior to that date.

3. The petition filed by Lyckan Development Corporation on August 23, 1972, did not constitute a Motion or responsive pleading in which the Defendant was required to assert the defense of insufficiency of service of process or the defense of lack of jurisdiction over the person, and therefore the defendant did not waive such defenses pursuant to the provisions of North Carolina General Statutes Section 1A-1, Rule 12(h)(1).

4. The Answer of the Defendant, Lyckan Development Corporation, filed on August 20, 1973, was properly filed within the 12 months period prescribed by North Carolina General Statutes 136-107 as the Answer was filed within 12 months from the date upon which the defendant corporation petitioned the court for the withdrawal of the $5,000 deposit and the defendant corporation is therefore entitled to a determination of just compensation according to the procedures provided in Article 9 of Chapter 136, of the General Statutes of North Carolina.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion entitled Motion to Strike Answer and Motion for Final Judgment and Order of Disbursement is hereby denied and it is further ordered that the defendant corporation is entitled to a determination of just compensation according to the procedures provided in Article 9 of Chapter 136 of the General Statutes of the State of North Carolina.

On 15 January 1974, Judge Clark entered a "SUPPLEMENTARY ORDER" providing as follows:

This matter having been heard before the undersigned Judge at the December 10, 1973 Session of the Durham County Superior Court, and the undersigned Judge having entered the Order allowing Defendant's Motion In The Cause and denying Plaintiff's Motion To Stike [sic] Defendant's Answer, and it being called to the Court's attention that the Order so entered omits material uncontroverted

evidence which was received at the hearing, the Court makes Findings of Fact which reflects such evidence, and it is

ORDERED that said Order entered on January 10, 1974, be changed by substituting the following for Paragraph 9 in the section entitled FINDINGS OF FACT:

On August 8, 1972, at approximately 5:45 P.M. Durham County Sheriff C. W. Harris delivered a copy of the Summons, Complaint and Declaration of Taking filed in this action to a white male adult, approximately fifty-five years of age, who represented himself to Deputy Sheriff Harris to be President of the Lyckan Development Corporation; that said person answered the doorbell when Deputy Sheriff Harris rang it, and that he was the only person Harris saw upon the premises; that said service took place at 1008 North Guthrie Avenue, Durham, N. C.; that said person was not otherwise known to Deputy Sheriff Harris and that his identity is not now known.

On 17 January 1974, plaintiff filed exceptions to the 10 January 1974 order and particularly to each of the conclusions of law set out therein. Defendant excepted to the 15 January 1974 supplementary order.

The cause came on for trial at the 16 December 1974 session on the issue of amount of defendant's damages. A jury answered the issue $18,000 and plaintiff appeals from judgment predicated on the verdict and from the 10 January 1974 order. Defendant appeals from the 15 January 1974 supplementary order.

Rufus C. Boutwell, Jr., for plaintiff appellant.

Powe, Porter, Alphin & Whichard, P.A., by Edward L. Embree III, for defendant appellee.

BRITT, Judge.

PLAINTIFF'S APPEAL

Plaintiff contends Judge Clark erred in allowing defendant to make eight separate motions simultaneously, without any reference to any rule of civil procedure, to receive defendant's written argument on those motions, and then restrict the hearing to a single motion. We find no merit in the contention.

This contention pertains to defendant's "Motion in the Cause" filed 23 October 1973. In its motion, defendant asked that the complaint be dismissed for the reasons that (1) the court lacked jurisdiction over the subject matter of the action, (2) plaintiff was following unauthorized and unconstitutional procedures, and (3) there was insufficient service of process. Defendant also asked for injunctive relief. In the alternative, defendant asked that the return on the summons be amended to show the correct date of service on defendant " . . . if such can be determined." It further asked in the alternative that if the action was not dismissed that defendant be allowed to file an amendment to its answer and allege a counterclaim. Plaintiff and defendant each proceeded to file a memorandum of law and a brief in support of their respective motions and in defense of their respective positions on the other's motions.

[1] The gist of plaintiff's argument on this contention is that defendant did not cite the number of any rule under which it was moving, and plaintiff was greatly inconvenienced in having to prepare for a hearing on all facets of defendant's motion and the court allowed defendant to proceed on only one of them, namely, the claim of insufficiency of service of process.

Rule 6 of the General Rules of Practice for the Superior and District Courts provides that all motions, whether written or oral, shall state the rule number or numbers under which the movant is proceeding and makes reference parenthetically to Rule 7 of the Rules of Civil Procedure. G.S. 1A-1, Rule 7(b)(1) provides that motions, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state the grounds therefor, and shall set forth the relief or order sought. While defendant failed to comply with Rule 6 of the trial court rules, it fully complied with G.S. 1A-1, Rule 7(b)(1). Assuming, *arguendo,* that defendant erred in not stating the rule number, we perceive no prejudice to plaintiff. We are not impressed with plaintiff's argument that it suffered inconvenience in having to prepare to defend on all aspects of defendant's motion.

Plaintiff contends the court erred in concluding that defendant was not properly served with process on 8 August 1972. The essence of plaintiff's argument on this contention is that the evidence did not support the conclusion. We note that plaintiff did not except to any finding of fact, therefore, this court will assume that the facts found are correct and are supported

by the evidence, and the appeal will be determined in accordance with those findings. 1 Strong, N. C. Index 2d, Appeal and Error, § 28, at 160. The question then arises, do the findings of fact support the conclusion of law that defendant was not properly served with process on 8 August 1972? We answer in the affirmative.

[2] Plaintiff argues that process was served in compliance with G.S. 1A-1, Rule 4(j)(6)a which provides that service may be had "By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office." The return states that process was served on defendant's president but the court found as fact that defendant's president was not in Durham County at 5:45 p.m. on 8 August 1972. This brings us to consider whether a copy of the summons and complaint was left in the office of an officer, director, or managing agent of defendant corporation with the person who was apparently in charge of the office.

The court found as fact that on 8 August 1972 defendant corporation was using the residence of its president (1008 North Guthrie Avenue, Durham) as its temporary place of business, and that on the date and at the hour above stated, the deputy sheriff delivered process to a male person, whose identity is unknown, at said address. In its supplementary order (entered 15 January 1974) the court further found that the man at the residence answered the doorbell when the deputy rang it, was white, approximately 55 years of age, represented himself to be the president of defendant corporation, and was the only person the deputy saw on the premises. The court further found that 5:45 p.m. was after normal business hours for the conducting of business at said address. Even considering the additional facts set forth in the supplementary order, we think the facts found by the court were sufficient to support its conclusion of law that process was not properly served on defendant. While the evidence might have warranted different findings of fact, that was a prerogative of the trial judge.

[3] Plaintiff contends the court erred in concluding that defendant, by filing its petition for disbursement of funds on 23 August 1972, did not waive or was not estopped from contesting the date of service of process. We hold that this conclusion of law is fully supported by the findings of fact.

[4] Plaintiff contends the court erred in ruling that defendant's answer, filed on 20 August 1973, was filed in apt time. We hold that the court's ruling is fully supported by its conclusions of law, which conclusions are supported by the findings of fact.

We have not overlooked defendant's contention that in the stipulation with respect to the record on appeal counsel for the parties stipulated that "[a]ll pleadings herein were properly and timely filed. . . ." Defendant argues that the stipulation renders moot the crucial question with respect to its answer being filed within the time allowed by statute. In view of our holding hereinbefore set out, we do not reach defendant's contention involving the stipulation.

[5] Finally, by its assignment of error No. 9, plaintiff contends the court at trial erred in refusing to admit into evidence a map prepared by the U. S. Corps of Engineers in 1965 depicting certain floodway zones for the land in question and surrounding areas, when counsel, in the order on final pretrial conference, had stipulated to the admissibility of the map. This assignment has merit.

The "ORDER ON FINAL PRE-TRIAL CONFERENCE" entered by Judge Hall on 16 December 1974 contains the following provision (paragraph 6): "It is stipulated and agreed that each of the exhibits identified by the Plaintiff is genuine, and, if relevant and material, may be received in evidence without further identification or proof." The map above referred to is one of the exhibits covered by the stipulation.

Pretrial stipulations duly entered into by the parties are binding upon them. *Quinn v. Thigpen,* 266 N.C. 720, 147 S.E. 2d 191 (1966). We then consider whether the map which plaintiff sought to introduce was relevant and material. "Strictly speaking, evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. . . . " 1 Stansbury, N. C. Evidence, § 77, at 234 (Brandis rev. 1973).

We think the map contained information which was relevant and material to the issue being tried, namely, the damages sustained by defendant by the taking of its property by plaintiff. Defendant offered evidence tending to show that its land was capable of high type commercial development. Plaintiff, on the other hand, offered evidence tending to show that a creek ran through defendant's property and that the land taken in was in an area that was subject to flooding. Certainly, the map con-

tained information bearing on the question of whether the area was subject to flooding. Absent the stipulation, the laying of considerable foundation would have been necessary to render the map admissible in evidence, but the stipulation removed all grounds of objection by defendant except that of relevancy and materiality.

We also think the court's error in excluding the map was sufficiently prejudicial to entitle plaintiff to a new trial on the issue of amount of damages.

DEFENDANT'S APPEAL

Defendant's appeal raises only one question: Whether the Court erred in entering its 15 January 1974 "SUPPLEMENTARY ORDER" amending its 10 January 1974 order. In view of our holding set forth above that even considering the additional findings set forth in the supplementary order, the conclusions of law were supported by the findings of fact, we find it unnecessary to pass upon the question raised by defendant's appeal.

* * *

For the reasons stated, the orders entered by Judge Clark from which plaintiff and defendant appealed are affirmed; the judgment entered by Judge Hall from which plaintiff appealed is reversed and a new trial is ordered on the issue of amount of damages.

New trial.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF THE CHANGE OF NAME OF: JAYNE BRYANT MOHLMAN TO JAYNE MARIE BRYANT; ELSIE THULL CISAR TO ELSIE ELIZABETH THULL; MARGARET PIPES LYSAGHT TO MARGARET LINDSEY PIPES; ELIZABETH BUIE SMITH TO ELIZABETH ANNE BUIE

No. 7510SC137

(Filed 18 June 1975)

1. Names— married woman — use of husband's surname not mandatory

There is no common law or statutory requirement in this State that a married woman use her husband's surname.

2. Common Law; Names— change of name at will — common law in force in N. C.

At common law, a person may lawfully change his name at will and assume a new name so long as it is not for a fraudulent or illegal purpose, and, of course, the common law of England is in force in this State to the extent that it has not been abrogated or repealed by statute and to the extent that it is not repugnant to or destructive of our form of government.

3. Names— power of General Assembly to regulate name changes

The N. C. Constitution prohibits the General Assembly from enacting any private, local, or special act or resolution altering the name of any person, but the legislature does have the power to pass general laws regulating the same. N. C. Constitution, Art. II, § 24(1)(n); G.S. 101-1.

4. Names— change of name — effect of statutes on common law

It is generally held that statutes regulating the change of a person's name and prescribing a procedure therefor do not abrogate the common law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise; rather, they merely affirm and are in aid of the common law rule and provide an additional method of effecting a change of name, and, more importantly, provide a method for recording the change.

5. Names— change of name — discretion of court

While it is true that under the common law standard a showing of fraud or misrepresentation akin to fraud is necessary to deny a change of name, the statutes providing a procedure for change of name are not absolute in granting the privileges but are usually so phrased as to leave it in the reasonable discretion of the court hearing the petition either to grant or deny it; and while it is generally held that some substantial reason must exist before the court is justified in refusing to grant the petition, it is also the general rule that the court is not subject to the whim or capricious desire of a petitioner to change his name.

6. Names— change of name — burden on petitioner to show good and sufficient reason

Since the General Assembly has provided that a person may change his name for good cause shown and for good and sufficient reasons, there must be a hearing upon a petition for change of name and petitioner has the burden of establishing that it is just and reasonable that the petition be granted—not merely that petitioner desires it and that the request is without fraud.

7. Names— married woman — change of name from husband's surname to maiden name — failure to show good and sufficient reasons

The trial court properly denied the petitions of four married women who sought, without dissolving their marriages, to resume the use of their maiden names "for personal and professional reasons" where petitioners offered no evidence and refused to do so except for

introduction of the pleadings, thereby failing to show good and sufficient reason for granting the petitions.

Judge CLARK concurring.

APPEAL by petitioners from *Smith, Judge.* Judgments entered on 29 January 1975 and 30 January 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 16 April 1975.

These four cases present identical questions for our consideration and were consolidated for purposes of appeal. In each proceeding a married woman sought, pursuant to Chapter 101 of the North Carolina General Statutes, and without dissolving her marriage, to resume the use of her maiden name "for personal and professional reasons." In each instance the Clerk of Superior Court of Wake County denied relief on grounds that in his opinion "good and sufficient reasons" did not exist for the change. On appeal to the Superior Court in each proceeding the trial judge concluded as a matter of law:

"1. That at common law, a woman upon marriage, assumed the surname of her husband as her own.

2. That common law marriages and the instances thereof were abolished by the General Assembly of North Carolina on the adoption of chapter 51 of the General Statutes of North Carolina which said chapter provided for a statutory method of uniting a couple in matrimony.

3. That the General Statutes of North Carolina and particularly chapter 51 thereof contain no provision requiring a female person to assume her husband's surname upon marriage, other than the implication thereof contained in N.C.G.S. 50-12.

4. That at common law a person could assume any name of his choosing so long as it was not done for fraudulent purposes or to hide his true identity.

5. That a person in North Carolina may still assume and use any name of choosing so long as the same is not done with the intent to defraud or to hide one's true identity.

6. That the petitioner has not shown good and sufficient reason for allowing the change of name as required in N.C.G.S. 101-5 or any reason except that '. . . for business and professional reasons . . . ' she desires the change.

7. That the relief sought by the petitioner in this proceeding is unnecessary for the reasons set forth in conclusion #5 hereof."

The trial judge then entered an order dismissing each of the petitioner's applications and denying the relief sought. Petitioners appealed.

Deborah G. Mailman for petitioner appellants.

Women-in-Law, University of North Carolina School of Law, Chapel Hill, North Carolina, by Irene Bartlett, Anne Edenfield, Joanne Foil and Susan Owens, Amicus Curiae, for petitioner appellants.

Attorney General Edmisten, by Associate Attorney Alan S. Hirsch, for the State.

MORRIS, Judge.

These appeals present a novel question in this jurisdiction. Decision requires that we look not only to the common law, but to decided cases from other jurisdictions.

The court in its judgment in each case concluded as a matter of law "[t]hat at common law, a woman upon marriage, assumed the surname of her husband as her own." It appears clear that in England from whence came our customs with respect to names, there is not now and has never been any common law *requirement* that a wife assume her husband's name.

> "When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. *The change of name is in fact, rather than in law, a consequence of the marriage.* Having assumed her husband's name she retains it, notwithstanding the dissolution of the marriage by decree of divorce or nullity, unless she chooses thereupon to resume her maiden name or acquires another name by reputation. On her second marriage there is nothing in point of law to prevent her from retaining her first husband's name." 19 Halsbury's Laws of England 829 (3d Ed. 1957). See also 9 American and English Encyclopedia of Law, *Husband and Wife,* § 5, p. 813 (1889). (Emphasis supplied.)

A celebrated instance of a refusal to follow the custom was the well known instance of Lady Hatton, the second wife of Sir Edward Coke, who refused to use his name but continued throughout her marriage to use the name Lady Hatton.

That a married woman voluntarily assumes and uses her husband's surname but is under no legal compulsion to do so, absent a statutory requirement, is supported by a number of recent cases. *Kruzel v. Podell,* 67 Wisc. 2d 138, 226 N.W. 2d 458 (1975); *Custer v. Bonadies,* 30 Conn. Sup. 385, 318 A. 2d 639 (1974); Application of Halligan, 76 Mis. 2d 190, 350 N.Y.S. 2d 63 (1973); *Stuart v. Board of Supervisors of Elections,* 266 Md. 440, 295 A. 2d 223 (1972); *Wilty v. Jefferson Parish Democratic Committee,* 243 La. 145, 157 So. 2d 718 (1963); *State, ex rel. v. Green,* 114 Ohio App. 497, 177 N.E. 2d 616 (1961); *State, ex rel. Bucher v. Brower,* 7 Ohio Supp. 51, 21 Ohio Op. 208 (1941).

[1] This custom has been adopted and followed by the vast majority of married women in every state of the Union. We find no statutory requirement in this State that a married woman use her husband's surname. We are, of course, aware of G.S. 50-12 providing that upon divorce a woman "may resume the use of her maiden name or the name of a prior deceased husband, . . . " upon application to the Clerk, but we do not interpret that statute as implying a *requirement* that a married woman *must* assume her husband's surname. It merely recognizes that by her marriage the wife may have, through usage, effected a common law change in her name, but it does not indicate that she was compelled to do so. Although there is no common law requirement, it is certainly now and has been since the beginning of the history of this State, the custom that a married woman use her husband's surname. We recognize there are exceptions and these will be referred to. At this point, however, suffice it to say, that in this jurisdiction there is no legal compulsion for a wife to assume her husband's surname. We do not think that the court's conclusion in this case necessarily requires the interpretation that at common law a married woman is *required* to assume her husband's surname. However, in order to avoid confusion, to the extent that it does require such an interpretation, the conclusion is erroneous.

In early England, a person's surname was relatively unimportant. The given name was more important, and, as a

matter of fact, the surname, if any, was frequently not used even in legal matters. A grant to John, son of William, was perfectly good, if otherwise legally sufficient. Gradually in England surnames came into use as an additional means of identifying people who had the same Christian name. "Surnames came into common use in the 14th Century in England, and by the time of Cromwell, were required of all persons." Application of Lawrence, 128 N.J. Super. 312, 319 A. 2d 793 (1974). At English common law, the surname could be changed at will, "and this without the intervention of either the sovereign, the courts, or Parliament." 21 American and English Encyclopedia of Law 311 (2d Ed. 1902). To obtain a change of the Christian name, however, one had to be confirmed with the consent of the bishop and for good cause shown or obtain an Act of Parliament. This is still the case in England. *In re Evett's Appeal,* 392 S.W. 2d 781 (Tex. Civ. App. 1965), and see also 5 Journal of Family Law, Note, "The Right to Change One's Name" 220 (1965).

[2] At common law, then, a person may lawfully change his name at will and assume a new name so long as it is not for a fraudulent, or illegal purpose. He may enter a contract or other obligation under any name he chooses to assume. "The law is chiefly concerned with the identity of the individual, and when that is ascertained and clearly established, the act will be binding on him and on others." 57 Am. Jur. 2d, *Name,* § 22, pp. 289, 290. Of course, the common law of England is in force in this State to the extent that it has not been abrogated or repealed by statute and to the extent that it is not repugnant to or destructive of our form of government. *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231 (1955).

[3] It is interesting to note that the Constitution of North Carolina adopted in 1868 contained, in Section 11 of Article 2, the following provision:

> "The general assembly shall not have power to pass any private law to alter the name of any person, . . . but shall have power to pass general laws regulating the same." Vol. 1, Mordecai's Law Lectures, 2d Ed. 18 (1916).

The Constitution still prohibits the General Assembly from enacting any private, local, or special act or resolution altering the name of any person. N. C. Constitution, Art. II, § 24(1)(n). This provision has been codified as G.S. 101-1 which provides that "The General Assembly shall not have the power to pass

any private law to alter the name of any person, but shall have power to pass general laws regulating the same."

[4] The General Assembly has, by Chapter 101 of the General Statutes of North Carolina, enacted general laws regulating the change of a person's name, and prescribing a procedure therefor. Many other states have done so. See 57 Am. Jur. 2d, *Name*, § 11, p. 282 (1971). It is generally held that these statutes do not abrogate the common law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise. They merely affirm and are in aid of the common law rule and provide an additional method of effecting a change of name and, more importantly, provide a method for recording the change. *In re Evett's Appeal, supra* (and cases there cited); 5 Journal of Family Law 222; Application of Lawrence, 128 N.J. Super. 312, 319 A. 2d 793 (1974); 57 Am. Jur. 2d, supra.

G.S. 101-2, in setting out the procedure for changing one's name, provides that "[a] person who wishes, *for good cause shown*, to change his name must file his application before the clerk of the superior court of the county in which he lives, having first given 10 days' notice of the application by publication at the courthouse door." (Emphasis supplied.)

G.S. 101-3 prescribes the information which the application shall contain, and G.S. 101-4 requires that the applicant shall file with the petition proof of his good character "which proof must be made by at least two citizens of the county who know his standing." G.S. 101-5 provides that "[i]f the clerk thinks that *good and sufficient reason exists* for the change of name, it shall be his duty to issue an order changing the name of the applicant from his true name to the name sought to be adopted." Chapter 101 also provides for recording the name change on the public records of the county and with the State Registrar of Vital Statistics, and further that a person may change his name only once under the provisions of the statutes except that he shall be permitted to resume his former name upon compliance with the requirements and procedure set out therein.

[5] While it is true that under the common law standard a showing of fraud or misrepresentation akin to fraud is necessary to deny a change of name, the statutes providing a procedure for change of name are not absolute in granting the privileges but are usually so phrased as to leave it in the reason-

able discretion of the court hearing the petition either to grant or deny it. While it is generally held that some substantial reason must exist before the court is justified in refusing to grant the petition, it is also the general rule that the court is not subject to the whim or capricious desire of a petitioner to change his name. See 57 Am. Jur. 2d, *Name*, § 10, p. 282 et seq. (1971); 5 Journal of Family Law, supra; Petition of Hauptly, ____ Ind. ____, 312 N.E. 2d 857 (1974); Application of Lawrence, supra; annotation, "Duty and discretion of court in passing upon petition to change name of individual," 110 A.L.R. 219 (1937) and cases there cited.

It is, of course, a matter of common knowledge that persons in the world of entertainment and like occupations quite often use an assumed or stage name quite different from their birth given name or the name assumed upon marriage. It is also a matter of common knowledge that quite frequently a married woman who has her separate professional career will use in the practice of her profession the name by which she is generally known to her patients or clients or colleagues while using her husband's surname socially and familially. These situations rarely cause confusion, and usually do not require application of the policy behind the name changing statutes. However, with the increasing mobility of our society, and the growing dependence upon credit cards, automated check cashers, charge accounts, computerized record keeping both in commerce and in government, numerous name changes can lead to chaotic confusion. Thus, it appears completely obvious that to provide a procedure whereby one can secure a change of name through legal procedure with a provision for proper recordation thereof among the public records is desirable and far less objectionable than the common law provision. While we find nothing in the law which states that by marriage a woman gives up her right as a person to change her name as anyone else might change his or hers, nevertheless, we still assume that the great majority of women, upon becoming married, will follow established custom and tradition and adopt and use the surname of the husband. There are and will be those who will hear a different drummer and step to that music, and the fact that they will constitute a definite minority should not foreclose to them the invocation of the provisions of the statute.

[6, 7] Our General Assembly, recognizing there are circumstances under which a legally sanctioned change of name may

be warranted—regardless of the attendant burdens to the bench and bar, commerce, government, and society—has provided the procedure. In so doing, the General Assembly has provided that a person may change his name under the statute *for good cause shown and for good and sufficient reasons.* This contemplates a hearing, and petitioner has the burden of establishing that it is just and reasonable that the petition be granted—not merely that petitioner desires it and that the request is without fraud. We are of the opinion that the words "for good cause shown" and "good and sufficient reason" mean more than merely the absence of fraud. Each petitioner here alleged that her true name is her husband's surname, and she desired to resume her maiden or birth given name "for personal and professional reasons." None offered evidence. We do not think this is sufficient to establish "good cause shown" or "good and sufficient reason." In their brief, they set out the evidence they could have given. The court's judgment, in each case, states that the petitioner was offered the opportunity to present evidence and refused to do so except for the introduction of the pleadings. In each judgment the trial court found that the petitioner had not shown good and sufficient reason for allowing the change of name requested and denied the relief sought. With this finding we agree and this action of the trial court is affirmed. Petitioners may, if so advised, file new petitions. The trial court further found in each judgment that the relief sought by the proceeding is unnecessary for the reasons set forth in conclusion No. 5.

To the extent that the court, in denying relief and dismissing the petition, based its action upon its finding that the relief sought is unnecessary, it did so erroneously.

Affirmed.

Judges VAUGHN and CLARK concur.

CLARK, Judge, concurring:

Though concurring in the result and also the conclusion of the majority that a married woman may change her name as provided by Chapter 101 of the General Statutes of North Carolina, I do not agree that she is under no legal compulsion to assume her husband's surname. That upon marriage the wife by operation of law takes the husband's surname is based on

custom extending back for centuries into the heritage of western civilization. It has ripened into a common law rule that has been generally recognized by the states, including by implication the State of North Carolina. See generally *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971); 2 Lee, N. C. Family Law, § 221 (3d ed. 1963); Annot., 35 A.L.R. 417 (1925); 57 Am. Jur. 2d, Name, § 9 (1971); 65 C.J.S., Names, § 3(c) (1966).

Z. W. AUSTIN v. WELLES WILDER AND ODELL BARTLETT

No. 7418SC1090

(Filed 18 June 1975)

1. **Duress— filing of suit and lis pendens — economic duress — summary judgment improper**

In an action to recover on a promissory note, the trial court erred in granting summary judgment for plaintiff where plaintiff alleged that he sued defendants for sums owed him on account of a joint venture between the parties for construction of apartments, plaintiff and defendants settled the dispute and as part of the agreement defendants paid plaintiff $10,000 and executed a promissory note for $15,000, defendants alleged that plaintiff voluntarily withdrew from any business association with defendants no later than February 1971, in July 1971 defendants held an option on land for the apartment project and obtained in the same month a commitment for a construction loan and permanent financing for the project, learning that the loan was about to be closed, plaintiff filed his civil action against defendants and filed notice of *lis pendens* on the land upon which the apartments were to be built, the notice of *lis pendens*, if not removed, would have prevented the loan from being made to defendants, there was no immediately available alternative source of financing, defendants, lacking sufficient time to oppose plaintiff's lawsuit or to establish the invalidity of the notice of *lis pendens*, were forced to accede to plaintiff's demands or face severe economic losses far in excess of the amount which plaintiff demanded, and only because of this "severe economic duress" defendants signed the promissory note and transferred the $10,000 to plaintiff.

2. **Duress— filing of civil suit — misuse of process — duress recognized**

Ordinarily the filing of a civil suit to establish a claim, whether the claim be ultimately determined to be well founded or not, will not in itself be sufficient to show any wrongful duress imposed upon the defendant in such suit; however, when the plaintiff goes further and wrongfully perverts or abuses the processes of the court to coerce something for which the process was not intended, the court is warranted in granting relief to the victim of such coercion, either by recognizing an action for the tort of abuse of process, or by recog-

nizing duress such as to justify avoidance of the transactions coerced by such misuse of process.

APPEAL by defendants from *Crissman, Judge.* Judgment entered 1 October 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 March 1975.

Civil action on a promissory note. In complaint filed 10 September 1973 plaintiff alleged: On 20 July 1971 he sued defendants and others in Superior Court alleging defendants were indebted to him on account of a joint venture between the parties for construction of an apartment complex in Greensboro. On 30 July 1971 he and defendants agreed to settle the dispute. As part of that agreement defendants paid him $10,000.00 on the closing of the construction loan for the apartment complex and executed the promissory note here in suit, copy of which is attached to the complaint. The note, dated 2 August 1971, was in the principal amount of $15,000.00, bore interest at 9 percent per annum, was signed by defendants, and was payable to the order of plaintiff on the second anniversary of its date. Despite demands for payment, defendants have made no payment on the note. Plaintiff prayed judgment for $15,000.00 plus accrued interest.

Defendants answered and alleged as a defense: When plaintiff sued them in 1971 he knew he had no right or interest whatsoever in the apartment project. He also knew that defendants had negotiated for a construction loan which the lender was preparing to make and that if the lender refused to make the loan, defendants would suffer "great, immediate and devastating economic loss." Knowing this, plaintiff filed his complaint and notice of lis pendens solely to cause the lender to refuse to make the construction loan and "thereby place the defendants under such duress and compulsion that they would accede to his monetary demands, notwithstanding that these demands were invalid." Plaintiff knew that even if his claim was valid, it was not of the type for which a notice of lis pendens was permitted by G.S. 1-116. Notwithstanding knowing this, plaintiff filed a notice of lis pendens "with the malicious and extortionate intent to compel defendants to capitulate to his demands, knowing them to have no foundation in law or equity." The filing by plaintiff of the complaint and notice of lis pendens in 1971 constituted "an abuse of the judicial process of this State because plaintiff's motive in filing these documents, and especially the Notice of

Lis Pendens contrary to the requirements of law, was to place a cloud on the title and prevent defendants from obtaining their construction money, thus subjecting them to financial ruin, when plaintiff well knew that his action in no way affected title to the realty and that his claim was unfounded." Defendants prayed that plaintiff recover nothing of them on the note and counterclaimed to recover the $10,000.00 they had paid to plaintiff.

Plaintiff replied to the counterclaim, alleging that defendants had entered into the agreement settling the prior lawsuit voluntarily and with advice of counsel and that defendants had executed, in addition to the note and a memorandum of the settlement agreement, a "Release" dated 2 August 1971 by virtue of which the parties released each other from any and all claims whatsoever arising at any time prior to execution of the release, except for the obligation of defendants to pay the promissory note in the amount of $15,000.00 to the plaintiff.

Following the serving of interrogatories by plaintiff and defendants, plaintiff moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. The motion was allowed, and from summary judgment that plaintiff recover of the defendants the amount sued for in the complaint and that defendants' counterclaim be dismissed, defendants appealed.

Smith, Carrington, Patterson, Follin & Curtis by Marion G. Follin III for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by James A. Medford for defendant appellants.

PARKER, Judge.

Defendants assign error to the granting of plaintiff's motion for summary judgment. A careful examination of the record, which consists of pleadings and exhibits, answers to interrogatories, and affidavits, discloses that entry of summary judgment for the plaintiff was improper.

Entry of summary judgment is proper "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 party moving for summary judgment "has the burden of 'clearly establishing the lack of any triable issue of fact by the record

properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439." *Page v. Sloan,* 281 N.C. 697, 704, 190 S.E. 2d 189, 193 (1972).

In determining what constitutes a "genuine issue as to any material fact," our Supreme Court has stated that " 'an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. . . . [Citations omitted.]' " *McNair v. Boyette,* 282 N.C. 230, 235, 192 S.E. 2d 457, 460 (1972). Applying this test, we find that plaintiff as movant has failed to carry the burden of establishing the lack of a genuine issue of material fact in this case.

[1] Plaintiff based his motion for summary judgment upon the showing that defendants executed the note and the "Release" as part of the settlement of plaintiff's prior civil action against them. He contends that the defenses set forth in defendants' answer simply constitute an effort to relitigate the prior civil action. In response to plaintiff's motion, defendants filed their joint affidavit in which they stated the following: Plaintiff voluntarily withdrew from any business association with defendants no later than February 1971. Learning that defendants were about to acquire the requisite funds for the apartment project, plaintiff made unfounded demands on defendants for his share of the project. Defendants denied the validity of these demands. In July 1971 defendants and others held an option on land for the apartment project and had obtained in the same month, a period when any type of financing was difficult to secure, a commitment for both a construction loan and permanent financing for the project. Learning that the loan was about to be closed, plaintiff filed his civil action against defendants and filed the notice of lis pendens on the land upon which the apartment project was to be built. This notice of lis pendens, if not removed, would have prevented the loan from being made to defendants. Without the loan, the project would have failed because the time period for exercising the option was expiring and there was no immediately available alternative source of financing. Defendants, lacking time sufficient to oppose the lawsuit or to establish the invalidity of the notice of lis pendens, were forced to accede to plaintiff's demands or face certain and severe economic losses far in excess of the amount which plain-

tiff demanded. Only because of this "severe economic duress," defendants "signed a number of papers" and transferred the $10,000.00 to plaintiff.

[2] "Facts asserted by the party answering a summary judgment motion must be accepted as true." *Railway Co. v. Werner Industries,* 286 N.C. 89, 98, 209 S.E. 2d 734, 739 (1974). Applying this rule in the present case, and accepting as true the facts set forth in defendants' affidavit for purposes of reviewing the trial court's action in allowing plaintiff's motion for summary judgment, we find such facts sufficient to establish defendants' defense that their signatures on the note and their payment of the $10,000.00 were the result of duress imposed upon them by wrongful acts of the plaintiff such as to entitle them to relief. Certainly plaintiff had the right in 1971 to assert his original claim by filing suit to recover a money judgment against defendants. Courts are established for the very purpose of providing for the orderly settlement of disputed claims. Therefore, ordinarily the filing of a civil suit to establish a claim, whether the claim be ultimately determined to be well founded or not, will not in itself be sufficient to show any wrongul duress imposed upon the defendant in such suit. However, when the plaintiff goes further and wrongfully perverts or abuses the processes of the court to coerce something for which the process was not intended, the court is warranted in granting relief to the victim of such coercion, either by recognizing an action for the tort of abuse of process, *Estates v. Bank,* 171 N.C. 579, 88 S.E. 783 (1916), or by recognizing duress such as to justify avoidance of the transactions coerced by such misuse of process. *See* D. Dobbs, Handbook on the Law of Remedies, § 10.2, pp. 665-666; Dawson, Duress Through Civil Litigation (pts. 1-2), 45 Mich. L. Rev. 571, 679 (1947); Dalzell, Duress By Economic Pressure (pts. 1-2), 20 N. C. L. Rev. 237, 341 (1942). As stated in the opinion in *Estates v. Bank, supra:* "It seems to us to be beyond question that one who wantonly, maliciously, without cause, commences a civil action and puts upon record a complaint and a *lis pendens* for the purpose of injuring and destroying the credit and business of another, whereby that other suffers damages, must be liable for the legal consequences." 171 N.C. at 582.

Here, had plaintiff in 1971 filed suit only to establish his claim and to obtain a money judgment against defendants, we would find no grounds for relieving defendants from the settle-

ment made of that litigation. Plaintiff, however, went further and filed a notice of lis pendens when, if the facts set forth in defendants' affidavit be accepted as true, plaintiff had no lawful grounds under G.S. 1-116 to support the filing of a notice of lis pendens. Furthermore, still accepting the facts stated in defendants' affidavit as true, plaintiff filed the notice of lis pendens in order to coerce defendants and to accomplish an unlawful purpose for which lis pendens was never intended.

The release alleged in plaintiff's reply will not bar defendants' defense. The same duress which entitles defendants to recover the $10,000.00 which they paid and to be relieved from the obligation of the note also serves to vitiate the release.

The defendants also assign error to the trial court's denying in part their motion to compel plaintiff to answer certain specified interrogatories. Whether plaintiff's objections to such interrogatories, made pursuant to G.S. 1A-1, Rules 33 and 36(a), should be sustained is within the discretion of the trial court. *Travel Agency v. Dunn,* 20 N.C. App. 706, 202 S.E. 2d 812 (1974). The record discloses no abuse of this discretion.

For the reasons discussed, the judgment of the trial court is

Reversed.

Judges HEDRICK and CLARK concur.

WARREN E. BOWES, ROBERT M. MOORE, MELVIN W. LONG, S. N. BROACH, TRUSTEES OF WHEELER'S CHURCH v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 759DC143

(Filed 18 June 1975)

1. Insurance § 117— fire insurance — hostile or friendly fire

Even though a fire may be spatially confined to its intended place, if it is extraordinary, or excessive, and unsuitable for the purpose intended, and is in a measure uncontrollable, the fire is "hostile" as distinguished from "friendly" and would be covered under standard form fire insurance policies in this State; whether a spatially confined fire has become excessive within the contemplation of the parties to an insurance policy is for the jury pursuant to proper instructions in the particular case.

2. Insurance §§ 117, 136— instructions on hostile fire

In an action to recover under a fire insurance policy for smoke and soot damage to a church from fires in gas heating units in the church, the trial court erred in limiting its definition of hostile fire to the concept of "uncontrollability" since the court should have broadened its definition of hostile fire to include a fire that has become excessive even though it remains spatially confined to its intended place.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 23 September 1974 in District Court, PERSON County. Heard in the Court of Appeals 16 April 1975.

This action was brought by the trustees of Wheeler's Church against the defendant to recover for fire and smoke damage allegedly covered by a policy of fire insurance issued by the defendant to plaintiff. It is alleged that on or about 7 February 1973, Wheeler's Church was partially damaged by fire resulting in $1,708.59 property damage. Plaintiff filed timely proof of loss with defendant, but defendant refused to pay the loss. Plaintiff filed an alternative claim for relief pursuant to the extended coverage provisions in the policy for smoke damage. Defendant answered denying all pertinent allegations and defended on the grounds that the loss complained of was not such a loss as was covered by the policy. In particular, defendant alleged that the extended coverage provisions were inapplicable since the policy explicitly required heating and cooking units to be vented before coverage would exist, there being no vents on the heating units which caused the damage. Secondly, defendant alleged that the fire which presumably caused the damage in the present case was not a "hostile" fire and absent such a fire, no coverage existed.

Three witnesses testified for the plaintiff that they arrived at the church at approximately the same time to attend a funeral service and that upon entering the church discovered that the sanctuary was filled with smoke. There were four gas burning heating units in the church, each unit being approximately thirty inches high and twenty-four inches wide. These units normally operated by igniting gas emitted from a line of tubes in the bottom of the unit, producing flames which eventually caused a porcelain or asbestos waffle grille assembly above it and part way up the unit to heat to a red glow. They discovered that the flames on two of the units were leaping up over the top of the entire unit. On one the flames were leaping approxi-

mately four inches over the unit and on the other up to two feet above. The witnesses further testified that the flames were coming out of the unit and to the outside of the porcelain grille whereas they normally remain within the unit. After some effort on the part of the witnesses, the units were cut off and the flames went out. The other two units were not working. The man who undertook to repair the church testified that the damage caused by the units was of the nature of smoke and soot.

At the close of the evidence, defendant's motion for directed verdict was allowed as to the claim for relief under the extended coverage provisions, but was denied as to the principal claim for relief. The jury found for the defendant. Plaintiff appealed.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Ramsey, Jackson, Hubbard & Galloway, by Mark Galloway, for the plaintiff.

Haywood, Denny & Miller, by John C. Martin, for the defendant.

CLARK, Judge.

The trial court submitted the issue of liability to the jury on the principles of friendly versus hostile fires. Our research of reported opinions discloses that heretofore no previous case has been so submitted to the jury in this State. Therefore, before we review the various assignments of error brought forward in reference to the instructions, we shall discuss the general application and definitional limits of the doctrine.

The friendly fire-hostile fire distinction arose as an interpretative rule to find what was the actual contemplation of the parties to a fire insurance contract wherein the insurer undertook to compensate the insured "against all direct loss by fire." The leading case adopting the distinction was the English case of *Austin v. Drew,* 4 Camp. 360, 171 Eng. Rep. 115 (1815). The issue which the court had to resolve was: Did the parties intend to include within the undertaking of the insurance company any and all losses caused by fire however started and whatever its nature, or did they intend to make a distinction between intentional and accidental fires as the risk being insured against? The court felt that logically, not all fires were intended to result in a recovery against the insurer, so it sought to construe

the policy somewhere between liability in every case and no liability at all. While reports differ as to the precise facts in the case, the test ostensibly arrived at by the court was:

> "When a fire has been intentionally lit, and remains in the place designated to accommodate it, neither the insured, nor the insurer intended to treat losses arising therefrom as fortuitous—unexpected in the normal course of events." Reis, *The Friendly Versus Hostile Fire Dichotomy,* 12 Vill. L. Rev. 109, 115 (1966).

For lack of more appropriate terms, fires within the above category came to be known as friendly; those without, hostile. See *Way v. Abington Mutual Fire Ins. Co.,* 166 Mass. 67, 43 N.E. 1032 (1896). The result of the opinion is that if a fire remains spatially confined to its intended place, *situs,* it is friendly and no liability should have been contemplated by the parties. However, as later cases employing the rule have revealed, the effect in many instances creates substantive results rather than approaching the rule as interpretive in nature. We believe this is indicated by the fact that the *situs* test relies principally upon questions of actual consumption or flame, thereby disregarding in many cases the by-product element of fires such as smoke, soot, light, and heat.

As a more recent case infers, the idea of excessive heat may cause an otherwise spatially confined and therefore friendly fire to be regarded as hostile, particularly when viewed from the standpoint of an insured's policy coverage expectations. See *Barcalo Mfg. Co. v. Firemen's Mut. Ins. Co.,* 24 App. Div. 2d 55, 263 N.Y.S. 2d 807 (1965). While the case is factually distinct from that of the present case, it recognizes that "[a]n excessive or uncontrolled fire, sufficient to melt parts of a furnace, surely is included in the *intended* meaning of the words 'loss or damage by fire.'" 24 App. Div. 2d at 58 (Emphasis added). The word "intended" is emphasized for it is well established that the intention of the parties, having due regard to the situation and character of the property being insured and the natural and necessary uses to which it must be put, are paramount in interpreting the effect of insurance contracts. See *Baum v. Insurance Co.,* 201 N.C. 445, 160 S.E. 473 (1931).

[1] While the majority of the decisions throughout the country have applied the *situs* or confinement test in determining the intention and contemplation of the parties to a fire insurance

policy, it is our opinion that if the size of the fire in terms of heat becomes greater than would be anticipated by the insured and if by excessive heat, damages are caused, then it would be reasonable on the part of an ordinary insured to expect that he would be covered. The question of whether a fire, though spatially confined, has become excessive within the contemplation of the parties to the insurance policy would be properly left to the jury pursuant to proper instructions in any particular case. This accords with fairness and appropriately promotes the idea that, after all, the primary object of all insurance is to *insure*. Even though a fire may be spatially confined to its intended place, if it is extraordinary, or excessive, and unsuitable for the purpose intended, and is in a measure uncontrollable, then the fire is "hostile" as distinguished from "friendly" and is such a fire as would be covered under standard form policies in this State. We note that the principles enunciated above would apply to the situation of the parties in the present case.

[2] Turning to the questions involved here, the record reveals that the trial court instructed the jury on the hostile-friendly fire distinction as follows:

> "Now, a hostile fire is—a hostile fire means one not confined to the place intended or one not intentionally started, and it is generally considered to refer to such a fire which if it pursued its natural course would have resulted in a total or partial destruction of the insured property.
>
> When a friendly fire escapes from the place it ought to be—place it ought to be to some place where it ought not to be causing damage, it becomes a hostile fire.
>
> A hostile fire is one which becomes uncontrollable or breaks out from where it was intended to be and becomes a hostile element and where this is such a fire, fire recovery may be had for losses or damages caused by smoke and/or soot and/or heat.
>
> Now, I have talked about hostile fire. I guess in order for you to make a decision in your minds between hostile and friendly, I will give you the definition of a friendly fire.
>
> A friendly fire is one which is employed for the ordinary purpose of heating, lighting or manufacturing and it is confined within its usual limits.

> If a fire is burned any place where it's intended to burn, if those damages may have occurred where none were intended, it is a friendly fire, and the insuror [*sic*] is not liable for damages flowing therefrom."

The instructions of the trial court omitted entirely the concept of "excessiveness" and limited the definition of "hostile fire" to the concept of "uncontrollability." Since the evidence revealed that once the control valves were closed the fires went out, the jury could conclude from the quoted instructions that the fires were controllable and, therefore, friendly. The trial court should have broadened its definition of a hostile fire to include a fire that has become excessive, even though it remains spatially confined to its intended place. Controllability is not control in the sense that one can put out the fire, but control in the sense that the apparatus producing the flame at the time the damage is occurring is operating within reasonably defined operating limits. If the heat being produced substantially exceeds what one could expect the apparatus to produce, the fire becomes hostile. See generally, Vance, *Friendly Fires*, 1 Conn. B.J. 284 (1927). The broader definition of a hostile fire, with the concept of excessiveness, is a more realistic recognition of the multiple characteristics of a fire and of the risks contemplated and intended to be covered in the fire insurance policy.

For error in the instructions of the trial court, the judgment is vacated and the cause remanded for a

New trial.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAVID HACKETT

No. 7530SC223

(Filed 18 June 1975)

1. Constitutional Law § 30— speedy trial — Sixth Amendment — preindictment delay — due process

While the Sixth Amendment right to a speedy trial does not apply until the defendant is accused, either by indictment, information or arrest, the due process clause of the Fourteenth Amendment is applicable and would require dismissal of the indictment if the preindictment delay caused substantial prejudice to defendant's right to a fair trial.

2. Constitutional Law § 30— preindictment delay — due process

Defendant's right to due process was not violated by the delay between alleged narcotics offenses on 9 May 1974 and his indictment and arrest for the offenses on 30 September 1974, though defendant contended the delay had resulted in loss of memory of the events of the day in question, where the reason for the delay in indicting defendant was to permit the completion of an investigation of drugs at Western Carolina University by undercover agents and to prevent dispersal of other persons engaged in the drug traffic.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 5 December 1974 in Superior Court, JACKSON County. Heard in the Court of Appeals 14 May 1975.

Defendant pled not guilty to charges of on 9 May 1974 (1) sale and delivery of more than five grams of marijuana, and (2) possession of more than five grams of marijuana with intent to sell. On 30 September 1974, the indictment was returned by the grand jury, and on the same day defendant was arrested.

The case was calendared for trial during the week of the Session beginning 2 December 1974. On Tuesday, 3 December, defendant filed a written motion to dismiss on the grounds that the State had purposely and arbitrarily delayed trial, and that the delay had resulted in loss of memory of events on 9 May 1974 and was prejudicial to his defense.

In the hearing on the motion, Dan Crumley, employed as undercover agent to obtain evidence of drug offenses on the campus of Western Carolina University, testified that he drove out to a house in the Glenville-Cashiers area, purchased a bag of marijuana from defendant for $10.00, and that his investigation was complete on that day. Crumley gave the bag to S.B.I. Agent Charles Hess on 14 May, who in turn gave it to S.B.I. Agent James T. Maxey. Agent Maxey mailed the bag to the Chemistry Laboratory of the S.B.I. in Raleigh.

Agent Maxey testified that Dan Crumley and two others were used as undercover agents in a drug operation in the area of Western Carolina University during the period from late January 1974 to the following July or August, and the defendant had a continuing reputation for dealing in drugs.

Assistant District Attorney John Snow testified that if there had been grand jury action on the drug charges before the college closed in August, the students engaged in drug traf-

fic would have dispersed and the action would have exposed the cover of the agents. Consequently, the delay was not to gain any advantage for the State at trial.

Defendant testified that he did not remember anything that happened on 9 May but he did remember not seeing Dan Crumley on that date; that he graduated from Western Carolina on 9 August and went to his home in Greenwood, South Carolina.

The trial judge found facts and concluded: "That although earlier date of charge would have made easier the preparation of a defense to the charge lodged against the defendant, it is clear that the State delayed issuance of the bill of indictment or the initiation of a charge for the purpose of bringing to a successful conclusion a massive effort to curtail or possibly destroy the illegal distribution of controlled substances in the Western Carolina College area;" and the court further concluded that the defendant's constitutional rights had not been violated. The motion to dismiss was denied.

At trial, undercover agent Crumley testified that he was a student at Western Carolina University and he had known the defendant for two years; that when he went to the house in the Glenville-Cashiers area and bought the marijuana from defendant there were ten to fifteen people in the house; and that he transferred to Elon College in June. The State's evidence also tended to show chain-of-custody of the marijuana to the S.B.I. drug laboratory in Raleigh and return; and that based on chemical analysis the substance was marijuana. Defendant testified that he had never been in a house in or near Cashiers, and that Crumley had accused him of stealing his television in early spring, 1973.

On the charge of selling marijuana the jury was unable to agree and the trial court declared a mistrial. The defendant was convicted of possession of marijuana with intent to sell; he appealed from the judgment entered 5 December 1974 imposing a jail sentence of five years, and suspending for five years that portion of the sentence beginning after 6 December 1976, then placing defendant on probation for five years.

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

Erwin and Beaty, by James A. Beaty, Jr., for defendant.

CLARK, Judge.

We have reviewed all assignments of error preserved by the defendant and find it would serve no useful purpose to discuss any of them except those which raise the following question: Did the trial court err in denying the motion to dismiss on the grounds that the State's delay in charging and arresting the defendant violated due process and his right to a speedy trial?

In *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967), the Supreme Court of the United States held that the Fourteenth Amendment made applicable to the states the Sixth Amendment guaranty of a speedy trial. *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), sets out the criteria by which the speedy trial right is to be judged.

[1] However, the factual situation of the case at bar does not raise the question of violation of the Sixth Amendment right to a speedy trial because this provision has no application until the defendant is accused, either by indictment, information or arrest. Here the defendant contends that the delay between the alleged time of the offense and the indictment and arrest was prejudicial to him. Though the Sixth Amendment has no application here, the due process clause of the Fourteenth Amendment is applicable and would require a dismissal of the indictment if the preindictment delay caused substantial prejudice to the defendant's right to a fair trial. *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971).

Exactitude is impossible in determining when the delay is so long that due process is denied. In the exercise of the adjudicative process the courts should base their determination on all of the circumstances, without the restriction of narrow procedural rules or limiting criteria.

The State has the duty of bringing the accused to trial in our system where justice is supposed to be speedy but deliberate. Where the State delays deliberately to gain a trial advantage, this should be given great weight; delay as a result of negligence should be weighed less heavily.

On the other hand, the defendant in support of his motion to dismiss has the responsibility of asserting his right to due process. Except where the delay is so unusually long that preju-

dice may be inferred, he must show the seriousness of his deprivation, such as death or disappearance of witnesses, or impairment of memory. The court should give significant weight to creditable evidence of his deprivation but little or no weight to a purely formal and unsupported objection or to a false claim which is a part of his defense strategy.

[2] Turning now to the circumstances of the case before us, we first note that the defendant is charged with a drug offense in which the State relies primarily on the testimony of an undercover agent. We must recognize and consider the role played by informants and undercover agents in the apprehension of drug violators, and the need in most instances to keep their identity confidential for the purpose of protecting their safety and continuing their use effectively. In this case the State used the witness Dan Crumley and two others as undercover agents in a program to discover drug offenders at Western Carolina University during the period from January-February to July-August, 1974. Though Crumley left the campus in June, there was evidence that the program continued until the end of the summer session in early August and that arrests prior to that time would have resulted in a dispersal of other student offenders.

The indictment was presented to the grand jury and returned on the first day of the September 30th, 1974 Session of the Superior Court. The preceding mixed session of the court in Jackson County was that of 24 June, 1974.

The defendant claimed that because of the delay in indictment and arrest his memory was impaired or lost; that he remembered none of the events of the day in question; but that on that day he was not in the house in the Glenville-Cashiers area referred to by undercover agent Crumley. Admittedly, it is difficult to offer supporting evidence of loss of memory, but it is noted that the record on appeal does not reflect that the defendant moved for a bill of particulars or made any discovery effort to determine the identity of the owner, or tenant, or the ten to fifteen persons that Crumley testified were present in the house when he bought the marijuana from defendant. Under these circumstances the defendant's claim of prejudice loses some of its force.

The defendant relies on *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969), which involved a preindictment delay

of four years while the defendant was in prison for other crimes. Justice Sharp (now Chief Justice), for the Court, writes: "A delay of four years in securing an indictment is, nothing else appearing, an unusual and an undue delay. [Citations omitted.] The four-year delay in this case was the purposeful choice of the prosecution, and it created the reasonable possibility that prejudice resulted to defendant. Therefore, the action against him must be dismissed. . . ." 275 N.C. at 277.

The defendant also relies on *Ross v. United States,* 349 F. 2d 210 (D.C. Cir. 1965), cited with approval in *State v. Johnson, supra,* wherein the court held that a seven-month delay between a narcotics offense and the swearing out of a complaint violated defendant's right to due process because it interfered with defendant's ability to present an effective defense.

State v. Johnson, supra, involved an inordinate delay deliberately caused by the State which was sufficient in itself to create the inference or presumption of prejudice to defendant. In *Ross v. United States, supra,* it appears that the weakness of the government's case, and particularly the unreliability of the identification of the accused, was given significant weight by the court in reaching its decision. In our opinion it is appropriate for the court to consider whether the delay increased the probability of an erroneous conviction of an innocent man. We find the *Johnson* and *Ross* cases clearly distinguishable. We find more comparable circumstances in *United States v. Jackson,* 504 F. 2d 337 (8th Cir. 1974), where there was a delay of eleven months between the drug offenses and indictment, and in *United States v. Norton,* 504 F. 2d 342 (8th Cir. 1974), where there was a delay of five and one-half months between the drug offense and indictment. In both cases the convictions were upheld.

In the conclusion of the learned and able trial judge that the defendant's right to due process was not denied, and in the trial, we find.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

State v. Widemon

STATE OF NORTH CAROLINA v. RANDOLPH WIDEMON ALIAS RANDOLPH WILLIAMS

No. 7527SC9

(Filed 18 June 1975)

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

A witness's in-court identification of defendant was based on the witness's observation of defendant as he ran within 8 or 10 feet of the witness immediately after the shooting in question, and the identification was not the result of an illegal and impermissibly suggestive confrontation between the witness and defendant at the police station on the morning following the shooting.

2. **Criminal Law § 84; Searches and Seizures § 1— trespasser — standing to question validity of search**

Defendant was without standing to question the validity of a warrantless search of the house where defendant was arrested since defendant was a trespasser therein.

3. **Criminal Law § 96— reference to defendant as prison escapee — withdrawal of evidence**

The unexpected and volunteered statement of incompetent evidence by a witness making reference to the fact that defendant was a prison escapee was rendered harmless to defendant by the prompt and emphatic action of the trial judge in withdrawing the evidence from the consideration of the jurors and instructing them to disregard it.

4. **Homicide § 21— first degree murder in attempt to commit armed robbery — sufficiency of evidence**

Evidence was sufficient to warrant a jury finding defendant was engaged in an attempted armed robbery when the fatal shots were fired, and so the trial court did not err in overruling defendant's motions for nonsuit as to the first degree murder charge; furthermore, the jury's action in finding defendant guilty of second degree murder rendered harmless any error, if any was committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent some showing that the verdict of guilty of the lesser offense was affected thereby.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 5 September 1974 in Superior Court, GASTON County. Heard in the Court of Appeals 17 March 1975.

In separate indictments defendant was charged with the first-degree murder and attempted armed robbery of Otis Parr. Defendant pled not guilty to each charge and the cases were consolidated for trial.

The State's evidence in summary shows: Otis Parr operated a grocery store on Union Road in Gaston County. About 7:30 p.m. on 8 May 1974 the State's witness, David Goodson, was working on a truck parked across the road from the store. He heard two gunshots and heard Parr call for help. Looking into the store, Goodson saw Parr and another man fall to the floor fighting inside the store. Goodson then heard three more shots and saw the man run from the store, brandishing a pistol. The man, whom Goodson identified at the trial as the defendant, went past Goodson, passing within eight to ten feet from him, and ran into some woods near the store. Parr died that night as result of .22 caliber gunshot wounds.

Early next morning officers of the Gaston County Rural Police, while searching a vacant house approximately two miles from Parr's store, found defendant inside. He was sitting on the floor next to a padded chair, the only piece of furniture in the house. After arresting defendant, the officers searched the house and found a .22 caliber pistol stuffed into the back of the chair. At the police headquarters defendant gave a statement in which he admitted shooting Parr.

Defendant did not introduce evidence.

The court, finding that the charge of attempted armed robbery was merged into the first-degree murder charge, submitted to the jury only the issues as to defendant's guilt or innocence of first-degree murder and the lesser included offenses of second-degree murder and manslaughter. The jury found defendant guilty of murder in the second degree, and from judgment sentencing defendant to prison for a term of thirty years, to commence at the expiration of a sentence previously imposed upon defendant in Guilford County on 27 October 1972, defendant appealed.

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

Joseph B. Roberts III for defendant appellant.

PARKER, Judge.

[1] Defendant challenges the admissibility of Goodson's in-court identification testimony on the ground that it was the result of an illegal and impermissibly suggestive confrontation between the witness and defendant at the police station on the

morning following the shooting. No evidence concerning this confrontation was admitted before the jury. Before admitting Goodson's in-court identification testimony, the judge conducted an extensive voir dire examination, at the conclusion of which he entered an order making detailed factual findings both concerning the circumstances under which the pretrial confrontation occurred and concerning the circumstances under which the witness had observed defendant at the scene of the crime. Based on these detailed findings, the judge found and concluded that "[i]t is clear and convincing from the evidence that Goodson's in-court identification of the defendant originated solely upon Goodson's observation of the defendant at the scene of the alleged crime and was independent of any confrontation or show up procedure at the police station."

Even had there been any illegal or impermissibly suggestive procedures in connection with the pretrial confrontation at the police station, and the trial judge found none, the in-court identification testimony was rendered competent by the above-quoted finding. "It is well established that the primary illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the in-court identification is of independent origin." *State v. Henderson,* 285 N.C. 1, 12, 203 S.E. 2d 10, 18 (1974). Here, the trial judge's determination that Goodson's in-court identification was of independent origin was supported by competent evidence. It is, therefore, binding on this appeal. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974). There was no error in admitting Goodson's in-court identification testimony.

[2] Defendant next contends that the court erred by admitting in evidence the pistol which the officers found by a warrantless search of the house where defendant was arrested. Defendant, a trespasser in the house, has no standing to question the validity of that search. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Jennings,* 16 N.C. App. 205, 192 S.E. 2d 46 (1972); Annot., 78 A.L.R. 2d 246, § 8 (1961).

[3] In an unresponsive answer to a question on direct examination, one of the State's witnesses, a police officer, stated:

> "We were looking for Mr. Widemon in reference to his being an escapee and—"

Defense counsel then objected and moved to strike. The court promptly sustained the objection and motion and emphatically

instructed the jurors not to consider the witness's answer but to erase it from their thoughts. Based on this incident, defendant moved for a mistrial, which motion was denied. In this we find no error. The unexpected and volunteered statement of incompetent evidence by the witness was rendered harmless to defendant by the prompt and emphatic action of the trial judge in withdrawing the evidence from the consideration of the jurors and instructing them to disregard it. *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193 (1954).

[4] Defendant assigns error to the denial of his motions for nonsuit. In this connection he contends that there was insufficient evidence to support a jury finding that he was engaged in an attempted armed robbery when the fatal shots were fired. The trial judge did not submit the attempted armed robbery charge to the jury as a separate offense, ruling that this charge was merged into the felony murder charge as being the element which the State relied upon to raise the offense to the first degree. Defendant's assignment of error and his contentions concerning the denial of his motions for nonsuit are, therefore, presently pertinent only insofar as they relate to the charge of first-degree murder. Applying the well-established rule that on motion for nonsuit in a criminal case the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference which may be legitimately drawn from the evidence, we find the evidence in the present case sufficient to warrant a jury finding defendant was engaged in an attempted armed robbery when the fatal shots were fired. Therefore, we find no error in the court's overruling defendant's motions for nonsuit as to the first-degree murder charge. Furthermore, the jury's action in finding defendant guilty of second-degree murder rendered harmless any error, if any was committed, in submitting to the jury the question of defendant's guilt of the more serious offense, 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, 186 S.E. 2d 667 (1972). Defendant has not shown that his conviction was affected in any way by the jury's consideration of his possible guilt of the more serious offense.

Defendant assigns error to a portion of the court's charge to the jury in which the court referred to the house in which defendant was found on the morning after the shooting as a house "which appeared to have been abandoned." He contends

this characterization of the house was not supported by the evidence and that he was prejudiced thereby. We do not agree. On the voir dire examination, the arresting officer did describe the house as "an abandoned house." Although no such express description was used by any witness before the jury, evidence was admitted before the jury that the house was a four-room frame house in which "there was no furniture except one old padded chair located in the back room of the house." Defendant suffered no prejudicial error when the judge referred to the house as an abandoned house.

Defendant assigns as error that the court failed to charge the jury adequately as to which acts of the defendant would have amounted to an attempted armed robbery. Any error in this connection, and we find none, would be rendered harmless by the verdict rendered.

We have carefully examined all of defendant's remaining assignments of error and find no prejudicial error. Read contextually and as a whole, the court's instructions to the jury clearly and correctly applied the law arising on the evidence in this case. There was no error in failing to charge as to excusable homicide by accident or misadventure, as there was no evidence in this case to raise any question of accident or misadventure.

In defendant's trial and in the judgment appealed from, we find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

HEPSIE H. PRICE v. J. C. PENNEY COMPANY, INC.

No. 758SC54

(Filed 18 June 1975)

1. Libel and Slander § 12— one year statute of limitations — accrual from publication date

To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, and the action accrues at the date of the publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date. G.S. 1-54(3).

2. Libel and Slander § 12; Rules of Civil Procedure § 15— failure to plead slander — amended complaint — no relation back — statute of limitations

Plaintiff's claims for relief based on libel or slander were barred by the statute of limitations where plaintiff did not allege any slanderous statement made within one year before she filed her original complaint or her proposed amended complaint, nor did plaintiff's claim for relief based on slander in her proposed amended complaint relate back to the date of the filing of her original complaint and thus save her action from the bar of the statute of limitations where the original complaint gave no notice of the transactions to be proved pursuant to the amended pleading which set forth an entirely new claim. G.S. 1A-1, Rule 15(c).

APPEAL by plaintiff from *Rouse, Judge.* Order entered 28 October 1974 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 March 1975.

Plaintiff commenced this action on 15 August 1973 to recover actual and punitive damages for her alleged wrongful discharge. In her complaint filed on that date she alleged: From 1957 until 1972 she was employed in defendant's store in Goldsboro. On 8 August 1972 she was called into the manager's office and informed that "observers" reported on 7 August 1972 she had failed to "ring up" the purchase of a $3.12 item, that according to these "observers" plaintiff placed the $3.12 in the cash register and closed it but did not ring up the sale. Plaintiff was informed that the manager had checked the register at the end of the day, that it "came out even," and he "wanted to know where the $3.12 was." Plaintiff denied any knowledge of the $3.12 item and denied having failed to ring up the sale, but despite her protestations of innocence, plaintiff's employment was wrongfully terminated without just cause. Because of the wrongful discharge plaintiff suffered damages because of lost benefits from defendant's pension and profit-sharing plan and because of severe emotional and mental distress. She prayed for recovery of $5,000.00 for each of these two elements of damages and for an additional $10,000.00 as punitive damages.

Defendant filed answer in which it denied that plaintiff's discharge was wrongful, alleged that she had been discharged for violation of established sales procedure rules, and alleged that in October 1972 it made final and complete settlement with plaintiff of her credits in the savings and profit-sharing plan.

On 8 July 1974 plaintiff filed a motion pursuant to Rule 15(a) of the Rules of Civil Procedure for leave to amend her complaint. In this motion it is stated:

> "At the time of the filing of this action, the plaintiff did not know the identity of the 'observers' who allegedly reported her for violating sales procedures of the defendant. Subsequent to that time, she has learned through discovery that these 'observers' were actually paid employees of the defendant and she now believes she has a claim against the defendant for slander. In addition, the plaintiff feels she has a claim for relief against the defendant for intentional infliction of severe emotional harm as set forth in her Third Claim for Relief."

Attached to the motion was a copy of the proposed amended complaint which plaintiff sought leave to file. In this, three claims for relief are stated. The first states a claim to recover $5,000.00 damages for lost pension and profit-sharing benefits resulting from the alleged wrongful discharge and is based upon substantially the same allegations as are contained in plaintiff's original complaint. The third claim for relief states a claim to recover $5,000.00 compensatory and $10,000.00 punitive damages for severe emotional distress caused plaintiff by her wrongful discharge.

In the second claim for relief set forth in the proposed amended complaint, plaintiff alleged that the two "observers" who reported on 7 August 1972 that plaintiff failed to "ring up" the $3.12 purchase item were in fact hired employees of the defendant whose primary duties consist of spying upon other employees, that the statements of the two "observers" were false, malicious, and slanderous *per se*, and that as a consequence of the unlawful slander of plaintiff by the agents of defendant, her employment was wrongfully terminated. Plaintiff further alleged that subsequent to her discharge she petitioned defendant to have her name cleared and to be reinstated, but the defendant through its agents republished the slanderous statement and "the agents of the defendant, on more than one occasion after her dismissal, until and including October 12, 1972, communicated and republished the slander through written and spoken words."

Defendant opposed plaintiff's motion to amend her complaint, in its response alleging that the second claim for relief

is an action for libel and slander and is barred by the statute of limitations.

The court entered an order allowing plaintiff's motion insofar as plaintiff's motion seeks leave to file an amended complaint containing the allegations of the proposed first and third claims for relief. The court ruled, however, that it was without discretion to allow plaintiff to file an amended complaint containing the allegations of the second claim for relief "for the reason that the applicable Statute of Limitations has expired and that the proposed amendment would not relate back to exempt any allegation contained within the Second Claim for Relief from being barred by the Statute of Limitations."

From that portion of the order which denied her leave to file an amended complaint containing the allegations of the second claim for relief, plaintiff appealed.

Dees, Dees, Smith, Powell & Jarrett by Tommy W. Jarrett for plaintiff appellant.

Harris, Poe, Cheshire & Leager by W. C. Harris, Jr. for defendant appellee.

PARKER, Judge.

[1] To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, G.S. 1-54(3), and the action accrues at the date of the publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date. *Gordon v. Fredle,* 206 N.C. 734, 175 S.E. 126 (1934).

[2] Plaintiff's original complaint filed 15 August 1973 does not allege any slanderous statement made within one year before it was filed. Her proposed amended complaint filed 8 July 1974 does not allege any slanderous statement made within one year before it was filed. Therefore, any claim for relief which plaintiff has alleged or attempted to allege based upon libel or slander is barred by the statute of limitations unless the claim which plaintiff seeks to assert as her second claim for relief in her proposed amended complaint can properly be held to relate back to the date of the filing of her original complaint.

G.S. 1A-1, Rule 15(c) provides:

> *"Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

Here, the original complaint does not give notice of any "transactions, occurrences, or series of transactions or occurrences" taking place after 8 August 1972. The allegation in the original complaint that "defendant later ratified all actions of the store manager," clearly refers to the actions of the store manager on and prior to 8 August 1972, since these were the only actions on his part which were in any way mentioned in the original complaint. Certainly, the broad statement that "defendant later ratified" the store manager's actions in discharging plaintiff on 8 August 1972 does not give notice of any transaction or occurrence involving a subsequent slander or libel of plaintiff.

Although Rule 15 of the North Carolina Rules of Civil Procedure is not identical with the Federal Rule 15, the two are sufficiently similar that authorities discussing the Federal Rule are here pertinent. Speaking of the Federal Rule, the authors of 6 Wright & Miller, Federal Practice and Procedure, had this comment in § 1497, pp. 489-490: "When plaintiff attempts to allege an entirely different transaction by amendment, as, for example, the separate publication of a libelous statement . . . the new claim will be subject to the defense of statute of limitations." The same authority, at § 1474, p. 384, states: "[W]henever a party seeks to add an entirely new claim for relief under Rule 15(a), it will be subject to the applicable statute of limitations and may not be allowed if it is time barred."

In the second claim for relief set forth in plaintiff's proposed amended complaint, she has set forth an entirely new claim as to which the allegations in her original complaint give no notice. The new claim asserted in the amended complaint was barred at the time it was filed. The court correctly denied her leave to file the amendment, and the order appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. RICKY RAY HARRIS

No. 7529SC253

(Filed 18 June 1975)

1. **Criminal Law § 145.1— probation revocation — absence of arraignment**

The trial court did not err in failing to arraign defendant in a proceeding to revoke his probation.

2. **Criminal Law § 145.1— probation revocation hearing — sufficiency of notice**

Defendant received notice of his probation revocation proceeding within the meaning of G.S. 15-200.1 where defendant was arrested by a police officer pursuant to an "authority to arrest" signed by his probation officer stating that defendant had violated the conditions of his probation by failing to pay court costs, failing to remain gainfully employed, and by being convicted of driving under the influence, the officer testified the "authority to arrest" had been "executed," and defendant appeared at the hearing and was represented by counsel pursuant to the execution of the "authority to arrest."

3. **Criminal Law § 145.1— probation revocation — sufficiency of findings**

The trial court's findings supported its conclusions that defendant wilfully violated the conditions of his probation by failing to make restitution payments ordered by the court, failing to remain gainfully employed and being convicted of driving under the influence.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 5 December 1974 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 28 May 1975.

This is an appeal from an order revoking defendant's probation and activating a two-year prison sentence imposed in the District Court of Mecklenburg County on 24 May 1973.

The record discloses the following: On 24 February 1974, pursuant to an "authority to arrest" signed by his probation officer, the defendant was arrested by Officer J. D. Turner of the Marion Police Department. The authority to arrest stated that the defendant had violated the terms and conditions of a probation judgment entered in the District Court of Mecklenburg County by a "[f]ailure to pay court costs and violation of the condition of probation that he remain gainfully employed and also that he was convicted for the crime of Driving Under the Influence."

On 6 June 1974, after a hearing before District Judge Hart in McDowell County, the court made findings and conclusions

and entered an order revoking the defendant's probation. Defendant appealed to the superior court; and after a hearing in which the defendant was represented by counsel, Judge Snepp, on 3 September 1974, made findings and conclusions which, except where quoted, are summarized in pertinent part as follows: (1) The defendant entered a plea of guilty to the crime of "DAMAGE TO PERSONAL PROPERTY" at the 24 May 1973 Session of District Court held in Mecklenburg County and was given a two-year jail sentence as a Committed Youthful Offender, which sentence was suspended and the defendant placed on probation for a period of two years. (2) "[T]he defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment as hereinafter set out:

(a) That at the time the defendant was placed on probation and accepted for supervision, he was ordered in the form of the special condition of probation to pay $300.00 restitution into the Mecklenburg County Clerk's Office on or before November 24, 1973, which was to reimburse the prosecuting witness, Noel Weathers for damages incurred as the result of this offense. He was also ordered to pay $45.00 per month beginning December 24, 1973, until a total of $700.00 had been paid for the benefit of Mr. Charlie Edmonson, who incurred damages also as the result of this offense. As of February 15, 1974, no money has been received by the Mecklenburg County Clerk's Office, this being in violation of the special condition of probation that he "make restitution into the Mecklenburg County Clerk's Office in the amount of $300.00 on or before 11-24-73 and make restitution into the Clerk of Court's Office at the rate of $45.00 per month beginning 12-24-73 and a like amount each month thereafter until the sum of $700.00 is paid in full."

(b) That on or about December 22, 1973, the defendant committed the offense of Driving Under the Influence, for which offense he entered a plea of guilty at the January 31, 1974 Session of the McDowell County 29th District Court, which is in violation of the condition of probation that he "violate no penal law of any state or the Federal Government and be of general good behavior."

(c) That on or about January 24, 1974, the defendant was terminated from his employment at the Marion Manufacturing Company for being absent without excuse from his job five days in succession, and has not obtained regular employment since that date, which is in violation of the condition of probation that he "work faithfully at suitable, gainful employment as far as possible and save his earnings above his reasonably necessary expenses."

After making the foregoing findings and conclusions, Judge Snepp entered the following order:

"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED, in the discretion of the Court, that the probation, heretofore revoked, be continued to the November 25, 1974 term of this Court, on the condition that the defendant pay into the Clerk of Court of Mecklenburg County the sum of $15.00 per week beginning on or before September 6, 1974; said monies to be used to reimburse the prosecuting witnesses for damages incurred as the result of this offense as set out in the original probation judgment."

After hearings on 25 November 1974 and on 5 December 1974, Judge Snepp made the following pertinent findings and conclusions:

"The Court finds that as a condition of the Probationary Judgment imposed in the District Court Division of Mecklenburg County, defendant was ordered to pay $300.00 restitution into the Mecklenburg County Clerk's Office on or before November 24, 1973, to reimburse the prosecuting witness for damages incurred, as a result of this offense. He was also ordered to pay $45.00 per month, beginning December 24, 1973 until a total of $700.00 restitution had been paid for the benefit of one Charlie Edmonson, who incurred damages as a result of this offense. As of February 15, 1974, no money had been paid into the Office of the Clerk of Superior Court of Mecklenburg County.

The Court further finds as a fact that since the hearing at the 3 September, 1974 Session of the Superior Court for McDowell County, the defendant has wilfully failed to make the payments as ordered, although he was at the time of the order gainfully employed, but left that employment

on or about September 21, 1974, without the knowledge or permission of his Probation Officer.

Based upon the foregoing, the Court finds that the conditions of probation have been violated as set forth in the Order of the District Court Division of McDowell County, and finds that the circumstances and conditions surrounding the violations of said terms of probation have not substantially changed."

From Judge Snepp's order dated 5 December 1974 revoking the defendant's probation and activating the prison sentence imposed in the judgment entered in the District Court of Mecklenburg County on 24 May 1973, defendant appealed.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Story, Hunter & Goldsmith, P.A., by C. Frank Goldsmith, Jr., for defendant appellant.

HEDRICK, Judge.

The record on appeal contains none of the evidence heard in the district court on 6 June 1974 or in the superior court on 3 September or 25 November 1974. Five of the six exceptions noted in the record appear in the transcript of the testimony of the probation officer at the 5 December 1974 hearing in the superior court before Judge Snepp. However, none of these exceptions is based on any proceeding, ruling, or order of the court and presents no question for review. The only other exception in the record appears to be to the order of Judge Snepp dated 5 December 1974 revoking the defendant's probation and activating the prison sentence imposed at the 24 May 1973 Session of District Court held in Mecklenburg County. This exception presents the face of the record proper for review. Review is limited, however, to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form and supported by the verdict. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). An appeal alone, or an exception to the judgment does not present for review the findings of fact or the sufficiency of the evidence to support them. *Lamb v. McKibbon,* 15 N.C. App. 229, 189 S.E. 2d 547 (1972).

[1] Defendant first contends the "trial court erred in failing to arraign the defendant prior to revoking his probation."

> "A proceeding to revoke probation is not a criminal prosecution, and we have no statute in this State requiring a formal trial in such a proceeding. Proceedings to revoke probation are often regarded as informal or summary." *State v. Hewett,* 270 N.C. 348, 353, 154 S.E. 2d 476, 479 (1967).

The record discloses that the defendant was present in court and represented by counsel when the district attorney announced that the defendant was charged with a violation of the terms and conditions of his probation. This assignment of error has no merit.

[2] By assignments of error two, three, and four, defendant contends that: (1) "The trial court erred in entering judgment where no written notice of the grounds upon which revocation of the defendant's probation was prayed was served on the defendant."; (2) "The failure of the State to give notice to defendant of the charges against him a reasonable time in advance of trial violated defendant's constitutional right to due process of law."; and (3) "The superior court lacked jurisdiction to hear the State's plea for revocation where the proceedings in the district court were void for lack of notice to the defendant." Each of these contentions is without merit simply because the record discloses that the defendant received notice within the meaning of G.S. 15-200.1 when the defendant was arrested on 24 February 1974 by an officer of the Marion Police Department pursuant to an "authority to arrest" signed by the probation officer stating that the defendant had violated the terms and conditions of his probation by failing to pay court costs, failing to remain gainfully employed, and by being convicted of the offense of driving under the influence. *State v. Dawkins,* 262 N.C. 298, 136 S.E. 2d 632 (1964); *State v. Noles,* 12 N.C. App. 676, 184 S.E. 2d 409 (1971). While the officer making the return did not specifically state that the "authority to arrest" was "served" on the defendant, he did state that the "authority to arrest" was "Executed." Since the defendant appeared at the hearing and was represented by counsel pursuant to the execution of the "authority to arrest," it is obvious he had notice within the meaning of the statute. Furthermore, the defendant made no motion for a bill of particulars at the hearing in the district court, nor did he except to the judge's finding that he had notice.

[3] By his sixth assignment of error, defendant contends "[t]he evidence presented was insufficient to support a finding that the defendant had violated the terms and conditions of a probation judgment." As hereinbefore pointed out, the record contains only the evidence adduced at the hearing on 5 December 1974. Because all of the evidence is not before us and because the defendant did not except to any of the findings of fact, the question of the sufficiency of the evidence to support the findings is not presented. However, we have reviewed the findings of fact made by Judge Snepp and hold that the findings support the conclusions that the defendant has wilfully violated the terms and conditions of his probation and that the conclusions support the order executing the jail sentence imposed. See *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974). The order appealed from is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JIMMY AUSTIN NORRIS

No. 7510SC204

(Filed 18 June 1975)

1. **Automobiles § 131— failure to stop after accident — proviso concerning parked and unattended vehicles**

In the statute setting forth the offense of failing to stop at the scene of an accident which resulted in property damage, G.S. 20-166(b), the proviso concerning parked and unattended vehicles does not describe a separate offense but merely withdraws from the general language of the statute the case of a parked and unattended vehicle whose owner is not readily ascertainable; therefore, the proviso need not be negatived in the warrant.

2. **Automobiles § 131— failure to stop after accident — allegations of failure to give identifying information — parked and unattended car — no variance**

There was no fatal variance where the warrant charged defendant with violating the general provisions of G.S. 20-166(b) by failing to stop at the scene of an accident and to give certain identifying information and the evidence showed that defendant struck a parked and unattended vehicle, since a driver violates the statute by failing to stop at the accident scene, all the evidence showed that defendant failed to stop at or near the scene, and the allegations concerning fail-

ure to give the identifying information become relevant only if there is evidence that defendant immediately stopped at the scene; furthermore, there was evidence that the struck vehicle was parked in front of the home of the owner, who was present and may have been "readily ascertainable," and that defendant was therefore required to give the identifying information alleged in the warrant.

3. **Criminal Law § 99— remarks by trial judge — fair trial**

Defendant was not denied the right to a fair trial when, upon being informed by defense counsel that he would like to be heard on a motion in the absence of the jury, the court asked, "You want to be heard on it?" and stated to the jury that "I'll have to let you go to your jury room again. It won't be long. I don't know as how I would light up a cigarette," or when the court asked defense counsel out of the jury's presence, "You serious about a motion?" and thereafter stated, "All right I'll listen to you, but I can't imagine what you're going to say," and "There's not any sense in that so it's denied."

4. **Constitutional Law § 32; Criminal Law § 99— effective assistance of counsel — remark by trial judge**

Defendant was not denied his right to the effective assistance of counsel by the trial court's statement out of the jury's presence before the State's case was completed that "if the jury finds this man guilty, I'm going to put him in prison. You ought to think about that between now and the time we finish this case."

APPEAL by defendant from *Bailey, Judge.* Judgment entered 19 December 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 8 May 1975.

Upon conviction in District Court, defendant was tried in Superior Court on two warrants charging him with operating a motor vehicle on a public street, highway or vehicular area while under the influence of intoxicating liquor and with failing to stop at an accident which resulted in property damage, in violation of G.S. 20-166(b).

Bill Rawls testified for the State that on 15 June 1974, between 1:30 and 2:00 a.m., he saw a large dark automobile run into a Vega automobile, parked on Park Avenue 15 or 20 feet from the porch where he stood, and continue down the street. Jeffery Billheimer identified the Vega as his and testified that it was undamaged when he parked it in front of his house on the night in question. He later observed that the vehicle had been pushed into a telephone pole causing damage front and rear. A neighbor, David Batt, testified that on 15 June 1974, between 1:30 and 2:00 a.m., he heard a crash, ran outside, and saw a late model automobile on Park Avenue proceeding toward Hillsborough Street. He gave a description of the vehicle and

the license plate number to Officer G. L. Mack who came to investigate the incident.

Officer Mack testified that shortly after responding to the call he saw Jimmy Austin Norris, operating a Lincoln Continental, back into another vehicle in the parking lot of the Hilton Inn on Hillsborough Street. He stopped Norris and, observing his condition, placed him under arrest for driving under the influence. Norris refused to take the breathalyzer test. Officer Mack's description of the damage to Norris's vehicle and the license plate number corresponded with those given by the witness Batt.

Defendant offered no evidence, and 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.

H. Spencer Barrow, for defendant appellant.

ARNOLD, Judge.

[1] Defendant assigns error to the trial court's denial of his motions for judgment as of nonsuit on grounds of variance. He contends that the statute creates two distinct offenses, one dealing with occupied vehicles and the other dealing with parked or unattended vehicles, and that the warrant charged him with the former while the evidence supported the latter. We disagree.

G.S. 20-166 provides in part as follows:

> *"Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.*
>
> . . . .
>
> (b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided

that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c) [report to owner of parked or unattended vehicle], shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle. . . ."

In our view the proviso merely withdraws the case of a parked or unattended vehicle whose owner's identity is not readily ascertainable from the general language of the statute. It does not describe a separate offense, and therefore it need not be negatived in the warrant. *See State v. Abbott,* 218 N.C. 470, 11 S.E. 2d 539 (1940); *State v. Burton,* 138 N.C. 576, 50 S.E. 214 (1905).

[2] The statute requires that the driver of the responsible vehicle immediately stop at the scene *and* give certain identifying information. The driver violates the statute if he does not immediately stop at the scene. All of the evidence in this case tends to show that the defendant failed to stop at or anywhere near the scene. Under these circumstances the warrant's allegations that the defendant "did fail to . . . give his name, address, operator's lic. number and registration number of his vehicle to the driver and occupants of the other vehicle involved" would become relevant only if there was some evidence that he immediately stopped at the scene.

It is noted, however, that there is evidence that the damaged vehicle was parked in front of the home of the owner, who was present and may have been "readily ascertainable by the driver." If so, the defendant failed to give identifying information to the owner as alleged in the warrant. There is no variance requiring nonsuit.

Defendant's remaining assignments of error concern comments made by the court during the trial. G.S. 1-180 places a duty on the trial judge to be absolutely impartial. He is not to intimate his opinion in any way, but he is to insure a fair and impartial trial before a jury.

[3] The challenged remarks in this case were made both in and out of the jury's presence. No useful purpose would be served by setting out all of them. The following exchange is illustrative:

> "MR. BARROW: 'Your Honor, I'd like to be heard on a motion, if I could at this time out of the presence of the jury.'
>
> COURT: 'You want to be heard on it?'
>
> MR. BARROW: 'I would like to, yes sir, for the purpose of the record.'
>
> COURT: 'Ladies and Gentlemen, I'll have to let you go to your jury room again. It won't be long. I don't know as how I would light up a cigarette.'
>
> JURY ABSENT
>
> COURT: 'You serious about a motion?'
>
> MR. BARROW: 'Yes sir, I would like to make a motion for nonsuit and like to be heard on it.'
>
> COURT: 'All right I'll listen to you, but I can't imagine what you're going to say. Go ahead.'
>
> (ARGUMENT BY MR. BARROW)
>
> COURT: 'There's not any sense in that so it's denied. Bring them back. There ain't any sense in that.' "

We do not approve of the judge's critical comments. Nevertheless, while these gratuitous statements before the jury were entirely unnecessary and improper, we do not find that their probable result was prejudicial to defendant. The "bare possibility" that defendant may have suffered prejudice is not enough to overturn a guilty verdict. *See State v. Best,* 280 N.C. 413, 186 S.E. 2d 1 (1972); *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889 (1972); *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951); *State v. Brooks,* 15 N.C. App. 367, 190 S.E. 2d 338 (1972).

[4] Defendant further challenges this statement by the judge: "Now while the jury is out, I think you might as well know if the jury finds this man guilty, I'm going to put him in prison. You ought to think about that between now and the time we finish this case." This comment came before the State had finished putting on evidence. It raises the question of whether the effective assistance of counsel was impaired.

The assistance of counsel for defendant is a right guaranteed by state and federal constitutions. Improper remarks or threats by trial judges which intimidate and frustrate lawyers could cost the accused effective use of counsel. *See generally* Annot., 62 A.L.R. 2d 166 (1958). From the record it is apparent that counsel was unintimidated by the court and continued a vigorous defense of his client. Although his efforts were unsuccessful, it cannot be said that he "trimmed his sails to the judicial wind that prevailed in the courtroom during the trial. . . ." *Id.* at 191.

We have examined all of defendant's assignments of error concerning comments by the court, and we have carefully examined the record. We find

No error.

Judges MARTIN and CLARK concur.

PHILCO FINANCE CORPORATION v. WILLIAM T. MITCHELL AND WIFE, BRENDA L. MITCHELL, ELLIOTT R. GAY AND BETTY B. GAY

No. 7521SC237

(Filed 18 June 1975)

1. **Rules of Civil Procedure § 59— setting aside judgment and ordering new trial — no error**

The trial court did not err in setting aside the judgment entered on 1 November 1974 and in ordering a new trial under G.S. 1A-1, Rule 59, where the trial judge stated that he felt he had "acted too hastily in denying plaintiff's motion to reopen the case" and he wanted to have all the facts before him.

2. **Contracts §§ 14, 27— third party beneficiary — denial of motion to dismiss proper**

In an action for money judgment and claim and delivery the trial court did not err in denying defendant Mitchells' motion to dismiss where the evidence tended to show that plaintiff was a third party beneficiary of the contract between defendants Gay and defendants Mitchell, plaintiff granted the Mitchells three extensions of time for payment, and under the transfer agreement executed by all the parties the Mitchells promised to pay the balance due on laundry equipment.

3. Rules of Civil Procedure § 15— failure to object to evidence — pleadings deemed amended

Though defendants objected to testimony of three of plaintiff's employees, they did not do so on the ground that the pleadings did not conform to the evidence, and the pleadings were therefore deemed amended; moreover, the trial court determined that defendants were not surprised or prejudiced in their defense by plaintiff's proposed amendments and the court did not abuse its discretion in allowing the amendments. G.S. 1A-1, Rule 15(b).

APPEAL by defendants Mitchell from *Exum, Judge.* Judgment entered 31 December 1974. Heard in the Court of Appeals 15 May 1975.

Plaintiff Philco Finance instituted this action on 11 January 1974 seeking a money judgment and an order for claim and delivery against defendants Gay and Mitchell. In its complaint, Philco alleged the following: On 6 March 1970 the Gays entered into a conditional sales contract or installment security agreement with Woodcoe, Inc., for the purchase of commercial laundry equipment. The Gays executed a promissory note to Woodcoe, who immediately assigned all of its contractual rights to Philco Finance. A financing statement was filed in Guilford County.

The security agreement provided that the buyer should not sell or encumber the collateral without the consent of the seller. On 1 November 1970 the Gays sold the property to the Mitchells without Philco's knowledge. Thereafter, on 6 March 1973, a transfer agreement was executed between Philco Finance and the Mitchells and the Gays. Philco agreed to the sale and the Gays and the Mitchells agreed to pay the balance due on the note. The plaintiff alleges that defendants are now in default and plaintiff, having made demand, is entitled to recover the collateral and a judgment in the amount of $18,009.72.

Defendants Mitchell, in their answer, averred that they had not entered into an agreement with Philco and were not liable under any agreement between Philco and the Gays. They alleged that the transfer agreement was without legal effect, for failure of consideration, and further alleged that it was obtained by fraud and duress.

On 1 November 1974 a hearing was held and two Philco employees testified. They identified the contract and the transfer agreement. Each denied having coerced the Mitchells into

signing the agreement but neither could remember whether it was filled in when they signed it. Plaintiff then rested, reserving the right to call J. V. Morgan, the Gays' attorney, on rebuttal. Defendants moved to dismiss, and, while the judge was ruling on the motion, plaintiff requested that Mr. Morgan be allowed to testify. The judge refused the request and announced that he was entering judgment against the Gays and for the Mitchells. He directed counsel for the Mitchells to prepare a judgment for his signature.

On 4 November 1974 plaintiff moved pursuant to G.S. 1A-1, Rule 59, for the court to reconsider and amend its judgment. The next day the prepared judgment was submitted to the judge. A hearing was held on November 7 at which time the judge declined to sign the judgment and allowed plaintiff's motion to reopen the case. J. V. Morgan identified a sales agreement between the Gays and the Mitchells. In it the Mitchells agreed to pay the balance due to Philco Finance. The two Philco employees identified certain agreements between Philco and the Mitchells. In these Philco granted to the Mitchells extensions of time for payment of the balance due and the Mitchells agreed to pay the balance to Philco.

Defendants then moved for dismissal and the court denied the motion. Mitchell himself testified that Philco employees harassed him in order to obtain the extension and transfer agreements.

Having moved pursuant to G.S. 1A-1, Rule 15(b), Philco was allowed to amend its complaint to allege that it was a third-party beneficiary of the Gay-Mitchell agreement and that the Mitchells were obligated to it under the extension agreements. The court found the Mitchells liable to plaintiff under their sales agreement with the Gays, the extension agreements with Philco, and the transfer agreement. From judgment entered against all defendants, the Mitchells appealed to this Court.

Floyd & Baker, by Walter W. Baker, Jr., for defendant appellants.

A. Carl Penney for plaintiff appellee.

ARNOLD, Judge.

[1] Appellants contend that the trial court erred in setting aside the judgment entered 1 November 1974 and in ordering

a new trial. We disagree. G.S. 1A-1, Rule 59(a)(1) provides that a new trial may be granted for "[a]ny irregularity by which any party was prevented from having a fair trial." This section provides wide latitude for the trial judge to award new trials, and it does not require that he set out grounds to support his order. However, the able judge in this case indicated that he was granting the motion, under Rule 59, because he felt he "acted too hastily in denying plaintiff's motion to reopen the case" and because he wanted to have all the facts before him.

[2, 3] Appellants further contend that the court erred in denying their motion to dismiss and in allowing plaintiff to amend its complaint. Again, we disagree. Viewed in the light most favorable to plaintiff, the evidence showed that Philco was a third party beneficiary of the contract between the Gays and the Mitchells. *See generally* 4 Corbin on Contracts §§ 774-77; Restatement of Contracts §§ 133(b) and 136(1)(a). The evidence also showed that Philco granted the Mitchells three extensions of time for payment. Finally, under the transfer agreement executed by all the parties, the Mitchells promised to pay the balance due. The evidence adduced clearly was sufficient to permit recovery. *See Gibbs v. Heavlin,* 22 N.C. App. 482, 206 S.E. 2d 814 (1974). Although defendants objected to testimony of J. V. Morgan (concerning the Gay-Mitchell contract) and the additional testimony of two Philco employees (concerning the extension agreements), they did not do so on the ground that the pleadings did not conform to the evidence. When such an objection is not made, the pleadings are deemed amended. G.S. 1A-1, Rule 15(b). *See Mangum v. Surles,* 281 N.C. 91, 187 S.E. 2d 697 (1972). Rule 15(b) provides, moreover, that "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. . . ." The court's ruling on a motion to amend is not reviewable absent a showing of abuse of discretion. *Service Co. v. Sales Co.,* 264 N.C. 79, 140 S.E. 2d 763 (1965). In the instant case, the court found that the defendants were not surprised or prejudiced in their defense by the proposed amendments. We find no abuse of the trial court's discretion.

The judgment is

Affirmed.

Judges BRITT and CLARK concur.

LAWRENCE E. KACZALA v. GEORGE GRADY RICHARDSON v. CITY OF WILMINGTON

No. 755SC210

(Filed 18 June 1975)

Appeal and Error § 62— appeal by plaintiff — new trial — defendant's counterclaim

Where the jury at the first trial found defendant negligent and plaintiff contributorily negligent, plaintiff's claim and defendant's counterclaim were dismissed, plaintiff appealed and the Court of Appeals awarded plaintiff a new trial, the Court of Appeals did not intend to grant a partial new trial limited to plaintiff's claim but intended to grant a new trial on all issues, including defendant's counterclaim.

Judge BRITT dissenting.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 27 December 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 13 May 1975.

Plaintiff instituted this action against defendant Richardson seeking to recover damages for personal injuries sustained by him while operating a fire truck for the City of Wilmington when it collided at an intersection with an automobile operated by Richardson. Richardson answered, denied negligence, alleged that plaintiff was contributorily negligent and asserted a counterclaim against plaintiff Kaczala and a third party complaint against Kaczala's employer, the City of Wilmington.

At trial, eight issues were submitted to the jury. Only two were reached. The jury found defendant negligent and plaintiff contributorily negligent. Judgment was entered dismissing the action.

Plaintiff appealed. This court awarded a new trial because the court allowed a police officer, called by plaintiff, to state on cross-examination that his investigation revealed that the fire truck had run through a red light. The opinion in that case on appeal is reported at 18 N.C. App. 446, 197 S.E. 2d 21.

When the case was tried the second time the jury found that defendant Richardson was not negligent, that plaintiff Kaczala was negligent and awarded defendant Richardson damages on his counterclaim.

Prior to the call of the case for the second trial plaintiff and the City had moved that the trial be limited to the trial of plaintiff Kaczala's action against defendant. The motion was made on the grounds that the counterclaim and cross action had been finally determined adversely to defendant Richardson at the first trial from which Richardson did not appeal. The judge delayed ruling on the motion. Upon the coming in of the verdict in defendant Richardson's favor, the judge declined to enter judgment thereon and, in effect, allowed plaintiff's motion. Judgment was entered decreeing that neither party recover from the other. From the entry of that judgment defendant Richardson appealed.

Smith & Spivey, by Vaiden P. Kendrick, for plaintiff appellee, and Yow & Yow, by Cicero P. Yow, for third party defendant appellee.

Prickett & Scott, by Carlton S. Prickett, Jr., and Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellant.

VAUGHN, Judge.

In their brief appellees state that the question now before this court is whether, on the earlier appeal, the court intended to and did in fact grant plaintiff and third party defendant, appellant in that case a partial new trial—limited to appellant's claims.

The opinion of this court on that appeal concludes as follows:

> "We deem it unnecessary to discuss the other assignments of error brought forward in appellants' brief as the points raised may not occur upon a retrial of this action.
>
> For the reasons stated, appellants are awarded a
>
> New trial." *Kaczala v. Richardson,* 18 N.C. App. 446, 448, 197 S.E. 2d 21, 23.

Although this court may, in a proper case, direct a partial new trial, we will not intentionally do so without specifically designating the issues which are to be retried. Certainly we did not intend to do so in the present case. The questions of negligence, contributory negligence and proximate cause are too closely interwoven between all the parties for us to say that the

errors discussed, as well as those assigned and not discussed, did not affect all of them. Indeed, where a jury has found plaintiff contributorily negligent, the cases will be rare when we will order a new trial on that issue without requiring reconsideration of the issue of the defendant's negligence as a proximate cause of the injury. *See Huffman v. Ingold,* 181 N.C. 426, 107 S.E. 453. If defendant is to be entitled to have the question of his negligence determined at the new trial, then the questions arising on his counterclaim cannot be said to have been finally determined against him.

As the Supreme Court has said:

> "We think the Court erred in thus restricting the new trial. Our order, as we have said, was general in its terms, and extended to all the matters involved in the case. We were not asked to limit the new trial to any particular question, and did not do so. This Court, upon application, can grant a general or a partial new trial, as it may see fit under all the circumstances; but when a new trial is granted, nothing more being said, it means a new trial of the whole case—of all the issues, and not merely of one of them. . . ." *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164.

Our order for a new trial on the earlier appeal vacated the verdict on both issues answered by the jury.

For the reasons stated the judgment is reversed and the case is remanded for entry of judgment in conformity with the verdict returned by the jury.

Reversed and remanded.

Judge PARKER concurs.

Judge BRITT dissents.

Judge BRITT dissenting: I respectfully dissent to the majority opinion. In my view, when the pleadings were completed and the cause initially went to trial, three distinct claims were presented to the court: Plaintiff's claim against defendant Richardson; defendant Richardson's counterclaim and cross action against plaintiff and defendant city; and defendant city's counterclaim against defendant Richardson.

When the jury in the initial trial answered issues that plaintiff and defendant Richardson were both negligent, and the trial court entered judgment that no party should recover on his or its claim, all three parties were aggrieved and had a right to appeal to the Court of Appeals. Plaintiff and defendant city saw fit to exercise that right. Defendant Richardson, in effect, said that he was satisfied with the judgment allowing him no recovery on his claim and did not appeal. This court awarded "appellants" (plaintiff and defendant city) a new trial, and, in my opinion, that disposition granted plaintiff and defendant city a new trial on their claims but did not grant defendant Richardson a new trial on his claim.

In the 1970 Pocket Parts to McIntosh, North Carolina Practice and Procedure, § 1800, p. 119, it is said: "Ordinarily the appellate court will not render a decision which directly benefits a party who, though entitled to appeal, did not, even though this may leave the case in an awkward posture. . . ."

In 5 Am. Jur. 2d, Appeal and Error, § 707, it is said:

> While an appellee who has not cross appealed may argue in the appellate court in support of the decision appealed from, and in opposition to a claim of error in the court below raised by the appellant, it is settled that ordinarily an appellee who did not file a cross appeal is not entitled to an appellate review to obtain a decision more favorable to him than that appealed from by the other party. . . . The claim of one who took no appeal from a decision adverse to him is not before the appellate court upon appeal by another party not in privity with him, even where the other party has a practical interest in sustaining the claim of the nonappealing party. Unless the decision below is reversed in favor of the appellant, it must on appeal stand even though it is not as favorable to the appellee as the evidence would have warranted, and where the decision of the court below was in part favorable and in part unfavorable to each of the adverse parties, it can be reviewed for the benefit of each party only if each party has attacked it by either appeal or cross appeal.

See also Gower v. Ins. Co., 281 N.C. 577, 189 S.E. 2d 165 (1972); *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366 (1942);

and *Manufacturing Co. v. Moore,* 144 N.C. 527, 57 S.E. 213 (1907).

In my opinion, the trial judge ruled correctly in the retrial of the cause and I vote to affirm.

STATE OF NORTH CAROLINA v. DAVID LEROY PETTICE

No. 7526SC292

(Filed 18 June 1975)

1. **Witnesses § 1— test of competency — discretion of trial court**

The competency of a witness rests largely in the court's discretion, and the test of competency is the capacity to understand and to relate under oath facts which will assist the jury in finding the ultimate facts.

2. **Witnesses § 1— competency of witness — finding of trial court proper**

The trial court did not err in finding a witness competent to testify where the court heard testimony of three physicians, two of them psychiatrists, who had examined the witness both before and after the robbery, the court found that the witness knew the difference between right and wrong and understood the obligations of an oath, and the court also found that the witness was able to understand the physical facts about him and had sufficient mental capacity to receive and impart his impressions of matters he had seen and heard.

3. **Criminal Law § 90— examination of State's witness — no impeachment by State**

The trial court did not err in allowing the District Attorney to withdraw a State's witness from the stand, discuss with him his testimony, and then continue his direct examination since the District Attorney did not impeach the witness but merely enabled the witness to testify correctly.

4. **Robbery § 4— beer truck driver — armed robbery — sufficiency of evidence**

The trial court in a prosecution for armed robbery did not err in denying defendant's motions for nonsuit where the evidence tended to show that defendant suggested robbing a beer truck and said he knew the driver, and defendant rode with other defendants to the scene of the crime and remained in the car nearby while the robbery was taking place.

5. **Criminal Law § 114— getaway car in armed robbery — jury instructions proper**

The trial court's instructions as to the State's evidence concerning the getaway car in an armed robbery case was based upon a state of facts presented by a reasonable view of the State's evidence.

State v. Pettice

APPEAL by defendant from *Baley, Judge.* Judgment entered 23 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 June 1975.

Defendant was charged in a bill of indictment with the armed robbery of Tommy Sharp on 23 August 1974. He pleaded not guilty and, with codefendants Frank Goodman and Reginald Williams, was tried before a jury.

The victim Sharp testified that he had parked his truck and was delivering beer to the Polynesian Lounge in Charlotte when two black males, one holding a shotgun, robbed him of approximately eleven hundred dollars in currency and checks. He identified his assailants as defendant Williams and Carl Edward Greene. Sharp further testified that while he was calling the police he saw a green and white Ford parked nearby. D. A. Bailey, the police officer who answered the call, testified that he and Sharp followed the automobile and stopped it. Sharp could not identify the occupants, two black males. Bailey identified them as defendants Goodman and Pettice. Sharp testified that defendant Pettice had helped his supervisor deliver beer on his route when he was on vacation.

Two witnesses to the robbery testified that they first saw a green and white Ford, occupied by four black males, parked near the Polynesian Lounge. After the robbery they saw only two men in the car. One of the witnesses identified defendant Pettice as the man who held the shotgun during the robbery.

Defendants challenged Carl Edward Greene's competency to testify, but after a *voir dire* hearing the court overruled their objections. Greene testified that he and the three defendants were riding in a green and white Ford on the day in question. Pettice said, "We can hit a beer truck," adding, "I can't hit it because I know the driver." They waited at a shopping center, and, when Sharp's truck appeared, they followed it to the Polynesian Lounge. Then Greene and defendant Williams got out, robbed Sharp, and returned to the car, which was still parked behind the lounge. Goodman said "Run to the woods," and they did, staying there until they were apprehended by the police.

The court instructed on armed robbery and aiding and abetting, and the jury found defendant Pettice guilty as charged. From judgment imposing a prison sentence, he appealed to this Court.

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

Paul J. Williams for defendant appellant.

ARNOLD, Judge.

[1, 2] Defendant contends that the trial court erred in finding that Carl Edward Greene was competent to testify. We disagree. The competency of a witness rests largely in the court's discretion. *State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793 (1970). The test of competency is the capacity to understand and to relate under oath facts which will assist the jury in finding the ultimate facts. *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365 (1971). On *voir dire* the court below heard the testimony of three physicians, two of them psychiatrists, who had examined Greene both before and after the robbery occurred. The court found that "Carl Edward Greene knows the difference between right and wrong and is able to understand the obligations of an oath." The court also found that "he is able to understand the physical facts about what is going on around him . . . [and] has sufficient mental capacity to correctly receive and impart his impressions of matters which he has seen and heard." We find no abuse of discretion in the court's ruling.

[3] Defendant next contends that the court erred in allowing the District Attorney to withdraw Greene from the witness stand, discuss with him his testimony, and then continue his direct examination. He argues that the State was allowed to impeach its own witness. Again we disagree. As explained by the North Carolina Supreme Court in *State v. Anderson,* 283 N.C. 218, 195 S.E. 2d 561 (1973), the trial court may permit the district attorney to cross-examine an unwilling witness, for the purpose of refreshing his recollection, by reference to prior statements. This, in effect, is what the State sought to do in the case at bar. The court cautioned the District Attorney that he could not impeach his witness and would have to resume direct examination when he returned. The record shows that, after conferring with the District Attorney, Greene only enlarged upon and did not contradict his earlier testimony. It was not error to allow the State to enable the witness to testify correctly.

[4] Defendant further contends that the court erred in denying his motions for judgment as of nonsuit. This contention is with-

out merit. The rule, as set forth in *State v. Ham,* 238 N.C. 94, 97, 76 S.E. 2d 346, 348 (1953), is as follows:

> "To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary."

Viewed in the light most favorable to the State, the evidence presented was sufficient to be submitted to the jury. *See State v. Walker,* 269 N.C. 135, 152 S.E. 2d 133 (1967). The perpetrator of the crime, Carl Edward Greene, testified that defendant suggested robbing a beer truck and said he knew the driver. He rode with the other defendants in a green and white Ford to the Polynesian Lounge and remained in the car nearby while the robbery was taking place. Defendant's motions for nonsuit were properly overruled.

[5] Finally, defendant contends that the court erred in instructing the jury that the State had offered evidence which tended to show that "both Greene and defendant Reginald Williams ran to the back of the lounge where the red [sic] and white Ford car was parked, waiting for them." He argues that there was no evidence that the car was in fact waiting and that the court violated G.S. 1-180 by expressing an opinion that this fact had been proven. We disagree. The recapitulation was based upon a state of facts presented by a reasonable view of the State's evidence. *See State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970).

Defendant has received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. FRANK GOODMAN, JR.

No. 7526SC255

(Filed 18 June 1975)

1. **Criminal Law § 9— aiders and abettors**

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and are equally guilty, but to render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary.

2. **Robbery § 4— armed robbery — defendant as aider and abettor — sufficiency of evidence**

The trial court did not err in denying defendant's motions for nonsuit in a prosecution for armed robbery where the evidence tended to show that defendant was associated with the actual perpetrators in the robbery, he was the driver of the car and was nearby when the robbery occurred, he had knowledge of the impending robbery and actually followed the beer truck whose driver was robbed to the scene of the crime, when the perpetrators ran to his car, apparently knowing that he would stand by, they were advised to run for the woods, and defendant's presence gave encouragement to the perpetrators.

3. **Criminal Law § 114— getaway car in armed robbery — jury instructions proper**

The trial court's instructions as to the State's evidence concerning the getaway car in an armed robbery case were based upon a state of facts presented by a reasonable view of the State's evidence.

APPEAL by defendant from *Baley, Judge.* Judgment entered 23 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 May 1975.

The defendant, Frank Goodman, Jr., together with Carl Edward Greene, David Leroy Pettice, and Reginald Williams, was charged by bill of indictment with the crime of armed robbery of one Tommy Sharpe, driver of a beer truck. Greene entered a plea of guilty and testified as a witness for the State. Defendant entered a plea of not guilty.

State's evidence tended to show that on 23 August 1974 Greene, Pettice, and Williams were passengers in an automobile being driven by defendant Goodman. While traveling on Wilkinson Boulevard, Pettice said, "We can hit a beer truck." After

that, they went to the "Bi-Lo" Shopping Center on Wilkinson Boulevard. A beer truck arrived at a store in the shopping center and its driver went into the store. While stopped at the shopping center, Pettice stated that he couldn't "hit" the beer truck because he had worked for the company and knew the driver.

After the truck driver came out of the store, they started their car and followed him. They drove around until the beer truck had stopped at the Polynesian Lounge, and then they drove around the block and stopped on the road behind the lounge. Greene got out of the car carrying a "sawed-off" shotgun, and he and Williams went around to the Polynesian Lounge and waited for the truck driver, Tommy Sharpe. After Sharpe came out of the lounge, he went to his truck and began to unload cases of beer. Williams offered to help him, and when Sharpe declined the offer, Williams stated, "This is a hold up, let me have your damn money." Williams then snatched Sharpe's wallet while Greene held the shotgun on Sharpe.

According to Greene, he and Williams ran to the car and started to get in when someone said, "Run to the woods." Greene testified that it was defendant Goodman who told them to run to the woods. Greene and Williams did go to the woods, and thereafter they were taken into custody.

Williams testified that Greene pointed the shotgun at him and told him to get out of the car and "hit" the beer truck. According to this witness, after they took the wallet they ran by the car and at that time Goodman said he didn't want to have anything to do with it and pulled away. He and Greene then ran to the woods.

The jury found defendant guilty of armed robbery, and from judgment imposed thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James L. Blackburn, for the State.

Edward T. Cook, for defendant appellant.

MARTIN, Judge.

Defendant first contends that the court erred in denying his motions for judgment as of nonsuit. He argues that the evidence was insufficient to warrant a verdict that he is guilty

of the alleged crime as an aider and abettor. In this he relies primarily on the cases of *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655 (1967), and *State v. Ham,* 238 N.C. 94, 76 S.E. 2d 346 (1953). These cases are clearly distinguishable.

In *State v. Aycoth, supra,* the evidence tended to show that defendant Shadrick remained seated on the passenger side of an automobile while the driver, defendant Aycoth, went into a store armed with a pistol and took money from an employee. There was no evidence that defendant Shadrick moved from his position in the car, that he could or did observe what was taking place in the store, or that he shared in the proceeds of the robbery. However, there was evidence that Aycoth concealed his pistol before he stepped out of the store. The Court held the evidence insufficient to be submitted to the jury on the issue of defendant Shadrick's guilt as an aider and abettor in the commission of armed robbery.

In *State v. Ham, supra,* the evidence tended to show that the driver of a car was the husband of one of its occupants and a friend or acquaintance of the other women occupants. The occupants of his car became involved in a "free-for-all" affray with women occupants of another car; however, he neither did nor said anything but merely stood at the rear of his automobile and watched. The evidence was insufficient to withstand defendant husband's demurrer.

When considered in the light most favorable to the State, there was sufficient evidence in the present case to permit a jury to find that the suggestion to "hit a beer truck" was made in the presence of defendant Goodman; that Goodman was the driver of the car; that he followed the beer truck and drove to the vicinity of the Polynesian Lounge where the beer truck stopped; that he waited in the car until the robbery was consummated; and that upon the return of Greene and Williams he told them to "run to the woods."

[1] " 'All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. (Citations.) An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. (Citations.) To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending

to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. (Citations.)' (Citations omitted.)" *State v. Aycoth, supra.*

[2] The evidence, when considered in the light most favorable to the State, showed the association of defendant with the actual perpetrators in the robbery. He was the driver of the car and was nearby when the robbery occurred. He had knowledge of the impending robbery and actually followed the beer truck to the scene of the crime. When the perpetrators ran to his car, apparently knowing that he would stand by, they were advised to run for the woods. His presence gave encouragement to the perpetrators. The trial court properly denied defendant's motions for judgment as of nonsuit.

[3] Defendant further assigns as error a portion of the charge where the court instructed the jury that the State had offered evidence which tended to show that "both Greene and the defendant Reginald Williams ran to the back of the lounge where the red and white Ford was parked, waiting for them." He argues that there was no evidence that the car was in fact waiting and that, consequently, the court erred by "recollecting to the jury contentions of material prejudicial facts which were not supported by the evidence." The trial court's instruction was based upon a state of facts presented by a reasonable view of the evidence. *See State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970). This assignment of error is overruled.

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

No prejudicial error appears in the trial.

No error.

Judges CLARK and ARNOLD concur.

Henderson v. Matthews and Rogers v. Henderson and Newkirk v. Henderson and Lanier v. Henderson

MARION HENDERSON v. LUCILLE MATTHEWS

BERTHLAND ROGERS v. MARION HENDERSON AND LUCILLE MATTHEWS

MARGIE RUTH NEWKIRK v. MARION HENDERSON AND LUCILLE MATTHEWS

KATIE MAE MATTHEWS LANIER v. MARION HENDERSON AND LUCILLE MATTHEWS

No. 754DC202

(Filed 18 June 1975)

Trial § 36; Rules of Civil Procedure § 51— expression of opinion in instructions

In an action arising out of an automobile accident wherein defendant driver's version of the accident was corroborated at trial by the passengers in her automobile but it was shown that one of the passengers had given a different version in a deposition, the trial court expressed an opinion on the evidence in instructing the jury that there was "some discrepancy" in connection with the testimony of defendant and the passengers in her car. G.S. 1A-1, Rule 51(a).

APPEAL by defendant Lucille Matthews from *Crumpler, Judge.* Judgment entered 18 October 1974 in District Court, DUPLIN County. Heard in the Court of Appeals 8 May 1975.

These four actions, consolidated for trial, are based on claims arising from an automobile collision which occurred on 23 December 1970 at about 6:30 p.m. on Rural Paved Road 1827. The collision involved a 1963 Ford automobile being driven by Marion Henderson in an easterly direction and a 1967 Rambler being driven by Lucille Matthews in a westerly direction. Berthland Rogers, Margie Ruth Newkirk and Katie Mae Matthews Lanier were passengers in the Matthews automobile.

One of the suits was brought by Marion Henderson against Lucille Matthews for personal injury and property damage; Lucille Matthews denied negligence and alleged contributory negligence. The other three suits were brought by the three passengers in the Matthews car against Lucille Matthews and Marion Henderson jointly. Both denied negligence and alleged sole liability in the other codefendant.

At the point of the collision, Rural Paved Road 1827 is perfectly straight and flat. Marion Henderson's version of the

events surrounding the accident was that he was operating his car on the rural paved road at about 45 to 50 miles per hour when he first observed the Matthews vehicle backing out of a driveway from the left-hand side of the road. His lights were on low beam and when he saw the vehicle, it was sitting in his lane of travel approximately 150 feet away, but it was too close to stop, so the collision occurred.

Lucille Matthew's version was that she was operating her vehicle in a westerly direction after having turned onto the road from an intersecting road; that she was traveling about 20 miles per hour on her side of the road when she observed the Henderson vehicle coming from the opposite direction; that said vehicle was in the middle of the road with its bright lights on and appeared to be moving over toward her side; and that when she pulled her vehicle over onto the right shoulder the Henderson vehicle collided with hers. The three passengers in her car testified in corroboration of Matthew's version.

Counsel for Marion Henderson sought to impeach plaintiff Newkirk by alleged prior inconsistent statements made in a deposition. Her testimony at trial was basically that she was confused at the deposition hearing concerning the roads and events which took place leading up to the accident; that her testimony that Lucille Matthews had backed out onto the road on which the accident occurred was in error; and that the road she was actually referring to was another road altogether.

The jury answered the negligence issue in favor of Marion Henderson both as plaintiff in his case against Lucille Matthews and as defendant in the cases by the three passengers, finding against Lucille Matthews on all issues with all parties. From judgments awarding personal injury and property damages to Marion Henderson and awarding damages for personal injury to the third-party plaintiffs, defendant Lucille Matthews appealed.

Crossley & Johnson, by Robert White Johnson, for plaintiff-defendant Henderson.

E. C. Thompson III for the third-party plaintiffs.

Johnson & Johnson, by Rivers D. Johnson, Jr., for defendant Lucille Matthews.

CLARK, Judge.

In the charge to the jury, the trial court instructed as follows:

> "Now in connection with the testimony of Mrs. Matthews and the passengers in her car there was *some discrepancy* there, seemingly brought out on cross examination by one of the attorneys for Mr. Henderson referring back to a deposition she had made in April of this year, in which she testified that they were backing out of a driveway. In explanation of her contradictory testimony she testified that she was not familiar with the location of this accident, and at the time she gave this deposition back in April."

Whether the instruction constituted prejudicial error must be answered by determining its probable effect upon the jury. *Worrell v. Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971). As the evidence in the case revealed, the jury was basically presented with two different versions of how the accident occurred, one being that of Marion Henderson and the other that of Lucille Matthews, which was corroborated by the passengers in her car. And, as the evidence disclosed, the answers to the issues depended on which version the jury chose to believe. Only one of the passengers, Margie Ruth Newkirk, ever had a different story, that being revealed in a deposition taken prior to trial. Whether or not Newkirk's credibility had been impaired by this evidence and the manner by which conflicts in such evidence were to be resolved remained exclusively with the jury. See *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970), and *Worrell v. Credit Union, supra*. "The court in its charge may not intimate or express an opinion as to the facts, the weight of the evidence, or the credibility of the witnesses, either directly or indirectly, in any manner, and if the judge does intimate or express such an opinion, it is prejudicial." *Belk v. Schweizer*, 268 N.C. 50, 54, 149 S.E. 2d 565, 568 (1966).

As the above instructions reveal, not only did the trial judge effectively express an opinion as to the credibility of the plaintiff Newkirk, but he cast considerable doubt upon the defendant Matthews's entire version of the accident. The clear import of the instruction was in fact to impeach Matthews and not Newkirk. Under these circumstances where the issues of negligence and liability depended entirely upon questions of credi-

bility and the resolution of conflicts in the evidence, it is our opinion that the challenged portion of the instructions had the probable effect of influencing the jury to resolve those questions against the defendant Matthews which is in clear violation of G.S. 1A-1, Rule 51(a).

For this error in the charge, among others, the judgments must be vacated, the verdicts set aside, and new trials ordered.

New trial.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DALE SMITH

No. 7529SC201

(Filed 18 June 1975)

1. **Criminal Law § 75— statement by defendant — voluntariness**

Where there was evidence on *voir dire* that prior to any questioning the defendant had been given the traditional *Miranda* warnings and had told the investigating officer that he understood each of his rights and did not want a lawyer, there was no error in the finding of the trial court that defendant had freely and understandingly waived his Fifth Amendment rights and that any statement made thereafter was admissible.

2. **Homicide § 26— intentional shooting with deadly weapon — killing of wife's paramour by husband — second degree murder instruction proper**

Where the evidence tended to show that defendant found his wife and her paramour in bed together in the nude, both were asleep, defendant awakened his wife and told her he was going to call the police and to get the paramour out of the house, and defendant thereafter started crying and carrying on and shot the paramour with his own gun, the trial court properly instructed on the presumptions arising from an intentional killing with a deadly weapon that the killing was unlawful and was done with malice, thereby constituting second degree murder, unless the defendant proved to the satisfaction of the jury the facts which would mitigate it to manslaughter.

3. **Criminal Law § 172— second degree murder — failure to instruct on heat of passion — error cured by verdict of guilty of voluntary manslaughter**

Any error there may have been in submitting a second degree murder case to the jury without instructions on the killing in the heat of passion upon discovery by defendant of his wife and deceased in bed immediately subsequent to an adulterous act was rendered harmless by a verdict of guilty of voluntary manslaughter.

State v. Smith

APPEAL by defendant from *Winner, Judge.* Judgment entered 11 October 1974 in Superior Court, HENDERSON County. Heard in the Court of Appeals 8 May 1975.

Defendant was charged with murder in the first degree of Sergis Gonzalez, but the State elected to seek only a conviction of murder in the second degree, or manslaughter. The defendant pled not guilty.

The evidence in the case tended to show that the defendant, after having completed his work on the night shift at the General Electric plant in Hendersonville, went home and discovered his wife and Sergis Gonzalez asleep in bed together in the nude. Gonzalez and the defendant's wife had been having an affair for approximately a week and a half and had engaged in sexual intercourse some six to eight times during that period unbeknownst to the defendant. As both were asleep, the defendant woke his wife and told her he was going to call the police and to get Gonzalez out of the house. The defendant thereafter started crying and carrying on and shot the deceased with the deceased's own gun which the deceased had carried to the house and placed on the night stand beside the bed.

The case was submitted to the jury on murder in the second degree and voluntary manslaughter. Upon a verdict of guilty of voluntary manslaughter, the trial judge in his discretion sentenced the defendant to be imprisoned for a term of not less than eight nor more than ten years. The defendant appealed.

Attorney General Edmisten, by Associate Attorney G. Jona Poe, Jr., for the State.

Edwin R. Groce for the defendant.

CLARK, Judge.

[1] The appellant contends that the trial court erred in admitting the statement made by the defendant to a police officer in which he confessed that he shot Gonzalez, since the defendant had not knowingly and understandingly waived his constitutional rights against self-incrimination. There was evidence on voir dire that prior to any questioning the defendant had been given the traditional *Miranda* warnings and had told the investigating officer that he understood each of his rights and did not want a lawyer. We find no error in the finding of the trial court that the defendant had freely and understandingly waived his

Fifth Amendment rights and that any statement made thereafter was admissible. In any event, the defendant was not prejudiced thereby since his wife, called by the defendant as his witness, brought out all the circumstances surrounding the killing and the fact that the defendant had fired the fatal shot.

[2] The defendant further contends that since the evidence clearly indicated that the defendant's wife and the deceased were discovered by him when an act of intercourse had just been completed, it was error for the trial court to charge on second-degree murder and place the burden on the defendant of reducing the crime to manslaughter; he contends that the trial court should charge only that if the jury should find such circumstances, the defendant would be guilty of manslaughter. We do not agree.

The defendant relies on *dictum* in *State v. Ward,* 286 N.C. 304, 312-13, 210 S.E. 2d 407, 413-14 (1974), as follows:

> "When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was 'severely proximate,' and the killing follows immediately, it is manslaughter. However, a mere suspicion, belief, or knowledge of past adultery between the two will not change the character of the homicide from murder to manslaughter."

The foregoing language does not sustain the defendant's contention. Since all of the evidence tends to show an intentional killing with a deadly weapon, the court properly instructed on the presumptions therefrom that the killing was unlawful and was done with malice, thereby constituting second-degree murder, unless the defendant proved to the satisfaction of the jury the facts which would mitigate it to manslaughter. 4 Strong, N. C. Index 2d, Homicide, § 24 (1968). The burden was on the defendant to satisfy the jury that the killing was due to passion aroused by the provocation and not to revenge or malice. See 40 C.J.S., Homicide, § 49 (1944).

In this State, the trial judge has the burdensome task under G.S. 1-180 of declaring and explaining the law arising on the evidence. In a homicide case where the evidence tends to show that the killing followed the discovery by the defendant of his wife and the deceased in the very act of intercourse, or

under circumstances clearly indicating that the act had just been completed, or was "severely proximate," then it would be appropriate for the trial judge to instruct that if they are satisfied as to the foregoing facts and that the defendant killed the deceased in a heat of passion engendered by such discovery, then the killing would be mitigated from murder to manslaughter.

[3] In the case at bar, the jury returned a verdict of guilty of voluntary manslaughter. That verdict rendered harmless any error there may have been in so submitting the case to the jury on "Pattern Jury Instructions" without instructions on the killing in the heat of passion upon discovery of the adulterous act. See generally *State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667, *cert. denied,* 281 N.C. 316, 188 S.E. 2d 900 (1972).

In the trial below we find

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. SAMUEL RAY MARR

No. 7530SC173

(Filed 18 June 1975)

1. **Indictment and Warrant § 5— indictment — absence of "X" on endorsement**

   A bill of indictment was not rendered invalid by the absence of the letter "X" or some other mark in an endorsement on the indictment stating "this bill found ..... A True Bill."

2. **Automobiles § 113— involuntary manslaughter — death from car accident**

   In this involuntary manslaughter prosecution, the State's evidence was sufficient to show a causal connection between the automobile accident in question and the decedent's death for submission of the case to the jury where it tended to show that a car driven by decedent was struck by defendant's car traveling at high speed, that decedent was dead when a doctor saw her in a hospital emergency room, that decedent's death resulted from a tear in the aorta, and that such a tear had to be caused by an injury received to the body.

APPEAL by defendant from *Friday, Judge.* Judgment entered 17 October 1974 in Superior Court, SWAIN County. Heard in the Court of Appeals 7 May 1975.

Defendant was tried upon a bill of indictment charging that on 20 March 1974 he did unlawfully "kill and slay" one Bertie Burchfield Thomas. Defendant pleaded not guilty.

In pertinent part, the evidence for the State tended to show the following facts. Dr. Paul Sale, a licensed medical physician, testified that on the evening of 20 March 1974 he saw the deceased, Bertie Thomas, in the emergency room of Swain County Hospital and that she was dead. He found abrasions, scrapes, and contusions about the face, neck, and chest. Dr. Sale was permitted to consider the findings and report of Dr. Robert S. Boatwright, an expert in the field of pathology. The deceased was examined by Dr. Boatwright, and his report indicated that he found a laceration of the aorta, the main artery which leaves the heart and feeds the entire body. According to Dr. Sale, a tear to the aorta had to be caused by some trauma—an injury received to the body. In his opinion, Bertie Thomas died as a result of the tear in the aorta.

Ivan Hugh Gibby, grandson of the deceased, testified that on 20 March 1974 he was with his grandmother, Bertie Thomas, and his uncle, Mr. McCoy, in a car being driven by his aunt, Mrs. Monteith. Prior to the accident, they had been riding around and had driven to a market. Their car was three-fourths of a mile on U. S. 19 coming west toward Bryson City. This witness was in the back seat talking to his uncle, and he saw a yellow car in the process of passing a green car. The yellow and green cars were just coming out of a curve. The yellow one pulled back in front of the green car and then swerved back into Mrs. Monteith's lane and was coming sideways when it hit the Monteith car. According to this witness, the yellow car was traveling around seventy-five to eighty miles per hour when he last saw it before the collision.

Ralph S. McCoy testified that he was seated behind Mrs. Thomas and that he saw two cars coming around the curve together. The yellow car got around the green one and then started sliding sideways and struck the car in which he was riding.

Charles Ball, an ambulance driver, testified that he went to the accident scene, saw Mrs. Thomas seated on the right front seat of a 1963 Ford, and took her to the Swain County Hospital.

Phyllis Lowe, driver of the green car, testified that the yellow car passed her, got back into its lane, and then went out

of control—crossing into the other lane and hitting another car. She stated that the yellow car did not seem to be out of control as it passed her.

Samuel G. Ball, a member of the North Carolina Highway Patrol, testified concerning the position of the cars involved in the accident and the characteristics of the highway. At the point where the vehicles were located on U. S. 19 there is a straight stretch of road to the east for approximately two-tenths of a mile, and about three hundred yards to the west there is a curve. The road going east is painted with a double yellow line for over four-tenths of a mile until the next passing zone. "Coming west" towards Bryson City, the double yellow line extends all the way into town. From Bryson City to the scene of the collision, the road is posted at thirty-five miles per hour in three places. Patrolman Ball observed tire impressions leading from the yellow vehicle in a westerly direction towards Bryson City. The tire impressions were in the left lane for approximately two hundred feet, then they traveled back into the right lane and then crossed into the left lane for another 145 feet. According to Patrolman Ball, there was no odor of alcoholic beverage about defendant.

Defendant's evidence tended to show the following facts. Dr. Sale testified that defendant had some injuries to the head and had difficulty remembering details surrounding the accident.

Defendant Samuel Marr testified that he was looking for some gas due to the gas shortage and had come into Bryson City. He went past a gas station, and the next thing he remembered was being in a patrol car. Defendant's aunt testified that defendant's car was yellow. Several witnesses testified as to defendant's good character.

The jury found defendant guilty of involuntary manslaughter. He was sentenced to a term of not less than four years nor more than seven years in the county jail. Execution of sentence was suspended for five years upon compliance with certain specified conditions.

Defendant appealed.

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

Holt, Haire & Bridgers, by R. Phillip Haire, for defendant appellant.

MARTIN, Judge.

[1] By his first assignment of error, defendant contends that the indictment in this action is not valid.

The bill of indictment shows the following endorsement: "Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found ..... A True Bill."

Defendant contends that the mere absence of some mark from the blank space renders the bill invalid. His reasoning seems to be that (1) a form bill of indictment does not indicate the findings of the grand jury until their findings are expressed in some way such as placing an "X" in the blank space, and (2) it cannot be inferred that the grand jury intended to return a true bill because it is equally as easy to infer from the endorsement, as presently written, that they intended not to return a true bill.

Defendant's first line of reasoning presupposes that the letter "X" is a symbol which indicates approval. This is not necessarily true. Indeed, in *State v. Cox,* 280 N.C. 689, 187 S.E. 2d 1 (1972), a defendant argued that the grand jury meant not to return a true bill because an "X" was placed in the endorsement before the words, "a True Bill." As for defendant's second line of reasoning, we fail to see the ambiguity, as suggested by defendant, resulting from the blank space. Had the grand jury meant not to return a true bill, they could have inserted the word "not" in the space. Aside from the foregoing, even if we assume for the sake of argument that the absence of the letter "X" or some other mark results in an ambiguity, defendant's contention cannot be sustained. *State v. McBroom,* 127 N.C. 528, 37 S.E. 193 (1900), which held by a divided Court that the endorsement "a true bill" is essential to the validity of an indictment, was expressly overruled in *State v. Sultan,* 142 N.C. 569, 54 S.E. 841 (1906). *State v. Avant,* 202 N.C. 680, 163 S.E. 806 (1932).

[2] In his next assignment of error, defendant contends that his motion for nonsuit should have been allowed because the State failed to show any causal connection between the wreck and the injuries which caused the death of Bertie Thomas.

In considering defendant's motion for judgment as of nonsuit, the trial judge must consider the evidence in the light most

favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. If there is evidence, direct, circumstantial, or a combination of both, from which the jury can find that the offense charged was committed by the defendant, the motion for judgment as of nonsuit must be overruled. *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975). In the present case, the evidence would clearly permit an inference that the fatal injury to Bertie Thomas resulted from the automobile wreck. This assignment of error is overruled.

We have carefully examined defendant's remaining assignments of error, which relate to the charge of the trial court to the jury, and find them to be without merit.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOE HUTCHISON, JR.

No. 7521SC12

(Filed 18 June 1975)

1. **Homicide § 21— second degree murder — sufficiency of evidence — no self-defense as matter of law**

The evidence in this second degree murder case did not establish as a matter of law that defendant acted only in his lawful exercise of his right of self-defense, and the case was properly submitted to the jury, where it tended to show that defendant and the victim were on their respective front porches and were quarreling, defendant accused the victim of "ratting" at his girl friend and said, "I'm going to stop you," the victim placed a shotgun next to a chair on her porch, defendant carried a pistol onto his front porch and asked the victim if she were ready, the victim replied, "Darn right, I'm ready," as the victim picked up the shotgun and was raising it, defendant fired his pistol several times, and three of these shots struck the victim and caused her death.

2. **Homicide § 28— self-defense — excessive force — instructions**

The trial court did not err in permitting the jury to determine whether defendant used excessive force in repelling decedent's attack upon him where the evidence showed that decedent was in the act of raising a shotgun in defendant's direction when defendant fired his pistol five times and three of these shots struck decedent.

3. Homicide § 28— self-defense — right to stand ground — murderous assault

The trial court did not err in giving the jury an instruction which limited defendant's right to stand his ground on his own premises only to the case when a murderous assault was being made upon him where the evidence disclosed that the only possible kind of assault which could have been made upon defendant was a murderous assault.

APPEAL by defendant from *Exum, Judge.* Judgment entered 15 August 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 March 1975.

Defendant was indicted for the first-degree murder of Olivia Sutson. The State elected to proceed on a charge of second-degree murder or such lesser included offense as the evidence might justify. Defendant pled not guilty. He was found guilty of voluntary manslaughter. From judgment imposing a prison sentence for the term of twelve years, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr. for the State.

Hall, Scales & Cleland by Roy G. Hall, Jr. for defendant appellant.

PARKER, Judge.

Defendant's motions for nonsuit were properly denied. Viewed in the light most favorable to the State, the evidence shows the following:

[1] Defendant and Olivia Sutson were next-door neighbors, their front porch steps being approximately 37 feet apart. They frequently quarreled. In the early evening of 17 June 1974 defendant and Olivia were on their respective front porches and were arguing, as they usually did. Defendant accused Olivia of "ratting" at his girl friend and said, "I am going to stop you." He then went into his house. About this time Olivia brought a 12-gauge shotgun onto her porch and said, "[w]ell, if you are going to shoot me, I'm going to shoot you back." At her daughter's behest, Olivia took the gun back inside her house but soon returned with an axe handle or "baseball stick." Going into her front yard, she called for defendant to come out so she could "whip the devil" out of him. She then reentered her house, got the shotgun, and placed it next to a chair on her porch. Defendant came from within his house onto his front porch, carrying

a pistol. He asked Olivia, "Are you ready?" and she replied, "[d]arn right, I'm ready." As she picked up the shotgun and was raising it, defendant fired his pistol several times. Three of these shots struck Olivia, causing her death.

Defendant's contention that the uncontradicted evidence affirmatively establishes that he acted only in lawful exercise of his right of self-defense cannot be sustained. The case which he cites and relies on, *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84 (1964), is easily distinguishable on its facts. From the evidence in the present case, the jury could find that defendant willingly entered into the conflict. "The right of self-defense is not available to one who invites another to engage in a fight, unless he first abandons the fight and withdraws from it, and gives notice to his adversary he has done so." *State v. Church,* 229 N.C. 718, 722, 51 S.E. 2d 345, 348 (1949); *Accord, State v. Johnson,* 278 N.C. 252, 179 S.E. 2d 429 (1971); *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623 (1945). That defendant was on his own premises and deceased was on hers does not call for application of a different principle of law under the facts disclosed by the evidence before us. Certainly the evidence was not such as to establish as a matter of law that defendant acted only in exercise of a lawful right of self-defense, and his motions for nonsuit were properly denied.

[2] The court submitted to the jury for its determination the question whether defendant acted in lawful exercise of the right of self-defense. Defendant now assigns error to certain portions of the court's charge to the jury in this respect. He first contends that the court erred in permitting the jury to determine whether he used excessive force in repelling the deceased's attack upon him. In this regard he contends that, since all of the evidence shows that the deceased was in the act of raising a 12-gauge shotgun in his direction, the use by the defendant of deadly force in the form of a .22 pistol must be held, as a matter of law, not excessive. We do not agree. There was evidence that defendant fired his pistol five times and that three of these shots struck his victim. It was clearly a question for the jury to determine whether defendant acted in exercise of a right of self-defense and, if so, whether he used no greater force than reasonably appeared to be necessary.

[3] The court instructed the jury that, in considering defendant's plea of self-defense, "when a person is on his own premises he is not required to retreat from a murderous assault that is

being made upon him at the time, but he is entitled to stand his ground and use whatever force he reasonably believes to be necessary to save himself from death or great bodily harm." Citing *State v. Boswell,* 24 N.C. App. 94, 210 S.E. 2d 129 (1974), defendant contends this instruction was in error in limiting defendant's right to stand his ground only to the case when a murderous assault was being made upon him, whereas he contends he had the right to stand his ground while on his own premises regardless of the character of the assault being made against him. Under the evidence in the present case, which discloses defendant was on his premises armed with a pistol and the deceased was on her premises armed with a shotgun, the only possible kind of assault which could have been made upon the defendant was a murderous assault. Under the facts of this case we find no prejudicial error in the instruction given.

There was evidence that the shotgun held by the deceased would not fire but that defendant did not know this. This evidence does not change the applicable principles of law. Had the jury found that defendant knew the shotgun would not work, then no assault other than verbal was being directed against him, and in such case clearly defendant had no right to use deadly force in self-defense. Only if the jury found that defendant did not know the shotgun was inoperable would they even reach any issue as to whether defendant acted in lawful exercise of the right of self-defense. In that case the only possible type of assault which the jury could have found that defendant reasonably believed was being made upon him would have been a murderous assault.

We have carefully examined all of appellant's remaining assignments of error brought forward in this appeal, and find no prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

IN THE MATTER OF JULIA A. BENTON

No. 7512DC273

(Filed 18 June 1975)

1. **Appeal and Error § 9— commitment to mental health care facility — commitment period expired — appeal not moot**

Though a commitment period of sixty days to a mental health care facility expired before respondent's appeal was heard in the Court of Appeals, her appeal from the order committing her was not moot.

2. **Insane Persons § 1— involuntary commitment — admission of affidavit of psychiatrist — right to cross-examine abridged**

In a proceeding for involuntary commitment to a mental health care facility, the trial court erred in allowing into evidence the affidavit of the examining psychiatrist since he was not present at trial and respondent was thereby denied her right to cross-examine the witness. G.S. 122-58.7(e).

3. **Insane Persons § 1— imminent danger to self — insufficiency of evidence**

In a proceeding for involuntary commitment to a mental health care facility, evidence was insufficient to support findings required by the involuntary commitment statutes that respondent was mentally ill or inebriate and was imminently dangerous to herself or others where such evidence consisted of an incompetent affidavit of a psychiatrist that respondent was mentally ill or inebriate and that she was "dangerous to herself only in that her illness negates her ability to meet her personal needs," testimony by respondent's parents that she kept them awake at night, talked to the television set, and complained of radioactive materials entering the house and of people poisoning her food, and testimony by respondent herself denying her parents' statements and stating that she had training in chemistry and botany and knowledge of physics and electronics.

APPEAL by respondent from *Guy, Judge.* Order entered 24 February 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 29 May 1975.

Petitioner, R. B. Benton, instituted this proceeding for the involuntary commitment of his daughter Julia. Respondent moved to dismiss the petition on the grounds that further proceedings would deny her rights of confrontation, guaranteed by the Sixth Amendment and G.S. 122-58.1 and -58.7(e), in that Dr. Pellegrini, whose affidavit would be offered in evidence by petitioner, was not present for cross-examination. The court denied the motion and respondent was arraigned.

The affidavit of M. L. Pellegrini, M.D., was admitted into evidence over respondent's objection. In it Dr. Pellegrini stated:

> "Miss Benton has disassociative thought patterns, grandiose ideations, florid paranoid delusions, and shows marked impairment of her reasoning abilities. The patient is in the manic phase of her illness and exhibits pressure of speech and flight of ideas. She is presently disorganized and somewhat confused. . . . Miss Benton is dangerous to herself only in that her illness negates her ability to meet her basic personal needs."

Respondent's parents testified that she kept them awake at night, talked to the television set, and complained of radioactive materials entering the house and of people poisoning her food.

In her own behalf, Julia Benton testified that she often stays awake at night but does nothing to disturb others. She denied accusing people of poisoning her food and claimed to have training in chemistry and botany and knowledge of physics and electronics. She testified that she preferred not to take medication and had severed her relationship with the Veterans Administration Hospital in Fayetteville. There was no other evidence presented.

The court found that "respondent has disassociation thought process patterns and grandiose ideations, florid paranoid delusions and shows impairment in her reasoning ability." The court further agreed with Dr. Pellegrini that respondent "is dangerous to herself only in that her illness negates her ability to meet her personal needs." From an order committing her to an appropriate treatment facility for a period of sixty days, respondent appealed to this Court.

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

Mary Ann Tally, Assistant Public Defender, Twelfth Judicial District, for respondent appellant.

ARNOLD, Judge.

[1] While it is clear from the record that the commitment period of sixty days has expired, this appeal is not moot. *In re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975), and *In re Mostella*, 25 N.C. App. 666, 215 S.E. 2d 790 (1975).

[2] Defendant contends and the State concedes that the trial court erred in admitting the affidavit of Dr. Pellegrini, the examining psychiatrist. We agree. Dr. Pellegrini was a witness for purposes of the proceeding. *See Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860 (1957). G.S. 122-58.7(e) provides that "[c]ertified copies of reports and findings of qualified physicians and medical records of the mental health facility are admissible in evidence, but the respondent's right to confront and cross-examine witnesses shall not be denied." The statute could hardly be more explicit in preserving respondent's right of confrontation.

The order appealed from states, "That the court finds as fact that the testimony of the petitioner and corroborating witnesses clearly shows that the mental instability of the respondent which evidence is the basis for the court's order for further treatment; that the affidavit of the doctor in their [sic] diagnosis supported the evidence of the petitioner. However, the basis for the court's findings relied on the petitioner [sic] and other witnesses' testimony rather than the affidavits signed by the doctors."

[3] Notwithstanding the judge's statement to the contrary, it is obvious that Dr. Pellegrini's affidavit forms the basis of the order. It further states, "That the respondent was examined by a qualified physician on the 18th day of February, 1975, at the VA Hospital at Salisbury, North Carolina; that his recommendation is that she is mentally ill or inebriate. That his further recommendation or diagnosis is that Miss Benton is dangerous to herself only in that her illness negates her ability to meet her personal needs. . . . That the Court agrees and concurs with that recommendation." No evidence, except for the affidavit, was adduced to show that the respondent was imminently dangerous to herself or others.

From a reading of the involuntary commitment statutes we do not infer that an order of commitment may issue only when supported by competent medical evidence. G.S. 122-58.7(i), however, does require that there be "clear, cogent and convincing evidence" to support the finding of two facts: first, that the respondent is mentally ill or inebriate, and, second, that the respondent is imminently dangerous to himself or others. *See In re Carter, supra.* Aside from the affidavit there is no evidence in this case to support any finding of "imminently dangerous" as required by the statute.

The record shows that the affidavit of Dr. Pellegrini forms the basis of the order of commitment. Since respondent was not afforded the right, guaranteed by statute, to cross-examine all witnesses, and since the evidence was not sufficient to support findings required by statute, the order is

Reversed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. NANCY ANN McLOUD

No. 7510SC162

(Filed 18 June 1975)

1. **Indictment and Warrant § 14— motion to quash — resisting arrest — lawfulness of arrest**

   Motion to quash a warrant for resisting arrest on the ground defendant's arrest for disorderly conduct was unlawful was properly denied where there is nothing on the face of the warrant to indicate that the arrest for disorderly conduct was unlawful.

2. **Arrest and Bail § 5— resisting arrest — amount of force to overcome resistance — opinion testimony**

   In this prosecution for resisting arrest, defendant was not prejudiced by an officer's testimony that "I think we only used the amount of force that was necessary."

3. **Arrest and Bail § 3; Disorderly Conduct and Public Drunkenness §1— disorderly conduct — lawfulness of arrest — resisting arrest**

   Defendant's arrest for disorderly conduct was lawful, and she could be convicted for resisting such arrest, where she protested and remonstrated in a loud and boisterous manner against the arrest of another person and directed profane, racist and vulgar epithets at the arresting officers.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 1 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1975.

This is a criminal prosecution wherein the defendant, Nancy Ann McLoud, was charged in separate warrants, proper in form, with (1) disorderly conduct and (2) resisting arrest. She was found guilty on both charges in the district court and appealed to the superior court for a trial *de novo*.

At the trial in the superior court, the State offered evidence tending to show the following: On 6 April 1974, L. R. Hall, an off-duty policeman working part-time as a security guard for the K-Mart on Western Boulevard in Raleigh, and R. L. Kidd, the K-Mart security manager, took Barry Moseley to the security office at the back of the store to question him with respect to the larceny of a pair of sunglasses. The defendant and her mother followed the men to the office and complained in a loud and boisterous manner about the detention of Moseley. Hall identified himself as a policeman and told them to leave. They refused and Kidd pushed them out of the room. Hall called the police department, and R. N. Hogg, a Raleigh policeman, was sent to the K-Mart to take Moseley to the magistrate's office. Moseley was then taken to Hogg's police car at the front of the store. The defendant and her mother were at the car and resumed their loud and boisterous protests. After Officer Hogg placed Moseley in the police car, the defendant continued her remonstrations against the officers and directed profane, racist, and vulgar epithets toward them. Officer Hogg thereafter attempted to arrest the defendant for disorderly conduct and she resisted by kicking, pushing, pulling, scuffling, and otherwise refusing to submit to arrest.

The defendant offered evidence tending to show the following: When the policemen took Moseley to the police car and began to search him, the defendant's mother told Moseley that if he had taken anything he should show it to the officers. One of the officers said, "Watch your mouth lady," and the defendant responded, "You can't tell her to shut her mouth like that." Officer Hogg thereupon grabbed the defendant, twisted her arm, pushed her to the ground, and handcuffed her.

The jury found the defendant not guilty on the charge of disorderly conduct but found her guilty of resisting arrest. From a judgment that defendant be imprisoned in the county jail for fifteen (15) days, she appealed.

Attorney General Edmisten by Associate Attorney George J. Oliver for the State.

Vaughan S. Winborne for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of her motion to quash the warrant for resisting arrest. She argues that she had

a right to resist because her arrest for disorderly conduct was unlawful.

A motion to quash raises the question of the sufficiency of the warrant to charge the commission of a criminal offense. In passing on the motion, the court treats the allegations of fact in the warrant as true and considers only the record proper and the provisions of the statutes under which the offense is charged. *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152 (1972). There is nothing on the face of the warrant here to indicate that the arrest for disorderly conduct was unlawful. This assignment of error is not sustained.

[2] Next, defendant contends that the court erred in allowing Officer Hogg to testify over her objection and motion to strike that "at the same time—well, after we subdued the two women, which I think that we only used the amount of force that was necessary." While this testimony is clearly the officer's opinion as to whether he used excessive force in subduing the defendant and her mother, we do not perceive on the facts of this case how the admission of such evidence could have prejudiced defendant's trial for resisting arrest. Defendant also asserts that the court erred in not allowing her mother to testify that the police officer searched her pocketbook and that $80.00 and a "fingernail clip" were missing therefrom. This evidence was clearly irrelevant and properly excluded by the court.

Based on five exceptions in the record to comments of the trial judge during the taking of testimony and during the recapitulation of the evidence in the charge, the defendant contends the judge expressed an opinion on the evidence in violation of G.S. 1-180. Suffice it to say, we have carefully examined each comment challenged by these exceptions and find no impropriety whatsoever upon the part of the trial judge. This assignment of error has no merit.

[3] Defendant next asserts that the court erred in overruling her motions for judgment as of nonsuit because the evidence disclosed that her arrest for disorderly conduct was unlawful. This argument is not persuasive. Under G.S. 14-288.4(a)(2), it is illegal to use "any utterance . . . or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." See, *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972). The State's evidence tends to show that Officer Hogg arrested the defendant after she pro-

tested and remonstrated in a loud and boisterous manner against the arrest of Moseley and after she had directed profane, racist, and vulgar epithets at the officers. Under these circumstances, Hogg could reasonably believe that the statute (G.S. 14-288.4) had been violated in his presence. An arrest does not become unlawful merely because the person arrested is later acquitted of the crime for which he was arrested. *State v. Jefferies*, 17 N.C. App. 195, 193 S.E. 2d 388 (1972).

No useful purpose can be served by our discussing defendant's other assignments of error. We have carefully considered all the assignments of error in the record and conclude that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. ROGER LOCKLEAR

No. 7516SC236

(Filed 18 June 1975)

1. **Criminal Law § 87— leading questions**

The trial court did not err in allowing the district attorney to ask leading questions.

2. **Weapons and Firearms— discharging firearm into occupied dwelling — evidence of motive admissible**

In a prosecution for discharging a firearm into an occupied dwelling, evidence that defendant, a married man, had attempted to date the victim's stepdaughter two years earlier, that the victim ordered defendant to stay away from his house and his stepdaughter, and that defendant, defendant's brother and the victim engaged in a fight during which the victim shot defendant's brother was admissible for establishing motive and *quo animo*.

APPEAL by defendant from *Clark, Judge*. Judgment entered 15 November 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 27 May 1975.

This is a criminal prosecution wherein the defendant, Roger Locklear, was charged in a bill of indictment, proper in form, with the felony of discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1.

The defendant pleaded not guilty and the State offered evidence tending to show the following: At about 12:30 or 1:00 o'clock in the morning on 12 August 1974 Edford Jackson observed the defendant's automobile, "a black Buick with white stripes on top of it and white stripes down the side of it," pass down the street in front of his house. Approximately twenty minutes later, the same car again approached his house. On this occasion Jackson, who was seated in a front bedroom, was able to see that the defendant was the driver of the automobile. The defendant had an object in his hand that ". . . looked like a pistol. A small ball of fire came out of it and a loud blast and something went tearing through the house and tore through five walls." The next morning Jackson found a .45 caliber slug in one of the walls of the house.

The defendant offered the testimony of several witnesses tending to establish an alibi until approximately 2:30 a.m. on the morning in question.

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 Edmisten, by Associate Attorney T. Lawrence Pollard, for the State.

Arthur L. Lane for defendant appellant.

HEDRICK, Judge.

Assignments of error four and five relate to the sufficiency of the evidence to take the case to the jury and to support the verdict. Neither of these assignments of error is brought forward and argued in defendant's brief and both are deemed abandoned.

[1] Assignments of error one, two, and three relate to the admission of testimony offered by the State. First, defendant contends the court erred in allowing the district attorney to ask leading questions and in not giving definitive rulings on defendant's objections. We have examined the one exception upon which this contention is based and find it inadequate to support the argument. Furthermore, when counsel objected to what he now contends was a leading question, the court directed the witness to answer and admonished the district attorney not to

lead the witness. We fail to perceive how the court could have been more definitive.

[2] Second, over defendant's objection, Jackson was allowed to testify that in 1972 the defendant, a married man, had attempted to date his stepdaughter and that he had ordered the defendant to stay away from his home and his stepdaughter. As a result, the defendant, the defendant's brother, and Jackson had engaged in a fight and Jackson had shot the defendant's brother. Defendant argues that evidence of these incidents was so remote in time as to be irrelevant and prejudicial.

The existence of a motive, a circumstance tending to make it more probable that the person in question did an alleged act, is always admissible where the doing of the act is in dispute. *State v. Church,* 231 N.C. 39, 55 S.E. 2d 792 (1949). Motive may be proved by conduct or by evidence of facts which would naturally give rise to a relevant motive and from which such motive may be reasonably inferred, 1 Stansbury, N. C. Evidence § 83 (Brandis Rev. 1973). To this end evidence of threats or ill will existing between the defendant and the victim of the offense is competent. *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348 (1949); *State v. Artis,* 227 N.C. 371, 42 S.E. 2d 409 (1947); *State v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648 (1945). Ordinarily, the remoteness in time of such evidence goes more to its weight and credibility than to its admissibility. See, *State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329 (1944). We are of the opinion the evidence challenged by these exceptions was admissible for establishing motive and *quo animo.* These exceptions are not sustained.

Finally, based on exceptions to the testimony of the investigating officer, defendant argues the court erroneously allowed the State to introduce the surmises and conclusions of the deputy as to what happened under the guise of admitting his testimony as evidence tending to corroborate the testimony of the prosecuting witness. We have carefully examined each exception upon which this assignment of error is based and find it to be without merit. These assignments of error are all overruled.

Assignments of error six, seven, and eight relate to the court's instructions to the jury. We have carefully examined each argument advanced in defendant's brief including the contention that the court erred in failing to instruct the jury with

respect to defendant's alibi and find these assignments of error to be without merit. In the absence of a special request, the trial court is not required to instruct the jury specifically upon the subject of alibi. *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973).

Defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MORRIS concur.

RODNEY GAVIN NELSON T/A NELSON'S RESTAURANT v. NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL

No. 7510SC258

(Filed 18 June 1975)

Constitutional Law § 12; Intoxicating Liquor § 1— local act prohibiting sale of beer and wine — regulation of trade — unconstitutionality

A local act prohibiting the sale, disposal for gain or giving away of beer and wine in the community of Atlantic in Carteret County is a local act regulating a trade in violation of Article II, Section 24(1)(j) of the N. C. Constitution and is void.

APPEAL by respondent from *Lee, Judge.* Judgment entered 7 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 29 May 1975.

Petitioner, the proprietor of a restaurant in the community of Atlantic in Carteret County, applied to respondent for a retail beer and wine permit. After hearing, the application was denied. There was no controversy about the material facts. The only reason for denial of the application is the existence of Chapter 626, Public-Local Laws of 1937 which, in part, provides as follows:

> " 'That it shall be unlawful for any person, persons, firm or corporation to sell or otherwise dispose of for gain or to give away spirituous, vinous or malt liquors, wines, ciders, either foreign or domestic, bitters containing more than one-half of one percent, by volume, of alcohol in the community of Atlantic, running from Styron's Bay to Hall's Point in the County of Carteret, North Carolina.' "

Petitioner exercised his right to judicial review. The case came on for consideration before Judge Lee who concluded that the act in question is a local act purporting to regulate trade and is, therefore, contrary to the Constitution of North Carolina. The case was remanded for reconsideration by respondent in the light of the court's decision. Respondent appealed.

Attorney General Edmisten, by Associate Attorney James Wallace, Jr., for respondent appellant.

Wheatly & Mason, P.A., by C. R. Wheatly, Jr., for petitioner appellee.

VAUGHN, Judge.

Article II, Section 24, of the Constitution of North Carolina, in pertinent part, provides:

> "(1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> * * *
>
> (j) Regulating labor, trade, mining, or manufacturing;
>
> * * *
>
> (3) . . . [a]ny local . . . act . . . enacted in violation of the provisions of this Section shall be void.
>
> (4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section."

The quoted section is in all material respects identical to the relevant section in effect prior to the adoption of the revised constitution in 1970.

By its terms, the act in question applies only to an ill-defined unincorporated area made up of less than one county. It is a local act.

Petitioner seeks a license to engage in the retail sale of beer and wine. The retail sale of beer and wine is a "trade" within the meaning of this constitution. *Food Fair v. Henderson,* 17 N.C. App. 335, 194 S.E. 2d 213. "Trade" refers to a business venture for profit. *Smith v. County of Mecklenburg,* 280 N.C. 497, 187 S.E. 2d 67. Except for the local act in question, petitioner, upon compliance with the general laws regulating the sale of beer and wine, would be free to pursue that trade.

Appellant attempts to distinguish the local act in question from the ones involved in *Smith* and *Food Fair* because it absolutely "prohibits" the trade rather than to "regulate with particularity" as in *Smith,* and allows the local governing bodies no discretion as the act did in *Food Fair.* There is no such distinction to be made between the acts in a constitutional sense. All of them are local acts attempting to govern, or regulate, the carrying on of a trade in violation of the constitution.

A local act that authorizes or prohibits the sale of beer and wine is a local act regulating or governing a trade and is void.

In *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297, the Supreme Court upheld a conviction for racing on Sunday in violation of a local act. The act prohibited all motor vehicle races on Sunday without regard to whether profit or other compensation was involved. The court carefully limited its opinion to the attack then being made on the act and said that it regarded "the statute as placing a ban upon a specified activity, to wit, motor vehicle races on Sunday in Wake County, rather than as a regulation of labor or trade in which the defendants and others are privileged to engage."

Appellant suggests that since the local act in question here also makes it unlawful to "give away" the designated beverages, the rationale in *Chestnutt* should control the disposition of the case at bar. We disagree. The only substantial effect of the local act before us is to regulate the sale of alcoholic beverages. Its effect on trade is not, therefore, merely incidental. The only practical consequence of the additional proscription against giving the beverages away is, most likely, an aid to enforcement of the provisions regulating the sale of alcoholic beverages—a trade.

The trial court correctly concluded that Chapter 626 of the Public-Local Laws of 1937 violates Article II, Section 24(1) (j) of the Constitution of North Carolina and is void. *Food Fair v. Henderson, supra.* The judgment is, therefore, affirmed.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. LEROY GIBSON, J. T. HARRIS AND LAWRENCE ROBERT LITTLE, JR.

No. 755SC147

(Filed 18 June 1975)

1. **Conspiracy § 7— instructions assuming conspiracy entered**

In a prosecution of three defendants for conspiracy to damage real property by the use of explosives, the trial court erred in instructing the jury that if it found that a meeting was held at the home of one of the defendants on a certain date, it could consider against all defendants the acts and declarations of either of the defendants which occurred between the time of the meeting and the time of the explosion since the instruction assumed that defendants entered into a conspiracy at the "meeting" and failed to require such acts and declarations to have been made by a party to the conspiracy and in pursuance of its objectives.

2. **Criminal Law § 113— joint trial — instructions — one defendant guilty — conviction of all defendants**

In a prosecution of three defendants for conspiracy to damage real property by the use of explosives, the trial court erred in instructing the jury that it should return a verdict of guilty if it found beyond a reasonable doubt that defendants "or some of them" agreed with another or with one other of their number to damage property by explosives, since the instruction could have led the jury to believe that it should convict all defendants if it found that either defendant committed the offense charged.

ON *certiorari* to review trial before *Tillery, Judge.* Judgments entered 13 July 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 April 1975.

Each defendant was charged in a separate bill of indictment. The indictments charged that on or about the 16th and 17th day of June 1973 each defendant conspired with the other defendants and others named in the indictments to damage real property, owned by another, by the use of explosives.

The jury returned a verdict of guilty as charged against all defendants. Judgments imposing active prison sentences were entered and all defendants appealed.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Jay D. Hockenbury, for defendant appellants Leroy Gibson and John T. Harris; Rountree & Newton, by John Richard Newton, for defendant appellant Lawrence Robert Little, Jr.

VAUGHN, Judge.

The evidence was sufficient to take the case to the jury and supports the verdicts rendered thereon. Assignments of error to the contrary are, therefore, overruled.

The apparent theory of the State's case was that Gibson, Harris, Little and another formed the conspiracy during a meeting at Gibson's home on 16 June 1973, although there was some evidence tending to show that the conspiracy may have been formed earlier.

[1] The judge instructed the jury:

> "It is not necessary in a conspiracy that all of those who are involved in it become involved in it at the same moment. A conspiracy, once one is established, is an active conspiracy from the moment of its establishment until such time that the purpose of that conspiracy is accomplished or until it is abandoned.
>
> (My reason for telling you this is to emphasize one of the things which I want you to keep foremost in your mind as you go about your deliberations. From time to time during this trial you have heard me say you will only consider this evidence against a certain defendant, whichever one I might have named, and you will not consider it as against the other two. The rule which you should apply in respect to that is this: Any act or anything which was said by either of these defendants prior to an *alleged meeting* at the home of the defendant Leroy Gibson on the 16th of June, 1973, can only be considered against the person who did it or said it. That applies to each defendant. Let me emphasize that. Anything said or done by either of these men, if you find that anything was said or done prior to an *alleged meeting* at Mr. Gibson's home, can only be considered with respect to your deliberations in the case of the man who did it or said it. I further charge you that if you find from the evidence that there was a *meeting* on the 16th of June, 1973, and each defendant by his plea of not guilty denies every material fact in this action; so you will have to find from the evidence that there *was* such *a meeting*. It is denied. If you find that such a *meeting* occurred, then everything which you find from the evidence to be the truth from that moment until an alleged explosion occurred at Riverside Apartments sometime in the night-

time of June 17th, 1973 everything between those two times may be considered by you in deliberating upon the guilt or innocence of each of the defendants irrespective of whether or not that defendant was present when that thing occurred or that thing was said.)" (Emphasis added.)

[2] The error in this instruction is that it assumes the very fact the State was required to prove to the jury beyond a reasonable doubt. It assumes that at the "meeting" defendants made an agreement to carry out the unlawful act. Moreover,

> "Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) *the acts or declarations were made by a party to it and in pursuance of its objectives;* and (3) while it was active, that is, after it was formed and before it ended." *State v. Lee,* 277 N.C. 205, 213, 176 S.E. 2d 765, 769-770. (Emphasis added.)

The judge's final mandate to the jury is as follows:

> "(So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about the 16th of June, 1973, Lawrence Robert Little, Jr., Leroy Gibson, or J. T. Harris, *or some of them,* or all of them, agreed with David Smith or with one other of their number to maliciously damage the property of someone else by the use of an explosive or incendiary device, and if you further find that they intended at the time the agreement was made that this damage to property at Riverside in Wilmington would be accomplished by the use of an explosive device that it would be your duty to return a verdict of guilty. However, if you do not so find or have a reasonable doubt as to any one or more of these things it would be your responsibility to enter a verdict of not guilty.)" (Emphasis added.)

We are unable, in any material way, to distinguish this instruction from those held to be so prejudicial as to require a new trial in numerous opinions of the Supreme Court where the Court said that the instruction could have led the jury to believe that the guilt of one defendant could rest or fall upon the guilt of some of the others. *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851; *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230. (Reversing on that point, *State v. Parrish,* 2 N.C. App. 587, 163 S.E. 2d 523.) The error is particularly prejudicial in conspiracy

trials of consolidated prosecutions of a number of defendants where the volume of the evidence and the complexity of the purposes for which it may be considered puts such a difficult burden on the jury. In trials for conspiracy, perhaps to a greater extent than other consolidated prosecutions, there is always the danger that a jury may tend to infer the guilt of one defendant because of his association and joint trial with others whose guilt is manifest.

We will not discuss the other errors assigned by defendants. They may not occur at the next trial.

For the reasons stated, each of the appellants are awarded a new trial.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. DEWEY ABSHER

No. 7525SC200

(Filed 18 June 1975)

Constitutional Law § 33; Criminal Law § 48— accusations by companion — silence of defendant — evidence prejudicial

Where defendant was in custody and had been advised of his constitutional rights, he was under no duty to make a response in the face of accusations made by his companion, and admission of testimony by two officers concerning such accusations and defendant's silence was prejudicial error.

ON *writ of certiorari* to review the order of *Falls, Judge.* Order entered 4 December 1973 in Superior Court, CALDWELL County. Heard in the Court of Appeals 7 May 1975.

Defendant was charged in a bill of indictment with (1) breaking and entering an automobile and (2) larceny of one pair of Birolux binoculars that were under the front seat of the automobile. He was found guilty, and a two-year sentence was imposed.

The issues raised by this appeal concern the admissibility of accusations made by the defendant's companion in front of

the defendant and police officers, and the defendant's failure to deny those accusations.

Facts necessary for the determination of these issues are set forth in the opinion.

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

Ted S. Douglas, for the defendant-appellant.

BROCK, Chief Judge.

This prosecution arose out of the theft of one pair of Birolux binoculars, valued at $30.00, from a locked automobile belonging to one Alvin McMillian, Jr. The car was parked beside a road near Brown Mountain Gorge in Caldwell County. The windows were rolled down slightly, and the binoculars were under the front seat. McMillian had left the car to locate an appropriate place for a picnic when the theft occurred. On his way back from Brown Mountain Gorge, McMillian saw a deputy sheriff of Caldwell County. He reported the theft and was asked to come to the sheriff's department to file a formal statement. While there, McMillian was shown a pair of binoculars that had just been retrieved from the defendant's car. McMilian identified them as the ones that had been stolen.

The defendant offered little evidence; he merely denied stealing the binoculars and said he had noticed the binoculars in his car while he was driving near Brown Mountain Gorge, but did not know how they had gotten there.

Defendant asserts that substantial error was committed when the trial judge allowed both Charles Thompson, deputy sheriff of Caldwell County, and Mark Gentry, an employee of the sheriff's department, to testify as to accusations made by one Oscar Hunt, defendant's companion, and to defendant's failure to deny the accusations. Thompson, Gentry, and defendant were present when Hunt made his accusations of defendant. It was for that reason, and apparently because he considered defendant's lack of denial an admission, that the trial judge allowed the testimony to be admitted. Hunt did not appear as a witness at the trial, and he was not charged with any offense.

The evidence indicates that after the defendant and Hunt were stopped by the deputy sheriff, they were taken to the sheriff's department. Both were given the *Miranda* warnings. Ac-

cording to Thompson, Hunt stated that the defendant and he drank a few beers and drove to the Brown Mountain Gorge area. There defendant broke into McMillian's car and returned with the binoculars. Gentry's testimony was similar; he stated that Hunt had said

> "he looked up and saw that he was in the car and all [of] a sudden that he was coming back to the car and he had something in his hand like a case and also a pair of binoculars and he told him to put it back so he would not get him into trouble. He said that Dewey did not put them back and got in the car and rode up the road and that they got stopped.
>
> "Q. What did the Defendant say to that statement by Oscar Hunt?
>
> "A. He had no comment.
>
> MR. BECK: OBJECTION.
>
> COURT: OVERRULED.
>
> "A. He said he did not want to get Oscar in trouble and he had nothing to say."

Thompson also testified that in response to Hunt's statement that the defendant was going to get them into trouble, the defendant "didn't want to make any comment." The trial judge instructed the jury that "the defendant was present and heard the statement of Hunt and . . . said nothing."

The admission of the testimony of Thompson and Gentry, as it pertained to accusations by Hunt and the defendant's response to them, was error. "It was formerly a general rule that silence might amount to an admission though the party (usually, of course, a criminal defendant) was in custody under a charge of crime, . . ." 2 Stansbury, N. C. Evidence § 179 (Brandis rev. 1973); *see State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960). However, the landmark case of *Miranda v. Arizona,* 384 U.S. 436 (1966), made it clear that "whenever an accused has been taken into custody and officers are present, evidence of an admission by silence is banned, at least as substantive evidence." 2 Stansbury, N. C. Evidence § 179 (Brandis rev. 1973) citing footnote 37 to the controlling opinion in *Miranda v. Arizona, supra* at 468.

Here defendant had been given the *Miranda* warnings and had the right to remain silent. His silence was not an implied admission of guilt and could not be used against him. It made no difference that Hunt, rather than the police, made accusations against the defendant. The defendant was in custody; he had been advised of his constitutional rights; and he was under no duty to make a response in the face of the accusations. The admission of this evidence was prejudicial error.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. GRETTA VALORIE GORDON

No. 7528SC184

(Filed 18 June 1975)

1. **Criminal Law § 93— order of proof**

The order of proof is in the discretion of the trial judge.

2. **Kidnapping § 1— carrying away — victim taken from expressway to apartment**

The State's evidence showed a sufficient carrying away to support a conviction for kidnapping where it tended to show that the victim was assaulted on a ramp leading onto an expressway and knocked unconscious, and that he was then carried to an apartment where he was assaulted and robbed.

APPEAL by defendant from *Martin (Harry C.), Judge.* Judgments entered 12 November 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 7 May 1975.

Defendant was charged in two bills of indictment, each of which is proper in form. In case 74CR18069 she was charged with the felony of kidnapping. In case 74CR18070 she was charged with the felony of armed robbery.

The State's evidence tended to show the following: On 10 August 1974 at approximately 1:30 a.m. Carroll Messer was driving west on Patton Avenue in Asheville, approaching the expressway. As Messer turned down the ramp to the expressway, "he saw a stout black woman step out in front of his car waving her arms." Messer identified the defendant as the stout

black woman. Messer stopped his car and rolled down his window. As she did not approach the car, Messer placed his tranmission in "park" and stepped out of his car. He was immediately struck from behind by someone and was rendered unconscious. When he regained consciousness, his eyes were taped closed, his hands were tied behind him, and he was being carried by someone up the stairs at Hillcrest Apartments. Messer was carried into an apartment where $85.00 in cash, two payroll checks for approximately $85.00 each, a 23-jewel Bulova watch, and a Zippo cigarette lighter were taken from his person. Messer heard the voices of two women and a man. The voice of one of the women was that of defendant. While in the apartment, the legs of his trousers were cut off and lighted cigarettes were applied to his lips, his back, and his penis. The two women and the man laughed and joked. Messer was also cut on his chest and hip. The cut on the hip required forty-nine stitches. At about 5:30 a.m. Messer was carried out of the apartment with his eyes taped and hands tied. As they reached the foot of the stairs, a car drove by, and Messer was shoved down behind a wall. While down beside the wall, he was able to remove the tape from his eyes. He saw defendant standing about five feet from him. There were three persons present, but defendant is the only one he saw. Messer escaped by running through the Hillcrest Apartment project to a street where he flagged a motorist. The police were called, and Messer was taken to the hospital.

Defendant's evidence tended to show the following: Defendant lived at Hillcrest Apartments. She never saw Messer until after she was arrested. Messer was never in her apartment. She did not leave her apartment during the night in question.

The cases were submitted to the jury on charges of kidnapping and common law robbery. The jury returned verdicts of guilty of kidnapping and common law robbery.

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

Robert L. Harrell, Assistant Public Defender, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that it was error to allow the prosecuting witness to testify about the acts of violence without first

fully establishing the identity of the perpetrator. This argument is feckless. Before describing what took place, the prosecuting witness identified defendant as the person who flagged him down. In any event the order of proof is in the discretion of the trial judge. *State v. Franks,* 262 N.C. 94, 136 S.E. 2d 623 (1964). No abuse of discretion has been shown.

[2] Defendant next argues that the evidence does not support a conviction of kidnapping. He cites *State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958). In *Knight* the defendant dragged his victim into the woods for the purpose of blotting out the evidence of the homicide. In this case defendant carried the victim to the apartment for the purpose of committing the offenses of robbery and assault. Defendant also relies on *State v. Roberts,* 286 N.C. 265, 210 S.E. 2d 396 (1974). In *Roberts* it was held that where the victim was pulled a distance of only eighty to ninety feet, the requirement of "carrying away" was not satisfied so as to support a conviction of kidnapping. In the present case the distance the victim was carried was not shown, but there is no contention that the victim was not carried away from the immediate vicinity of the ramp from Patton Avenue to the expressway where the original assault upon him was committed. This assignment of error is overruled.

Defendant argues that the charge of common law robbery should have been dismissed. The evidence is sufficient to show that defendant was present and aiding and abetting in the robbery of the victim. This assignment of error is overruled.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBEY CLYDE BROWN

No. 7525SC110

(Filed 18 June 1975)

1. Assault and Battery § 13— assault with a deadly weapon — threats and assault by victim

In a prosecution for assault with a deadly weapon with intent to kill, the trial court did not err in excluding testimony of prior threats

made by the victim or testimony concerning the victim's prior assault on a third person.

2. **Assault and Battery § 13; Criminal Law § 50— eyewitness to assault — opinions properly excluded**

In a prosecution for assault with a deadly weapon with intent to kill, the trial court did not err in refusing to allow a witness who fully described the actions of defendant and the victim immediately prior to and during the shooting to give his opinions that defendant was trying to get away from the victim at the time of the shooting and defendant was not the aggressor.

APPEAL by defendant from *Winner, Judge.* Judgment entered 12 September 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 6 May 1975.

Defendant was charged in a bill of indictment with the felony of assault upon Manley Carswell with a deadly weapon with intent to kill, inflicting serious injuries. The jury found defendant guilty as charged.

The State's evidence tended to show the following: On 12 January 1974 defendant and Carswell were in the Starling Street Pool Room. Defendant struck Carswell in the back of the head while Carswell was seated in front of him. Defendant and Carswell began to scuffle, and Carswell wrestled defendant to the floor. Defendant asked Carswell to let him up, which Carswell did. Defendant walked toward the front of the building, and Carswell turned his back and started to sit down. Defendant shot Carswell in the back one time, and as Carswell turned, defendant shot him two more times in the shoulder. Carswell did not have a weapon of any kind.

The defendant's evidence tended to show the following: Carswell hit defendant several times with his fists. As defendant backed away, Carswell made a gesture toward his (Carswell's) hip and said, "I think I'll blow your brains out right now." Defendant thought Carswell had a gun and was afraid. Defendant drew his own pistol and shot Carswell in self-defense. Defendant's evidence further tended to show that on the day immediately preceding the day defendant shot Carswell, Carswell drove up beside defendant's car on the highway, pointed a pistol at defendant, and stated he would blow defendant's g- d- head off.

From his conviction defendant appealed.

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

Simpson, Martin, Baker & Aycock, by Samuel E. Aycock, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the trial court committed error in excluding testimony of prior threats made by Carswell. This argument is untenable. The defendant and his witness Clark were both permitted to testify about Carswell's (the victim's) threatening defendant with a pistol on the day before defendant shot Carswell. The testimony of defendant's witness LaFevers concerning an earlier assault upon LaFevers by Carswell was properly excluded as having no proper relevance to defendant's plea of self-defense. Although defendant may have been entitled, upon his plea of self-defense, to offer evidence of Carswell's reputation for being a violent and dangerous fighting man, he was not entitled to establish such reputation by showing an isolated instance of an assault upon a third party, even though it was in defendant's presence.

[2] Defendant further argues that it was error to refuse to allow his eye witness to state his opinions that (1) defendant was "trying to get away" from Carswell at the time of the shooting, and (2) defendant "was not the aggressor." This eye witness testified fully in describing the actions of both the defendant and Carswell immediately prior to and during the shooting. All the evidence was clearly before the jury in detail, and it was the function of the jury to decide whether defendant was trying to get away and whether defendant was the aggressor. We recognize that a witness is often permitted to give a "shorthand statement of the facts" or "an instantaneous conclusion of the mind" or "a natural and instinctive inference" where it is not practical to describe the facts in detail because of limitations of customary speech or the difficulty of analyzing the thought processes by which the witness reaches a conclusion. *State v. Kincaid,* 183 N.C. 709, 110 S.E. 612 (1922); *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24 (1969). Nevertheless, the witness in this case demonstrated his ability to relate the facts in detail, and, for this reason, if there were error in the trial court's exclusion of the opinions, we cannot perceive that it constitutes prejudicial error.

In our opinion defendant had a fair trial free from prejudicial error. The jury chose to reject defendant's contention that he acted in self-defense.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DONALD SMITH

No. 7512SC252

(Filed 18 June 1975)

Robbery § 4— armed robbery — defendant as lookout — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that two men robbed the employees of a convenience store, defendant was on the sidewalk in front of the store while the robbery was taking place looking up and down the street, defendant stared at one of the store employees whose hands were up in the air and turned his head when the employee looked at him, and defendant fled with the robbers.

APPEAL by defendant from *Smith, Judge.* Judgment entered 11 December 1974 in Superior Court, CUMBERLAND County. Argued in the Court of Appeals 10 June 1975.

Defendant was indicted for armed robbery and conspiracy to commit armed robbery. The conspiracy charge was dismissed at trial, and defendant was found guilty of armed robbery. A sentence of imprisonment for a term of not less than eight nor more than twenty years was imposed.

Attorney General Edmisten, by Associate Attorney G. Jona Poe, Jr., for the State.

William J. Townsend, for the defendant-appellant.

BROCK, Chief Judge.

Defendant's only assignment of error challenges the failure of the trial court to grant his motion for nonsuit. He argues that the evidence in this case shows only that he was present at the scene of the robbery. Defendant asserts that there is no evi-

dence that he communicated with the robbers in the store or that he had previously entered into any agreement to provide them either aid or encouragement. He argues that his conviction can only be based on conjecture; he may just have been an innocent passerby who noticed a robbery was taking place and foolishly decided to watch as it was being committed.

It is well known that on a motion for nonsuit, the evidence is to be considered in the light most favorable to the State. The State's evidence shows the following: On 22 September 1974 Robert Lee Hales and Robert Herring were employed as clerks at the Quik Stop, a convenience store in Fayetteville. At 10:30 p.m. two men came into the store. One was called McDonald, the other, Neal. McDonald asked for some cigarettes and held out a twenty dollar bill. Neal pulled out a gun and forced Hales and Herring to open the two cash registers. McDonald took $129.69 from one register, but the other was empty. During the robbery Hales looked out the window and saw defendant "looking up and down the street and then he turned and faced me." He looked at Hales for ten or fifteen seconds from a distance of ten feet, then turned away. The sidewalk in front of the Quik Stop was well-lighted. After McDonald and Neal got the money, they left the store and "took off running up West Russell Street, with the defendant Donald Smith running with them. They all took off in a bunch. . . ."

This evidence, in our opinion, is sufficient to withstand a motion for nonsuit. We agree that mere presence at the scene of the crime is not, by itself, proof of guilt. However, "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." *State v. Birchfield,* 235 N.C. 410, 414, 70 S.E. 2d 5 (1952). Furthermore, the fact that no words were spoken does not absolve the defendant of complicity in the robbery. "[C]ommunication of intent to aid . . . does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator." *State v. Rankin,* 284 N.C. 219, 223, 200 S.E. 2d 182 (1973).

The evidence shows defendant looked "up and down the street"; stared at Hales, whose hands were up in the air, and

turned his head when Hales looked at him; and fled with McDonald and Neal. A reasonable inference from this evidence was that defendant was acting as a "lookout" for the other two.

No error.

Judges PARKER and ARNOLD concur.

DICKERSON, INCORPORATED v. BOARD OF TRANSPORTATION
(FORMERLY STATE HIGHWAY COMMISSION)

No. 7510SC80

(Filed 18 June 1975)

Contracts § 30; Damages § 7— time limitation — liquidated damages — unavailability of site

In an action to recover a sum withheld by defendant as liquidated damages for failure of plaintiff to complete construction of a bridge by the date called for in a contract between the parties, summary judgment was improperly entered for defendant where plaintiff presented evidence that the plaintiff did not complete the work by the date called for in the contract because the site was not made available to it until some two to three months after the date specified in the contract.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 27 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1975.

Plaintiff instituted this action to recover a sum of $4,700.00 which it alleges defendant wrongfully withheld as liquidated damages under a contract between the parties.

A pre-trial conference resulted in an agreement by the parties as to various facts, among which the following appear. The court has jurisdiction over the parties and subject matter under G.S. 136-29. Pursuant to G.S. 136-28, plaintiff was awarded a contract for the construction of a bridge across the Little River in Transylvania and Henderson Counties. The contract was executed by plaintiff and the State Highway Commission (now Board of Transportation) on 11 December 1970. It provided that the bridge site on the project in question would be made available to the contractor on or before 4 May 1971

and that 4 May 1971 would be considered the date of availability for the structure contract. It also provided that the contractor would be required to complete all work included in the contract, except for field painting of structural steel, by 1 December 1971 and that liquidated damages of $100.00 would be charged the contractor for each calender day after 1 December 1971 for any work included in the contract that was not completed. The date of completion was extended from 1 December 1971 to 3 December 1971. Plaintiff began construction on 12 July 1971, seventy-one days after 4 May 1971 which was the date of availability under the contract. Except for field painting of the structural steel, construction of the bridge was completed on 19 January 1972, forty-seven days after the modified completion date of 3 December 1971. Defendant assessed $4,700.00 as liquidated damages.

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

Plaintiff appealed.

Koy E. Dawkins, for plaintiff appellant.

Attorney General Edmisten, by Associate Attorney C. Diederich Heidgerd and Associate Attorney Robert W. Kaylor, for the State.

MARTIN, Judge.

Much argument has been directed toward the trial court's denial of plaintiff's motion for summary judgment. This Court has held that ordinarily the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. *Stonestreet v. Motors, Inc.*, 18 N.C. App. 527, 197 S.E. 2d 579 (1973); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970). We will not consider the trial court's failure to grant summary judgment in plaintiff's favor.

The sole question for determination is whether the trial court erred in granting summary judgment for defendant. Summary judgment, when appropriate, may be rendered against the moving party. G.S. 1A-1, Rule 56(c). Rule 56 provides for the disposition of cases where there is no genuine issue of

fact, and its purpose is to eliminate formal trials where only questions of law are involved. *Harrison Associates v. State Ports Authority,* 280 N.C. 251, 185 S.E. 2d 793 (1972). 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. *Whitley v. Cubberly,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974). When so considered, did the evidentiary material show that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law? We think not.

"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 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." *Reynolds Co. v. Highway Commission,* 271 N.C. 40, 155 S.E. 2d 473 (1967).

In a "construction inspection report" made by A. L. Barnett, an area construction engineer employed by defendant, it is admitted that plaintiff was behind in its work because the site was not available to it until July. In addition, Mr. Barnett states in the report that he finally got to the bridge site on 16 September 1971 after "at least one-half dozen previous attempts" and that he was unable to reach the site because the access road was impassable due to either rock removal or rain. In response to plaintiff's request for admission of facts, defendant admits the genuineness of said report and also admits that it was kept in the regular and due course of its business.

While plaintiff failed in its motion for summary judgment, it did not follow necessarily that defendant was entitled to summary judgment.

Reversed.

Judges BRITT and HEDRICK concur.

RALPH KIRBY v. VIRGINIA KIRBY

No. 7528DC111

(Filed 18 June 1975)

1. **Judgments § 37— petition for support — dismissal on procedural grounds — subsequent alimony action — action not barred**

Denial of defendant's petition for support under the Uniform Reciprocal Enforcement of Support Act disposed of the matter on procedural grounds, was not a trial on the merits, and was not a bar to a subsequent action for alimony by defendant.

2. **Divorce and Alimony § 13— petition for support — dismissal on procedural grounds — no judicial separation**

Disposition on procedural grounds of an earlier action by defendant wife for support under the Uniform Reciprocal Enforcement of Support Act did not constitute a judicial separation such as would legalize the separation between the parties and deprive defendant of the use of abandonment as a defense in plaintiff's subsequent action for absolute divorce.

3. **Divorce and Alimony § 16— alimony award — sufficiency of evidence**

Evidence was sufficient to support the trial court's findings that plaintiff husband abandoned defendant wife and to support the trial court's award of alimony to defendant.

APPEAL by plaintiff from *Israel, Judge.* Judgment entered 16 October 1974 in District Court, BUNCOMBE County. Heard in the Court of Appeals 10 April 1975.

Plaintiff filed this action for absolute divorce. In his complaint, filed 17 July 1973, plaintiff husband alleged, among other things, that he and defendant separated 1 November 1971 and lived continuously separate and apart since that date. In her answer, defendant denied that the separation was with the consent of defendant, and, to the contrary, alleged abandonment by plaintiff and cross-claimed for alimony and divorce from bed and board. Replying to the answer, plaintiff pleaded that a prior order of 15 June 1973 was a bar to defendant's cross-claim and that the order constituted a judicial separation.

From a judgment for defendant awarding alimony, plaintiff appealed.

Wade Hall, for plaintiff appellant.

Adams, Hendon & Carson, P.A., by Philip G. Carson, for defendant appellee.

MARTIN, Judge.

Plaintiff contends that the District Court erred in awarding alimony to defendant because her claim is barred by the judgment of 15 June 1973 under the doctrine of res judicata.

[1] The record shows that in 1972 Virginia Kirby filed a petition in Virginia under the Uniform Reciprocal Enforcement of Support Act of that State, alleging that she was entitled to the support of her husband, Ralph Kirby, and that he had failed to provide adequate support. Since her husband resided in Asheville, North Carolina, the petition was tranmitted to Buncombe County. As a result, judgment was entered on 15 June 1973 in Buncombe County by District Court Judge Israel. In that judgment, the court stated rather tangentially that the separation between the couple was caused by the wrongdoing of the petitioner, Mrs. Kirby. It then denied the petition by concluding that "since property is owned by the parties in the State of Virginia, . . . the matter could properly be brought in a civil action for alimony and should be so brought rather than through the Uniform Reciprocal Enforcement of Support Act." Regardless of whether Mrs. Kirby's petition was properly denied due to the ownership of property in Virginia, her cross-claim for alimony in the present case was not barred by the 15 June 1973 judgment. Indeed, that judgment left open the possibility that alimony might be awarded in a future action.

"A judgment must be on the merits and not merely relate to matters of practice or procedure in order to have res judicata effect." 2 McIntosh, N. C. Practice and Procedure, § 1732 (2d Ed., Phillips Supp. (1970)). In the 15 June 1973 judgment, it appears that Judge Israel intended to dispose of the action on procedural grounds rather than on the merits. In the judgment appealed from in the present case, Judge Israel refers to his judgment of 15 June 1973 and finds, *inter alia:*

> "12. That the Judgment in Buncombe County Case No. 72 CVD 2795 offered by the Plaintiff into evidence and entered by the undersigned Judge on or about June 15, 1973, as a result of the institution of a reciprocal support action contemplates by its terms the institution of a civil action for alimony by the Defendant and that said Judgment was entered without the Defendant being represented by counsel, without an appearance on behalf of the Defendant by the solicitor, and without a hearing at which the Defend-

ant was present and said Order is not supported by Findings of Fact and that the said Judgment is not a bar to the alimony action of the Defendant."

[2] Plaintiff also argues that the judgment of 15 June 1973 constituted a judicial separation such as will legalize the separation and deprive defendant of her recriminatory defense. Either an action for a divorce a mensa et thoro, an action for alimony without divorce under former G.S. 50-16, or a valid separation agreement may constitute a legalized separation which thereafter will permit either of the parties to obtain an absolute divorce on the ground of one year's separation. *Harrington v. Harrington,* 286 N.C. 260, 210 S.E. 2d 190 (1974). In the present case, the disposition of the 15 June 1973 judgment on procedural grounds did not deprive the wife of the use of abandonment as a defense to the action for divorce.

[3] Next, plaintiff contends that the court erred in awarding alimony because the evidence clearly showed that the separation was caused by the wrongdoing of defendant. In pertinent part, the court found as a fact that plaintiff left the State of Virginia on his own volition; that his departure was not due to any wrongdoing of defendant; that plaintiff abandoned defendant; and that the separation was a result of such abandonment. In our opinion, the evidence was sufficient to support the challenged findings of fact. The facts as found by the court supported its conclusions of law and the judgment entered thereon.

In the trial we find no prejudicial error, and the judgment appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN LLOYD SORRELL III

No. 754SC238

(Filed 18 June 1975)

1. **Searches and Seizures § 3— sufficiency of evidence to support search warrant**

The trial court did not err in finding that the magistrate received sufficient evidence to determine that probable cause existed to issue a warrant to search defendant's premises where the affidavit to obtain the warrant contained information from an informant that he had been in defendant's home and observed marijuana there, he had obtained a sample of the marijuana, and the officer who obtained the search warrant told the magistrate of arrests and convictions which the informant had helped with before.

2. **Searches and Seizures § 3— father named in affidavit and warrant — warrant sufficient to charge son**

The trial court did not err in finding as fact and concluding as law that the defendant, John Lloyd Sorrell III, was the party named in the search warrant rather than his father, John Lloyd Sorrell, Jr., though the father's name was designated on the search warrant and affidavit.

3. **Criminal Law § 75— no Miranda warning — volunteered statement admissible**

A spontaneous and volunteered statement made by defendant as an officer was preparing to read the Miranda warnings to him was admissible in a prosecution for felonious possession of marijuana and possession with intent to sell.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 7 November 1974 in Superior Court, DUPLIN County. Heard in the Court of Appeals 27 May 1975.

Defendant was charged in a two-count bill of indictment with (1) felonious possession of over one ounce of marijuana and (2) felonious possession of over one ounce of marijuana with intent to sell and deliver. He pleaded not guilty. At the close of the State's evidence the court granted defendant's motion for judgment as of nonsuit on the second count and the jury returned a verdict of guilty of the first count. From judgment imposing prison sentence of not less than three nor more than five years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

L. Randolph Doffermyre III, and C. Diederich Heidgerd, for the defendant appellant.

BRITT, Judge.

[1] Defendant first contends that the trial court erred in finding as fact and "concluding as law" that the magistrate received sufficient evidence to determine that probable cause existed to issue the warrant to search defendant's premises. We find no merit in the contention.

The affidavit to obtain the search warrant contained the following:

> On 8-24-74 in the PM the reliable informant went to the mobile home of John Sorrell Jr. and observed Marihuana in plain view on the kitchen table. Sorrell stated to the informant that he had been "weighing it out" on the table and he was "loaded with it". . . . While at the mobile home, the informant obtained a sample of the marihuana and same was tested and found to definitely be Marihuana. . . .

Officer Charles Summerlin, the officer who obtained the search warrant, testified at the *voir dire* hearing ". . . that he told the magistrate of the arrests that the informant had helped him on before and that there were over 20 arrests that he had led him to"; that the informant had provided information pertaining to burglary, breaking and entering, larceny, possession of white liquor and possession of marijuana; and that there had been convictions based on the information provided by the informant.

Applying the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), we hold that the evidence presented to the magistrate was sufficient to show the underlying circumstances upon which the informant based his information, and also to establish the reliability of the informant.

[2] Defendant states his next contention as follows: "The trial court erred in finding as fact and concluding as law that the defendant, John Lloyd Sorrell III, was the party named in the

search warrant rather than his father, John Lloyd Sorrell, Jr., the name designated on the search warrant and affidavit." We find no merit in this contention.

It is true that the search warrant and affidavit attached to it referred to John Sorrell, Jr., rather than John Sorrell III as the owner or occupant of the premises sought to be searched. However, following a *voir dire* hearing, the court found that notwithstanding the error in "listing" defendant "as a junior rather than the III, there was no misunderstanding on the part of the officers that the defendant now before the Court was the person whose premises they wished to search." The court further found that the description in the search warrant affidavit of the mobile home sought to be searched identified the home occupied by defendant. The findings of the trial court were fully supported by evidence presented at the *voir dire* hearing.

[3] Defendant next contends that the court erred in allowing into evidence a statement made by defendant prior to the officers giving him the Miranda warnings. This contention is without merit.

When the officers arrived at defendant's mobile home, there were several people in the home. One officer stayed with the people, while the other officers searched the premises. As one officer was preparing to read the Miranda warnings to defendant, a second officer came into the room with a bag of marijuana. Defendant then stated: "I'll show you where it is at, it is all mine." The record does not disclose that defendant was asked any questions. To the contrary, it appears that defendant made the statement spontaneously. ". . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). We hold that the court properly ruled that the statement was admissible.

Finally, defendant contends the trial court erred in denying his motion for nonsuit. We have carefully reviewed the record and conclude that the evidence was sufficient to survive the motion.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAMES MARION ERVIN

No. 7526SC272

(Filed 18 June 1975)

1. **Criminal Law § 66— identification of defendant — observation at crime scene as basis**

A witness's in-court identification of defendant as one of the people who robbed him at gunpoint was based on his observation at the crime scene and not on his observation a week after the crime of two men in a room at the police station.

2. **Criminal Law § 119— alibi instruction — oral request not timely made — denial proper**

The trial court did not err in failing to instruct on alibi though requested to do so by defendant where defendant's request was oral and was made after the court had completed its charge. G.S. 1-181.

APPEAL by defendant from *Baley, Judge.* Judgment entered 9 January 1975 in Superior Court, MECKLENRURG County. Heard in the Court of Appeals on 29 May 1975.

Defendant was indicted for the armed robbery of Hugh Ackerman Pressgrove on 5 September 1974. He plead not guilty, the jury returned a verdict of guilty as charged, and from judgment imposing a maximum prison sentence of 15 years as a youthful offender, he appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

James M. Shannonhouse, Jr., for the defendant appellant.

BRITT, Judge.

[1] Defendant contends in his first assignment of error that the court erred in allowing Pressgrove to identify him at trial for the reason that the lineup procedures employed were impermissibly suggestive. We find no merit in the assignment.

The testimony of Pressgrove, on voir dire, was to the following effect: On the day in question Pressgrove was an employee of the City of Charlotte, working as a water department serviceman. At the time of the alleged robbery, around 1:30 p.m., he was parked and was sitting in his truck. Defendant and another individual came up to Pressgrove and asked about a job. After talking for three to four minutes they left and stopped about 150 feet from the truck that Pressgrove was sitting in. They were joined at that point by two other persons. One of the group separated from the other three who advanced toward the truck. The individual that had left the group circled around the truck, opened the door on the right and pointed a sawed-off shotgun at Pressgrove. At the same moment, defendant opened the door on the left, tried to push Pressgrove's face into the sterring wheel, and took his money and watch. One of the persons that robbed him (later identified as defendant) was a black male in his late teens; he had short uncombed hair, not cut in an Afro style; and he was wearing a cream colored T-shirt and faded-out blue jeans. One distinguishing feature was a chipped tooth. It was daylight and the weather was fair.

About a week later, Pressgrove was called to the police station to observe an individual. Pressgrove entered a room with a two-way glass and two persons were in an adjoining room. Pressgrove identified both of them as the people that had robbed him. Pressgrove stated: "There was no doubt that the two individuals in that room were the individuals who had robbed me on Thursday, September 5, 1974." Pressgrove picked out the one that he thought had the chipped tooth; after they were taken from the room, Pressgrove asked that the one that he had selected return to the room and grit his teeth. The individual did so, revealing a chipped tooth. "That was the clincher. I am sure of my identification."

Following the voir dire, the court found and held as follows:

> From the foregoing evidence, the Court concludes as a matter of law that there was ample opportunity on the part of the prosecuting witness Pressgrove to observe the defendant Ervin; (1) that there is nothing to indicate any suggestion by any person which would color the identification of the defendant; (2) that there were no illegal identification procedures involving the defendant which were unduly suggestive or conducive to mistaken identification;

(3) that the in-court identification of the defendant is of independent origin, based solely on what the prosecuting witness saw at the time of the crime and does not result from any out of court confrontation or from any procedure exercised by the police officers.

It is therefore ordered that the identification of the defendant is competent evidence in the trial of this case. The prosecuting witness will be permitted to identify him before the jury.

We find no error in the trial judge's findings and conclusions. The prosecuting witness had ample opportunity to see defendant at the time of the robbery which occurred in the daytime, and defendant came within a few feet of the prosecuting witness. The subsequent pretrial confrontation at the police station was not impermissibly suggestive. Due to his prior independent confrontation, Pressgrove immediately identified both of the individuals as the robbers and then to "clinch" the identification of defendant, defendant gritted his teeth, revealing the chipped tooth.

We hold that the trial court's findings that the in-court identification was of independent origin and that the lineup was not impermissibly suggestive were supported by substantial evidence presented on voir dire, and is, therefore, conclusive on appeal. Pressgrove's testimony identifying the defendant was clear and unequivocal. *See Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972); *State v. Burns,* 287 N.C. 102, 214 S.E. 2d 56 (1975).

[2] Defendant contends in the other assignment of error brought forward in his brief that the court erred in not instructing on alibi when requested to do so by him. His request to the court to instruct on the law with respect to the defense of alibi was oral and was made after the court had completed its charge. The court denied the request. In *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973), the court, reversing prior law, held that *absent a special request* a trial judge is not required to instruct on the defense of alibi. G.S. 1-181 requires that requests for special instructions must be submitted to the trial judge in writing, entitled in the cause, signed by counsel submitting them, and submitted *before* the judge's charge to the jury is begun. Defendant's request failed to meet any of the requirements of G.S. 1-181, therefore, the assignment is

overruled. *State v. Spencer*, 225 N.C. 608, 35 S.E. 2d 887 (1945). *State v. Long*, 20 N.C. App. 91, 200 S.E. 2d 825 (1973).

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOE FLOYD MEDLEY AND RUDOLPH McCURDY

No. 7520SC301

(Filed 18 June 1975)

Robbery § 4— armed robbery of store proprietor — sufficiency of evidence

Evidence was sufficient to withstand defendants' motions for nonsuit in a prosecution for armed robbery where it tended to show that one defendant held a sawed-off shotgun on a store proprietor while the other defendant went behind the counter, and the proprietor discovered that all of his money was gone after defendants left his store.

APPEAL by defendants from *McConnell, Judge.* Judgments entered 21 January 1975 in Superior Court, UNION County. Heard in the Court of Appeals 12 June 1975.

By indictment proper in form, defendants were charged with the armed robbery of S. H. Lowery on 27 September 1974. Defendants pleaded not guilty, a jury found them guilty as charged, and from judgments imposing prison sentence of not less than 25 nor more than 30 years on each defendant, they appealed.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

William H. Helms for defendant appellants.

BRITT, Judge.

Defendant Medley assigns as error the failure of the trial court to grant his motions for nonsuit. The assignment is without merit.

Evidence presented by the State tended to show: On the day in question, Lowery was operating a store at Olive Branch in Union County. Around 5:00 p.m. three young black males, including defendants, entered the store. After staying in there some two or three minutes and making a small purchase, the three men left. Approximately one hour later, while Lowery was alone in his place of business, the two defendants returned. Defendant McCurdy pulled a sawed-off shotgun from under his jacket, pointed it at Lowery and said: "This is a stick up. We want your money; open your cash register." Lowery opened the cash register after which defendant McCurdy ordered him to "[t]urn around"; McCurdy then stuck the gun to Lowery's ribs and told him to go to the back of the store and stay there until he heard a car leave. While defendant McCurdy was holding the gun on him, Lowery saw defendant Medley go behind the counter. After defendants left, Lowery determined that all of his money—between $800 and $850 in cash and between $400 and $450 in checks—was gone. Before it was taken, part of the money was in a tackle box and the balance was in the cash register.

Defendants offered evidence tending to show that they were not in Union County at any time on 27 September 1974.

We hold that the evidence was sufficient to survive the motions for nonsuit.

By their other assignments of error, defendants contend the court expressed an opinion on the evidence in violation of G.S. 1-180, and that it erred in its instructions to the jury. It suffices to say that we have carefully reviewed the record with respect to these assignments but find them too be without merit.

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

No error.

Judges HEDRICK and MARTIN concur.

NANCY H. SIDERS v. LARRY WAYNE GIBBS

No. 7514SC8

(Filed 18 June 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— judgment not adjudicating rights of all parties — no right to appeal

Where plaintiff brought an action against two defendants, one of whom then asserted cross-claims against his codefendant, summary judgment entered in favor of one defendant only as to plaintiff's claim is interlocutory and not presently appealable since it adjudicates the rights and liabilities of fewer than all the parties and contains no determination that there is no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiff from *Hall, Judge.* Judgment entered 11 December 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 March 1975.

Plaintiff brought this action to recover damages for injuries she sustained on 7 April 1974 when a car driven by Larry Wayne Gibbs collided with a car driven by Ralph L. Young in which plaintiff was a passenger. She alleged that the negligence of both drivers concurred in causing her injury and damage. The parties to this appeal have stipulated that plaintiff was the owner of the vehicle defendant Young was operating at the time of the collision.

In his answer, Gibbs asserted that Young's negligence is imputed to plaintiff, who had the legal duty to control and supervise the operator of her car. He further alleged that plaintiff, knowing Young was driving her car negligently but failing to protest such operation, assumed any risk of injury to herself. Gibbs pled both assertions as contributory negligence on the part of plaintiff barring plaintiff's action against him.

In his answer, Young alleged he was operating plaintiff's car at her request and direction and that plaintiff was negligent in allowing him to operate her car when she knew he was a reckless driver. Young pled this contributory negligence as a bar to plaintiff's action. Young also alleged two cross-claims against Gibbs, the first for contribution should Young be found liable to plaintiff, and the second for Young's own personal injuries.

On 22 October 1974 Gibbs filed a motion for summary judgment "as a matter of law to the plaintiff's claim." On 9

December 1974 Gibbs filed an affidavit verifying the truth of the matters asserted in his answer. A hearing was held on the motion that same day and the trial court, in a judgment filed 11 December 1974, ordered that

> "the motion of the defendant Larry Wayne Gibbs for summary judgment in his favor be and the same is hereby allowed and this action as to said defendant is dismissed."

Plaintiff appealed.

Clayton, Myrick, McCain & Oettinger by Grover C. McCain, Jr. for plaintiff appellant.

Haywood, Denny & Miller by John W. Haywood and George W. Miller, Jr. for defendant appellee.

PARKER, Judge.

Since defendant Gibbs moved for summary judgment only as to plaintiff's claim, the statement in the judgment allowing the motion that "this action as to said defendant is dismissed" can reasonably refer solely to plaintiff's claim. Young's cross-actions, so far as the record indicates, are still pending.

Plaintiff brought this action against two defendants, one of whom then asserted cross-claims against his codefendant. The judgment from which plaintiff now purports 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. Accordingly, the judgment is interlocutory and not presently appealable. *Leasings, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975); *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Appeal dismissed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. DARRELL MITCHELL FURR, ALIAS MICKEY WILKERSON

No. 7526SC151

(Filed 18 June 1975)

Weapons and Firearms— discharging firearm into occupied building — improper instruction

In a prosecution for discharging a firearm into an occupied building, the trial court committed prejudicial error in giving an instruction which equated wilful and wanton conduct with knowledge of occupancy of the building and thereby attempted to condense two separate elements of the crime into one.

APPEAL by defendant from *Chess, Judge.* Judgment entered 21 November 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 April 1975.

Defendant entered pleas of not guilty to five charges: three charges of assault with a deadly weapon, a charge of discharging a firearm into an occupied building, and a charge of assault with a deadly weapon with intent to kill, inflicting serious injuries, not resulting in death. All five cases were consolidated for trial. The case of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death was dimissed for insufficient evidence. The jury returned verdicts of guilty to the remaining charges. From judgments sentencing him to imprisonment for a term of seven years for discharging a firearm into an occupied building, sentence to begin at the expiration of any and all sentences the defendant was then serving, with credit for time spent in custody awaiting trial, and to imprisonment for a term of two years for each of the three assault charges, each term to be served concurrently with the term imposed for discharging a firearm into an occupied building, defendant appealed.

State's evidence tended to show that the defendant and a friend were drinking beer at the Speedway Lounge on 25 June 1974; that the defendant "appeared to be drunk"; that the defendant and his friend were asked to leave "on account of his friend" but the defendant "did not want to leave" and a small scuffle took place outside the lounge upon their being removed from the premises; that the defendant threatened to return with a shotgun and, in fact, did return approximately 45 minutes later just as the lounge was closing. Virginia Yow opened the

back door, saw the defendant with a shotgun, and slammed the door closed. About the same time a blast went off which blew the door open and splinters from the blast hit Virginia Yow. Defendant stepped into the building saying, "All of you son of a bitches in here are going to die," and "You'll die tonight, Louis Yow." The defendant then fired a shot, which went over Fred Goodman's head. Louis Yow testified that he felt threatened by the defendant and that he shot his pistol twice, hitting the defendant in the shoulder. Then both of the guns jammed. Virginia Yow corroborated the testimony of her son, Louis.

No evidence was offered by the defendant.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

William F. Hulse for defendant appellant.

MORRIS, Judge.

With commendable candor, the State calls our attention to the following portion of the trial court's instruction with respect to the charge of discharging a firearm into an occupied building:

> "Members of the jury, the defendant is also charged with discharging a firearm into an occupied building. Now, I charge that for you to find the defendant guilty of discharging a firearm into occupied property, the State must prove three things beyond a reasonable doubt. First, that the defendant intentionally and without justification or excuse discharged a shotgun into the Speedway Lounge; second, that the Speedway Lounge was occupied at the time the gun was discharged; and, third, that the defendant acted willfully or wantonly, which means that he had knowledge that the Speedway Lounge was occupied by one or more persons, or that he had reasonable grounds to believe that the Speedway Lounge might be occupied by one or more persons."

As we pointed out in *State v. Williams,* 21 N.C. App. 525, 204 S.E. 2d 864 (1974), and more recently in *State v. Tanner,* 25 N.C. App. 251, 212 S.E. 2d 695 (1975), although taken from the "Pattern Jury Instructions for Criminal Cases in North Carolina," we think this is an incorrect statement of the law

in that it equates willful and wanton conduct with knowledge of occupancy of the building and thereby attempts to condense two separate elements of the crime into one. G.S. 14-34.1, the statute under which defendant was charged, reads as follows:

> *"Discharging firearm into occupied property.*—Any person who wilfully or wantonly discharges a firearm into or attempts to discharge a firearm into any building, structure, vehicle, aircraft, water craft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in § 14-2."

The correct definition of what constitutes the offense is set out in *State v. Williams,* 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973):

> "[A] person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons."

Defendant is entitled to a new trial on the charge of discharging a firearm into an occupied building because of error in the instructions to the jury on that charge. As to the other charges for which defendant was convicted, we find no error.

No. 74CR40018—New trial.

No. 74CR49708—No error.

No. 74CR49709—No error.

No. 74CR49710—No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MATTHEW DANNY TEACHEY AND RONALD WHITAKER

No. 753SC186

(Filed 18 June 1975)

Criminal Law § 124— two charges — verdict referring only to one charge — acquittal on other charge

Where defendant was tried on charges of (1) possessing more than one ounce of marijuana with intent to sell or deliver and (2) selling or delivering marijuana, and the jury verdict found defendant "guilty of selling and delivering marijuana" but did not refer to the charge of possession with intent to sell or deliver, the verdict amounted to an acquittal on the charge of possession with intent to sell or deliver.

APPEAL by defendant Teachey from *Rouse, Judge.* Judgment entered 6 December 1974 in Superior Court, CARTERET County. Heard in the Court of Appeals 7 May 1975.

Defendant Teachey was charged with: (1) possessing more than one ounce of marijuana with intent to sell or deliver, and (2) selling or delivering marijuana. The two charges were consolidated for trial. Upon his plea of not guilty, the jury returned a verdict of guilty of selling or delivering marijuana. From judgment sentencing him to imprisonment for a term of "not to exceed 2 years in the Department of Corrections as a committed Youthful Offender pursuant to G.S. 148-3A," defendant Teachey appealed.

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

Edward G. Bailey for defendant appellant.

MORRIS, Judge.

Counsel for the defendant requests that we review the record to determine whether the trial court committed error. We have examined the record and find that although the defendant was tried on two indictments, the jury returned only one verdict. The jury found that the defendant was "[g]uilty of

selling or delivering marijuana" but in its verdict did not refer to the charge of possession of more than one ounce of marijuana with intent to sell or deliver. It has been held a verdict which refers to only one charge amounts to an acquittal on any other charges being tried at the same time. 3 Strong, N. C. Index 2d, Criminal Law, § 124, pp. 37-38, and cases cited therein. Accordingly, a judgment of acquittal should be entered in case number 74CR6249.

Although we find no error in the trial, the case must be remanded to the Superior Court of Carteret County for the entry of a proper judgment in case number 74CR6249.

Remanded for entry of judgment of acquittal in case number 74CR6249.

Number 74CR6250—no error.

Chief Judge BROCK and Judge HEDRICK concur.

WILLIAM KNUCKLES AND CORINTHEA RICHARDSON v. BEATRICE SPAUGH AND PAUL R. JOHNSON, T. E. JOHNSON, JR., AND RAY B. JOHNSON, D/B/A T. E. JOHNSON AND SONS

Nos. 7521DC246 and 7521DC247

(Filed 18 June 1975)

Landlord and Tenant § 19— recovery of rent paid — violation of housing code — dwelling unfit for habitation

A tenant is not entitled to recover rents already paid on the theory that the rented dwelling was maintained by the landord in violation of the city housing code and was unfit for human habitation.

APPEAL by plaintiffs and defendants from *Clifford, Judge.* Judgments and orders signed 31 December 1974, 2 January and 13 January 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 27 May 1975.

Gerald C. Kell and Reita P. Pendry, for plaintiffs.

Richard Tyndall, Robert A. Wicker and R. Bradford Leggett, for defendants.

VAUGHN, Judge.

Plaintiffs' appeal presents essentially the same questions raised in *Thompson v. Shoemaker,* 7 N.C. App. 687, 173 S.E. 2d 627 (1970). Plaintiffs concede that in *Thompson* this court followed the applicable decisions of the North Carolina Supreme Court but urge that this court ignored the "spirit of the times." This court will, of course, continue to adhere to the opinions of the Supreme Court according to our best knowledge and understanding of the meaning of cases decided by that court. Moreover, the lawmaking body of this State, the legislative branch, has just recently declined to enact legislation which would have brought about many of the changes in the law that plaintiffs urge this court to make by judicial decision. *See* H.B. 598, "Landlord and Tenant Act," N. C. General Assembly (1975) (Committee Substitute tabled 4 June 1975 in the House of Representatives.) On plaintiffs' appeal, the judgment is affirmed.

On defendants' appeal, the only question is whether the judge erred in allowing plaintiffs to appeal as paupers. We hold that he did not.

The judgments are affirmed.

Affirmed.

Judges BRITT and PARKER concur.

IN THE MATTER OF: JILL CATHEY ROBINSON, RESPONDENT

No. 7527SC294

(Filed 18 June 1975)

Insane Persons § 2— hearing on competency — notice to respondent required

One accused of incompetency is entitled to notice of the proceedings and a reasonable opportunity to rebut the allegations of the petition; for failure to give notice to respondent of a hearing on her competency, the adjudication by the trial court of lunacy is reversed. G.S. 35-2.

APPEAL by respondent from *Ervin, Judge.* Judgment entered 12 March 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 11 June 1975.

One of respondent's sisters filed a petition with the clerk, pursuant to G.S. 35-2, seeking to have respondent declared incompetent. No notice of the proposed hearing was served upon respondent. The hearing was held on 17 December 1974, and the jury found respondent (who was not represented by counsel) incompetent. On the same day, letters of guardianship were issued to petitioner. The judgment finding respondent incompetent recites that she was physically present at the hearing. Another sister and a brother of respondent employed counsel, who gave notice of appeal to the next session of superior court for trial *de novo*. They also filed affidavits alleging that on the day of the hearing respondent was walking along the highway to her aunt's house when she was forced into an automobile and taken away by petitioner. They also swore that they attempted to locate respondent, could not do so, and had no knowledge of the inquisition until after it had been concluded. On 31 January 1975, judgment was entered in the Superior Court dismissing the appeal because neither the incompetent nor her guardian (petitioner) had employed counsel to appeal the case. Subsequently, respondent engaged her present counsel and now seeks

appellate review of an order entered 12 March 1975 which denied relief from the judgment declaring her to be incompetent.

Basil L. Whitener and Anne M. Lamm, for petitioner appellee.

Roberts and Caldwell, P.A., by Joseph B. Roberts III; Mullen, Holland & Harrell, by Graham C. Mullen, attorneys for respondent appellant.

VAUGHN, Judge.

It is fundamental that one accused of incompetency is entitled to notice of the proceedings and a reasonable opportunity to rebut the allegations of the petition. The statute, G.S. 35-2, requires "notice." "This statute does not specify the time but . . . ten days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period." *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490.

Because of lack of notice to respondent, the adjudication of lunacy is reversed and the case is remanded for a hearing *de novo.*

Reversed and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JOHNNIE GREENE

No. 7518SC214

(Filed 18 June 1975)

Courts § 7; Criminal Law §§ 146, 149— quashal of warrant — unconstitutional ordinance — district court — appeal by State — jurisdiction in superior court

The superior court erred in refusing to hear the State's appeal from a district court order quashing a warrant for loitering on the ground the city ordinance allegedly violated was unconstitutional and remanding the case to the district court "for the State to appeal direct to the appellate court" since only the superior court has jurisdiction of an appeal from the district court in a criminal case. G.S. 15-179(6).

APPEAL by the State from an order of *Kivett, Judge.* Order entered 16 January 1975 in Superior Court, GUILFORD County. Argued in the Court of Appeals 14 May 1975.

Defendant was charged in a warrant with a violation of § 13-10 of the Greensboro City Code. This section prohibits loitering, loafing, or lounging in certain places. Defendant was arrested for "wilfully [loitering] upon the premises of [the] Union Bus Station . . . without having some immediate business upon the premises."

Defendant pleaded not guilty in district court, and a *nolle prosqui* was taken on 9 August 1974. Two weeks later, on 22 August, the case was reopened at defendant's request. The assistant public defender asked that the 9 August judgment be stricken and moved to quash the warrant on the grounds "that the charge was unconstitutional." The district judge allowed the motion. The State then appealed to the superior court. There Judge Kivett ordered the case remanded to the district court "for the State to appeal direct to the appellate court."

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State, appellant.

Wallace C. Harrelson, Public Defender, and Frank A. Campbell, Assistant Public Defender, for the defendant, appellee.

BROCK, Chief Judge.

The State assigns as error (1) the district court's quashing of the warrant and (2) the failure of the superior court to hear its appeal from the district court's action.

G.S. 15-179 provides:

> "*When State may appeal.*—An appeal to the appellate division or superior court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—
>
> * * *
>
> "(6) Upon declaring a statute unconstitutional."

"Under this statute, if the State's right to appeal arises in the district court, the appeal is to the superior court; if it arises in the superior court, the appeal is to the appellate division." *State v. Greenwood,* 12 N.C. App. 584, 586, 184 S.E. 2d 386 (1971), *rev'd on other grounds,* 280 N.C. 651, 187 S.E. 2d 8 (1972).

The superior court improperly refused to hear this case. It erred further in remanding the case to the district court "for the

State to appeal direct to the appellate court." This Court does not have jurisdiction of an appeal from the district court in a criminal case.

Appeal from the district court's order is dismissed; the order of Judge Kivett is reversed, and the case is remanded to the superior court for a hearing on the State's appeal from the order of the district court.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JEROME POWELL

No. 7529SC142

(Filed 18 June 1975)

Criminal Law §§ 155.5, 159— failure to docket record in time allowed by court — absence of judgment

Appeal is subject to dismissal where the record on appeal was not docketed within the time allowed in an order granting *certiorari* and no judgment appears in the record.

ON *writ of certiorari* to review the proceedings before *Winner, Judge.* Judgment entered October 1974 in Superior Court, HENDERSON County. Argued in the Court of Appeals 27 May 1975.

Defendant was indicted for armed robbery. He pleaded not guilty, but a verdict of guilty as charged was returned, and an active sentence was imposed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Robert J. Deutsch, for the defendant-appellant.

BROCK, Chief Judge.

We granted *certiorari* on 12 February 1975 in an order providing that the record on appeal be docketed by 17 February 1975. The record was docketed on 19 February 1975, two days late. This case is thus subject to dismissal in our discretion.

We take note of the fact that no judgment, from which an appeal may be taken, appears in the record. For this further

reason the appeal is subject to dismissal. We ordered the judgment to be certified to this Court as an addendum to the record on appeal.

We have carefully considered both the record on appeal and the briefs of counsel. In our opinion there was no prejudicial error in defendant's trial.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. CHARLES THOMAS VAWTERS

No. 7521SC235

(Filed 18 June 1975)

APPEAL by defendant from *Albright, Judge.* Judgment entered 16 January 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 May 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with intent to commit rape.

The State's evidence tends to show the following: During the evening of 12 July 1974 Robin Kiger, age 12, went to her sister's home. Her friend, Sunday Norman, age 9, went with her. When Robin and Sunday knocked on the door, no one answered. However, the door was unlocked and they went in. Robin's sister was not at home. Defendant and a companion were in the house drinking an alcoholic beverage. Defendant grabbed Robin, threw her to the floor, partially disrobed her, and tried to have sexual intercourse with her. Robin fought, screamed, and resisted defendant, and he was unable to accomplish his purpose. Robin finally escaped and ran from the house.

The defendant's evidence tended to show the following: Robin's sister and husband went to the movie and left defendant and his companion in their house. Defendant and his companion were drinking alcoholic beverages. Robin does not remember what happened that night and testified against him only at the connivance of her father.

The jury returned a verdict of guilty as charged.

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

Hamrick, Doughton and Newton, by James A. Harrill, Jr., for the defendant.

BROCK, Chief Justice.

We have carefully examined this record on appeal. In our opinion defendant received a fair trial free from prejudicial error. But for the forceful and determined resistance of Robin Kiger, defendant would have been subject to a charge of rape.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. EARL EUGENE CHANDLER

No. 7528SC300

(Filed 18 June 1975)

APPEAL by defendant from *Snepp, Judge.* Judgment entered 11 February 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 June 1975.

Defendant was charged with operating a motor vehicle on the public highways while under the influence of intoxicating liquor. After a plea of not guilty, defendant was tried before a jury and found guilty of the offense. From judgment entered upon the verdict, defendant appealed.

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

Robert L. Harrell, for defendant appellant.

MARTIN, Judge.

Counsel for defendant admits that he is unable to find prejudicial error in the trial. We have carefully examined the record and are also of the opinion that defendant has received a fair trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBY ANDREW SIZEMORE

No. 7525SC282

(Filed 18 June 1975)

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 15 November 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 June 1975.

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

Butner, Rudisill & Brackett, by J. Richardson Rudisill, Jr., for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. NEAL ARCHIE DAVIS

No. 7516SC285

(Filed 18 June 1975)

APPEAL by defendant from *Godwin, Judge.* Judgment entered 8 January 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 11 June 1975.

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. LOUIS DONALD HORTON

No. 7512SC275

(Filed 18 June 1975)

APPEAL by defendant from *Walker, Judge.* Judgment entered 16 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 June 1975.

BRITT, HEDRICK and MARTIN, Judges.

No error.

REXHAM CORPORATION, SUCCESSOR IN INTEREST TO RIEGEL PAPER CORPORATION, PETITIONER

— AND —

CAROLINA-MICHIGAN PROPERTIES CO., TAR HEEL CONTAINER CORPORATION, AND STRUCTURAL FOAM PRODUCTS, INC., PETITIONERS AND INTERVENORS v. THE TOWN OF PINEVILLE, NORTH CAROLINA, W. F. BLANKENSHIP, JR., MAYOR, AND WILLIAM H. EARNHEART, C. H. McCOY, FRED GORDON AND CHARLES R. YANDELL, MEMBERS OF THE TOWN COUNCIL OF THE TOWN OF PINEVILLE, RESPONDENTS

No. 7526SC231

(Filed 2 July 1975)

1. **Municipal Corporations § 2— annexation ordinance remanded — boundaries changed — second public hearing not required**

Where an annexation ordinance adopted by respondent town council did not include developed land on both sides of certain streets used as boundaries as required by G.S. 160A-36(d), the ordinance was remanded for amendment of the boundaries to conform to the provisions of the statute, and the town council upon remand did not add area to the municipality which was not included in the notice of public hearing and not provided for in the plans for municipal services, the town council was not required to hold a second public hearing before it could alter the annexation boundary.

2. **Municipal Corporations § 2— annexation — boundary lines — street as reference**

There is no provision in G.S. 160A-36(d) which prevents a municipality from using a street as a reference in setting the boundary lines of an area to be annexed; therefore, where the annexation boundary contained in an ordinance adopted by respondent town council followed the center lines of streets but the area to be annexed did not include developed land on the opposite sides of these streets, the town council upon remand did not act in violation of the statute by amending the boundary lines so that the new lines were roughly parallel to but were from 5 to 20 feet away from the streets previously used as boundaries.

3. **Municipal Corporations § 2— annexation — boundaries following topographic features**

Evidence was sufficient to support the trial court's finding and concluding that respondent had complied with G.S. 160A-36(d) in setting an annexation boundary by using wherever practical all of the natural topographic features in the vicinity of the proposed annexed area.

4. **Municipal Corporations § 2— annexation — boundaries following topographic features — splitting tracts proper**

The statutory requirement contained in G.S. 160A-36(d) that a municipality use natural topographic features wherever practical in

setting an annexation boundary demonstrates a legislative intent contrary to the contention of petitioner and intervenors that G.S. 160A-33 through G.S. 160A-44 forbids the splitting of tracts by an annexation boundary.

5. **Municipal Corporations § 2— annexation — provision of telephone service to annexed area**

Respondent town council's annexation report was sufficient to indicate *prima facie* that respondent would continue to provide telephone service to the annexed area on the same basis as to the remainder of the municipality; furthermore, the record was replete with evidence tending to show that the respondent had detailed plans for providing telephone service to all of the property annexed by the amended ordinance.

6. **Constitutional Law § 20; Municipal Corporations § 2— annexation by town under 5000 — constitutionality of statutes**

The statutory scheme for town-initiated annexation by towns of less than 5000 population, G.S. 160A-33 through G.S. 160A-44, does not violate the equal protection clauses of the U. S. and N. C. Constitutions because it denies the qualified resident voters of certain areas in the State subject to such annexation the benefit of voting in a referendum determinative of annexation while granting this benefit to qualified resident voters of other areas in the State also subject to annexation by a town of less than 5000 population; moreover, petitioner is a corporation, is not a member of the class of qualified resident voters allegedly discriminated against by the statute, and does not have standing to raise that constitutional argument.

7. **Municipal Corporations § 2— annexation ordinance — no vested property right in municipal services**

An annexation ordinance dated 5 May 1971 which was remanded to respondent town council for failure of the boundaries to conform to the provisions of G.S. 160A-36(d) in no way created a vested property right in intervenors in the municipal services of street cleaning and maintenance.

APPEAL by Rexham Corporation, Carolina-Michigan Properties Co., Tar Heel Container Corporation, and Structural Foam Products, Inc., from *Ervin, Judge.* Judgment entered 29 October 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 May 1975.

This is an appeal by petitioner, Rexham Corporation (Rexham), and petitioner-intervenors, Carolina-Michigan Properties Co., Tar Heel Container Corporation, and Structural Foam Products, Inc. (intervenors), from an order of the superior court affirming without change an amended annexation ordinance adopted by the Town of Pineville, N. C. (respondent) on 19 April 1973 pursuant to G.S. 160-453.1 through G.S. 160-453.12.

[Now G.S. 160A-33 through G.S. 160A-44. Hereinafter all citations will be made to the present statute.]

On 3 May 1971 the Town Council of Pineville after notice and public hearing pursuant to G.S. 160A-37 adopted an ordinance bringing within the corporate limits of the municipality certain property belonging to Rexham, intervenors, and others located in the Southland Industrial Park in Mecklenburg County. On 2 June 1971 Rexham filed a petition pursuant to G.S. 160A-38 seeking review in the superior court of the annexation ordinance. Within apt time, respondent filed in the superior court a transcript of the portions of the municipal minute book in which the procedure for annexation had been set forth, a copy of respondent's annexation report, and a copy of the annexation map.

When the appeal came on for hearing in the superior court, Judge Clarkson, on 30 January 1973, among other things, concluded: (1) That the applicable annexation statute, G.S. 160A-33 through G.S. 160A-44, was constitutional; (2) That the annexation ordinance did not include developed land on both sides of certain streets used as boundaries, as required by G.S. 160A-36(d); and (3) That the annexation ordinance did not sufficiently comply with G.S. 160A-35 in setting forth the plans of the municipality to provide to the annexation area the major municipal services of garbage collection and telephone service. Judge Clarkson thereupon remanded the ordinance to the Town Council "(1) . . . for amendment of the boundaries to conform to the provisions of N. C. Gen. Stat. § 160-453.4 [now G.S. 160A-36], provided, however, the municipal governing board shall not amend the boundaries of the annexation area by adding area which was not included in the notice of public hearing and not provided for in the plans for service; and (2) . . . for amendment of the plans providing telephone and garbage collection service to the end that the provisions of N. C. Gen. Stat. § 160-453.3 [now G.S. 160A-35] are satisfied."

Upon remand, the respondent, on 19 April 1973, adopted a revised annexation ordinance altering the boundaries of the area to be annexed and amending the annexation report to include telephone service and garbage collection. On 18 May 1973 Rexham filed a petition pursuant to G.S. 160A-38 again seeking review in the superior court of the annexation ordinance. Also within thirty days of the adoption of the amended ordinance Structural Foam Properties, Inc., Carolina-Michigan Properties

Co., and Tar Heel Container Corporation filed petitions to intervene in the action. This motion was allowed. On 27 April 1973 respondent transmitted to the court a transcript of the "Municipal Minute Book containing: (1) the amended annexation ordinance of May 3, 1971, as amended on April 19, 1973, to include plans for extending telephone service and garbage collection to the area to be annexed, (2) amended boundaries of the annexation area including a copy of the amended annexation map, [and] (3) a copy of the amended annexation report."

When the appeal came on for hearing in the superior court, respondent offered into evidence the amended annexation ordinance adopted 19 April 1973, the annexation map, the annexation report, and several other exhibits tending to show *prima facie* that the Town Council had substantially complied with the essential provisions of the annexation statute.

Petitioner and intervenors thereafter offered evidence tending to show that they owned property in the area to be annexed; that the streets adjacent to their property were without lights and street cleaning service and that the streets were in "deplorable" condition; that the Town of Pineville provides telephone service to Southland Industrial Park; that the boundary lines for the area proposed to be annexed split several tracts of land in the Park; that the amended boundary follows the rights-of-way of various streets within the Park; that the proposed annexation boundary follows two natural draws and one ridge line and otherwise does not follow natural topographic features in the vicinity; and that a tree line that was not used as a boundary was located outside of the original area proposed to be annexed.

Respondent thereafter offered additional evidence tending to show, among other things, that the Town of Pineville is capable of and plans to continue providing telephone service to the annexed area on substantially the same basis and in the same manner as is now provided to the rest of the municipality.

In his order filed 29 October 1974 Judge Ervin, among other things, found as a fact:

(1) That petitioner and intervenor abandoned their challenge to the inadequacy of the annexation plans for garbage collection;

(2) That the annexation report sufficiently sets forth the plans of the Town of Pineville for providing telephone service

to the annexation area; that the municipality had for some time provided telephone service to the annexation area and that said service "will continue to be extended on the date of annexation on substantially the same basis and in the same manner as such services were provided within the municipality prior to annexation."

(3) "That the ordinance of April 19, 1973, amending the ordinance of May 3, 1971, altered the boundaries of the proposed annexed area by varying the distance of the boundary from the margin of streets, unnamed streets and railroad rights of way by ten to twenty feet."

(4) "That the altered boundary splits several tracts of land."

(5) "That the amended boundary of the proposed annexed area follows the ridge line and several draws in or near the vicinity."

(6) "That although a portion of one street was not included in the amended boundary of the proposed annexed area the intervenors will have the use of other streets within the proposed annexed area and thereby receive the major municipal services of street cleaning, street maintenance and street lighting."

(7) "That neither the petitioners nor the intervenors offered any evidence to show that the substantive rights of the petitioners or intervenors were materially prejudiced by the Town of Pineville not holding a second public hearing prior to passage of amendments to the annexation ordinance of May 3, 1971."

Judge Ervin concluded:

(1) That the respondent had substantially complied with the procedures and requirements of the annexation statutes in adopting its annexation ordinance.

(2) That G.S. 160A-24 through G.S. 160A-56 does not violate either the United States Constitution or the North Carolina Constitution.

(3) That the Town Council complied with G.S. 160A-36(d) in using wherever practical "all of the natural topographic features, such as draws and ridge lines, in the vicinity of the proposed annexed area."

(4) That a second public hearing, under the circumstances, was not required prior to passage of the amendments to the annexation ordinance.

(5) That G.S. 160A-33 through G.S. 160A-44 does not prohibit a municipality from splitting lots or tracts in setting the annexation boundaries.

(6) That the amended ordinance did not wholly deprive the intervenors of the municipal services of street cleaning, street maintenance, and street lights.

(7) That the Town Council did not act arbitrarily or contrary to law or legislative intent in establishing the new municipal boundaries.

(8) That the respondent will provide the major municipal service of telephone service to the annexation area on substantially the same basis and in the same manner as telephone service is provided within the present boundary of the municipality.

(9) That the annexation report prepared by the respondent "clearly, concisely and adequately sets forth the plans of the Town of Pineville for providing telephone service to the proposed annexed area and said plan adequately, clearly and concisely sets forth the method of financing such service."

(10) That the amendments to the annexation ordinance of 3 May 1971, adopted 19 April 1973 should be affirmed without change.

From the order of Judge Ervin affirming without change the annexation ordinance of 3 May 1971, as amended by the Town Council on 19 April 1973, petitioner and intervenors appealed to this court.

Moore and Van Allen by James O. Moore, George V. Hanna III, and Norman A. Smith for petitioner appellant.

Caudle, Underwood & Kinsey by William E. Underwood, Jr., for petitioner-intervenor appellants.

Kenneth R. Downs and Davis, Ford & Weinhold by Larry Ford for respondent appellees.

HEDRICK, Judge.

By assignments of error five and twelve, petitioner first contends that Judge Ervin erred in finding as a fact that the

order of Judge Clarkson prohibited the Town Council from amending its ordinance dated 3 May 1971 to include within the municipality land not originally proposed to be annexed. Petitioner argues that this "misunderstanding" of Judge Clarkson's order influenced Judge Ervin in his finding that the Town Council acted reasonably in dropping back from the original annexation boundary in the manner it did as opposed to holding a new hearing for the purpose of annexing the developed land on the opposite sides of those streets originally used as boundaries.

G.S. 160A-38(g) provides:

> "The court may affirm the action of the governing board without change, or it may
>
> * * *
>
> (2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-36 if it finds that the provisions of G.S. 160A-36 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service."

Since the Town Council clearly had the statutory authority to amend its ordinance upon remand without increasing the area to be annexed, it is of no legal significance here whether Judge Ervin misinterpreted the order of Judge Clarkson as alleged by petitioner. In any event, there has been no showing by petitioner as to how the alleged misunderstanding on the part of Judge Ervin with regard to the options available to respondent upon remand affected his conclusions that the Town Council acted reasonably pursuant to the alternative taken in fixing the new boundary lines and that these lines conform to the provisions of G.S. 160A-36(d).

[1] In this respect, intervenors contend that even though the Town Council upon remand did not add area to the municipality which was not included in the notice of public hearing and not provided for in the plans for service, the Town Council was required to hold a second public hearing before it could alter the annexation boundary. We do not agree. Neither G.S. 160A-38 (g) (2), *supra,* nor any other provision of the annexation statute requires the municipal governing board upon remand to hold a second public hearing unless it adds area not included in the

original notice of public hearing and not provided for in the plans for service. See also *Williams v. Town of Grifton,* 22 N.C. App. 611, 207 S.E. 2d 275 (1974) (amendment of annexation report). Intervenors' property was included within the area originally proposed to be annexed and intervenors were given notice and an opportunity to be heard prior to adoption of the 3 May 1971 annexation ordinance. Intervenors did not participate in the proceedings at that time and, in fact, did not intervene until the second appeal of the ordinance to the superior court. We are therefore of the opinion that the intervenors have been denied neither their statutory nor constitutional rights of notice and hearing.

[2] Petitioner and intervenor next contend that the Town Council did not act reasonably in establishing the amended annexation boundary lines and that these lines do not conform to the provisions of G.S. 160A-36(d), which is as follows:

> "In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality developed land on both sides of the street."

The record discloses that portions of the annexation boundary contained in the 3 May 1971 ordinance followed the center lines of several streets in Southland Industrial Park in violation of G.S. 160A-36(d) since the area to be annexed did not include developed land on the opposite sides of these streets. Upon remand, the Town Council amended the boundary lines of the annexation area so that the new lines were roughly parallel to but were from five to twenty feet away from the streets previously used as boundaries. Appellants argue that by "dropping back" certain distances from the center lines of streets previously used as boundaries, the Town Council has continued to "use" the streets as boundaries and has therefore acted arbitrarily. We do not agree. Even assuming that portions of the new boundary lines are "setback" lines from the streets, we find no provision in G.S. 160A-36(d) which prevents a municipality from using a street as a *reference* in setting the boundary lines of an area to be annexed.

[3] Appellants also argue that Judge Ervin erred in finding and concluding that respondent had complied with G.S.

160A-36(d) in setting the annexation boundary by using wherever practical all of the natural topographic features in the vicinity of the proposed annexed area. Judge Ervin specifically found as a fact that "the amended boundary of the proposed annexed area follows the ridge line and several draws in or near the vicinity" and this finding is amply supported by the evidence. Maurice B. Seaver, a registered surveyor, testified for petitioner and intervenors as follows:

> "Two lines of the proposed annexation boundary follow natural draws. One line at the southwest corner of the annexation area generally follows a draw. Where the boundary line leaves Industrial Drive it also generally follows the center line of another drainage draw."
>
> "The proposed annexed area follows the ridge line as it runs in the general area of Old Pineville Road. Where the proposed annexation line parallels it does follow the ridge line there."

Furthermore, the only evidence of any natural topographic feature in the vicinity not used as a boundary is a tree line which, in fact, was located outside of the area included in the original notice of public hearing and which was not provided for in the plans for service. Thus, we hold that there is plenary competent evidence in the record to support Judge Ervin's conclusion that respondent "fully complied with the provisions of North Carolina General Statutes 160-453.4(d) (now 160A-36(d)) in establishing the new municipal boundaries and did not act arbitrary or contrary to law or legislative intent."

[4] Petitioner and intervenors next contend that "[t]he trial court erred in concluding that N. C. Gen. Stat. Secs. 160A-33—44 do not contain any prohibition against the splitting of established lots by the annexation boundary and that in splitting such lots the Town Council did not exceed its delegated legislative authority." They argue that the revised annexation boundary "runs through the middle of a lot owned by Structural Foam and divides other tracts by its setback from the adjacent streets" and that "the entire structure, grammar, syntax, and scheme of . . . " G.S. 160A-33 through G.S. 160A-44 forbids the splitting of tracts by the annexation boundary. While we can conceive of problems which might arise as a result of tract splitting, we believe that the statutory requirement contained in G.S. 160A-36(d) that a municipality use natural topographic fea-

tures wherever practical in setting an annexation boundary demonstrates a legislative intent to the contrary. Obviously, since the boundaries of lots and tracts of land do not necessarily follow "natural topographic features" it would be impossible for an annexation ordinance to follow "natural topographic features" without splitting lots or tracts.

[5] Petitioner further contends the trial court erred in finding that respondent's annexation report sufficiently sets forth the plans of the town for providing the major municipal service of telephone service to the area to be annexed. Upon remand respondent amended its annexation report to include plans for continuing in operation the telephone service which it was already providing to the annexation area. In our opinion, the annexation report is sufficient to indicate *prima facie* that respondent will continue to provide telephone service to the annexed area on the same basis as to the remainder of the municipality. See G.S. 160A-35. Furthermore, the record is replete with evidence tending to show that the respondent has detailed plans for providing telephone service to all of the property annexed by the amended ordinance. This contention has no merit.

[6] Petitioner next contends that the statutory scheme for town-initiated annexation by towns of less than 5,000 population, G.S. 160A-33 through G.S. 160A-44, violates the equal protection clauses of the North Carolina and United States Constitutions because it denies the qualified resident voters of certain areas in the State subject to such annexation the benefit of voting in a referendum determinative of annexation while granting this benefit to qualified resident voters of other areas in the State also subject to annexation by a town of less than 5,000 population. See G.S. 160A-44. Finding a rational relation between the classes of voting and non-voting areas created by the Legislature, the court, in *Thompson v. Whitley,* 344 F. Supp. 480 (E.D.N.C. 1972) rejected a constitutional challenge to this statutory scheme based on the equal protection clause of the Fourteenth Amendment of the United States Constitution. More importantly, however, we note that petitioner in the case at bar is a corporation and therefore is not a member of the class of qualified resident voters allegedly discriminated against by the statute. Thus, we fail to perceive how petitioner has standing to raise this constitutional argument. See generally *League of Nebraska Municipalities v. Marsh,* 209 F. Supp. 189 (D. Neb. 1962).

[7] Finally, intervenors contend that the amended annexation ordinance deprives them of a vested property right without due process of law. They argue that under the amended ordinance they will be deprived of the right to have respondent maintain and clean the streets which abut their property and which were used as boundary lines in the annexation ordinance dated 3 May 1971. This contention has no merit. We fail to perceive how the annexation ordinance dated 3 May 1971 which was remanded to the Town Council of Pineville for failure of the boundaries to conform to the provisions of G.S. 160A-36(d) could have in any way created a vested property right in intervenors in the aforestated municipal service as contemplated and protected by the due process clause of the state and federal constitutions.

For the reasons stated, the judgment of the trial court is

Affirmed.

Chief Judge BROCK and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. RALPH WILLIAM BALDWIN

No. 7515SC34

(Filed 2 July 1975)

1. **Criminal Law § 29— mental capacity to stand trial — test**

The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceeding against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

2. **Criminal Law § 29— mental capacity to stand trial — sufficiency of evidence**

The trial court did not err in denying the motion of defendant's counsel that the case be dismissed on the ground that defendant was not competent to stand trial and was not competent at the time the offense was committed where a report issued by the medical personnel at Cherry Hospital stated that defendant was competent to stand trial, and the statement in the report that defendant had 19 previous admissions to various State mental facilities and various diagnoses did not serve to "indict" the report's ultimate finding that defendant was competent to stand trial.

3. Criminal Law § 29— mental incapacity to stand trial — charges not dismissed

Even if there were a sufficient showing to require a determination that defendant lacked sufficient mental capacity to stand trial, such a determination would not warrant dismissal of the charge against him; rather, he might still be tried at a later date upon a finding that he had recovered sufficiently to be competent to stand trial. G.S. 122-87.

4. Criminal Law §§ 22, 158— arraignment and plea — absence from transcript — statement in record on appeal

Failure of the court reporter to record any reference of the arraignment and plea in the trial transcript and inability of defense counsel and the assistant solicitor to recall whether there was a formal arraignment and plea clearly did not establish that arraignment and plea did not occur, and defendant was not entitled to a new trial where the judgment from which the appeal was taken and the record as originally docketed in the Court of Appeals indicated that defendant was brought to trial upon a valid bill of indictment to which he pleaded guilty.

5. Criminal Law § 117— interested witness — no request for jury instruction

The trial court did not err in failing to instruct the jury to scrutinize the testimony of a State's witness since he was an interested witness where defendant made no request for such an instruction.

ON *writ of certiorari* to review trial before *Hall, Judge.* Judgment entered 5 December 1973 in Superior Court, ORANGE County. Heard in the Court of Appeals 8 April 1975.

By indictment proper in form defendant was charged with the first-degree murder of Charlie Mitchell. When the case was called for trial, the solicitor announced that the State would seek a verdict of guilty of second-degree murder.

The State's evidence shows: On the afternoon of 13 September 1973 defendant, Mitchell, and the State's witness, Michael Edwards, went to a graveyard in Carrboro, where they drank wine. Edwards testified that defendant "just suddenly hauled off and hit Charlie," then "stomped" Charlie Mitchell in the chest with his feet. Mitchell did not fight back. Defendant picked up a tombstone and struck Mitchell in the chest with it. Defendant and Edwards then left Mitchell lying on the ground in the cemetery, where his body was subsequently discovered. An autopsy revealed that his death was caused by blunt trauma to the chest and abdomen.

Defendant denied he hit Mitchell and testified that Edwards was the one who hit Mitchell with the stone.

The jury found defendant guilty of murder in the second degree. From judgment imposing a prison sentence, defendant gave notice of appeal. Because of delays in obtaining a transcript of the trial proceedings, defendant filed a petition for writ of certiorari, which was allowed.

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

Joseph I. Moore, Jr.; and Vann & Vann by Arthur Vann for defendant appellant.

PARKER, Judge.

Defendant's trial commenced on 3 December 1973. Prior to presentation of evidence by the State, defendant's counsel moved that the case be dismissed on the ground that defendant was not competent to stand trial and was not competent at the time the offense was committed. The motion was denied, and in this we find no error.

[1] "The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. Cooper,* 286 N.C. 549, 565, 213 S.E. 2d 305, 316 (1975). In the present case, defendant was committed on 21 September 1973 to Cherry Hospital by a court order entered pursuant to G.S. 122-91. Following examinations and testing at that facility, a report dated 25 October 1973 was issued by the medical personnel of Cherry Hospital. This report contains the following:

> "The examinations, observation and testing performed in this hospital have revealed no evidence of insanity nor any serious mental disorder which might interfere with the defendant's competency to stand trial to the charge of murder. Mr. Baldwin has demonstrated to this staff the capacity to distinguish between right and wrong and to understand the possible consequences of the alleged crime for which he is under indictment. He has the capacity to comprehend his position and to understand the nature and object of the proceedings against him. He has the capacity to conduct his defense in a rational manner and to cooperate with his counsel to the end that any available defense may

be interposed. It is the opinion of this staff that Mr. Baldwin should be returned to the court inasmuch as he is competent to plead to the charge against him."

[2] Defendant's counsel contends this report contains an "indictment of its own conclusion," pointing to other portions of the report in which it is stated that since 30 April 1968 defendant had nineteen previous admissions to various State mental facilities and that various diagnoses offered since that time included "Schizophrenic Reaction, Acute Undifferentiated Type; Schizophrenia, Paranoid Type; Mild Mental Retardation; Alcoholic Addiction; Passive-Aggressive Personality; Habitual Excessive Drinking; Sociopath and Alcohol Addiction; Alcohol, Paranoid State; Schizophrenia, Chronic Undifferentiated Type; Alcoholic Brain Syndrome; and Inadequate Personality." These previous diagnoses were, however, for the medical personnel at Cherry Hospital to evaluate along with their own current tests and observations of the defendant. The existence of these earlier diagnoses and the reference to them in the report did not, as defendant's counsel contends, serve to "indict" the report's ultimate finding that defendant was competent to stand trial. No further information bearing upon defendant's competency to stand trial was brought to the trial judge's attention and no request was made that the court conduct a formal inquiry into the matter. "Ordinarily, it is for the court, in its discretion, to determine whether the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense." *State v. Propst,* 274 N.C. 62, 68, 161 S.E. 2d 560, 565 (1968). Here, in view of the ultimate recommendation made by the hospital staff, the circumstances brought to the court's attention were insufficient to require the court to conduct a formal inquiry, and the court did not commit error in simply denying the motion made by defendant's counsel.

[3] We point out that in no event would defendant be entitled to the relief for which his counsel moved, i.e., that the case against him be dismissed. Had there been a sufficient showing to require a determination that defendant lacked sufficient mental capacity to stand trial, such a determination would not warrant dismissal of the charge against him. He might still be tried at a later date upon a finding that he had recovered sufficiently to be competent to stand trial. G.S. 122-87.

The matter of defendant's mental capacity at the time of the commission of the offense would have been for the jury to determine had any evidence bearing on this question been presented. In this case no evidence was presented before the jury which brought into question defendant's mental capacity at the time the offense was committed. If defendant intended to rely on the defense that he was legally insane at the time the crime was committed, the burden was on him to prove his insanity to the satisfaction of the jury. *State v. Swink,* 229 N.C. 123, 47 S.E. 2d 852 (1948). He did not invoke such a defense before the jury, but relied entirely on his testimony that it was the State's witness, and not himself, who delivered the fatal blows.

[4] Defendant next contends that he is entitled to a new trial because the record fails to show that he was ever arraigned or entered any plea to the charge upon which he was tried. We do not so interpret the record. As originally docketed in this Court on 14 January 1975, the record on this appeal contains the following under the heading, "Statement of Case on Appeal":

> "The defendant, Ralph William Baldwin, was charged in a bill of indictment with murder. The State announced that it would seek a verdict of guilty of second-degree murder. The defendant plead [sic] 'not guilty' to the bill of indictment. . . ."

Defendant's trial counsel and the solicitor for the State signed a stipulation dated 13 December 1974 agreeing to the foregoing statement of case on appeal. The judgment appealed from, which was signed by the trial judge on 5 December 1973, also contains the statement that defendant "entered a plea of not guilty."

After the original record on appeal was docketed in this Court, defendant's counsel filed a motion in this Court on 21 January 1975, citing *State v. McCotter,* 24 N.C. App. 76, 210 S.E. 2d 91 (1974), asking for an extension of time to file appellant's brief "to enable Appellant to make further inquiry into whether or not formal arraignment of the said Appellant was held." This Court allowed the motion for an extension of time to file appellant's brief. This motion, which was signed by both of defendant's counsel on this appeal, one of whom appeared and represented defendant throughout the trial, contains the statement that defendant's trial counsel "cannot specifically recall whether or not there was a formal arraignment and plea, nor does the Honorable John Joseph Hackney, then Assistant

Solicitor, for the Fifteenth Judicial District, who appeared for the State, recall whether or not there was in fact a formal arraignment." The motion also contains the further statement that defendant's trial counsel had contacted the court reporter, "who reported that the transcript of the trial as prepared by her was prepared in her customary manner and that she has not heretofore customarily included arraignment and plea." On 14 February 1975 defendant's counsel filed a motion, which was allowed, to add to the record on appeal three pages from the court reporter's stenographic transcript which contained the report of the proceedings at the commencement of defendant's trial. These pages of the transcript contained no reference to any arraignment or plea, which is not surprising in view of the court reporter's statement to defendant's counsel that the transcript was prepared "in her customary manner" and that she had not "heretofore customarily included arraignment and plea."

Certainly one of the prerequisites to a valid criminal trial is that defendant be brought to trial upon a valid warrant or bill of indictment to which he is given an opportunity to plead. The judgment from which the appeal was taken in the present case and the record as originally docketed in this Court indicate that this was done in this case and that defendant entered a plea of not guilty. Failure of the court reporter to include any reference to the arraignment and plea in the trial transcript clearly does not establish that arraignment and plea did not occur, since the court reporter stated that she customarily did not include any such reference. What is abundantly clear from the entire record is that defendant, represented by counsel, was brought to trial on a valid indictment charging him with the first-degree murder of Charlie Mitchell, that the solicitor announced that the State would seek a verdict of guilty only on a charge of second-degree murder, and that defendant and his attorney thereafter participated throughout the trial with full awareness of the exact charge for which defendant was being tried. Furthermore, the charge of the court to the jury shows that the jury was fully and correctly instructed as to the exact offense for which defendant was being tried, that he had pled not guilty, and that he was presumed to be innocent. We find no merit in defendant's assignment of error which is based on his contention that the record fails to show a valid arraignment and plea of not guilty.

Defendant next assigns error to the denial of his motion for nonsuit. The State's evidence was amply sufficient to war-

rant submitting the case to the jury, and defendant's motion for nonsuit was properly denied.

[5] Finally, defendant assigns error to the failure of the court to instruct the jury that the State's witness, Michael Edwards, was an interested witness whose testimony should be carefully scrutinized. "Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction." *State v. O'Neal*, 187 N.C. 22, 25, 120 S.E. 817, 818 (1924). Here, there was no request for such an instruction.

In defendant's trial and in the judgment appealed from we find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

ARTHUR G. TUGGLE AND WIFE, GERALDINE O. TUGGLE, PLAINTIFFS v. FRANK D. HAINES AND WIFE, ELIZABETH L. HAINES, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. HUGH G. NOFFSINGER, JR. AND SALLY NOFFSINGER, THIRD-PARTY DEFENDANTS

No. 755DC15

(Filed 2 July 1975)

1. Fraud § 12— representations by real estate agents — reasonableness of reliance by buyers

Evidence that defendants, an 80 year old man and his 68 year old wife, agreed to purchase a house upon representations by third-party defendant realtors that they could assume both the 6% VA loan and the owners' existing credit life insurance and that there was no penalty for prepayment of the mortgage, but that the loan was actually a 6½% FHA loan with a prepayment penalty and there was no credit life insurance which they could assume *is held* not to disclose as a matter of law that defendants did not reasonably rely upon the representations and to present a question for the jury on the issue of fraud.

2. Damages § 11; Fraud § 13— punitive damages

The right to an award of punitive damages, assessed for the purpose of punishing the wrongdoer, does not follow as a conclusion of law because the jury has found the issue of fraud against a defend-

ant, but there must be an element of aggravation accompanying the tortious conduct which causes the injury.

3. **Damages § 11; Fraud § 13— fraudulent representations — no punitive damages**

There was no evidence of such insult, indignity, malice, oppression or other conduct to justify an award of punitive damages against third-party defendant realtors where the evidence showed that they falsely represented to prospective purchasers of a house that there was no penalty for prepayment of the existing mortgage and that they could assume the sellers' existing credit life insurance to cover the mortgage.

4. **Brokers and Factors § 6— real estate agents' commission — defaulting buyers — fraud by agents**

Real estate agents were not entitled to recover their lost commission from the defaulting buyers of a house where the sales contract between the sellers and buyers contained no provision concerning payment of the real estate agents' commission; furthermore, the agents' right to recover the lost commission from the defaulting buyers would be barred by the jury's finding of fraud by the agents in the sale of the house.

APPEAL by third-party defendants from *Barefoot, Judge.* Judgment entered 13 August 1974 in District Court, NEW HANOVER County. Heard in the Court of Appeals 17 March 1975.

Plaintiffs, the Tuggles, brought this action against the Haineses, original defendants, to recover $3,050.00 damages which plaintiffs alleged resulted from the Haineses' breach of a contract to purchase the Tuggles' house. Defendants answered, alleging they were fraudulently induced to enter the contract by misrepresentations made by Hugh G. Noffsinger, Jr. and Sally Noffsinger, acting as agents of the plaintiffs. In a counterclaim and third-party complaint the Haineses asserted a claim against plaintiffs and against the Noffsingers to recover $1,250.00 previously paid by them, $1,000.00 of which was a deposit on the house and $250.00 of which was for the purchase price of a refrigerator. The Haineses further sought $10,000.00 as punitive damages against the Tuggles and the Noffsingers.

Plaintiffs replied, admitting they had refused to return the earnest money paid them by the Haineses, but otherwise denying material allegations of the counterclaim. The Noffsingers, third-party defendants, also answered the third-party complaint and denied the material allegations therein. In addition, the Noffsingers asserted a counterclaim against the Haineses to recover $2,400.00, the amount of the commission for sale of the Tuggles' house which the Noffsingers alleged was denied them by the Haineses' action in breaching their contract.

At trial, plaintiffs' evidence tended to show: On 6 March 1972 the Haineses came to the real estate office of the Noffsingers, partners engaged in business in Wilmington, N. C., to inquire about the availability of houses for sale in that area. They talked with Hugh G. Noffsinger, Jr., who took them to inspect a house for sale by the Tuggles. The Haineses examined the interior of the house for approximately two hours but at that time declined to buy it. On the following day Mrs. Haines, in a long-distance phone call to Noffsinger, informed him they would purchase the Tuggle house for the sum of $40,000.00, and agreed with Noffsinger that if he would sign the sales contract for the Haineses, they would later countersign the contract. Noffsinger complied with this request, sent the signed contract, and received it back after it was countersigned by the Haineses. As agreed, the Haineses also sent Noffsinger $1,000.00 as a deposit. In addition, the Haineses sent Noffsinger two checks totaling $250.00 for the purchase of a refrigerator offered for sale by the Tuggles. By letter dated 10 April 1972 Frank Haines informed Noffsinger that the Haineses had decided to "release" the house. The value of the Tuggles' house on 6 March 1972 was $40,000.00. The house was sold to other parties in June for the sum of $37,000.00.

The Haineses' evidence tended to show: Hugh Noffsinger, Jr. prevailed upon them to see the Tuggles' house although the Haineses thought it was too expensive. After their initial inspection, which consisted merely of walking through the house, Noffsinger told the Haineses that as purchasers, they could assume both the six percent VA loan and the Tuggles' existing credit life insurance to cover the mortgage on the house and that there was no penalty for prepayment of the mortgage. The Haineses decided to purchase the Tuggles' house in reliance upon obtaining this life insurance, a feature that was particularly attractive to them since Mr. Haines's age was 80 and his wife's was 68. In addition to sending Noffsinger the countersigned contract and a deposit of $1,000.00, they sent him two checks, the first in the amount of $200.00 payable to him and the second in the amount of $50.00 payable to Mr. Tuggle, both as payment for the Tuggles' refrigerator. Visiting Wilmington in April 1972, the Haineses learned from the mortgagee of the Tuggle property that the loan was an "FHA loan" at an interest rate of six and one-half percent, with a penalty for prepaying the mortgage, and that there was no credit life insurance which

they could assume. If they had known the truth about this loan, they never would have considered the house.

Hugh G. Hoffsinger, Jr., testified that he discussed the Tuggle house with the Haineses on 6 March 1972 and gave them a copy of "Wilmington Multiple Listing Service—Listing No. 11-71-742" sheet which described certain facts about the Tuggle property, including the facts that the price of the house and lot was $40,000.00 VA," and the balance remaining on the loan held by "Cameron Brown" was "$23,800 at 6% interest." Near the bottom of this sheet was this statement: "This information is believed to be correct but subject to verification." Hugh Noffsinger testified that he did not inform the Haineses that there was "credit life insurance" on the Tuggles' loan which could be transferred.

At the close of the Noffsingers' evidence, the trial court granted the Haineses' motion for directed verdict against the Noffsingers' counterclaim for recovery of a commission on the sale of the Tuggle house.

The jury found that the plaintiffs, through their agents, the Noffsingers, procured the contract with the Haineses through fraud, and awarded the Haineses actual damages in the amount of $1,250.00 jointly against the Tuggles and the Noffsingers and punitive damages in the amount of $2,700.00 against the Noffsingers. The Noffsingers appealed.

Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for third-party plaintiff appellees.

L. Gleason Allen; and Crossley & Johnson by Robert W. Johnson for third-party defendant appellants.

PARKER, Judge.

[1] Appellants Noffsinger assign error to denial of their motion for directed verdict in their favor on the issue of fraud, contending that the Haineses' own testimony shows that the Haineses unreasonably relied upon statements allegedly made by Hugh Noffsinger concerning the existence of credit life insurance in connection with the outstanding mortgage loan on the Tuggles' house and the possibility that such life insurance could be transferred to the Haineses upon their assumption of the mortgage debt. In particular, appellants point to those portions of the testimony given by Mr. and Mrs. Haines in which they

admitted that they had expressed some skepticism as to whether Mr. Haines, a man 80 years old, could obtain life insurance at the same rates as Mr. Tuggle, a much younger man. There was a conflict in the evidence as to whether Noffsinger had made any representations concerning credit life insurance. However, whether any representations concerning the credit life insurance were in fact made by Noffsinger and, if made, whether the Haineses reasonably relied upon such statements, were questions for the jury to resolve. The testimony of the Haineses was sufficient to support a jury finding that the representations were made and we cannot say, as a matter of law, that the Haineses did not reasonably rely upon them. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965). Moreover, the representations concerning the credit life insurance were not the only allegedly false representations upon which the Haineses relied, and their testimony concerning such other representations was sufficient to support a jury finding in their favor on the issue of fraud. There was no error in denying appellants' motion for a directed verdict on the issue of fraud.

[2, 3] There was error, however, in submitting the issue as to punitive damages. The right to an award of punitive damages, assessed for the purpose of punishing the wrongdoer, does not follow as a conclusion of law because the jury has found the issue of fraud against a defendant. "There must be an element of aggravation accompanying the tortious conduct which causes the injury. Smart money may not be included in the assessment of damages as a matter of course simply because of an actionable wrong, but only when there are some features of aggravation, as when the wrong is done willfully or under circumstances of rudeness, oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." *Swinton v. Realty Co.*, 236 N.C. 723, 725, 73 S.E. 2d 785, 787 (1953). Here, taking all of the Haineses' evidence as true, the record is void of evidence of such insult, indignity, malice, oppression, or other conduct on the part of the Noffsingers as to justify an award of punitive damages against them. Indeed, there was no evidence that Mrs. Noffsinger had any contacts with the Haineses prior to the time the Haineses countersigned the contract to purchase the Tuggles' house. The facts upon which the Haineses rely to recover punitive damages are the same facts upon which they rely in their action for fraud. Therefore, on this record we find that the Haineses were not entitled to an award of punitive damages.

[4] There was no error in allowing the Haineses' motion for a directed verdict in their favor as to the Noffsingers' counterclaim for lost real estate agent's commission. *Chipley v. Morrell,* 228 N.C. 240, 45 S.E. 2d 129 (1947), relied on by appellants, is distinguishable. In that case, the contract between the seller and the buyer included an express provision for a real estate broker's commission to be paid by the seller when the sale was closed. The buyer defaulted on the contract. In a suit by the broker to recover the commission, the trial court sustained the defaulting buyer's demurrer to the complaint. On appeal our Supreme Court reversed, holding that although the broker was not a party to the contract between seller and buyer, the broker was a beneficiary thereof to the extent of the commission and as a third-party beneficiary could maintain the action against the defaulting buyer. *See generally* Annot., 30 A.L.R. 3d 1395 (1970). In the present case, the sales contract between the Tuggles and the Haineses made no mention of a commission, provision for payment of a commission being included only in a separate "Exclusive Listing Contract" entered into between the Tuggles and Noffsinger, Realtors, to which contract the Haineses were not a party. Furthermore, the jury's answer to the fraud issue in the present case would in any event bar the Noffsingers' right to maintain an action for lost commission against the Haineses. *See* Annot., 9 A.L.R. 2d 504 (1950).

We have examined appellant's remaining assignments of error and find no error such as to warrant the granting of another trial. The charge of the court to the jury, when considered contextually and as a whole, was free from prejudicial error.

For the reasons hereinabove set forth, that part of the judgment appealed from which allows a recovery of punitive damages against the appellants is reversed, and that part of the judgment which awards to the Haineses recovery of actual damages in the amount of $1,250.00 against the Tuggles and the Noffsingers jointly is affirmed.

Reversed in part.

Affirmed in part.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. EDWARD THOMAS HARRIS

No. 7514SC58

(Filed 2 July 1975)

1. **Criminal Law § 91— continuance — discretionary matter unless constitutional rights denied**

A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent a showing of abuse of discretion; however, when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the trial judge is reviewable.

2. **Criminal Law § 91— attorney absent from State — return on day of trial — continuance denied**

Where defendant was arrested on 1 August 1973 upon a warrant charging the offense for which he was tried, shortly thereafter counsel was appointed to defend him, defendant's counsel left the State at the end of September and returned on 8 October 1973, and trial of defendant's case commenced that afternoon, defendant was not denied any of his constitutional rights by the court's denial of his motion to continue, since for 60 days prior to trial defendant was represented by the same counsel who appeared and represented him at trial and defendant was given ample opportunity to present witnesses to testify in his defense.

3. **Criminal Law § 40— transcripts of separate trials — testimony of absent witness — affidavit proper**

The trial court did not err in denying defendant's motion that he be furnished free transcripts of two trials of one Parker who was accused in a separate indictment of participating in the same robbery for which defendant was convicted, since their only possible use to defendant would have been to show on this appeal what the testimony of a missing witness would have been had the witness been available at defendant's trial, and an affidavit of the witness, which defense counsel made no effort to obtain, would have served the same purpose.

4. **Criminal Law § 22— entry of formal plea not in record — evidence that plea was entered**

The trial court did not err in denying defendant's motion in arrest of judgment made on the ground that he had not been properly arraigned, though the record does not show that a formal plea was entered, where the record does show that defendant, represented by counsel, was present in court when his case was called, when the indictment against him was read, when he was called upon to plead, when the jury was selected and impaneled, and thereafter throughout all of the trial proceedings, the trial court instructed the jury that defendant entered a plea of not guilty, and the order signed by the trial judge by which prayer for judgment was continued recited that defendant entered a plea of not guilty.

State v. Harris

APPEAL by defendant from *Braswell, Judge.* Judgment entered 3 October 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 March 1975.

Defendant was tried on an indictment, proper in form, charging him with armed robbery of William D. Buck. The State's evidence showed: On the afternoon of 4 June 1973, Buck, an insurance company employee, went to the home of Mrs. Jane Caldwell to collect an account. While he waited in the house for Mrs. Caldwell to get her purse, two men walked into the house. Mrs. Caldwell returned to the room, and as Buck was marking the account book, one of the men said, "This is a robbery." Buck turned and was confronted by one of the men, whom Buck identified at the trial as the defendant, holding a knife. Defendant said, "We're going to take your money." Defendant held the knife next to Buck's ribs while the other man took Buck's wallet, which contained about $420.00. The two men then ran out the back door.

Mrs. Caldwell testified and identified defendant as one of the men who robbed Buck. She testified that she knew defendant because she "went with him for four and one-half years," but had quit going with him about three months before the robbery and had a new boyfriend when the robbery occurred.

Defendant testified and denied taking part in the robbery. He testified that he had previously gone with Jane Caldwell but had broken up with her, and he testified that one Jerome Oliver had told him on the day of the robbery that Jane Caldwell and her new boyfriend had planned the robbery and that the new boyfriend and Oliver had carried it out.

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

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

Clayton, Myrick, McCain & Oettinger by Jerry B. Clayton and Kenneth B. Oettinger for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to denial of his motion for a continuance. Such a motion is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent a showing of abuse of discretion. However, when

the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the trial judge is reviewable. *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972). Defendant contends that denial of his motion deprived him of his constitutional rights to have effective assistance of counsel at his trial and to confront his accusers with other testimony. The record does not support this contention.

[2] The record discloses the following: Defendant was arrested on 1 August 1973 upon a warrant charging the offense for which he was tried. Shortly thereafter counsel was appointed to defend him. The indictment on which he was tried was returned as a true bill by the grand jury at the 13 August 1973 session of Superior Court. On 3 October 1973 a court calendar was published showing this case was scheduled for trial on 8 October 1973. Defendant's counsel had previously informed the court that it was necessary for him to be out of the State for a few days at the end of September but that he expected to return to Durham on or about 2 October 1973. Because of "family needs," defendant's counsel delayed his return and arrived in Durham about 9:00 a.m. on 8 October 1973. Trial of defendant's case commenced that afternoon. In denying the motion for continuance, the trial judge advised defendant's attorney that if the State rested its case during the afternoon, a recess would be granted until the following morning. The trial actually continued until the following day, witnesses were presented for the defense, and, so far as the record reveals, only one witness of all those which defendant desired to present, was not available. This witness was a sixteen-year-old boy, Jerome Oliver. Defendant's attorney admitted he had not talked with this witness, and after an extensive voir dire examination, the trial judge found that defendant's contention as to what this witness would testify to under oath was not believable and that this witness would not benefit the defendant if he were present.

The record thus shows that for approximately sixty days prior to the trial defendant was represented by the same counsel who appeared and represented him at his trial. It further shows that defendant was given ample opportunity to present witnesses to testify in his defense. We therefore find no deprivation of any constitutional rights resulted from the denial of his motion for a continuance nor has any abuse of the trial judge's dicretion been shown. Accordingly, defendant's assignment of error directed to denial of his motion for a continuance is overruled.

[3] Defendant next contends that reversible error occurred when the court denied his motion to be furnished free copies of the transcripts of two trials of one Thomas Lee Parker, who was accused in a separate indictment of participating in the same robbery for which defendant was convicted. After defendant was found guilty, the trial judge entered an order dated 12 October 1973 continuing prayer for judgment. Prayer for judgment was thereafter continued from term to term until 3 October 1974, when the State prayed for judgment in the case. During the time between the date of defendant's trial and the date sentence was imposed, Thomas Lee Parker was twice brought to trial on the separate indictment against him, both of these trials resulting in mistrials when the jury could not agree. When defendant appeared for sentencing on 8 October 1974, his attorney made a motion that defendant be furnished free copies of the transcript of these trials of Thomas Lee Parker. He contends that denial of this motion resulted in depriving him of adequate appellate review of his own trial in that, so defendant's counsel contends, these transcripts would show that the witness, Jerome Oliver, appeared at the trials of Parker and that defendant had need of the transcripts of Parker's trials in order to demonstrate to the appellate court what the testimony of the witness, Oliver, would have been had that witness been available at defendant's trial. He further contends that because he was indigent, the State was obligated to furnish him the requested transcripts free of charge. We do not agree.

The transcripts requested were not of any prior proceedings in defendant's case. They were of proceedings which occurred after defendant's trial and in which defendant was not a party. Their only possible use to defendant would have been to show on this appeal what the testimony of the missing witness would have been had the witness been available at defendant's trial. An affidavit of the witness would have served the same purpose, yet defense counsel made no effort to obtain one. At defendant's trial in October 1973 defendant's counsel admitted that, though he had been appointed to represent defendant some sixty days previously, he had never talked with this witness. At the sentencing hearing which took place a year later, in October 1974, defense counsel still had not interviewed this witness whose testimony he contends was so important to his client's defense. A readily available alternative method for obtaining the information sought by the transcripts was never utilized by defendant's attorney. We find no error in the denial of his

motion that defendant be furnished free copies of the transcripts of the Parker trials. *See State v. McAllister,* 287 N.C. 178, 214 S.E. 2d 75 (1975).

[4] Following return of the verdict finding him guilty, defendant moved in arrest of judgment on the ground that he had not been properly arraigned. In support of this motion, defense counsel contended "[t]here never was a plea in this matter entered." In this connection the record shows that upon the call of the case for trial the prosecuting attorney read the bill of indictment and asked how defendant pled. At that point defense counsel, before entering a plea, made his motion for a continuance. That motion was denied, the jury was selected, sworn and impaneled, and the trial proceeded. The record before us showing the proceedings in the trial court does not disclose that a formal plea was entered except for the recitation in the order signed by the trial judge by which prayer for judgment was continued. That order contains the recitation that "the defendant through his attorney, Jerry Clayton, and in his own proper person plead [sic] not guilty." In any event, we find that defendant has suffered no deprivation of any substantial right because the minutes of the trial court may not otherwise reflect the formal entry of a not guilty plea. The record before us makes abundantly clear that defendant, represented by counsel, was present in court when his case was called, when the indictment against him was read, when he was called upon to plead, when the jury was selected and impaneled, and thereafter throughout all of the trial proceedings at which witnesses for the State and for the defense were examined and cross-examined. In submitting the case to the jury, the trial judge instructed the jury that "[t]o the charge in the bill of indictment the defendant has entered a plea of not guilty and under our law this raises in his behalf a presumption of innocence."

Had defendant stood mute when called upon to plead, a plea of not guilty would have been entered for him. The trial here proceeded in all respects as though such a plea had been formally entered. We find no error in the court's denial of defendant's motion in arrest of judgment.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

MARIE F. HUFFMAN, GUARDIAN AD LITEM FOR WANDA JEAN HUFFMAN v. GULF OIL CORPORATION

No. 7525SC188

(Filed 2 July 1975)

Principal and Agent § 9— watchdog kept by service station operator — liability of oil company — apparent authority

In an action to recover for injuries sustained by the minor plaintiff when she was bitten by a dog on the premises of a Gulf Oil service station, plaintiff's evidence was insufficient to hold Gulf Oil Corporation liable for the negligence of the service station operator upon theories of apparent agency and agency by estoppel where it tended to show that the dog was used by the service station operator as a watchdog for a coal and wood business on adjacent, separately leased property since a dealer's activity in keeping a watchdog does not come within the apparent agency doctrine, especially where the watchdog is used in connection with a separate business on adjacent property.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 11 October 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 13 May 1975.

This is a civil action instituted by the guardian ad litem and mother of the minor plaintiff against the defendants, Ray Whisnant and Gulf Oil Corporation, to recover damages for personal injuries sustained by the minor plaintiff, when she was bitten by a dog owned by the defendant Whisnant, and kept on his business premises "for purposes of guarding said premises." On 31 August 1973 plaintiff filed a complaint alleging that on 9 June 1971 the minor plaintiff and her mother were on the business premises of the defendant Whisnant, "who was at that time operating Ray's Scenic Gulf as an agent, servant, and employee of the defendant, Gulf Oil Corporation"; that they "had gone upon these premises for the mutual benefit of themselves and the defendants in that they were on said premises to purchase the goods and services which were for sale to the public" and "were therefore invitees of the defendants"; that the minor plaintiff was attacked by a large German Shepherd dog owned by the defendant Whisnant, and that as a proximate result of the attack, "suffered grevious personal injuries." Plaintiff further alleged that the defendant Whisnant, as agent of the defendant Gulf, knew of the dog's vicious character and was negligent in failing to restrain or warn customers of its propensity "to attack and bite persons who came upon said premises."

The defendant Gulf answered denying negligence and alleging contributory negligence on the part of the minor plaintiff. A subsequent motion for summary judgment filed by the defendant Gulf was denied.

At the trial the plaintiff presented several witnesses. A police officer with the City of Morganton, who investigated the incident on 9 June 1971, testified that he found a large German Shepherd dog chained to a small building, which was located about 28 feet behind the defendant Whisnant's Gulf station; that the dog's chain allowed it to reach a driveway which ran behind the station; and that the dog was barking and growling and would not allow one of his fellow officers to get out of the right-hand door of their patrol car. The officer further testified that on 9 June 1971 he did not see a warning sign, but that upon his return the following day, nearby shrubs had been cut and a large "Beware of Dog" sign was visible from the street.

A medical doctor who treated the minor plaintiff's injuries described her injuries and gave his opinion regarding the cost of additional surgery that might improve her appearance.

Several witnesses testified that on prior occasions the dog was "very aggressive" and would growl and bark. A witness testified that on one occasion the dog had "charged" toward him.

The minor plaintiff's mother testified that her husband stopped at the Whisnant's Gulf station on the morning of 9 June 1971 because "the car was giving [them] trouble and it needed some gas"; that he parked beside the station and began working under the hood and that she had just gotten the key to the restroom when she heard a scream and saw the defendant Whisnant's dog with her six-year-old daughter's head in its mouth, slinging her. Mrs. Huffman stated that the dog had its chain extended and was in the driveway behind the station when she saw it. The dog attacked her and tore her dress when she rushed over to get her daughter.

The minor plaintiff's father testified that Gulf advertising had influenced him to stop at this station and that he had been using Gulf products "for about six or seven months"; that he "had not looked" to see a "Beware of the Dog" sign and that he did not see his daughter walk from the car in the direction of the dog because he was under the hood checking the oil and looking at the carburetor.

The defendant Whisnant was called as an adverse witness. Whisnant testified that he had been operating this particular Gulf station for "close to ten years"; that he advertised and sold Gulf Oil Company products; that he "leased the property back of the station from someone by the month" and operated a separate coal and wood business out of the building on that property. Whisnant stated that although the two tracts of land were rented separately, there was no fence or anything between them and "[t]he people that sold the gas and oil also sold the coal and wood." He further testified that he had had the dog for "four and a half or five years"; that before he got the dog he had problems "with people stealing stuff" and "[t]he dog was there to guard the coal and the wood"; that "[t]he purpose of the dog was to scare people away from there." Sometimes the dog would bark and growl and "[i]f they got close to him, he would run at them and chase them." Whisnant denied the dog had ever bitten anyone and stated that he did not consider the dog mean. He also maintained that a large "Beware of Dog" sign was visible on 9 June 1971 and denied that he had sawed off a tree limb after the minor plaintiff was bitten to make the sign more visible. Whisnant testified that he had not seen the minor plaintiff's parents before 9 June 1971.

At the close of the plaintiff's evidence, the defendant Gulf moved for a directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure on the following grounds:

> "1. That on the basis of the pleadings and the evidence the plaintiff has shown no right to relief against the defendant, Gulf Oil Corporation.
>
> 2. That there is no substantial evidence that the defendant, Gulf Oil Corporation, had any control over the premises occupied by the defendant, Ray Whisnant, on the occasion giving rise to this action.
>
> 3. That there is no substantial evidence that the defendant, Ray Whisnant, was the agent, servant or employee of Gulf Oil Corporation on the occasion giving rise to this action.
>
> 4. That there is no substantial evidence that the defendant, Gulf Oil Corporation, was negligent in proximately causing any injuries or damages which the minor plaintiff may have sustained.

5. That the plaintiff has offered no evidence as against the defendant, Gulf Oil Corporation, of either the agency of Ray Whisnant to Gulf Oil Corporation or of any liability on the part of Gulf Oil Corporation, but on the contrary, the evidence submitted as to the defendant, Gulf Oil Corporation, discloses affirmatively that the defendant, Ray Whisnant, was an independent contractor, and had sole and exclusive control over the premises leased by him from John Mackerall, and that Gulf Oil Corporation had no control or right to control over said premises or the defendant, Ray Whisnant."

From judgment allowing defendant Gulf's motion for a directed verdict on grounds "the plaintiff's evidence considered in the light most favorable to the plaintiff, was insufficient to support a verdict for the plaintiff against the defendant, Gulf Oil Corporation," plaintiff appealed.

Simpson, Martin, Baker & Aycock, by Samuel E. Aycock, for plaintiff appellant.

Uzzell and Dumont, by Harry Dumont, Robert E. Harrell and Susan Shatzel Craven, for defendant appellee.

MORRIS, Judge.

Rule 54(b) of the Rules of Civil Procedure provides as follows:

"(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment,

any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The record in this case does not indicate the disposition of plaintiff's claim against the defendant Whisnant nor does the judgment in this case state there is "no just reason for delay." Accordingly, plaintiff's appeal is subject to dismissal pursuant to Rule 54(b). However, counsel for both parties have stated in oral argument that judgment has been entered with respect to plaintiff's claim against the defendant Whisnant. We, therefore, conclude that the judgment in the case at bar is appealable and have decided to consider plaintiff's appeal on the merits.

Plaintiff's only assignment of error is to the decision of the trial court allowing the defendant Gulf's motion for a directed verdict at the close of the plaintiff's evidence. Plaintiff argues that there was sufficient evidence from which the defendant Gulf could be held liable upon the theories of apparent agency and agency by estoppel for the negligence of the defendant Whisnant, and, therefore, it was error for the trial court to allow the defendant Gulf's motion. In support of this contention, plaintiff relies heavily upon the case of *Gizzi v. Texaco, Inc.*, 437 F. 2d 308 (3d Cir. 1971).

In *Gizzi* the plaintiffs Gizzi and Giaccio were seriously injured in an expressway collision when the brakes failed on a 1958 Volkswagen van purchased by Gizzi from a Texaco service station operator on the day of the accident. Incident to the sale of the van the Texaco dealer had agreed to put the van "in good working order." His repairs to the van "included the installation of a new master braking cylinder and a complete examination and testing of the entire braking system." Both plaintiffs sued Texaco for damages for personal injuries they sustained in the collision under theories of apparent agency and agency by estoppel. In support of their theories of liability plaintiffs introduced evidence that Texaco exercised control over many activities of the service station in question; that the Texaco insignia and the slogan "Trust your car to the man who wears the star" were prominently displayed by the station, as well as a sign indicating the availability of an "Expert foreign car mechanic" on the premises; and that Texaco engaged in substantial national advertising portraying its dealers as skilled in servicing automobiles. There also was evidence in the record that approximately 30 percent of all Texaco dealers sold used

cars and that this activity was "known to and acquiesced in by the corporation."

The United States District Court for the Eastern District of Pennsylvania ruled that the plaintiffs had not introduced sufficient evidence to warrant submission of the issues of apparent authority and agency by estoppel to the jury and directed a verdict in favor of the defendant Texaco. On appeal, the Third Circuit, viewing the evidence in the light most favorable to the plaintiffs, held that "[w]hile the evidence on behalf of appellants by no means amounted to an overwhelming case of liability, we are of the opinion that reasonable men could differ regarding it and that the issue [of apparent authority] should have been determind by the jury, after proper instructions from the court."

In our opinion the Gizzi case is clearly distinguishable from the case at bar. Here the dog was used in connection with a separate coal and wood business and was kept on separately leased property. There was no evidence that the defendant Gulf knew that the separate business was operated by the defendant Whisnant or that the dog could reach the service station property. Moreover as pointed out in a recent note entitled "Agency —Apparent Authority and Agency by Estoppel: Emerging Theories of Oil Company Liability for Torts of Service Station Operators," 50 N.C. L.Rev. 647 (1972), "*Gizzi* may represent an outer limit with respect to what reasonable men could agree on as being within the apparent authority created by the oil company's manifestations to the public. *It cannot reasonably be assumed that the oil company 'holds out' its dealer with respect to each and every activity the dealer undertakes,* and the sale and repair of a used vehicle would seem to be on the borderline." (Emphasis supplied.)

We are of the opinion that a dealer's activity in keeping a watchdog is clearly beyond the borderline of the apparent agency doctrine, especially where, as here, the watchdog is used in connection with a separate business on adjacent, but separately leased premises.

It is most unfortunate that, by reason of Whisnant's keeping a vicious dog on property controlled by him, a little girl has been so disfigured. However, the liability of Whisnant is not before us, and we find nothing in the record which would justify placing liability upon Gulf Oil Corporation.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

MONA ROBINSON COGDILL v. SUSAN WEEKS SCATES AND GEORGE THOMAS COGDILL

No. 7530SC166

(Filed 2 July 1975)

Automobiles § 50— automobile accident — testimony by plaintiff that defendant was not negligent — directed verdict proper

In an action for damages for personal injuries sustained by plaintiff, while a passenger in her husband's automobile, when it collided head-on with another vehicle, plaintiff was conclusively bound by her unequivocal testimony, despite the allegations of her complaint, that her husband, defendant Cogdill, was not negligent in any way, that he was not driving in a reckless manner, that he was in his proper lane of traffic, either stopped or moving slightly, had given a proper signal for a left turn, and was waiting for traffic to clear; therefore, defendant's motion for directed verdict should have been allowed.

Judge HEDRICK dissenting.

APPEAL by defendant, George Thomas Cogdill, from *Friday, Judge.* Judgment entered 30 September 1974 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 6 May 1975.

This is a civil action for damages for personal injuries sustained by the plaintiff, while a passenger in her husband's automobile, when it collided head on with another automobile being driven by the defendant, Scates, allegedly due to the negligence of both drivers. In his answer, plaintiff's husband, the defendant Cogdill, denied any negligence on his part and alleged contributory negligence on the part of the plaintiff. Prior to the trial, plaintiff settled with the defendant, Scates, and filed a voluntary dismissal as to Scates. Similar actions against both defendants, instituted by Edna Reece Ruff, owner-occupant of the Scates vehicle, and Robert Reece, passenger in the Scates automobile, were consolidated with plaintiff's action for purposes of trial. Defendant Susan Weeks Scates, in the Ruff and Reece actions, filed a cross claim against defendant Cogdill and defendant Cogdill filed a cross claim against defendant Susan Weeks Scates.

The jury answered the 21 issues submitted to them which resulted in the following findings: (1) that plaintiff Cogdill was injured by the negligence of defendant Cogdill in the amount of $40,000; (2) that plaintiff Reece was injured by the concurrent negligence of defendant Cogdill and defendant Scates in the amount of $7,500; (3) that plaintiff Ruff was injured by the concurrent negligence of defendant Cogdill and defendant Scates in the amount of $35,000, and that defendant Scates' negligence, as imputed to plaintiff Ruff, the owner of the Scates automobile, did not contribute to the plaintiff Ruff's injury in her action against the defendant Cogdill; (4) that defendant Cogdill was injured by the negligence of defendant Scates in the amount of $1,500, and that defendant Cogdill did not contribute to his own injury; and (5) that the defendant Scates was injured by the negligence of the defendant Cogdill in the amount of $5,000 and that the defendant Scates did not contribute to her own injury. From judgment on the verdict awarding plaintiff Cogdill $40,000, defendant Cogdill appealed.

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

Bruce A. Elmore, by John A. Powell, for plaintiff appellee.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellant.

MORRIS, Judge.

Appellant strenuously contends that the trial judge erred in failing to grant his motion for a directed verdict at the end of plaintiff's evidence, at the end of all the evidence and for judgment notwithstanding the verdict.

In her original verified complaint plaintiff Cogdill had alleged that her husband was negligent in that he (1) failed to keep a proper lookout; (2) operated his automobile in a careless and reckless manner; (3) "operated his automobile at a high and dangerous speed"; (4) failed to maintain proper and reasonable control of his automobile; (5) "operated his automobile on the left side of the center of Balsam road"; (6) operated his automobile "in such a manner and at such a speed as to be incapable of stopping it within a reasonable distance"; (7) "turned his automobile from a direct line without first ascertaining that such movement could be made with safety"; (8) "suddenly and abruptly turned his automobile to the left with-

out giving a signal or warning whatever"; and finally, (9) "operated a motor vehicle when he had been consuming alcoholic beverages, and when he was under the influence of intoxicants, contrary to statutes." On the day of the trial, counsel for plaintiff Cogdill filed an unverified amended complaint deleting the prior allegations of (1) carelessness and recklessness and (2) driving under the influence of intoxicants. The collision between the two cars was head on. Both drivers were alleged to have crossed the center line into the other's lane of traffic. Each denied this.

The record does not indicate that there was any objection lodged to consolidation. At trial, the evidence of plaintiffs Ruff and Reece was presented first. Their evidence was sufficient to show negligence on the part of both Cogdill and Scates. Plaintiff appellee then presented her evidence. She testified on direct examination that she never saw the car operated by Susan Scates; that immediately before the collision she was "looking out the right-hand side"; that her husband, defendant Cogdill, "had given a left-hand signal to turn to Little Bill's. Our car was sitting still, waiting to turn into Little Bill's." On cross-examination she testified that she knew their car was in its proper lane; that she did not remember the collision; that the last she remembered was that they were sitting in the right-hand lane waiting to turn in to Little Bill's; that the car driven by her husband, the defendant, had been stopped in its right lane of traffic on the Balsam Road for several seconds waiting for traffic to clear; that her husband, the defendant, immediately before the collision had been driving "at least 20 miles an hour"; that her husband, the defendant, had not drunk any alcoholic beverage; that he was "not negligent, in any way, as far as this accident was concerned"; that shortly after the accident occurred she signed a statement, given out of the presence of her husband, in which she stated: "About 9:05 p.m. we had left Mrs. Lyles home about a quarter of a mile from Little Bill's Drive-In. Neither George nor myself had been drinking. Our daughter wanted a cup of ice, and we were on our way to Little Bill's. We were traveling on Balsam Road which is a hard-surface two lane road. One lane east and one lane west. We were going east and was approaching the Drive-In. The weather was clear and the streets were dry. I don't recall if there was any traffic in front of us. I don't know how far we were from the upper drive when we came to a stop waiting for oncoming traffic to clear and wasn't paying much atten-

tion to what was going on around us. The next thing I recall was sitting on the floorboard of the car and George was in the front seat holding me up. . . . Up to the impact George was driving in a careful manner. Also he was not driving reckless (sic) in any way and is a safe driver . . . George had not started his turn and was still in his lane when we came to a stop"; that she didn't know anything about whether her "husband was looking around, straight ahead, or wherever he was looking"; that when she said they were stopped she didn't mean they were "actually dead stopped and none of the wheels moving at all"; that she meant the wheels "were just barely turning as [they] were sort of moving along the highway waiting for this traffic to pass so [they] could turn into Little Bill's."

It is obvious that plaintiff's own evidence contains no evidence of negligence on her husband's part. Any evidence of his negligence would have to come from the evidence presented by the plaintiffs in the other actions. However, not only did plaintiff fail to testify as to any act of negligence on the part of her husband, she completely and unequivocally absolved him of liability. Her testimony not only would entitle defendant Cogdill to a directed verdict; it amounts, in effect, to a voluntary dismissal of her alleged cause of action against her husband, defendant Cogdill.

We think the following comment is appropriate and applicable:

> ". . . A party may not recover on a set of facts which the party unequivocally testifies are not so, nor can he recover on a ground or theory, or rely on a defense, which he has directly or in effect repudiated by his own testimony, at least where there is nothing in the record to indicate that he was confused or uncertain in testifying. It has been held that the rule will not be applied as against a party subject to such mental limitations that his testimony is unreliable." 32A C.J.S., Evidence, § 1040(3), p. 778. See also IX Wigmore, Evidence, 3d ed., § 2594a: Party's Testimony as a Conclusive Admission; *Kanopka v. Kanopka,* 113 Conn. 30, 154 Atl. Rep. 144 (1931).

We do not discuss this case upon the theory that plaintiff may or may not have by judicial admission negated, as to her, any prior evidence introduced by other plaintiffs as to defendant Cogdill's negligence. We simply hold that plaintiff Cogdill

is conclusively bound by her unequivocal testimony that her husband, defendant Cogdill, was not negligent in any way, that he was not driving in a reckless manner, that he was in his proper lane of traffic, either stopped or moving slightly, had given a proper signal for a left turn, and was waiting for traffic to clear. *Bradshaw v. Stieffel,* 230 Miss. 361, 92 So. 2d 565 (1957); *Jacobs v. Munez,* 157 F. Supp. 120 (U.S.D.C. S.E. N.Y. 1957); *Thies v. Reich Bros. Long Island Motor Freight, Inc., et al.,* 273 N.Y. 552, 7 N.E. 2d 688 (1937). The record gives no indication that plaintiff was confused, was mentally impaired, or was in any way not able to understand the question propounded to her. Her answers were clear and well stated. She was employed as a telephone operator for Western Carolina Telephone Company. In our opinion, she clearly and totally without ambiguity, indicated that in her opinion, despite the allegations of her complaint (which she testified she had not read), her husband was not negligent in the operation of his automobile. This amounts to repudiation of any alleged cause of action she had as to him. Surely no unfairness results to plaintiff by adopting her testimony that she had no cause of action based upon her husband's negligence and no liability attached to him. Since she had, by her own explicit and unambiguous testimony, repudiated any cause of action she had previously alleged against her husband, no issues with respect to his liability for her injuries should have been submitted to the jury. Defendant's motion for directed verdict should have been allowed.

Plaintiff's other exceptions and assignments of error are directed to the admission and exclusion of evidence, the charge of the court to the jury, the issues presented to the jury, and the inconsistency of a finding of negligence on the part of defendant Cogdill in plaintiff's case, but a finding of no contributory negligence on the part of defendant Cogdill in his cross claims against Scates. The view of the case expressed by this opinion makes any discussion of those exceptions unnecessary and undesirable.

Reversed.

Chief Judge BROCK concurs.

Judge HEDRICK dissents.

Judge HEDRICK, dissenting:

The majority opinion fairly summarizes plaintiff's testimony. Without elaborating on the circumstances surrounding the taking of her testimony, or the contradictions, discrepancies, and equivocations contained therein, I am of the opinion that plaintiff's testimony is not so unequivocal as to require that a directed verdict be entered against her and in favor of the defendant Cogdill, whether her testimony be characterized as a judicial admission, a repudiation of her claim against her husband, or a voluntary dismissal. See McCormick, Evidence, § 266, 2d ed. pp. 636-639.

I vote to affirm.

HARRY C. SISKRON, d/b/a CITY PLUMBING COMPANY v. TEMEL-PECK ENTERPRISES, INC., HENDERSON BELK, AND W. DAVID TEMEL

No. 7526SC217

(Filed 2 July 1975)

Unjust Enrichment— improvements to hotel — contract with lessee — liability of owner — opportunity to reject benefits

The owner of a hotel is not liable under the theory of unjust enrichment for plumbing materials and services furnished to the lessee, whom the plumbing contractor believed to be the owner, upon the owner's reentry of the premises after the lessee's default where the owner was not given an opportunity to reject the benefits in advance of their bestowal since the owner could properly assume that the lessee was making the repairs pursuant to its covenants in the lease and that the contractor was looking to the lessee for payment, and where the owner did not have the opportunity to return the benefits conferred prior to his reentry since they could not feasibly be removed without closing down the hotel.

APPEAL by plaintiff from *Alvis, Judge.* Judgment entered 19 December 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 May 1975.

This is a civil action in which plaintiff seeks to recover damages from defendants for materials and labor provided by the plaintiff pursuant to a contract between the plaintiff and defendants Temel-Peck Enterprises, Inc., and W. David Temel, said contract relating to the renovation of the Barringer (now

Cavalier) Inn in Charlotte. Specifically, the plaintiff sought $10,623.52 in damages for plumbing materials and services and the enforcement of a materialmen's lien. When the case came on for trial the plaintiff voluntarily dismissed the defendants Temel-Peck Enterprises, Inc., and W. David Temel without prejudice and further consented to an order dismissing his lien. The case was tried without a jury and was limited to the sole issue of unjust enrichment.

Basically, the plaintiff alleged that as a contractor, he furnished labor and materials to Temel-Peck, the lessee of the Cavalier Inn, whom plaintiff mistakenly believed to be the owner, that as a result and due to defendant Belk's subsequent reentry upon the premises after Temel-Peck's default, Belk became unjustly enriched by plaintiff's services, thereby entitling plaintiff to relief.

On 18 September 1971, an article appeared in the "Charlotte Observer" stating that the Barringer Inn had been sold by defendant Belk to Temel-Peck Enterprises, Inc., which would take control of the hotel effective October 1. Plaintiff read this article.

On 28 September, Temel-Peck Enterprises, Inc., and Henderson Belk executed a lease whereby Temel-Peck leased the hotel for a term of three years with an option to purchase. In pertinent part, the lease provided as follows:

" '7. MAINTENANCE AND USE

* * *

'(c) The Lessee shall, at its own expense, keep the premises clean and neat, and shall make all necessary and appropriate repairs and replacements to the premises and all parts thereof, both exterior and interior, structural or non-structural. . . .

* * *

'9. COVENANTS OF LESSEE

'Lessee covenants that as to the demised premises and free of expense to Lessor it shall:

* * *

'(c) Keep and maintain the improvements, equipment, fixtures and furnishings in good repair.

* * *

'16. DEFAULT.

* * *

'If an event of default . . . shall occur, Lessor shall have the right, on notice, immediately to cancel the lease and the lease shall immediately terminate. Lessor shall have the immediate right to re-enter and repossess the demised premises, and in such event of re-entry, Lessor shall ipso facto become vested with fee simple title to all furnishings, improvements, and fixtures upon the demised premises, free of all liens and rights of Lessee. . . ."

On 4 October 1971, plaintiff received a telephone call from David Temel, President of Temel-Peck Enterprises, Inc., who told plaintiff that he had purchased the Inn and requested that plaintiff do some work for him. A verbal contract was entered providing for repair and remodeling services including the installation of certain plumbing fixtures. At the end of the first month of work, plaintiff submitted a bill to Temel-Peck for services and was paid in due course. Thereafter, a check was received dated 3 January 1972, but payment was stopped; so plaintiff withdrew from the job on 7 January, when $10,623.52 was due for labor and materials.

Plaintiff's supervising employee on the job was told by David Temel that he had purchased the property and was further told the same thing by someone who represented himself to be Frank Wilson, Vice-President of Henderson Belk Enterprises. It was established at trial that the person making this latter statement was not in fact Frank Wilson but was someone else who could not be named or identified. Defendant Belk stipulated that he knew that plaintiff was furnishing repair and remodeling services to Temel-Peck over the entire period to January 7 and that he retained office facilities in the hotel during that period.

It was stipulated that on 6 January 1972, the defendant Belk reentered and assumed possession upon default of Temel-Peck. On two occasions thereafter plaintiff performed services for the defendant Belk on the hotel on a COD basis.

The trial court rendered judgment holding against the plaintiff on the issue of unjust enrichment and the plaintiff appealed.

Hamel, Cannon & Hamel, P.A., by I. Manning Huske and Reginald S. Hamel, for the plaintiff.

Weinstein, Sturges, Odom, Bigger and Jonas, P.A., by John J. Doyle, Jr., for the defendant.

CLARK, Judge.

When one person confers a benefit upon another which is not required by a contract either express or implied or a legal duty, the recipient thereof is often unjustly enriched and will be required to make restitution therefor. However, this rule is not the case where the person conferring the benefit is a volunteer or intermeddler or where the person conferring the benefit does so without affording the recipient an opportunity to reject the benefit. See D. Dobbs, Remedies, § 4.9 (1973). This latter principle called the "choice principle," does not apply, however, with absolute rigidity but yields at times to special situations cognizable in equity which override a defendant's right of free choice. Nevertheless, it has been said that:

> "Where a plaintiff in the performance of his own duty incidentally confers a benefit on the defendant, it is usually held that restitution is not available. Thus, where one in possession of land hires the plaintiff to put an improvement on it, the fact that this inures to the benefit of the owner does not create liability to make restitution." Wade, Restitution for Benefits Conferred Without Request, 19 Vand. L. Rev. 1183, 1204 (1966).

Further,

> "A person is ordinarily not required to pay for benefits which were thrust upon him with no opportunity to refuse them. The fact that he is enriched is not enough, if he cannot avoid the enrichment." Wade, Restitution for Benefits Conferred Without Request, 19 Vand. L. Rev. at 1198 (1966).

The concept of the "choice principle" finds cognizance in this State in *Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434 (1966), wherein the plaintiff-contractor contracted with defendant's mother for the construction of a house upon a lot which was represented by the mother to be owned by her. As it turned out, the plaintiff was mistaken as to the ownership of the lot as it was actually owned by the defendant. The defendant there-

after refused to allow the plaintiff to remove the house from the lot and refused to pay for the improvement. It was held that ". . . where through a reasonable mistake of fact one builds a house upon the land of another, the landowner, electing to retain the house upon his property, must pay therefor. . . ." *Homes, Inc. v. Holt, supra,* at 474. As is apparent from the above case, the defendant had the "choice" of either allowing plaintiff to remove the house or retaining it. Having elected to retain it, equity required her to pay since she had the choice of returning the benefit conferred even though she could not reject the benefit in advance of its bestowal.

Applying these principles to the facts in the present case, we fail to discern that the defendant Belk was ever given an opportunity to either reject the benefits in advance of their bestowal or to return them after they had been conferred. Under the lease to Temel-Peck Enterprises, Inc., the lessee covenanted to ". . . keep and maintain the improvements, equipment, fixtures and furnishings in good repair," and ". . . make all necessary and appropriate repairs and replacements to the premises." Even though Belk was aware that repairs were being made, it was perfectly proper for him to assume that Temel-Peck was making them pursuant to its covenants in the lease and that the contractor was looking to the lessee for payment, which he in fact was. It would be unreasonable to place upon every lessor of substantial leasehold property the duty of policing every expenditure made for repairs by a lessee who is required under the lease to make repairs. Under the circumstances, the defendant had no opportunity to reject the benefits conferred in advance.

The next question is whether defendant Belk had an opportunity to return in specie the benefits conferred prior to his reentry into the property in January 1972. The answer to this is simply in the negative as the plaintiff personally admitted that the improvements and repairs could not feasibly be removed without closing down the hotel.

We find no special circumstances present in this case which would override Belk's freedom of choice and coerce liability for the benefits conferred upon him. The plaintiff relies upon his good faith, reasonable belief that Temel-Peck was the owner, and Belk's inaction after the newspaper article previously referred to was published as grounds for liability. He further contends that the evidence that someone representing himself

to be Belk's vice president told his agent that Temel-Peck owned the hotel is probative of an innocent misrepresentation by Belk. We fail, however, to see how the representations of an unidentified person amount to any kind of representation on Belk's part. Furthermore, there was no evidence whatsoever that Belk was ever aware of plaintiff's mistaken belief as to the ownership of the property. In any event, it is not clear whether ownership in Belk as opposed to Temel-Peck would have made any difference to the plaintiff when he originally formed the contract with Temel-Peck. Under these circumstances, the general rule of equity applies and the defendant Belk, having had no suitable opportunity to accept or decline the benefits, could not be held liable in restitution for the benefits conferred. See generally, *LaChance v. Rigoli,* 325 Mass. 425, 91 N.E. 2d 204 (1950); *Chatfield v. Fish,* 126 Conn. 712, 10 A. 2d 754 (1940); and *Kennedy v. Nelson,* 37 Ala. App. 484, 70 So. 2d 822 (1954).

For the foregoing reasons, we find

No error.

Judges MARTIN and ARNOLD concur.

BEN F. WILLIAMS AND WIFE, MARGARET C. WILLIAMS v. DUKE POWER COMPANY

No. 7510SC260

(Filed 2 July 1975)

1. **Witnesses § 7— unresponsive answer — testimony not supportive of contentions**

The trial court did not err in the exclusion of testimony by plaintiffs' witness which was unresponsive to the question and not supportive of plaintiffs' contentions.

2. **Evidence § 41— opinion testimony — invasion of province of jury**

The trial court did not err in the exclusion of testimony that silt which damaged plaintiffs' property came from the right-of-way cut made by defendant power company on property above that owned by plaintiffs since that was the critical question for the jury and the witness was no more qualified than the jury to form an opinion from the facts.

3. **Appeal and Error § 48— admission of evidence — other evidence of like import**

The admission of incompetent evidence was cured where substantially the same evidence was theretofore or thereafter admitted without objection.

4. **Compromise and Settlement § 3— offer of settlement**

Plaintiffs were not prejudiced by the admission of testimony of a purported offer by defendant to settle the claim on which plaintiffs' action is based.

5. **Witnesses § 6— prior inconsistent statement — impeachment**

Evidence of an inconsistent statement made by the male plaintiff in a former trial was relevant for the purpose of impeaching the male plaintiff.

6. **Waters and Watercourses § 3— siltification of lake and ponds — clearing of power line right-of-way — directed verdict, judgment n.o.v.**

The trial court did not err in the denial of plaintiffs' motions for directed verdict and for judgment n.o.v. in an action to recover damages for the siltification of a lake and ponds on their land allegedly caused by soil erosion from a transmission line right-of-way cut and cleared by defendant power company on nearby lands.

APPEAL by plaintiffs from *McKinnon, Judge.* Judgment entered 14 January 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 29 May 1975.

Plaintiffs instituted this action on 23 December 1970 to recover for damage to their real estate allegedly caused by defendant. In their amended complaint, filed 27 March 1973, plaintiffs alleged separate counts of damage to real property, trespass, negligence, strict liability, and punitive damages. The allegations include the following:

Plaintiffs are the owners of an 80-acre tract of land located in Alleghany County near Roaring Gap, N. C. During the latter part of 1969, agents or employees of defendant went upon land adjacent to plaintiffs' land and bulldozed or otherwise disturbed vegetation and soil adjacent to a stream that ran onto plaintiffs' land. The actions of defendant's employees caused loose soil, debris and trash to enter said stream, resulting in siltification of the stream and a lake and ponds on plaintiffs' land. Defendant failed to use due care in the bulldozing and clearing on the adjacent land and failed to employ proper safeguards to prevent erosion onto plaintiffs' land. Plaintiffs asked for actual and punitive damages, for an injunction, and for other relief.

In its answer defendant denied material allegations of the amended complaint and pled numerous defenses.

Evidence presented at trial tended to show that during the latter part of 1969 defendant cut and cleared a right-of-way for a transmission line on lands adjacent to or near plaintiffs' land; that the segment of the right-of-way in question was approximately 200 feet wide and approximately 3,500 feet long; that the right-of-way ranged from about 2,000 feet to 4,500 feet from plaintiffs' land; and that the power line "cut" was considerably higher in elevation than plaintiffs' land. Other facts pertinent to this appeal are stated in the opinion.

Issues were submitted to and answered by the jury as follows:

1. Did the defendant, Duke Power Company, cause or permit dirt or other materials from its right-of-way to go onto the lands of the plaintiffs which, in the natural conditions of the lands, would not have been carried by the normal flow of surface waters from the upper to the lower lands?

ANSWER: No.

2. If so, what amount of actual damages, if any, are the plaintiffs entitled to recover from the defendant?

ANSWER: $

3. If the answer to question number 1 above is yes, was the conduct of the defendant, Duke Power Company, intentional or with reckless and wanton disregard of the property rights of the plaintiffs?

ANSWER:

4. If so, what amount of punitive damages, if any, are the plaintiffs entitled to recover from the defendant?

ANSWER: $

From judgment denying plaintiffs any recovery, they appealed.

McDaniel and Fogel, by L. Bruce McDaniel, for the plaintiff appellants.

Harold D. Coley, Jr., and W. Edward Poe, Jr., for the defendant appellee.

BRITT, Judge.

By their first assignment of error, plaintiffs contend the court erred in excluding certain testimony of their witness E. W. Brown. The record reveals:

> Q. by Mr. McDaniel: Do you know whether those towers could have been put there without grading the soil itself?
>
> MR. COLEY: Objection.
>
> COURT: Sustained.
>
> (Transcript shows witness's answer would have been: "Well, now, that would call for a technical and engineering determination I would say; but personally and professionally, to the extent at least that my own training leads me to believe that complete defoliation of an area like that would seem unnecessary to do the job. It appeared to me to be a case of overkill. In other words, if you ask me if I could put a power line through there without destroying all the natural vegetation I would say yes, I think I could if I tried hard enough.")
>
> EXCEPTION No. 1

[1] We find no merit in the assignment. Clearly, the answer was not responsive to the question. While we do not have before us the entire trial transcript showing the testimony in question and answer form, we find no indication in the record that plaintiffs were contending that in the installation of its power line defendant destroyed *all* natural vegetation on its right-of-way. The assignment of error is overruled.

[2] Plaintiffs state their second assignment of error thusly: "The Court erred in excluding testimony of a plaintiffs' witness that the silt which damaged the property of the plaintiffs came from the right-of-way cut made by the defendant on property above the property of the plaintiffs."

This assignment relates to the evidence of plaintiffs' witness Charlotte Brown who testified that she made extensive examinations of plaintiffs' property between 1969 and 1972. The record discloses:

> Q. (Mr. McDaniel) Did you determine where the siltation came from as you described it?

MR. COLEY: Objection.

COURT: Sustained.

(Transcript shows witness's answer would have been: "As near as I could see it was coming from the cut.)" EXCEPTION NO. 2

* * *

MR. MCDANIEL: Did you determine to your satisfaction that the silt then did come from the cut?

MR. COLEY: Objection.

COURT: Sustained.

(Transcript shows that witness's answer would have been: "I couldn't see anywhere else it could come from. Looks like a roller coaster track tilted going across the side of a mountain, that's not even plowed, however you plow the mountains. You plow across the grain to keep soil running down the, to keep it from running down the mountain and the only thing was there looked like a motorcycle track.")

EXCEPTION NO. 3

The "cut" referred to in the witness' answer was a graded area on defendant's right-of-way which plaintiffs contend was the root cause of their problem. This was a critical question for the jury. We think the trial court properly excluded the proffered testimony which, at most, was opinion evidence. 1 Stansbury, N. C. Evidence, § 125, at 389 (Brandis rev. 1973) states: "Opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences. . . ."

The witness had described the right-of-way cut, the rivulets that had formed, the siltation that had washed down from it, how the stream that flowed through the cut flowed toward the plaintiffs' pond and lake, and that as of 1971 no preventive measures had been taken to prevent erosion. Applying the stated rule to this witness, we do not feel that she was any better qualified to form an opinion from the facts than the jury was. From the facts an inference could be drawn that the siltation from the cut washed into plaintiffs' lake. The jury, however, found that it did not. The assignment is overruled.

[3] By their third assignment of error, plaintiffs contend the court erred in allowing defendant's claim agent to testify with respect to a telephone conversation he had with J. J. Alexander who stated that it would cost about $4,500 to desilt plaintiffs' lake twice over a 12-months' period. Plaintiffs had offered evidence to the effect that desilting the lake would cost considerably more than that amount. The assignment has no merit.

J. J. Alexander had previously testified as a witness for plaintiffs. On cross-examination and without objection he testified that it would cost $4,500 to desilt the lake over a 12-months' period. It is well settled that the admission of incompetent evidence is cured where substantially the same evidence is theretofore or thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, § 48 (1967). The assignment is overruled.

[4] In their fourth assignment of error, plaintiffs argue that the court erred in admitting evidence of a purported offer by defendant to settle the claim on which this action is based. Specifically, in response to the question of " . . . whether or not in an effort to avoid any further problems with the Williams [sic] you offered to pay one-half of the cost of that desilting?", the defendant's claims adjuster answered "Yes, I did." We note that no objection appears in the record to the question but only a motion to strike after the answer was given. The rule with respect to objections is that ". . . objection . . . should have been interposed to the question at the time it was asked as well as to the answer when given. An objection to testimony not taken in apt time is waived. . . . Afterward, a motion to strike out the testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. (Citations.)" *State v. Hunt,* 223 N.C. 173, 176, 25 S.E. 2d 598 (1943); 1 Strong, N. C. Index 2d, Appeal and Error, § 30 (1967). Plaintiffs have failed to show any abuse of discretion. Furthermore, we fail to see how the offer by defendant prejudiced plaintiffs. To the contrary, it would appear to be an admission by defendant of some liability. The assignment is overruled.

[5] In their fifth assignment of error, plaintiffs contend the court erred in allowing into evidence an inconsistent statement made by the male plaintiff in a former trial. Plaintiffs objected on the grounds of irrelevancy; in their brief, however, they

attack the evidence as being improperly admitted on the basis of failure to properly authenticate the transcript of the prior proceedings. The assignment is without merit. Where objection to the admission of evidence is based upon a specified ground, the competency of the evidence will be determined solely on the basis of the ground specified, even though there may be another ground upon which the evidence might be held incompetent. 7 Strong, N. C. Index 2d, Trial, § 15, at 278 (1968). Clearly, a prior inconsistent statement introduced to impeach the male plaintiff was relevant.

[6] Plaintiffs contend in their sixth assignment of error that the court erred in not granting their motion for a directed verdict at the close of all of the evidence. We find no merit in this assignment. In *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), the court held that a trial judge cannot direct a verdict in favor of the party having the burden of proof when the right to recover depends upon the credibility of witnesses, even though the evidence is uncontradicted. In the case at bar, plaintiffs' recovery hinged upon the credibility of various witnesses, therefore, the trial judge properly denied the motion.

In their seventh and eighth assignments of error, plaintiffs contend the court erred in not allowing their motions for judgment notwithstanding the verdict and a new trial. We hold that the evidence was sufficient to survive the motion for judgment n.o.v. Viewing the evidence in the light most favorable to defendant the court cannot say as a matter of law that plaintiffs are entitled to recover. There was conflicting testimony and the jury decided in favor of defendant. As to the motion for a new trial, the granting of this motion is within the trial judge's discretion and no abuse of that discretion appears. The assignments are overruled.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. GEORGE SEGARRA

No. 7512SC312

(Filed 2 July 1975)

1. **Criminal Law § 66— voir dire on identification of defendant — questions by court proper**

While the trial judge did ask questions of the two State's witnesses who testified at the *voir dire* hearing regarding an armed robbery victim's identification of the defendant, there is nothing in the record to support the defendant's contention that the court assumed the role of the prosecution or that the judge committed any error by asking questions of the witnesses.

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

Evidence was sufficient to support the trial court's findings and conclusions that an armed robbery victim's in-court identification of defendant was based on his observations at the time of the crime and was not tainted by an out-of-court photographic identification procedure conducted in the victim's hospital room 10 days after the crime.

3. **Criminal Law §§ 43, 85— photograph of defendant — markings indicating prior public custody — admission harmless error**

Where the trial court allowed into evidence the six photographs used by the police in a pre-trial identification procedure and all six had written material on them indicating that the subjects were or had been in the custody of local law enforcement officials, the trial court did not err with respect to the photographs of the five individuals other than the defendant; however, admission of defendant's photograph with the figures "8 13 74" on it indicated to the jury that defendant was in police custody two months prior to the commission of the offense for which he was being tried, and such admission was harmless error.

4. **Criminal Law § 89— corroborating evidence — admissibility**

The trial court did not err in admitting into evidence testimony of an officer which corroborated that of one of defendant's accomplices.

5. **Robbery § 5— armed robbery — failure to submit lesser included offenses — no error**

Where all the evidence tended to show that if the defendant committed a crime at all he and two accomplices robbed their victim with the use or threatened use of a pistol, a tree limb, and an iron pipe, the trial court in a prosecution for armed robbery did not err in failing to submit to the jury lesser included offenses.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 29 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 June 1975.

This is a criminal prosecution wherein the defendant, George Segarra, was charged in a bill of indictment, proper in form, with armed robbery.

Defendant entered a plea of not guilty, and the State offered evidence tending to show the following: On the night of 15 October 1974 Allen Bellows and a friend, Willie Christors, met two girls, Anna Martino and Cheryl Snow, at a pizza parlor on Hay Street in Fayetteville. The four of them went to Miss Snow's house on Shaw Road in Cumberland County. About thirty minutes later Bellows and Christors decided to return to Fayetteville. When they walked out the door of the house leading to the driveway, the defendant and two other men came around the side of the house. The defendant had a piece of wood in his hand which was about three feet long and "about as thick as a wrist." One of the men had a pistol. When Bellows yelled to his friend, "This is a robbery," and attempted to escape, the defendant and one of the other men grabbed him and began to hit him about his head and shoulders. The defendant hit Bellows by swinging the stick "like a baseball bat," and the second man hit Bellows with a "long piece of . . . a galvanized pipe." Bellows fell to the ground, and his assailants took $2,000 in American Express Traveler's Checks and $260 in cash from out of his pockets. Bellows was hospitalized for sixteen days. As a result of being beaten, he suffered cracked ribs, injuries to his head, and bruises and lacerations. One of his eyes was damaged so badly that it had to be removed.

Det. Sgt. Robert L. Burns of the Cumberland County Sheriff's Department testified that due to the severity of Bellows' injuries he was not able to discuss the robbery with Bellows until 24 October 1974. On 25 October 1974, Officer Burns showed Bellows a total of fourteen photographs. Bellows immediately picked the defendant's photograph out of a group of six photographs as one of the men who had participated in the robbery. The six photographs depicted men of approximately the same age who had similar features and coloring.

The State also offered the testimony of Merritt L. Hope who stated that he, the defendant, and another man named Scott, followed Bellows and Christors from Hay Street to Cheryl Snow's house. When Bellows and Christors came out of the house, Scott pointed a gun at them and said, "Hold it, we're going to take your money." Bellows indicated that he was not going to comply with their demands, and while Hope held the

gun on Christors, Scott and the defendant beat and robbed Bellows. The defendant hit Bellows with an "object [which] looked like a tree. . . . It was about 4 feet long and a little larger than a 2 by 4 stick." About an hour and a half after the robbery, Hope, the defendant, and Scott split the money taken from Bellows and Christors, which consisted in part of Traveler's Checks.

The defendant offered no evidence.

The jury returned a verdict of guilty. From a judgment that the defendant be imprisoned for not less than twenty-five (25) nor more than thirty (30) years, he appealed.

Attorney General Edmisten by Assistant Attorney General Lester V. Chalmers, Jr., and Associate Attorney T. Laurence Pollard for the State.

Downing, David, Vallery and Maxwell by Ray C. Vallery for defendant appellant.

HEDRICK, Judge.

By his first assignment of error, defendant contends the court erred (1) in asking questions of the State's witnesses on the voir dire hearing to such an extent that it assumed the role of the prosecution and (2) in allowing the witness Bellows to identify the defendant at trial as one of his assailants.

[1] While the trial judge did ask questions of the two State's witnesses who testified at the voir dire hearing regarding Bellows' identification of the defendant, there is nothing in the record to support the defendant's contention that the court assumed the role of the prosecution or that the judge committed error by asking questions of the witnesses. Since the very purpose of such a hearing is to enable the judge to determine whether the witness' identification of the defendant at the trial as a peretrator of the crime was based entirely on his observations during the commission of the crime, we think the trial judge is and should be at liberty to make such inquiries as he deems necessary to enable him to make a fair and independent determination of the question.

[2] After the voir dire hearing, the trial judge made findings and concluded that Bellows's "in-court" identification of the defendant was based on his observations at the time of the commission of the crime and that such identification was not tainted by the "out-of-court" photographic identification pro-

cedure. There is plenary competent evidence in the record to support the findings of the trial judge which in turn support his conclusion. This assignment of error has no merit.

[3] Next, defendant contends the court erred in allowing the six photographs used by the police in the pre-trial identification procedure to be introduced into evidence and exhibited to the jury. Defendant argues that the court erred in not instructing the jury that these photographs were admitted for the sole purpose of illustrating the testimony of Officer Burns.

It is well-settled that when evidence competent for one purpose only and not for another is offered, the objecting party must request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. Failure of the trial judge to give a limiting instruction in the absence of a request therefor is not error. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968).

Defendant argues that the admission of the photographs was prejudicial error because the writing on the photographs, particularly on the photograph of the defendant, indicated that the defendant had committed other offenses and thereby presented his character to the jury in an unfavorable light. All of the photographs in question contain written material indicating that the subjects were or had been in the custody of local law enforcement officials. All of the photographs likewise have identification markings which indicate that the photographs were used in a pre-trial identification procedure in this case. The photograph of the defendant has the following legend beneath his face:

CITY COUNTY
BUR OF IDENTIFICATION
41255 8 13 74
FAYETTEVILLE NC

The written material on the photographs of the five individuals other than the defendant could not possibly tend to show that the defendant had committed other crimes and therefore could not have placed him in an unfavorable light in the eyes of the jury. We find no error in the admission of these photographs into evidence for the purpose of illustrating Burns' testimony.

However, the figures "8 13 74" on the photograph of the defendant obviously refer to the date the photograph was taken

by the City County Bureau of Identification. This at least indicates that the defendant was in police custody two months prior to the commission of the offense for which he was being tried. While we are of the opinion that the admission of this photograph without deleting or covering the written material was error, see Annot. 30 A.L.R. 3d 908 (1970), we are of the opinion that the error was harmless beyond a reasonable doubt, *State v. Cauthen,* 18 N.C. App. 591, 197 S.E. 2d 567 (1973), cert. denied, 283 N.C. 755, 198 S.E. 2d 724 (1973), cert. denied, 415 U.S. 926 (1974). Prior to introduction of the photograph into evidence, the defendant had been identified by Bellows and Anna Martino; and Merritt Hope, one of the accomplices, had given detailed testimony of the defendant's complicity in the crime. In the light of these overwhelming circumstances, we do not perceive how the admission of the unexpurgated photograph of the defendant could have been prejudicial. This assignment of error is not sustained.

[4] Based on exceptions nineteen through twenty-five, defendant contends the court erred in allowing Officer Burns to testify at trial as to what the witness Merritt L. Hope had told him during the officer's pre-trial investigation of the assault and robbery of Bellows by Hope, the defendant, and a third individual.

This aspect of Officer Burns's testimony was clearly admitted into evidence for the purpose of corroborating Hope's prior account of the events of the night of 15 October 1974. In fact, when the defendant initially objected to the testimony complained of, the trial judge correctly instructed the jury that Burns's testimony as to anything said to him by Hope was offered only for the purpose of corroborating Hope, if the jury believed that it did, and for no other purpose. We have reviewed the testimony objected to and find no substantial variance between it and what Hope testified to at trial. Slight variances in corroborating testimony do not render such testimony inadmissible. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960). These exceptions are without merit.

[5] Finally, defendant contends the trial court erred in failing to submit to the jury the lesser included offenses of armed robbery. "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 *pres-*

ence of such evidence is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954).

In the instant case, there was no evidence introduced at trial from which a jury could find that a crime of lesser degree than robbery with the use or threatened use of a firearm or other dangerous weapon had been committed. All the evidence tended to show that if the defendant committed a crime at all he and two accomplices robbed Allen Bellows with the use or threatened use of a pistol, a tree limb, and an iron pipe. This assignment of error is not sustained.

We have carefully considered defendant's other assignment of error regarding the court's failure to give equal stress to the contentions of the State and the defendant and find it to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, MEDFIELD-KINGSBROOK HOMEOWNERS' ASSOCIATION, HIDDEN VALLEY CIVIC ACTION GROUP WATER COMMITTEE, DEVELOPMENT ASSOCIATES, INC., AND JOHN E. ALDRIDGE, JR. v. HEATER UTILITIES, INC., APPLICANT

No. 7510UC283

(Filed 2 July 1975)

1. **Utilities Commission § 6— water rates — rate base — exclusion of contributed plant**

The Utilities Commission was not required by G.S. 62-133(b)(1) to include contributed plant in a water utility's fair value rate base, and the exclusion of contributed plant did not constitute a taking of the utility's property without just compensation.

2. **Utilities Commission § 6— water rates — operating expenses — depreciation on contributed plant**

A water utility was not entitled under G.S. 62-133(b)(1) to have depreciation expense on contributed plant considered as an operating expense for ratemaking purposes.

Utilities Comm. v. Utilities, Inc.

APPEAL by applicant from order of North Carolina Utilities Commission entered 12 December 1974. Heard in the Court of Appeals 10 June 1975.

Heater Utilities, Inc., instituted this proceeding on 24 October 1973 by filing an application with the North Carolina Utilities Commission for approval of revised rates for water utility service in eleven service areas. On 21 November 1973 the Commission declared the application to be a general rate case and suspended the proposed rates. On 30 November 1973 Heater filed an amendment to its application, adding nine newly-licensed service areas, and substituting new rate schedules. By order dated 10 December 1973 the Commission allowed the amendment and scheduled the application for public hearing on 12 February 1974.

Interventions were filed by the Medfield-Kingsbrook Homeowners' Association, the Hidden Valley Civic Action Group Water Committee through Attorney William Anderson, Attorney John E. Aldridge, Jr., for himself, and Development Associates, Inc., through Attorney H. Arthur Sandman. The Commission allowed the interventions, and Attorney Anderson moved for continuance. Public hearing was rescheduled for 2 July 1974 after due notice to the public.

When the matter came on for hearing, Heater elected to have the rates set pursuant to G.S. 62-133(b) using the traditional rate base method. Evidence was presented by Heater, a customer, and the Commission. On 12 December 1974 the Commission filed its order, which included the following findings of fact:

(1) Rates should be fixed on the basis of operating results for the seven dominant systems which were in operation during the test year. The thirteen other systems, which were operated at far less than capacity, should be excluded for the purpose of fixing rates in this case.

(2) The reasonable original cost of the applicant's utility plant serving the seven dominant systems is $579,045, and the depreciation reserve is $38,370, resulting in a net depreciated original cost of utility plant of $540,675.

(3) No reliable evidence exists in the record as to reasonable replacement cost of the utility plant serving the seven dominant systems. Therefore, the Commission must

determine the fair value of the systems based upon the net depreciated original cost as adjusted to account for other factors set forth below.

(4) The fair value of the seven systems is $124,472 consisting of the net depreciated original cost of the plant of $540,675 plus a reasonable allowance for working capital of $1,552 less contributions in aid of construction of $417,755 which is composed of recorded contributions of $175,591 and additional contributions of $242,164 classified by the applicant as an "acquisition adjustment."

(5) The annualized gross revenues for the test year are $63,510 under present rates and $156,942 under rates proposed by applicant.

(6) The annualized level of operating expenses is $64,946, which includes $7,063 for actual investment currently consumed through actual depreciation.

(7) The proper rate of return which applicant should have the opportunity to earn on the fair value of its property used and useful in rendering utility service in North Carolina is 11%.

(8) The gross revenues required to produce the 11% rate of return are $82,732.

In its order the Commission approved a schedule of rates that would produce gross revenues of $82,732 and an 11% rate of return on the fair value of Heater's property. Heater Utilities, Inc., appealed to this Court.

North Carolina Utilities Commission, by Commission Attorney Edward B. Hipp, Assistant Commission Attorney Robert F. Page, and Associate Commission Attorney Lee West Movius.

Weaver, Noland & Anderson, by William Anderson, for intervenor appellees Medfield-Kingsbrook Homeowners' Association and Hidden Valley Civic Action Group Water Committee.

Parker, Sink & Powers, by Henry H. Sink, for applicant appellant.

ARNOLD, Judge.

By this appeal, applicant Heater Utilities, Inc., presents two related questions for review:

(1) Whether the Utilities Commission is required, under G.S. 62-133(b)(1) and the state and federal constitutions,

to include contributed plant in applicant's fair value rate base; and

(2) Whether the applicant is entitled, under G.S. 62-133 (b) (3) to have depreciation expense on contributed plant treated as an operating expense for ratemaking purposes.

G.S. 62-133(b) (1) provides that in fixing rates the Commission shall:

> "Ascertain the fair value of the public utility's property used and useful in providing the service rendered to the public within this State, considering the reasonable original cost of the property less that portion of the cost which has been consumed by previous use recovered by depreciation expense, the replacement cost of the property, and any other factors relevant to the present fair value of the property. Replacement cost may be determined by trending such reasonable depreciated cost to current cost levels, or by any other reasonable method."

Heater contends that all of its "property used and useful" should be included in the rate base regardless of whether it was paid for by the utility or acquired by donation. We note that Heater does not object to the Commission's conclusion that $175,591 recorded as "contributions in aid of construction" (amounts paid directly by the customers to the utility) should be deducted in determining the fair value rate base. Heater objects only to the deduction of $242,164 recorded as "acquisition adjustment" representing the difference between depreciated original cost and purchase price of certain property. The Commission concluded that amounts recorded in the "acquisition adjustment" account should be treated as "contributions in aid of construction," since they also represented property provided by the customers, although indirectly, and did not represent actual investment by the utility or actual cost to it.

Although case law in other jurisdictions offers some support for the proposition that the source of a utility's property is not determinative of fair value, when that source is the very customers who will pay the rates based thereon, courts have deemed it inequitable to include such property in the rate base. *See DuPage Utility Co. v. Commerce Com.*, 47 Ill. 2d 550, 267 N.E. 2d 662, *cert. denied* 404 U.S. 832 (1971); *Mississippi Public Serv. Com'n v. Hinds County W. Co.*, 195 So. 2d 71 (Miss. 1967); *Utilities Corp. v. Commonwealth*, 211 Va. 620, 179 S.E.

2d 714 (1971); *cf. City of Covington v. Public Service Com.*, 313 S.W. 2d 391 (Ky. App. 1958).

In a recent North Carolina case, our state Supreme Court affirmed the Utilities Commission's deduction of customer-supplied monies from the allowance for working capital, a component of the fair value rate base. *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). *See also Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970). The rationale behind these and the above cited cases we believe is apposite to the case at bar.

[1] The fact that Heater's "acquisition adjustment" account represented a cost of plant borne by customers at time of construction and never by investors is one of the "other factors relevant to the present fair value of the property" under G.S. 62-133(b)(1). We hold that the Commission is not required by statute to include contributed plant in applicant's fair value rate base.

Nor is the inclusion constitutionally required. As a public utility, Heater has submitted to the regulatory authority of the State in return for State sanction of its monopoly position. Heater's stockholders are entitled to no more than a reasonable return on their investment. *See generally Utilities Com. v. State* and *Utilities Com. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133 (1954). The Commission's refusal to allow them a return on property in which they have not invested, and to force the customers who are the real investors to pay twice, does not constitute a taking without just compensation.

G.S. 62-133(b)(3) provides that the Commission shall:

> "Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation."

[2] Heater contends that the Commission should include depreciation on contributed plant as part of operating expenses. The Commission concluded that the applicant is not entitled to depreciation on property in which it has no investment. There is case law supporting Heater's contention. *See, e.g., DuPage Utility Co. v. Commerce Com., supra; cf. Utilities Corp. v. Commonwealth, supra. But see Utilities Com. v. State* and *Utilities Com. v. Telegraph Co., supra,* at 346, 80 S.E. 2d at 142, in which our Supreme Court discusses depreciation deductions.

The Commission's conclusion, however, seems to be compelled by the language of the statute, which limits depreciation to "actual investment" and which we are powerless to amend.

For the reasons stated, the order appealed from is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

DEBRA L. MITCHELL BY HER GUARDIAN AD LITEM, DONALD MITCHELL v. K. W. D. S., INC. (A NORTH CAROLINA CORPORATION)

No. 7514SC68

(Filed 2 July 1975)

1. **Negligence § 52— public bowling alley — minor with grandmother — implied invitee**

Plaintiff who, accompanied by her grandmother, was lawfully at defendant's public bowling alley at the time she was injured occupied the relationship of at least an implied invitee on the premises.

2. **Negligence § 53— operator of business — duty to invitee**

Defendant as the operator of a business is not an insurer of the safety of its customers, but it does owe the duty to exercise ordinary care to keep in reasonably safe condition those portions of its premises which it may expect they will use during ordinary business hours and to give warning of hidden perils or unsafe conditions insofar as these are known or can be ascertained by reasonable inspection.

3. **Negligence § 57— public bowling alley — plate glass window — jury question of negligence**

Where it appeared that defendant maintained on its premises adjacent to the building's entrance doors a panel of glass of such size and position and so transparent that invitees to the premises, particularly small children, could easily mistake the glass for an actual opening, it was for the jury to determine whether defendant was negligent, and the trial court erred in granting defendant's motion for summary judgment.

4. **Negligence § 53— injury to minor invitee — duty of parent or responsible person**

That a parent or other person primarily responsible for the care of a small child is somewhere on the premises does not absolve the proprietor of liability for injuries to the child caused by the proprietor's negligent failure to maintain the premises in a reasonably safe condition.

5. Negligence § 18— child under seven — no contributory negligence as matter of law

A child under seven years of age is incapable of contributory negligence as a matter of law.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 7 November 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 April 1975.

Civil action to recover damages for personal injuries sustained by plaintiff when she collided with a plate glass panel on defendant's premises. The pleadings and answers to interrogatories disclose there is no genuine issue as to the following facts.

On 14 July 1970 defendant operated a public bowling alley in Durham. On that date plaintiff, then six years old, was visiting her grandmother in Durham. While so visiting, plaintiff was in the care and custody of her grandmother. On 14 July 1970 plaintiff accompanied her grandmother to defendant's bowling alley. While the grandmother bowled, plaintiff played with other children on the premises. Intending to continue their play out-of-doors, plaintiff attempted to go out the door at the front of the building. In so doing, she mistook a plate glass panel beside the door for the door, ran into the glass, and was injured.

The glass with which plaintiff collided was 80 inches by 90 inches in size and was located immediately to the right of the main entrance doors as one faces the building. It was separated from the door by approximately four inches of metal casing. There was a two-inch casing around the glass, the casing beginning two inches off the floor, making a total distance of four inches from floor to glass. The walking surface immediately in front of the glass was carpeting. At the time of plaintiff's injury, there were no markings, decals, or other objects on the glass, and there was no furniture and no obstruction in front of the glass to prevent contact with the glass by persons using the building. The defendant provided no security guard, custodian, supervisor, or other such person within the immediate vicinity of the glass to supervise or assist in controlling the actions of defendant's customers or invitees.

In her complaint plaintiff alleged and defendant by answer denied that defendant was negligent in maintaining on its premises "a clear, transparent section of glass without any marking of any type to indicate to the general public the presence of such glass when Defendant knew or reasonably should have known

that its patrons, consisting largely of small children similar to the minor Plaintiff, would be deceived by the appearance of such plate glass into believing that the area in which such glass was installed was an unobstructed opening."

After considering the pleadings, interrogatories, and answers to interrogatories, the court allowed defendant's motion for summary judgment and plaintiff appealed.

Bryant, Lipton, Bryant & Battle, P.A. by Victor S. Bryant, Jr. for plaintiff appellant.

Spears, Spears, Barnes, Baker & Boles by J. Bruce Hoof for defendant appellee.

PARKER, Judge.

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 on the movant to establish that there is no genuine issue as to any material fact and that 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). Moreover, all material filed in support of or opposition to the motion for summary judgment must be viewed in the light most favorable to the nonmovant and such party is entitled to the benefit of all inferences in his favor that may be reasonably drawn from such material. *Whitley v. Cubberly,* 24 N.C. App. 204, 210 S.E. 2d 289 (1974); 6 Moore's Federal Practice (2d Ed. 1974) ¶ 56.15[3]. In the present case the plaintiff, opposing defendant's motion for summary judgment, had no burden of producing evidence supporting her claim until defendant, as movant, produced evidentiary material of the necessary certitude to negate plaintiff's claim in its entirety and to show that defendant was entitled to judgment as a matter of law. *Sanders v. Davis,* 25 N.C. App. 186, 212 S.E. 2d 554 (1975); *Tolbert v. Tea Co.,* 22 N.C. App. 491, 206 S.E. 2d 816 (1974). Our examination of the record, which consists of pleadings, interrogatories, and answers to those interrogatories, discloses that defendant here failed to establish that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

Plaintiff alleged that the sole and proximate cause of her injuries was defendant's negligence. Issues of negligence are not, except in exceptional cases, susceptible to summary adjudication for the reason that the applicable standard of care by

which one party's conduct or omission is judged is ordinarily for the jury to apply under appropriate instructions from the court. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972).

[1, 2] The record discloses that plaintiff, accompanied by her grandmother, was lawfully at defendant's public bowling alley at the time she was injured. On this occasion plaintiff occupied the relationship of at least an implied invitee on the premises. *Foster v. Weitzel,* 17 N.C. App. 90, 193 S.E. 2d 329 (1972), *cert. denied,* 282 N.C. 672 (1973); *see* 6 Strong, N. C. Index 2d, Negligence, § 52. Defendant as the operator of a business is not an insurer of the safety of its customers, but it does owe the duty to exercise ordinary care to keep in reasonably safe condition those portions of its premises which it may expect they will use during ordinary business hours and to give warning of hidden perils or unsafe conditions insofar as these are known or can be ascertained by reasonable inspection. *Long v. Food Stores,* 262 N.C. 57, 136 S.E. 2d 275 (1964); *Sanders v. Anchor Co.,* 12 N.C. App. 362, 183 S.E. 2d 312 (1971). "What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. 65 C.J.S., Negligence, § 45(b). It also depends upon the known or reasonably foreseeable characteristics of the invitees. 38 Am. Jur., Negligence, §§ 38, 40." *Hedrick v. Tigniere,* 267 N.C. 62, 67, 147 S.E. 2d 550, 553 (1966).

[3] When all of the material in this record which was filed in support of or opposition to defendant's motion for summary judgment is examined in the light most favorable to the nonmovant plaintiff, and when she is given the benefit of all inferences in her favor which may be reasonably drawn from such material, it appears that defendant maintained on its premises adjacent to the building's entrance doors a panel of glass of such size and position and so transparent that invitees to the premises, particularly small children, could easily mistake the glass for an actual opening. We hold that upon this showing it was for the jury to determine whether defendant was negligent. *See* Annot., 41 A.L.R. 3d 176 (1972).

[4] Defendant relies upon *Freeze v. Congleton,* 276 N.C. 178, 171 S.E. 2d 424 (1970). We find the instant case distinguishable. Liability of the defendant in that case could not be predicated, as it is here, upon any condition of the premises, since the premises there was owned by defendant and her husband as

tenants by the entirety, the condition of the premises was the responsibility of the husband, and the husband was not a party to the action. In *Freeze* the plaintiff sought to make out a case of actionable negligence against the defendant for closing a sliding glass door and failing to warn the infant plaintiff of the danger thereby created. The mother of the child was present in the room, had knowledge of the pertinent facts, and knew the child was walking toward the door. In holding that judgment of nonsuit should have been sustained, the opinion of our Supreme Court pointed out that under the circumstances disclosed by the evidence in that case the duty to warn the child of the closed glass door fell upon the parent who was present with full knowledge of the danger. In the present case the grandmother of the child was present on defendant's premises, but there was no showing that she accompanied the child as she attempted to leave the building or that the grandmother was present in the portion of the building where the child was hurt. That a parent or other person primarily responsible for the care of a small child is somewhere on the premises does not absolve the proprietor of liability for injuries to the child caused by the proprietor's negligent failure to maintain the premises in a reasonably safe condition.

[5] In the present case defendant in its answer pled contributory negligence of the minor plaintiff as a defense. In this jurisdiction a child under seven years of age is incapable of contributory negligence as a matter of law. *Hoots v. Beeson,* 272 N.C. 644, 159 S.E. 2d 16 (1968); *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124 (1958). Moreover, although we are not called upon to decide the matter in the present case, had the plaintiff here been an adult, it is questionable whether the record would support summary judgment for defendant on the ground that plaintiff was guilty of contributory negligence as matter of law. *See Brant v. Robinson Investment Company,* 435 F. 2d 1345 (4th Cir. 1971).

The judgment appealed from is

Reversed.

Chief Judge BROCK and Judge ARNOLD concur.

HARRINGTON MANUFACTURING COMPANY, INC. v. POWELL MANUFACTURING COMPANY, INC.

No. 756SC230

(Filed 2 July 1975)

1. **Rules of Civil Procedure § 33— interrogatories — failure to answer or object in apt time**

Where defendant did not answer any of plaintiff's interrogatories until 26 days after they were due and did not object to any interrogatories until 46 days after time for objection had passed, defendant is deemed to have waived its right to object to the interrogatories absent some overriding constitutional privilege such as self-incrimination.

2. **Rules of Civil Procedure § 30— protective order — trade secrets — confidential commercial information**

While Rule 30(b) recognizes that protective orders may be issued to prevent disclosure of trade secrets for good cause shown, "confidential commercial information" is not so treated; nevertheless, the courts should be careful in the interests of justice to prevent disclosure of confidential commercial information to avoid annoyance, embarrassment or oppression, particularly where the action is between competitors.

3. **Rules of Civil Procedure § 30— protective order — customer list**

A customer list was not a trade secret subject to a protective order under G.S. 1A-1, Rule 30(b).

4. **Rules of Civil Procedure § 30— list of buyers — refusal of protective order**

In an action in which plaintiff contends that defendant's advertisement of its tobacco harvester constituted an unfair method of competition and a deceptive act under G.S. 75-1.1(a), the trial court did not abuse its discretion in refusing to enter a protective order preventing discovery of the names and addresses of persons who had bought or ordered defendant's harvesters since the information was reasonably calculated to lead to the discovery of admissible evidence concerning the amount of damages to plaintiff resulting from the sale of tobacco harvesters by defendant to purchasers who relied on defendant's allegedly deceptive practices.

APPEAL by defendant from *Winner, Judge.* Order entered 18 February 1975, in Superior Court, BERTIE County. Heard in the Court of Appeals 15 May 1975.

The defendant advertised nationally that it offered for sale to the public the only automatic tobacco harvester that primed lugs through tips and that it owned the "exclusive Cutter Bar" for priming tips. Plaintiff alleges that the advertisement of the defendant was untrue and constituted an unfair

method of competition and a deceptive act under G.S. 75-1.1. Plaintiff also manufactures an automatic tobacco harvester which primes lugs through tips and is in competition with defendant and other manufacturers.

On 24 October 1974, plaintiff served twenty interrogatories on the defendant, one of which sought the names, and addresses of all persons, firms and corporations to whom defendant had sold or from whom defendant had received an order for its tobacco combines since June 1, 1974 to date. On 6 December 1974, plaintiff filed a motion to compel defendant to answer the interrogatories. On 19 December 1974, defendant answered objecting, *inter alia,* to the above interrogatory. On the same date, plaintiff made application for an order to compel defendant to answer the objected to interrogatories. On 23 December, defendant filed a motion for a protective order pursuant to G.S. 1A-1, Rule 33, Rule 30(h), and Rule 31(d) contending that the subject matter sought in the above interrogatory was confidential. After hearing, an order was entered which sustained defendant's objections to some of the interrogatories but denied its motion for the protective order. From this order compelling discovery, defendant appealed.

Pritchett, Cooke & Burch, by Stephen R. Burch, for the plaintiff.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and William P. Farthing, Jr., for the defendant.

CLARK, Judge.

[1] G.S. 1A-1, Rule 33, provides in pertinent part that answers to interrogatories shall be served within 30 days after service of the interrogatories unless upon motion and notice and for good cause shown the court enlarges the time. Objections to particular interrogatories must be served within 10 days, together with notice of hearing. In the present case, defendant did not answer any of the interrogatories until 26 days after they were due and did not object to any until 46 days after time for objection had passed. Under these circumstances alone, the defendant would be deemed to have waived its right to object to the interrogatories absent some overriding constitutional privilege such as self-incrimination. See *Hammer v. Allison,* 20 N.C. App. 623, 202 S.E. 2d 307 (1974) and *Golding v. Taylor,* 19 N.C. App.

245, 198 S.E. 2d 478 (1973). Consequently, the appeal is subject to dismissal on that ground. However, due to the unique posture of this appeal relating to appellant's claim of trade secret privilege, we choose to treat the appeal on its merits.

Appellant has appealed pursuant to G.S. 1-277, admitting the interlocutory nature of the order from which it appealed but contending that a substantial right will be irrevocably affected if it is compelled to comply with the order.

An appeal lies from an interlocutory order ". . . only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant." *Privette v. Privette,* 230 N.C. 52, 53, 51 S.E. 2d 925, 926 (1949).

In order to determine if a substantial right has been affected by the discovery order, it is necessary preliminarily to consider the scope of the discovery rules relative to the recognition of privileged matters.

Initially, it is noted that there is a distinction between the federal rules and the North Carolina rules relating to the enumerated instances in which secret processes, etc., may be protected from discovery. With particular reference to the area of involvement in this case, Federal Rule 26(c) provides that protective orders may be entered in order that ". . . a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." G.S. 1A-1, Rule 30(b) provides for the entry of protective orders so that ". . . secret processes, developments, or research need not be disclosed. . . ." Apparently, the drafters of the North Carolina rule did not see the need for expressly protecting confidential commercial information, but relegated that sort of information to either (1) the catch-all provision providing for protection in the interest of justice where the request is unreasonably annoying, embarrassing, expensive or oppressive, G.S. 1A-1, Rule 30(b), or (2) the general "privilege" protection provision of G.S. 1A-1, Rule 26(b). It is within this procedural context that the defendant was ordered to divulge certain customers' names and has appealed.

The appellant contends that a customer list is privileged as a trade secret which is recognized as such in 8 Wigmore, Evidence, § 2212(3) (McNaughton rev. 1961), wherein it is stated that such information ". . . for lack of a better term,

[had] come to be known as trade secrets." See also *Gorham Mfg. v. Emery-Bird-Thayer Dry Goods Co.*, 92 F. 774 (C.C. Mo. 1899). However, it is not believed that this passing comment in *Wigmore* is in accordance with the traditional notion of a trade secret. For instance, a *trade secret* has been defined as "a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value." Annot., 17 A.L.R. 2d 383, 385 (1951), citing *Re Bolster,* 59 Wash. 655, 110 P. 547 (1910). For a similar definition see Black's Law Dictionary (4th Ed. 1951).

[2, 3] It is our opinion that there is a distinction under our discovery rules between the traditional notion of a "trade secret" and "confidential commercial information." Whereas G.S. 1A-1, Rule 30(b) recognizes that protective orders may be issued to prevent disclosure of trade secrets for good cause shown, "confidential commercial information" is not so treated. Nevertheless, the courts under our rules should be careful in the interests of justice to prevent disclosure of confidential commercial information to avoid annoyance, embarrassment or oppression, particularly where the action is between competitors. It is noted that even under the more liberal federal rules, courts have held that there is no true privilege preventing the disclosure of either trade secrets or confidential commercial information. *A. H. Robins Company v. Fadely,* 299 F. 2d 557 (C.A. 5 1962); *Spartanics, Ltd. v. Dynetics Engineering Corporation,* 54 F.R.D. 524 (N.D. Ill. 1972). In any event, the customer list sought in this case is not a trade secret under our Rule 30(b). However, due to the sensitive and confidential nature of the information being sought in the competitive circumstances which are present in this case, the discretionary order requiring disclosure should be carefully reviewed for abuse.

[4] The plaintiff brought the present action under G.S. 75-1.1(a) contending that defendant's advertising practices constituted an unfair method of competition and a deceptive act. As the pleadings are couched, the list of buyers requested appears to be "relevant to the subject matter" under our Rule 26 and is reasonably calculated to lead to the discovery of admissible evidence, to wit, the amount of damages to plaintiff resulting from the sale of tobacco combines by defendant to purchasers who relied on defendant's allegedly deceptive practices. The consequence of *denying* plaintiff's request would to a partial

extent have the effect of legally sanctioning defendant's alleged unlawful conduct, the court conceding to the alleged wrongdoer the privilege of keeping the fruits of his irregular doings secret. Under these circumstances, we find no abuse of discretion in allowing discovery of the requested information.

Having so found, it is our opinion that no substantial rights of defendant have been destroyed or seriously imperiled; therefore, this appeal from an interlocutory order is

Dismissed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. EMMETT ALSTON

No. 7514SC256

(Filed 2 July 1975)

Constitutional Law § 34; Criminal Law § 26; Robbery § 4— dismissal of armed robbery charge — retrial — double jeopardy — trial on lesser included offense proper

Where a defendant is convicted of the offense charged and on appeal the conviction is reversed for insufficient evidence, the double jeopardy clause protects the defendant from retrial on the offense charged, but it does not protect him from trial on a lesser offense if the evidence at the first trial was sufficient to support a conviction of the lesser offense; therefore, the trial court upon remand properly granted the motion of defendant to dismiss the charge of armed robbery against him where the court on appeal had determined that there was insufficient evidence to support such charge, but the trial court's dismissal did not include the lesser offense of accessory before the fact to armed robbery.

APPEAL by the State from *Canaday, Judge.* Judgment entered 8 January 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 May 1975.

The defendant was originally tried at the 30 May 1972 Criminal Session of Durham Superior Court for (1) armed robbery and (2) conspiracy to commit armed robbery. The jury returned verdicts of guilty on both charges and from a judgment sentencing defendant to terms of imprisonment, he sought review pursuant to a writ of certiorari to this Court. The armed

robbery charge was submitted to the jury solely on the issue of aiding and abetting.

At the prior appeal reported in 17 N.C. App. 712, 195 S.E. 2d 314 (1973), this Court found error in the rulings on evidence by the trial court and ordered a new trial on both the armed robbery and conspiracy charges; the court further ruled that the evidence was not sufficient to support the verdict of guilty of armed robbery because the defendant was not actually or constructively present at the scene of the crime, and directed that in the case charging armed robbery, the trial court should have charged the jury only on the lesser included offense of accessory before the fact.

In the retrial on 8 January 1975, defendant pled not guilty to both charges and then moved to dismiss the charge of armed robbery on the grounds of double jeopardy. From the order allowing defendant's motion, the State appealed pursuant to G.S. 15-179.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., and Associate Attorney Raymond L. Yasser, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for defendant.

CLARK, Judge.

It appears from the record on appeal that on retrial the State attempted to place the defendant on trial for both conspiracy and armed robbery, although this Court had ruled that in the first trial the evidence was not sufficient to support the verdict of guilty of armed robbery. The order granting the motion to dismiss was limited to the charge of armed robbery and did not include any lesser offense than the crime charged. The appeal presents the following question: Where a defendant is convicted of the offense charged and on appeal the conviction is reversed for insufficient evidence, does the double jeopardy clause protect the defendant from retrial on the offense charged and from trial on a lesser offense if the evidence at the first trial was sufficient to support a conviction of the lesser offense?

The fact that there is no double jeopardy upon a new trial ordered by an appellate court on the ground of insufficient evidence is supported by at least one United States Supreme Court decision and one North Carolina Supreme Court decision. In

Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950), the contention that a new trial would place the defendant in double jeopardy was rejected. "He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. '. . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' " 94 L.Ed. at 342. In *State v. Rhodes,* 112 N.C. 857, 17 S.E. 164 (1893), the court rejected the double jeopardy claim upon retrial following reversal because of insufficient evidence, reasoning that the granting of the new trial was not on acquittal, and that defendant could not plead the former conviction for it was set aside.

The rule of both the *Bryan* and *Rhodes* cases has been significantly limited, if not eroded, by subsequent decisions. In *Sapir v. United States,* 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 (1955), the Court of Appeals had first reversed and remanded the case with orders to discharge the defendant on grounds of insufficient evidence. Later, the court amended its judgment and granted a new trial because of newly discovered evidence. The court reinstated the first judgment in a per curiam opinion which avoided the double jeopardy question. But in a concurring opinion Mr. Justice Douglas argued that a new trial for lack of evidence was no different from a new trial after an acquittal from a trial court, and that both were proscribed by the double jeopardy clause. He distinguished the *Bryan* case on the ground that there the defendant had asked for a new trial. In *Forman v. United States,* 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed. 2d 412 (1960), the Supreme Court seemed to treat Douglas's opinion as law. It held that a new trial after reversal for erroneous instructions by the trial court was not barred by the double jeopardy clause. The court then distinguished *Sapir* on two grounds. First, the *Sapir* case involved a reversal for insufficient evidence, not for error. Second, "Sapir made no motion for a new trial," while in the *Forman* case the petitioner filed such a motion. "That was a decisive factor in Sapir's case." 4 L.Ed. 2d at 419.

It is not clear to what extent the distinction between a specific request for a new trial and a mere reversal is the determinative factor on the question of double jeopardy in the federal courts.

In this State after the *Rhodes* decision, the Supreme Court in *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963) found that in an appeal from a conviction of assault with intent to rape there was insufficient evidence to support the conviction, and ruled that the case be remanded for a new trial on the lesser offense of assault on a female if the State so elected.

In *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972), this Court held that the evidence was insufficient to support the conviction of armed robbery, but sufficient to support a conviction of accessory before the fact of armed robbery, ruled that the defendant was not entitled to have the armed robbery charge dismissed and remanded the case with the direction that the State may, if it so elected, try the defendant under the original bill of indictment for the offense of accessory before the fact to armed robbery.

Considerations which justify a new trial after reversal for error, or for trial on a lesser offense which is justified by the evidence, are lacking where the reversal is for lack of evidence to support the verdict. A new trial after reversal is usually justified by the courts on the ground that the defendant waives his double jeopardy protection by appealing. See Note, 31 U. of Chic. L. Rev. 365, 367 (1964). The waiver rationale should not be extended to situations where an appellate court finds that the evidence is insufficient to support the verdict where the only choice is between jail and second jeopardy. The waiver of this fundamental constitutional right is hardly voluntary.

A divided court in *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213 (1961), held that the crime of accessory before the fact is included in the charge of the principal crime. Justice Bobbitt (later Chief Justice), dissenting, stated: "If and when an appropriate factual situation is presented, I think this Court should reconsider and clarify this subject." 254 N.C. at 453. *State v. Wiggins, supra,* was retried and again appealed and reported in 21 N.C. App. 441, 204 S.E. 2d 692 (1974), and this Court held that a defendant may be convicted of both conspiracy to commit robbery and of accessory before the fact to robbery.

We conclude that the trial court properly granted the motion of the defendant to dismiss the charge of armed robbery and that the dismissal did not include the lesser offense of accessory before the fact to armed robbery. This case is re-

manded so that the District Attorney, if he so elects, may try the defendant under the original bill of indictment for the offense of accessory before the fact to armed robbery.

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. PAUL EDWARD ANDERSON

No. 7523SC232

(Filed 2 July 1975)

1. **Indictment and Warrant § 13— bill of particulars — use for discovery — denial of motion proper**

The trial court in a murder case did not err in denying defendant's motion for a bill of particulars where defendant was well aware of the circumstances surrounding the shooting and the theory of the State's case against him, and where defendant by his motion sought extensive discovery to which he was not entitled.

2. **Homicide § 19— deceased as violent and dangerous man — cumulative evidence — exclusion proper**

The trial court in a murder prosecution did not err in excluding evidence that deceased was a violent and dangerous man where there was already similar testimony in evidence and the excluded testimony would have added nothing to that evidence.

3. **Homicide § 19— statement by deceased — admissibility to show apprehension of deceased**

In a murder prosecution where defendant testified that deceased said "'I am going to kill you' and he started for his pocket and I kept telling him to stop and I had no choice," the trial court did not err where it sustained the State's objection only as to the last phrase, a self-serving declaration, and admitted the rest as competent on the issue of defendant's apprehension.

4. **Homicide § 15— statements contemporaneous with shooting — inadmissibility as res gestae**

The trial court in a murder prosecution did not err in refusing to admit, as part of the *res gestae*, evidence of statements and actions contemporaneous with the shooting.

5. **Homicide § 28— defense of family and others — failure to instruct proper**

The trial court in a murder prosecution did not err in refusing to instruct the jury on defense of family and others in one's presence where by their verdict the jury found from all the evidence that it

was not actually necessary or apparently necessary for defendant to kill in order to save himself from death or great bodily harm, and the jury therefore could not have found that defendant was justified in killing to protect others who were less immediately threatened.

APPEAL by defendant from *Winner, Judge.* Judgment entered 19 November 1974 in Superior Court, WILKES County. Heard in the Court of Appeals 14 May 1975.

Defendant was indicted on a charge of murder. He pleaded not guilty and was tried before a jury.

Evidence for the State tended to show that on the afternoon of 13 April 1974 the deceased, Billy Dean Miller, drove with his mother- and father-in-law to a trailer park in search of his wife Juanita. While they were at the park, defendant, Paul Edward Anderson, drove past in an automobile owned by Juanita Miller, who was sitting on the seat beside him. Dean Miller followed them, running into the vehicle driven by Anderson, and forcing it off the road. Anderson, followed by Miller, proceeded to a service station and stopped. Miller also stopped, got out, and trial to pull his wife and children from the other car. Anderson then got out and, carrying a gun, walked to the rear of the car. There he confronted Miller and fired three shots, killing him.

Juanita Miller testified that she and her husband had been separated, and she had been dating Anderson. When Dean Miller began to follow the car in which they were riding, she became frightened, took a pistol from the glove compartment, and placed it on the floor. She told Anderson that she was afraid of Miller.

Defendant testified that Miller's car twice bumped the car he was driving. Later, at the service station, Miller assaulted the passengers and then ran behind the car. Anderson, who was afraid of Miller because he had heard that Miller had threatened to kill him, took the gun from the floor and got out of the car. When Miller said, "I am going to kill you," and reached for his pocket, Anderson shot him.

The court instructed the jury on second degree murder, provocation and voluntary manslaughter, and self-defense. The jury found defendant guilty of second degree murder. From judgment imposing a sentence of 25 to 40 years imprisonment, defendant appealed to this Court.

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

Franklin Smith for defendant appellant.

ARNOLD, Judge.

[1] Defendant initially contends that the trial court erred in denying his motion for a bill of particulars. As explained in *State v. Cameron,* 283 N.C. 191, 194, 195 S.E. 2d 481, 483 (1973):

> "G.S. 15-143 provides that when further information not required to be set out in the bill of indictment is desirable for the better defense of the accused, the court upon motion may in its discretion require the solicitor to furnish a bill of particulars. The function of a bill of particulars is to inform the defendant of the nature of the evidence which the State proposes to offer. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). The granting or denial of motions for a bill of particulars is within the discretion of the court and not subject to review except for palpable and gross abuse thereof. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1966); *State v. Overman, supra; State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594 (1943)."

Accord, State v. Martin, 21 N.C. App. 645, 205 S.E. 2d 583 (1974). In the case at bar, defendant was well aware of the circumstances surrounding the shooting and the theory of the State's case against him. By his motion he sought extensive discovery to which he was not entitled. *See State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972). It was properly denied.

[2] Defendant has raised a number of contentions with respect to his attempts to present evidence that Dean Miller was a violent and dangerous man. These contentions are without merit. While evidence of decedent's character is admissible for the purpose of showing provocation and justification, it is limited to evidence of specific acts of violence known to defendant or to decedent's reputation as a ferocious, violent, and dangerous man. *See State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48 (1967); *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443 (1956). *See generally* 1 Stansbury, N. C. Evidence (Brandis rev.) § 106; Some of the proffered testimony was entirely unrelated to character for violence and therefore inadmissible. As for the rest, the

exclusion of evidence cannot be prejudicial when the witness later testifies to the same facts or the evidence is merely cumulative of other testimony. *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138 (1955); *State v. Werst,* 232 N.C. 330, 59 S.E. 2d 835 (1950); *State v. Elder,* 217 N.C. 111, 6 S.E. 2d 840 (1940). Several witnesses testified that Dean Miller's automobile bumped the automobile driven by defendant, causing it to leave the road. Juanita Miller testified that she was frightened of her husband and had told defendant that Dean Miller had purchased a gun. Defendant stated that he was afraid because Miller had sent word he was going to kill him. The excluded portions of testimony would have added nothing to the foregoing evidence, which was before the jury.

Equally without merit are defendant's contentions concerning his attempts to impeach the testimony of the SBI agent who investigated the shooting and to contradict the testimony of decedent's father-in-law. In both instances, defendant's questions were highly speculative and of little probative value. Answers to them were properly excluded.

[3] Defendant contends that the court struck his testimony that "[Dean Miller said] 'I am going to kill you' and he started for his pocket and I kept telling him to stop and I had no choice." As we read the record, the court sustained the State's objection only as to the last phrase, a self-serving declaration, and admitted the rest as competent on the issue of defendant's apprehension. *See State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971). Defendant's contention is overruled.

[4] Defendant also contends that the court erred in refusing to admit, as part of the *res gestae,* evidence of statements and actions contemporaneous with the shooting. We note first that some of the statements were not offered for the truth of the matter asserted, and therefore they were not objectionable as hearsay. *See* 1 Stansbury, *supra* § 141. The record indicates, however, that the court, after first sustaining the State's objection, later admitted testimony that after defendant shot Dean Miller he asked Juanita, "Is he shot?" and she said, "He is dying." The exclusion therefore was not prejudicial. *See State v. Tyson, supra.* The *res gestae* exception to the hearsay rule does apply to the testimony that just after the shooting defendant said he "did it for her trying to protect her." *See Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757 (1944); 1 Stansbury, *supra* § 158. Nevertheless, for reasons given below with respect

to the verdict and the charge, we believe error in the exclusion was not prejudicial.

[5] Finally, defendant contends that it was error to refuse to instruct the jury on defense of family and others in one's presence. Ordinarily the court must instruct on self-defense and defense of others when such defenses are raised by the evidence. *See State v. Deck,* 285 N.C. 209, 203 S.E. 2d 830 (1974); *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154 (1965). Nevertheless, we are unable to see how the instructions given in this case, which dealt only with self-defense, could have been prejudicial to defendant. By their verdict the jury found from all the evidence that it was not actually necessary or apparently necessary for defendant to kill in order to save *himself* from death or great bodily harm. The evidence showed that decedent confronted defendant behind the automobile while the others remained inside with the right front door locked. It follows that the jury could not have found that defendant was justified in killing to protect *others* who were less immediately threatened.

Defendant has received a fair trial free from prejudicial error.

No error.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. MARGARET DELLINGER

No. 7527SC259

(Filed 2 July 1975)

1. **Criminal Law § 79— extra-judicial statement of codefendant — admissibility**

   The trial court did not err in allowing into evidence an extra-judicial statement of a codefendant.

2. **Conspiracy § 6— conspiracy to commit murder — sufficiency of evidence**

   In a prosecution for conspiracy to commit murder, evidence was sufficient to be submitted to the jury where it tended to show that defendant had conversations with one Payseur about having her son-in-law killed and that defendant saw Payseur after the killing and discussed payment with him.

3. **Criminal Law §§ 79, 102— extra-judicial statement of codefendant — use by solicitor in jury argument**

The trial court did not err in denying defendant's motion for a mistrial when the solicitor used portions of a codefendant's statement dealing with defendant in his argument to the jury where the court did, upon defendant's objection to the solicitor's argument, repeat its limiting instruction to the jury.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 7 November 1974 in Superior Court, LINCOLN County. Heard in the Court of Appeals 28 May 1975.

Defendant was charged in an indictment, proper in form, with conspiracy to commit murder. She pleaded not guilty and together with Arnold Jones, who was charged with being an accessory after the fact, was tried before a jury.

Russell Audie Payseur was the principal witness for the State. He testified that on the afternoon of 29 June 1974 he went to the home of defendant and discussed with her payment for his killing of Randall Smith, defendant's son-in-law. Prior to this occasion, defendant's daughter Kathy had promised Payseur $3,000.00 if he could arrange the death of Smith. This conversation took place in the presence of defendant, who later promised Payseur up to $5,000.00 for Smith's death. Defendant and her daughter told Payseur that the money would come from insurance on Smith's life.

Payseur is paralyzed from the waist down. He was driven to defendant's home by Elbert Rickman. Arnold Jones was in the back seat. Payseur had prepared a sawed-off shotgun, using a .20 gauge barrel and a .16 gauge stock, which he put in the car.

Randall Smith joined the men and they went for a ride. They left Jones at a place called Jud's Pantry and, since they had been drinking, drove back on a country road. They stopped at an isolated spot to "use the bathroom." Payseur testified that he decided to try out his shotgun and pointed it at a fence post. Afraid that the gun might explode, he turned to grasp the seat. When he turned around, Smith had seized the barrel. Smith pulled the gun and it fired, killing him. Blood spattered on the windshield. Payseur and Rickman left the body at the scene and went to pick up Jones. Rickman and Jones washed the blood off the car. Defendant came to Payseur the next day and, when he told her Smith was dead, promised to pay him.

Dr. Guy Joseph Guarino testified that Randall Smith died of massive bleeding secondary to a gunshot wound in the left chest. In his opinion, the wound was caused by a .20 gauge shotgun.

Payseur further testified that defendant had told him she wanted Smith killed because he had beaten and threatened to kill her, his wife and his two children. Payseur said he did not promise to kill Smith but only to get someone else to do the job for the money which defendant and her daughter were going to pay him. On cross-examination Payseur admitted that at the time of the offense he was a heavy user of drugs and alcohol.

Elbert Rickman's testimony tended to corroborate Payseur's account of the events of June 29. Larry James Carpenter testified that he took Payseur to defendant's home on the Sunday after the killing and heard him tell defendant he wanted the money in tens, fifties and twenties. Barry Divine, an insurance agent, testified that in March 1974 he sold Randall Smith additional life insurance and that defendant and her daughter were present at the time.

Arnold Jones testified for defendant. He stated that he accompanied Payseur and Rickman to defendant's home but denied having overheard a conversation between defendant and Payseur about murder. On cross-examination the State introduced a statement made by Jones on the morning after his arrest. It included the following: "Rusty [Payseur] said, 'I am going to keep my promise or bargin [sic].' Both the women said the money will be waiting. It will be two or three weeks. Rusty told them to make sure it is in small bills. Rusty said something about $4,000.00." The court instructed the jury that if they found that such a statement was made they may consider it only as evidence against Jones and not against defendant Dellinger.

Defendant's daughter Kathy testified that she and Payseur had discussed the killing of her husband but that she did not want him killed. Her mother was not present during this conversation. She testified that her husband drank excessively and often was absent from work. After Smith's death Payseur told her he was in a hurry for the money. She knew Payseur had killed her husband, and, when she discussed this fact with Payseur's mother, defendant overheard the conversation and became upset.

Defendant Margaret Dellinger denied any prior knowledge or agreement with respect to the killing of her son-in-law. She denied having told neighbors she was afraid of him and denied knowing that he had increased his insurance coverage.

The State offered rebuttal evidence from Smith's employer that he had been a regular worker with a good reputation. The company had carried a $3,000.00 insurance policy on Smith's life, with his wife as beneficiary.

The jury found defendant Jones not guilty and defendant Dellinger guilty as charged. From judgment imposing a sentence of eight to ten years' imprisonment, Margaret Dellinger appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Wilson & Lafferty, P.A. by John O. Lafferty, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant Dellinger assigns error to trial court's admission into evidence of the extra-judicial statement of codefendant Jones. Quoting from *State v. Jones,* 280 N.C. 322, 339, 185 S.E. 2d 858, 868 (1972), she argues that "the prejudicial impact of testimony of out-of-court declarations of a codefendant, even when the right to confrontation is afforded, must be evaluated in the light of the competent admitted evidence against the nondeclarent defendant referred to in such declarations." Defendant contends that since Jones' statement tended to corroborate Payseur's testimony, which was suspect because of his use of drugs, the court's limiting instruction had no effect and the admission of the statement was prejudicial. We disagree. Payseur's account of the events surrounding Smith's death was competent evidence incriminating defendant Dellinger. It was corroborated at various points by other competent evidence. In this case, as in *Jones, supra,* there was no gap between the impact of the statement made by Arnold Jones and of other evidence competent against defendant Dellinger. This assignment of error is overruled.

[2] Defendant next assigns error to the court's denial of her motions for nonsuit. This assignment of error also is overruled. Viewed in the light most favorable to the State, there was ample

evidence of acts both before and after the murder to support a jury finding that defendant agreed with Payseur to have Smith killed. *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. Locklear,* 8 N.C. App. 535, 174 S.E. 2d 641 (1970).

[3] Finally, defendant assigns as error the court's refusal to declare a mistrial when the solicitor used portions of Jones' statement dealing with Dellinger in his argument to the jury. In noncapital cases, a ruling on motion for mistrial rests largely in the discretion of the trial court. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Brown,* 18 N.C. App. 35, 195 S.E. 2d 567, *cert. denied* 283 N.C. 586, 196 S.E. 2d 810 (1973). The record shows that, upon defendant's objection to the solicitor's argument, the court repeated its limiting instruction to the jury. Under these circumstances, we find no abuse of discretion in denying defendant's motion.

Defendant has received a fair trial free from prejudicial error.

No error.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. WALTER LEE FINK, JAMES L. FINK

No. 7519SC324

(Filed 2 July 1975)

1. Larceny § 7— identification of stolen wire

Wire found in defendants' possession was sufficiently identified to support an inference that it was wire stolen from a mobile home supply warehouse where the State's evidence tended to show that the warehouse was broken into and eighteen 1500-foot reels of "12-2" copper wire and twenty-one 2000-foot reels of "14-2" copper wire were stolen therefrom, one of the reels of "12-2" wire had the word "scrap" penciled on it, eighteen days later defendants were found in possession of eighteen 1500-foot reels of "12-2" copper wire and eighteen 2000-foot reels of "14-2" copper wire, one of the reels of "12-2" wire had the word "scrap" written on it in pencil, and the wire found in defendants' possession had the same stock numbers and was manufactured by the same company as the wire stolen from the warehouse.

2. Larceny § 5— possession of recently stolen wire — 18 days between theft and possession

Interval of 18 days between the theft of copper wire and defendants' unexplained possession of the wire did not render the doctrine of possession of recently stolen goods inapplicable.

APPEAL by defendants from *Long, Judge.* Judgment entered 6 December 1974 in Superior Court, ROWAN County. Heard in the Court of Appeals 17 June 1975.

This is a criminal prosecution wherein the defendants, Walter Lee Fink and James L. Fink, were charged in separate bills of indictment, proper in form, with the felonies of breaking or entering with the intent to commit larceny and larceny.

The State offered evidence tending to show the following: The Southeastern Mobile Home Supply Corporation, located on Palmer Road in Rockwell, N. C., is a distributor of electrical supplies for the mobile home industry. At approximately 3:15 a.m. on 11 September 1974, Officer J. A. Hopkins of the Rowan County Sheriff's Department discovered that the large "garage type door" of Southeastern's warehouse was open and that the alarm system had been activated. Robert McGee, general manager of the corporation, was called to the warehouse; and he observed that a "1971 one ton flatbed Dodge truck" and several reels of copper wire were missing. The truck was found about three hours later in a nearby river. No wire, however, was found on the truck.

An inventory of the warehouse was taken on the morning of the break-in, and it was learned that eighteen 1500-foot reels of "12-2" copper wire and twenty-one 2000-foot reels of "14-2" copper wire had been taken. Each reel weighed approximately 100 pounds, and the total value of the missing wire was $10,600. One of the reels of "12-2" wire had the word "scrap" written on the label in lead pencil. While the inventory was being taken, McGee discovered a hole approximately four feet high which had been cut in one of the exterior walls of the warehouse and which had been covered over on the outside of the building by clumps of grass. A fork-lift in the warehouse had apparently been used to load the wire onto Southeastern's truck. McGee testified that until about May 1974 James Fink had been employed by Southeastern as manager of the warehouse and that until about 16 April 1974 Walter Fink had worked part-time for Southeastern as a truck driver. The alarm system

was installed in the warehouse sometime during May 1974 and was designed to activate when any of the warehouse doors were opened after being locked for the night.

At 4:00 p.m. on 29 September 1974 the defendants rented a sixteen foot U-Haul truck from the Mason Exxon Service Station in Kannapolis. At about 9:00 p.m. on the same day, several officers of the Rowan County Sheriff's Department stopped the truck on Highway 29A near the North Kananpolis Police Department. The defendants were the sole occupants of the vehicle. A search of the truck revealed eighteen 1500-foot reels of "12-2" copper wire and eighteen 2000-foot reels of "14-2" copper wire. The reels found in the defendants' possession had the same stock numbers and manufacturer as the reels taken from Southeastern's warehouse. One of the reels of "12-2" wire found in the truck had the word "scrap" penciled on it. In identifying the reels of wire found in the defendants' possession, McGee specifically identified the reel with the word "scrap" written on it as the same reel which had been in the warehouse prior to the break-in. In fact, he had never seen any other reel of wire come from the manufacturer with the word "scrap" written on it.

Defendants offered no evidence.

The jury found both defendants guilty of breaking or entering and larceny. From judgments imposing a prison sentence of ten (10) years as to each defendant on the count charging breaking or entering and a prison sentence of ten (10) years as to each defendant on the count charging larceny, defendants appealed.

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

Woodson, Hudson, Busby & Sayers by Benjamin H. Bridges, III, for defendant appellant Walter Lee Fink.

Somers & Eagle by Kenneth L. Eagle for defendant appellant James L. Fink.

HEDRICK, Judge.

By their first and fifth assignments of error, defendants contend the court erred in denying their timely motions for judgment as of nonsuit and in instructing the jury on the doctrine of the possession of recently stolen goods.

Defendants argue (1) that the wire found in their possession was not sufficiently identified to raise an inference that it was the wire stolen from Southeastern Mobile Home Supply Corporation and (2) that the interval of time between the commission of the crime and the finding of the property in their possession was so great as to render the doctrine of the possession of recently stolen goods inapplicable.

[1] In our opinion, the evidence tending to show that Southeastern's warehouse was broken into on the night of 11 September 1974, that eighteen 1500-foot reels of "12-2" copper wire and twenty-one 2000-foot reels of "14-2" copper wire were stolen, that one of the reels of "12-2" wire had the word "scrap" penciled on it, that the defendants were found in possession of eighteen 1500-foot reels of "12-2" copper wire and eighteen 2000-foot reels of "14-2" copper wire, that one of the reels of "12-2" wire had the word "scrap" written on it in pencil, that the wire found in the defendants' possession had the same stock numbers and was manufactured by the same company as the wire which was stolen from Southeastern's warehouse, when coupled with Mr. McGee's identification testimony of the stolen wire and specifically his testimony with respect to the reel of "12-2" wire having the word "scrap" written on it, is sufficient to raise an inference that the wire found in the defendants' possession was the wire which was stolen from Southeastern Mobile Home Supply Corporation pursuant to a break-in on 11 September 1974.

"It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief." *State v. Raynes,* 272 N.C. 488, 491, 158 S.E. 2d 351, 353 (1968). Furthermore, when it is established that a building has been broken into and entered and that property has been stolen therefrom, discovery of the property in the possession of the defendant soon after the theft raises a presumption that he is guilty of both the breaking and entering and the larceny. *State v. Lewis,* 281 N.C. 564, 189 S.E. 2d 216 (1972).

> "Whether the time elapsed between the theft and the moment when the defendant is found in possession of the stolen goods is too great for the doctrine to apply depends upon the facts and circumstances of each case. Among the relevant circumstances to be considered is the nature of the particular property involved. Obviously if the stolen article is of a type normally and frequently traded in

lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely. On the other hand, if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time interval. In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief. *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *State v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725. The question is ordinarily a question of fact for the jury. *State v. White,* 196 N.C. 1, 144 S.E. 299." *State v. Blackmon,* 6 N.C. App. 66, 76-77, 169 S.E. 2d 472, 479 (1969). See also, *State v. Waller,* 11 N.C. App. 666, 182 S.E. 2d 196 (1971).

[2] In our opinion, the interval of eighteen days between the theft of the wire and the defendants' unexplained possession of it on the night of 29 September 1974—in view of the nature of the stolen property, its regular marketing channels, the defendants' recent employment at Southeastern Mobile Home Supply Corporation, and the improbability of the defendants having come into the lawful possession of 63,000 feet of copper wire weighing approximately 3600 pounds—did not render the doctrine of the possession of recently stolen goods inapplicable. We, therefore, conclude that it was not error for the trial judge to have instructed the jury with respect thereto. Furthermore, when all of the State's evidence is considered along with the inference of the defendants' guilt arising from application of the doctrine of the possession of recently stolen goods, it is clear that the evidence was sufficient to require submission of the cases to the jury and to support the verdicts. See *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972).

Defendants have additional assignments of error which we have carefully considered and find to be without merit.

Defendants had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

OLA DEESE CALDWELL v. DAVIS W. DEESE

No. 7526SC254

(Filed 2 July 1975)

Automobiles § 64— bus driver striking dog — sufficiency of complaint

In an action to recover damages allegedly resulting from defendant's negligent operation of a bus, plaintiff's complaint was sufficient to state a claim upon which relief could be granted where plaintiff alleged that defendant bus driver failed to reduce his speed and take evasive action when he saw or should have seen a large group of children and plaintiff's dog approaching the street, defendant hit the dog but did not stop, the dog bit plaintiff and caused her severe injury when she tried to separate the dog and the children, and plaintiff incurred $25,000 in damages as a proximate result of defendant's negligence in operating the bus.

Chief Judge BROCK dissenting.

APPEAL by plaintiff from *Hasty, Judge.* Judgment entered 12 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 May 1975.

This is a civil action wherein the plaintiff, Ola Deese Caldwell, seeks $25,000 damages from the defendant, Davis W. Deese, allegedly resulting from the defendant's negligent operation of a bus on the public streets of the City of Charlotte.

The allegations of plaintiff's complaint, except where quoted, are summarized as follows: At 4:00 p.m. on 10 February 1974, approximately twelve small children ran out of the front door of plaintiff's house, which is located at 2001 Stratford Avenue in Charlotte, permitting plaintiff's dog to come out of the house with them. At this time plaintiff was standing in her front yard near the street talking with a friend. As the children and the dog ran across the yard toward the street, the defendant "came driving along the street in the direction of the Plaintiff's home, operating the bus belonging to New Hope Baptist Church, and saw or should have seen the large number of children and the dog approaching the curb as if to enter the street." Notwithstanding the presence of the children and the dog, the "Defendant continued to drive the bus in the general direction which he was heading along the street, and struck and ran over . . ." the plaintiff's dog. The defendant "then continued along the street without stopping, although he knew or should have known that he had struck plaintiff's dog." Plain-

tiff's dog was severely injured, and "the group of children immediately gathered around the dog to investigate." Fearing for the safety of the children and for the injured dog, the plaintiff "attempted to separate the dog and the children. Plaintiff's dog, in great pain and in a state of confusion, bit Plaintiff on the hand, causing her severe injuries."

Plaintiff alleged that the defendant was negligent in that:

"(a) The Defendant failed to keep his bus under proper control;

(b) The Defendant failed to reduce his speed in order to avoid a hazard in the street, in violation of Section 20-141 of the General Statutes of North Carolina;

(c) The Defendant failed to take evasive action when he knew or should have known in the exercise of due care that a large group of children and a dog at or approaching the side of the street was potentially dangerous, and when he knew or should have known that prudence required that he avoid the hazard;

(d) The Defendant operated his vehicle at a speed greater than was reasonable and prudent under the circumstances then existing, in violation of Section 20-141 of the General Statutes of North Carolina;

(e) The Defendant failed to sound his horn upon seeing a group of children and a dog at the side of the road, when he knew or in the exercise of due care should have known that an audible warning of his approach might prevent a collision;

(f) The Defendant failed to stop his vehicle after running over the Plaintiff's dog, when he knew or in the exercise of due care should have known that his striking the dog with his bus would create a hazardous condition by leaving an injured and confused dog in the presence of other people, a dangerous situation he had already created, and had a duty to mitigate."

Plaintiff further alleged that as a proximate result of the defendant's negligence in the operation of the bus she had incurred damages in the amount of $25,000. These damages included loss of wages, medical expenses, and pain and suffering resulting from severe, permanent, unsightly, and painful injur-

ies to her hand. She also incurred "substantial" expense in the care and treatment of her injured dog.

The defendant filed answer and (1) moved to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted, (2) denied the allegations of negligence and proximate cause, and (3) alleged contributory negligence upon the part of the plaintiff.

On 30 October 1974 the defendant moved for summary judgment and supported his motion with a deposition of the plaintiff, which reiterated in more or less detail the allegations of the complaint. On 12 February 1975 the trial court made the following findings:

> "2. That the Court considering all that is before it in the light most favorable to the plaintiff finds that there is an insufficiency of facts to establish actionable negligence on the part of the defendant and even if there were such facts in evidence the facts would also establish contributory negligence on the part of the plaintiff, as a matter of law;
>
> 3. That the Court is of the opinion that considering all of the evidence, most favorable to the plaintiff, that the plaintiff fails to show any proximate cause for any alleged injuries and damages sustained by her.
>
> 4. That the Court is of the opinion that if all the facts most favorable to the plaintiff in the record before the Court were presented by the plaintiff in a trial that the defendant would be entitled to a directed verdict and the Court therefore concludes that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law;"

From entry of summary judgment for defendant, plaintiff appealed.

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

Myers & Collie by George C. Collie and Charles T. Myers 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.

Although the trial judge in entering summary judgment for the defendant declared in the language of Rule 56 that there were no genuine issues of material fact, the findings made by him (findings being unnecessary in passing on a motion for summary judgment, *Wall v. Wall,* 24 N.C. App. 725, 212 S.E. 2d 238 (1975), cert. denied 287 N.C. 264, 214 S.E. 2d 437 (1975)) indicate that the court felt that the plaintiff's complaint failed to state a claim upon which relief could be granted. It may be helpful, therefore, to repeat the rule regarding the sufficiency of the allegations in a complaint to state a claim for relief. A complaint fails to state a claim upon which relief can be granted " 'if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim.' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.* Pleadings are to be liberally construed. Mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement." 2A Moore's Federal Practice § 12.08 (1974). Accord, *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). Viewing plaintiff's complaint in the light of the foregoing principles, we think it is sufficient to state a claim for relief for damages allegedly resulting from the defendant's negligent operation of the bus. *Sutton v. Duke, supra.*

The answer filed by the defendant denying negligence and pleading contributory negligence creates genuine issues of material fact as to whether any damages suffered by plaintiff were proximately caused by the negligence of the defendant as alleged in the complaint. These issues must be determined at trial unless the defendant, the party moving for summary judgment, carries his burden of producing evidence of the necessary certitude to negative plaintiff's claim in its entirety and thereby demonstrates a lack of genuine issues of material fact. G.S. 1A-1, Rule 56, Rules of Civil Procedure; *Sanders v. Davis,* 25 N.C. App. 186, 212 S.E. 2d 554 (1975); *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). If the defendant produces such evidence, the plaintiff may not rest upon the mere allegations of her complaint but must respond with affidavits or

other evidentiary matter which sets forth specific facts showing that there is a genuine issue for trial. Rule 56(e).

In the instant case the only evidentiary matter filed by the defendant in support of his motion was the deposition of the plaintiff wherein she merely reiterated the allegations in her complaint. This deposition does not negate plaintiff's claim in its entirety. Thus, there are genuine issues of material fact to be determined at trial, where the burden will be on the plaintiff to produce whatever evidence she can in support of the allegations in the complaint. Then and then only can the court test and determine the sufficiency of such evidence. At the present stage of the proceedings, the court can only test the sufficiency of the record to support summary judgment for the defendant.

Since the record here consists only of a complaint sufficient to state a claim upon which relief could be granted, an answer denying the material allegations of the complaint and pleading contributory negligence, and plaintiff's deposition which reiterates the allegations of the complaint, summary judgment for defendant was inappropriate.

Reversed and remanded.

Judge PARKER concurs.

Chief Judge BROCK dissents.

Chief Judge BROCK dissenting.

Defendant's motion for summary judgment is based in part upon his earlier Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The trial judge ruled upon the motion to dismiss and treated it as a motion for summary judgment, as is permitted under Rule 12(b). Upon this view of the trial court's ruling, I would affirm in part and reverse in part.

In my opinion the factual allegations by the plaintiff and her testimony by deposition disclose, as a matter of law, that the negligence of defendant, if any, was not a proximate cause of the injury to plaintiff's hand. Therefore, there is an absence of law to support her claim for damages to her hand. To this extent, I vote to affirm the dismissal of her action.

I vote to reverse the dismissal of plaintiff's action insofar as it relates to her claim for damages to her property (her dog).

STATE OF NORTH CAROLINA v. DONALD EUGENE MILLER

No. 755SC310

(Filed 2 July 1975)

Criminal Law § 60; Burglary and Unlawful Breakings § 5— fingerprint evidence — sufficiency of evidence for jury

The State's evidence was sufficient to show that defendant was the perpetrator of the offense of breaking and entering a launderette where it tended to show that vending machines in the launderette had been pried open during the nighttime, a padlock had been removed from a cigarette machine and was found on the floor near the machine, and defendant's thumbprint was found on the padlock, since the jury could find that the fingerprint could have been impressed only at the time the offense was committed, notwithstanding defendant showed by cross-examination of the witnesses that the cigarette machine and lock were located in a vending area frequented not only by customers of the launderette but by others who socialize around the vending machines.

Judge HEDRICK concurring.

Judge MARTIN dissents.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 10 December 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 June 1975.

By indictment, proper in form, defendant was charged with the felonies of (1) breaking and entering a building occupied by Williams Launderette and (2) larceny pursuant to the breaking and entering. He pled not guilty to both charges and at the conclusion of the evidence the court allowed his motion for nonsuit on the larceny count. The jury returned a verdict of guilty on the breaking and entering count, and from judgment imposing prison sentence of eight years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Archie W. Anders, for the State.

Carter and Carter, by James Oliver Carter, for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error is that the court erred in denying his motion for nonsuit on the breaking and entering count. We find no merit in the assignment.

Evidence presented by the State tended to show:

On 23 September 1974 the Williams Launderette was housed in a building located at 1107 Princess Street in the City of Wilmington. In addition to coin operated laundry machines, there were soft drink, cigarettes, and other merchandise vending machines in the building. At about 9:00 p.m. on that date, the building was locked and secured for the night and the operators went home. No one was given permission to enter the building after it was closed.

At about 3:55 the following morning, Officer McNew of the Wilmington Police Department, in a routine check of the building, found that the back door had been forced open. After obtaining additional police assistance, he entered the building but found no one in it. He determined that a candy machine and a drink machine had been pried open; and that a cigarette machine had been dragged from the front to the rear of the building and pried open. Prior to being entered, the cigarette machine was secured with a heavy chrome padlock; police found the lock lying on the floor near the cigarette machine and it "looked like it had been busted off." One witness stated that the lock "was cut off and laid down." Burglary tools were found on the floor of the building.

The padlock was examined for fingerprints and a right thumbprint, identified as that of defendant, was found on the lock. Defendant stipulated that the fingerprint was his. On 11 October 1974 police questioned defendant about the matter and he stated that he had never been in the Williams Launderette.

Defendant offered no evidence. On cross-examination of State's witnesses, he established that during business hours the launderette was open to the public; that prior to the burglary the cigarette machine was located near the front of the building; that the padlock was on the side of the machine near some chairs and could easily be seen and handled by persons patronizing the establishment; that numerous persons frequented the premises not only to patronize the laundry machines but also the drink, candy, and cigarette machines; and that many young people congregated in the building to socialize.

Defendant does not argue that the evidence was not sufficient to show that a felonious breaking and entering had been committed. He contends that the evidence was not sufficient to show that he was the perpetrator of the offense.

Decision in this case depends upon application of the rule that evidence showing that fingerprints found at the scene of a crime correspond with those of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that such fingerprints could have been impressed only at the time the offense was committed, is sufficient to withstand a motion for nonsuit. *State v. Reynolds,* 18 N.C. App. 10, 195 S.E. 2d 581 (1973) and cases therein cited. The question of whether the fingerprints could have been impressed only at the time when the crime was committed is ordinarily a question of fact for the jury. *State v. Helms,* 218 N.C. 592, 12 S.E. 2d 243 (1940); *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969).

Defendant insists that he showed by cross-examination of the witnesses that prior to the night in question the lock on which his thumbprint was found was located on the outside of the cigarette machine next to some chairs in an area frequented not only by customers of the launderette but by others who "socialized" around the cigarette and drink vending machines; therefore, the showing of his thumbprint on the lock was not accompanied by substantial evidence of circumstances from which the jury could find that his thumbprint could have been impressed only at the time the offense was committed. While a close question is presented, we think the evidence was sufficient to withstand the motion for nonsuit.

Defendant's statement that he had never been in the launderette was both inculpatory and exculpatory. It was inculpatory in that it tended to refute the assumption that at some time he had been in the building legally. It was exculpatory in that it tended to show that he did not enter the building on the night in question.

When the State introduces in evidence an exculpatory statement made by a defendant which is not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the statement. *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84 (1964). However, the State is not precluded from showing that the facts were otherwise. *State v. Mitchum,* 258 N.C. 337, 128 S.E. 2d 665 (1962).

In the case at hand, while the State presented evidence of a statement by defendant that he had *never* been in the building in question, by establishing defendant's fingerprint on the lock,

it presented evidence tending to show that defendant had been in the building at *some* time. We think it then became a question for the jury to say if defendant's fingerprint was impressed on the lock at the time of the burglary or at some other time. It is elementary that the jury may believe all, none, or only part of a witness' testimony; it follows that the jury may believe all, none, or only a part of a defendant's statement when there is a showing that the facts were otherwise. Had defendant's statement been more specific, i.e., that he was not in the building on 24 September 1974, or on 23 September 1974, or on 20 September 1974, or at any other time, it seems to us that the jury could have believed the statement in part and disbelieved it in part. That being true, we do not think his use of the all encompassing term "never" prevented the jury from believing the statement in part and disbelieving it in part.

For the reasons stated, we conclude that the court did not err in submitting the case to the jury.

No error.

Judge HEDRICK concurs.

Judge MARTIN dissents.

Judge HEDRICK concurring:

I concur in Judge Britt's opinion affirming the denial of defendant's motion for judgment as of nonsuit. However, I think the statement of the defendant to the officer that he had never been in the burglarized premises is of no legal significance in determining the question of whether the court erred in denying the motion for judgment as of nonsuit. If the statement is true, it exonerates the defendant completely; if the statement is false, the State still has the burden of offering evidence from which the jury could find that defendant's thumbprint on the lock could have been put there only at the time of the commission of the crime. In my opinion the evidence recited by Judge Britt of all the circumstances with respect to the finding of defendant's thumbprint on the broken lock at the scene of the crime is sufficient to support a finding by the jury that the defendant's thumbprint was impressed on the lock at the time of the commission of the crime. *State v. Reynolds, supra.*

NAOMI G. BAILEY v. WILLIAM D. BAILEY

No. 7512DC298

(Filed 2 July 1975)

Husband and Wife § 11— separation agreement — "alimony" provisions — modification outside power of court

Where the separation agreement of the parties was properly executed and acknowledged, the court, upon a showing of a change in circumstances of the parties occurring after execution of the agreement, had no power to modify the provisions in the agreement relating to the payments to be made by the defendant for the benefit of the plaintiff.

APPEAL by defendant from *Herring, Judge.* Judgment entered 12 February 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 11 June 1975.

Plaintiff and defendant were formerly married to each other. On 11 November 1970 they signed a separation agreement by which, among other things, defendant husband agreed to pay plaintiff wife $500.00 per month "for the support and maintenance of the minor children of said parties and the Wife, of which sum $250.00 shall be designated child support and $250.00 shall be designated alimony for the Wife." No question is presented on this appeal concerning the provisions in the agreement relating to child support. The agreement provided "that the payments in the amount of $250.00 per month specified herein to be paid as permanent alimony for the Wife shall survive absolute divorce of the parties (unless such divorce is procured by the Wife on the grounds of separation or by the Husband on the ground of adultery, in either which events said alimony shall terminate) but shall terminate in the event the Wife remarries, the Wife expressly waiving her right, if any, to receive any other or greater sum as permanent alimony from the Husband."

Subsequent to execution of the separation agreement, the husband instituted an action for divorce on the grounds of one year's continuous separation and was granted such divorce in Cumberland County. He has subsequently married and has adopted the two children of his present wife.

By complaint verified on 4 October 1973 filed in Case No. 73CVD4290 plaintiff alleged that defendant was in arrears in the amount of $1,375.00 in making payments as provided in the

agreement, for which amount plaintiff prayed judgment. Defendant answered and admitted he was in arrears in the amount of $1,250.00 "on the alimony payment to the Plaintiff." As a further defense, defendant alleged that since the date of the separation agreement the circumstances of the parties had changed in that plaintiff's earnings had substantially increased while his own expenses, incident to his later marriage and the adoption of two children, had increased without a proportionate increase in his income. Defendant prayed that the amount of the "alimony" payable by him to plaintiff be reduced. By order dated 2 April 1974 in Case No. 73CVD4290, the court granted plaintiff's motion for summary judgment against defendant in the amount of $1,250.00, the amount by which defendant admitted he was in arrears, and reserved the other issues raised by the pleadings in that case to be litigated at a future trial.

By complaint filed on 27 June 1974 in Case No. 74CVD3119, plaintiff alleged that since the filing of her complaint in the prior case on 4 October 1973 defendant had made no payments to her as required by the separation agreement except the payment of the arrearage in the amount of $1,250.00 which he had been previously ordered to pay and that defendant had become in arrears in the amount of $2,250.00 for payments required under the contract from October 1973 through June 1974. In Case No. 74CVD3119 plaintiff prayed judgment against defendant in the sum of $2,250.00. Defendant filed answer, admitting that demand had been made for the $2,250.00 and that he had refused to pay the same, and alleging as a defense that the prior action was still pending in which the issue raised by his plea of change in circumstances had not yet been determined. Defendant also again alleged the change in circumstances as a defense to plaintiff's claim.

The parties stipulated that both causes, No. 73CVD4290 and No. 74CVD3119, be heard by the court without a jury, and on motion of both parties the two cases were consolidated for trial. The parties further stipulated that unless the court modifies the contract the sum of $2,250.00 is due under the terms of the contract for the time alleged in the complaint in Case No. 74CVD3119.

At the hearing, the defendant attempted to offer evidence to support his allegations as to the change in the circumstances of the parties, but the court ruled as a matter of law that it did not have power to modify the contract entered into between

the parties and therefore excluded the evidence. The court entered judgment in which it made findings of fact, concluded as a matter of law that it had no power to change the contract, and adjudged that plaintiff recover of defendant in Case No. 74CVD3119 the sum of $2,250.00 with interest. From this judgment, defendant appealed.

Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A., by E. Lynn Johnson, for plaintiff appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by L. Stacy Weaver, Jr., for defendant appellant.

PARKER, Judge.

The copy of the separation agreement appearing in the record discloses that it was properly executed and acknowledged in conformity with the requirements of G.S. 52-6. No question has been raised in this litigation as to the validity of the agreement, and both parties recognize that it is binding as to them. The sole question presented by this appeal is whether the court, upon a showing of a change in the circumstances of the parties occurring after execution of the agreement, has the power to modify the provisions in the agreement relating to the payments to be made by the defendant for the benefit of the plaintiff. We agree with the trial judge that the court has no such power.

"The ordinary rules governing the interpretation of contracts apply to separation agreements and the courts are without power to modify them." *Church v. Hancock,* 261 N.C. 764, 765, 136 S.E. 2d 81, 82 (1964). Of course, no agreement between husband and wife can deprive the court of its inherent authority to protect the interests and provide for the welfare of minor children, *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963); *Rabon v. Ledbetter,* 9 N.C. App. 376, 176 S.E. 2d 372 (1970), but the rights of the children are in no way involved in the present appeal. We hold that insofar as the rights of the parties before us are concerned, the court had no inherent power to revise the contract. Furthermore, we do not agree with defendant's contention that the parties in the present case by their contract evidenced an intention that the court should have such a power with respect to the present contract. It is true that the contract describes the payments to be made for the benefit of the wife as "alimony" and that it provides for termination of the payments upon the occurrence of the same events which,

under G.S. 50-11(c) and G.S. 50-16.9(b), would cause termination of the wife's right to receive alimony awarded by a decree of court. However, to imply from these provisions that the court might thereafter revise their agreement in the same manner and under the same circumstances in which the court admittedly can revise its own prior decrees awarding alimony simply requires a more vigorous rewriting of the contract by implication than we are willing to undertake. Had the parties actually intended that the court should have the same power to change from time to time the amount of the payments which they had agreed upon, surely such an important provision would have been expressly stated and would not have been left to be included only by vague implication.

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. WILTON CEE JOYNER

No. 758SC112

(Filed 2 July 1975)

1. **Constitutional Law § 32— waiver of rights by defendant**

The trial court did not err in failing to determine whether defendant knowingly and voluntarily waived his right to counsel where defendant signed a written waiver of counsel, the judge certified that defendant was informed of his rights and waived them, and prior to arraignment the trial judge again advised defendant in open court that if defendant could not afford counsel then the court would appoint counsel if defendant so desired.

2. **Criminal Law § 22; Jury § 1— plea changed to not guilty after jury impaneled**

Where, after the jury was selected and impaneled, the trial court allowed defendant to withdraw his plea of guilty and plead not guilty to the charge of failing to stop for a siren, defendant cannot for the first time on appeal complain that the jury had not been selected and impaneled to try him for that particular offense.

3. **Criminal Law § 15— continuing offenses — commission in two counties — instruction proper**

Where warrants alleged that the offenses charged therein were committed in Lenoir County, the trial court did not err in charging the jury that, if defendant committed such offenses on the public high-

ways of either Lenoir or Greene County, then he could be found guilty, since defendant's continuous acts of speeding, reckless driving, and failing to heed a siren constituted three offenses against the State which did not become six offenses simply by crossing the dividing line between the two counties.

4. **Automobiles § 131— failing to stop at accident — erroneous instruction**

Defendant is entitled to a new trial where the warrant alleged that he left the scene of an accident involving an automobile operated by defendant and a deputy sheriff's automobile driven by Deputy Sheriff Charles R. Jones, but the charge of the court erroneously permitted the jury to find defendant guilty of the offense if they found beyond a reasonable doubt that defendant was involved in an accident with an N. C. Highway Patrol automobile being operated by Patrolman Early.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 23 October 1974 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 April 1975.

Defendant was charged in warrants with the following offenses: (1) failing to stop his vehicle upon the approach of a police vehicle giving an audible warning by siren in Case No. 74CR8710; (2) leaving the scene of a collision, involving a motor vehicle operated by defendant, without giving his name, address, operator's license number, and registration number in Case No. 74CR8711; (3) reckless driving in Case No. 74CR8712A; (4) driving ninety miles per hour in a fifty-five mile-per-hour speed zone in Case No. 74CR8712B.

Defendant entered pleas of not guilty to each charge and the cases were consolidated for trial.

State's evidence tended to show that on 22 September 1974 Patrolman Ray H. Early of the North Carolina State Highway Patrol was traveling on Queen Street in La Grange, Lenoir County. He commenced pursuit of a car which had failed to dim its lights. During an ensuing high speed chase, the car was clocked at ninety miles per hour and observed to disregard several stop signs. A collision occurred involving defendant's car, the patrol car, and a sheriff's department car which had joined in the chase. Defendant fled the scene of the collision and was pursued by cars from the sheriff departments of Lenoir and Greene Counties through parts of Lenoir and Greene Counties. Two more collisions occurred before defendant was apprehended in front of the Lenoir County Courthouse.

Defendant testified that he did not hear a siren and that he increased his speed. He noticed "lights" coming and panicked.

He then heard a siren and was afraid to stop. According to him, some shots were fired at his car after one of the collisions, and he decided to drive to the Lenoir County Courthouse. At the courthouse he was placed under arrest.

The jury found defendant guilty of each charge, and from judgments imposed thereon, defendant appealed.

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

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

MARTIN, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in failing to determine whether defendant knowingly and voluntarily waived his right to counsel. The record contains the following waiver of counsel:

"WAIVER OF RIGHT TO HAVE ASSIGNED COUNSEL

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

s/ WILTON CEE JOYNER

(Sworn to this 22nd day of October, 1974.)

CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open Court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the assignment of counsel; and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

This the 22nd day of October, 1974.

s/ ROBERT D. ROUSE, JR.
Signature of Judge"

Prior to arraignment, the trial judge again advised defendant in open court that if defendant could not afford counsel then the court would appoint counsel if defendant so desired. Defendant replied, "Well I choose just to tell what happened." This assignment of error is without merit. *See State v. Watson,* 21 N.C. App. 374, 204 S.E. 2d 537 (1974).

[2] Upon arraignment, defendant pleaded not guilty to three of the charges and pleaded guilty to the remaining charge of failing to stop for a siren. After the jury was selected and impaneled, the trial court allowed defendant to withdraw his plea of guilty and plead not guilty. On appeal and for the first time, defendant complains that the jury had not been selected and impaneled to try the charge of failing to stop for a siren.

A defendant may retract his plea of guilty and enter a plea of not guilty, but such retraction is not a matter of right. It is addressed to the sound discretion of the trial court. *State v. McClure,* 280 N.C. 288, 185 S.E. 2d 693 (1972). Defendant was obviously satisfied with the jury. His plea of guilty was changed at his own request, and he now attempts to take advantage of the resulting irregularity. His objection to the jury comes too late. Furthermore, no prejudice has been shown. This assignment of error is overruled.

[3] Warrants Nos. 74CR8710, 74CR8712A, and 74CR8712B allege that the offenses charged therein were committed in Lenoir County. In its charge to the jury on each of these offenses, the trial court instructed that if defendant committed such offenses on the public highways of either Lenoir or Greene County, then he could be found guilty.

Defendant takes exception to the charge in this regard and contends that the issue of his violation of any law in Greene County was not properly before the jury. He claims that the State has the burden to prove that the offenses were committed in Lenoir County; that it is impossible to determine whether the jury found defendant guilty based upon his conduct in Lenoir County or his conduct in Greene County; and that he is still subject to prosecution in Greene County.

We find no error in the court's charge. Defendant was chased continuously through parts of Lenoir and Greene Counties. His act of speeding, for example, was in violation of a state statute and would ordinarily constitute only one offense. It did not become two separate offenses of speeding simply by crossing the dividing line between the two counties.

Admittedly, there are circumstances under which a continuous series of acts by a defendant, all occurring on the same date as parts of one entire plan of action, may constitute two or more separate criminal offenses such that if they occur in different counties, a defendant may be tried for each in the county where it was committed. *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967). However, here defendant's continuous act of speeding in violation of a state statute constituted only one offense against the state, so that a conviction in Lenoir County would bar further prosecution for the same offense in Greene County. Lenoir County and Greene County were merely units of venue, and if acts constituting part of the commission of the speeding offense occurred in both counties, then each had concurrent venue. Lenoir County, being the first county in which criminal action was taken, became the county with exclusive venue.

The foregoing reasoning applies with equal force to the offenses charged in Warrants Nos. 74CR8710 and 74CR8712A.

[4] Warrant No. 74CR8711 alleges that defendant did unlawfully and wilfully leave the scene of a collision involving an automobile operated by defendant and a deputy sheriff's automobile driven by Deputy Sheriff Charles R. Jones. The charge of the court erroneously permits the jury to find defendant guilty of this offense if they find beyond a reasonable doubt that defendant was involved in an accident with a North Carolina Highway Patrol automobile being operated by Patrolman Early. Defendant is awarded a new trial in Case No. 74CR8711.

In Case No. 74CR8710—no error.

In Case No. 74CR8711—new trial.

In Case No. 74CR8712A—no error.

In Case No. 74CR8712B—no error.

Judges BRITT and HEDRICK concur.

HENRY J. KLEIN, ADMINISTRATOR FOR NATALIE LISIEWICZ KLEIN, SUBSTITUTE PLAINTIFF v. AVEMCO INSURANCE COMPANY

No. 7510DC154

(Filed 2 July 1975)

1. **Insurance § 147— airplane insurance — partial payment of premium due — effect**

Where insured failed to make an installment payment on an airplane insurance policy premium when due and the insurer sent insured a notice that the policy would be cancelled if the entire unpaid balance were not paid by a certain time, payment by the insured of the amount of a regular installment payment did not keep the policy alive for the fractional part of the year which the payment bears to the whole payment.

2. **Insurance § 147— airplane insurance — waiver of right to cancel — acceptance of late payments**

Defendant insurer did not waive its right to cancel an airplane insurance policy for failure of insured to pay a premium installment in apt time by its reinstatement of the policy on other occasions when insured made late premium payments.

3. **Insurance § 147— airplane insurance — right to cancel — condition of keeping policy in effect**

Where defendant insurer had the right to cancel a policy of airplane insurance for nonpayment of a premium installment when due, and insured failed to make an installment payment when due, the insurer had the right to require the insured to pay the full unpaid balance of the premium in order to keep the policy in effect.

4. **Rules of Civil Procedure § 56— summary judgment — no necessity for findings of fact**

The trial court need not make findings of fact in passing on a motion for summary judgment.

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 13 December 1974 in District Court, WAKE County. Heard in the Court of Appeals 17 April 1975.

Plaintiff filed a complaint on 1 November 1973 alleging that she purchased an airplane insurance policy from the defendant; that the policy was in effect on 28 July 1973, when the airplane crashed and was damaged in an amount exceeding $5,000, and that the defendant refused to compensate plaintiff for the damage to her airplane.

Defendant answered denying that the policy was in effect on 28 July 1973 and asking that plaintiff's cause of action be dismissed. Subsequently, defendant filed a motion for summary

judgment alleging there was no genuine issue as to any material fact, and defendant was entitled to a judgment as a matter of law. In support of the motion defendant submitted the affidavit of William B. Shoemaker, its Supervisor of Accounts Receivable. In this affidavit Shoemaker stated that on 11 July 1973 defendant sent plaintiff a notice stating her policy would be cancelled on 22 July 1973 unless a premium payment of $191.50 was received by that date; that on 16 July 1973 defendant received a payment of $38.30, but that no other payments were received before 22 July 1973 and the policy was then cancelled.

Plaintiff died while the action was pending, and, on motion, her administrator was substituted as plaintiff.

In opposition to defendant's motion for summary judgment plaintiff filed an affidavit, a deposition and several exhibits, which tended to show that the airplane had been insured with the defendant for several years; that on 16 January 1973 the policy was renewed for a period of one year for a total premium of $383, to be paid in ten monthly installments of $38.30 each, beginning 16 January 1973; that most of the monthly payments were not made on time; that in March and in May of 1973 defendant sent plaintiff cancellation notices threatening to cancel the policy unless the premiums were paid immediately; that these cancellation notices were followed by reinstatement notices when the payments were received; that by June of 1973 plaintiff had paid five monthly installments, and five monthly installments totalling $191.50 remained unpaid; that on 11 July 1973 defendant sent plaintiff a cancellation notice stating that her policy would be cancelled on 22 July 1973 if $191.50, the "full unpaid balance due" was not paid by that date; and finally that plaintiff already had made her sixth monthly payment of $38.30 on 10 July 1973 and she paid her seventh installment of $38.30 on 27 July 1973.

The affidavit of defendant's employee Shoemaker, showed further that inasmuch as the "full unpaid balance due" was not paid by 22 July 1973, plaintiff's policy was cancelled as of that date; that unearned premiums of $150 were credited to the policy, and finally that the unearned premium less the balance of payments due in the amount of $114.90 resulted in a refund of $35.10, which was mailed to plaintiff on 5 September 1973.

The trial court granted summary judgment for the defendant and plaintiff appealed.

Vaughan S. Winborne for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by C. Ernest Simons, Jr., for defendant appellee.

MORRIS, Judge.

[1] It is first contended that since plaintiff paid seven of the ten premium installments, the policy should be considered as remaining in effect for seven-tenths of the year, or 255 days, which would mean the policy continued in force until 28 September 1973, well past 28 July 1973, the date when the airplane was damaged. Plaintiff urges that even without considering the last payment, the policy should be considered as having remained in force for six-tenths of the year, or 219 days, which would mean the policy continued in effect until 23 August 1973. We disagree.

> "It is elemental law that the payment of the premium is requisite to keep the policy of insurance in force. If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. *Partial payment, even when accepted as a partial payment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment.* (Citation omitted.)" (Emphasis supplied.) *Clifton v. Insurance Co.*, 168 N.C. 499, 499-500, 84 S.E. 817 (1915).

Plaintiff next argues that by the acceptance of the last two payments and its past conduct as to late payments, defendant waived its right to insist on immediate payment of the premium installments and to require a forfeiture of the policy for delay in payment. We find no merit in this contention.

With respect to the last two payments actually received by the defendant, we note that the payment sent by plaintiff on 10 July 1973 was for the premium payment due in June. Defendant had earned the full amount of that payment. Similarly, defendant had earned a portion of the payment sent by plaintiff on 27 July 1973, since, under the terms of the cancellation notice, coverage was in effect until 22 July 1973. Plaintiff was entitled to and did receive a refund amount of $35.10, which represented unearned premiums subsequent to 22 July 1973.

[2] Turning to the question of whether defendant's past conduct as to late payments amounted to a waiver, we note that

paragraph 20 of the policy, which is entitled "Cancellation for Non-payment of Installment Premium—All Coverages," in pertinent part, provides as follows:

> "Upon the failure of the named insured to pay any installment of the premium, the insurance shall cease and terminate, provided at least ten (10) days notice is mailed by the company to the named insured at the address shown in this policy stating when thereafter such cancellation shall become effective."

All of the evidence in the case at bar shows that the defendant sent the plaintiff notice of cancellation of the policy in accordance with the above terms each time plaintiff was delinquent in the payment of premiums. In each instance the policy was reinstated only after the receipt of the necessary premiums. Defendant was in no way obliged to reinstate the policy at any time after plaintiff's default in the payment of premiums, and, in our opinion, plaintiff may not now complain when defendant has elected to cancel the policy for the nonpayment of premiums.

[3] Furthermore, we conclude that, having the right to cancel the policy when premiums were not paid when due, defendant clearly had the right to state the conditions under which the policy could be kept in force. Here the conditions were payment of the full unpaid balance of $191.50 by cashier's check or money order before 22 July 1973. Plaintiff did not comply with these conditions and may not now complain.

Our Supreme Court has held that:

> " 'If after a breach of the conditions of the policy the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they still recognize the validity of the policy and consider him as protected by it, and induce him to incur expense they will be deemed to have waived the forfeiture and will be estopped from setting it up as a defense.' " *Perry v. Ins. Co.*, 132 N.C. 283, 288, 43 S.E. 837 (1903), citing *Grubbs v. Ins. Co.*, 108 N.C. 472, 13 S.E. 236 (1891), and 23 Am. St. 62.

Here the notice of cancellation on 22 July 1973 was clear and unambiguous. Defendant in no way induced or led plaintiff to believe the policy would be kept in force after 22 July 1973 in any manner other than payment of the full unpaid balance of premiums.

[4] Plaintiff's only remaining contention is that the judgment entered by the trial court is improper because it contains no findings of fact or conclusions of law. As we noted in *Wall v. Wall,* 24 N.C. App. 725, 729, 212 S.E. 2d 238, 241 (1975),

> ". . . it is not necessary for the trial judge in passing on motions for summary judgment to make findings of fact. The following from *General Teamsters, Chauffeurs & Helpers U. v. Blue Cab Co.,* 353 F. 2d 687, 689 (7th Cir. 1965), may be instructive:
>
> 'The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented.' "

For the foregoing reasons the decision of the trial court granting defendant's motion for summary judgment is hereby affirmed.

Affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. ROGER ALLEN CARON

No. 7510SC211

(Filed 2 July 1975)

Arson § 4— setting fire to paint and body shop — sufficiency of evidence

In a prosecution for feloniously setting fire to a building used as a business, evidence was sufficient to be submitted to the jury where it tended to show that the building burned housed a body and paint shop operated by defendant, the fire was caused by someone setting fire to lacquer thinner, defendant who was summoned to the scene had smut on his clothes, face and hands, and insurance policies on the building and contents were in defendant's name.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 20 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 13 May 1975.

Defendant was tried on a charge of feloniously setting fire to a building used as a business. The building housed a body

and paint shop operated by defendant and was unoccupied at the time of the fire. He was found guilty and judgment imposing an active prison sentence was entered.

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

William A. Smith, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant contends that the evidence was insufficient to take the case to the jury. The State's evidence, in part, tended to show the following.

On 22 January 1974 at 4:01 a.m., Raleigh Fire Chief S. J. Talton participated in responding to a fire at Caron Body Shop located at 705 North Person Street behind Mordecai Florist. Chief Talton and other firemen arrived at the building at 4:04 a.m. and proceeded to extinguish the fire.

Talton then entered the building and immediately sensed the heavy odor of lacquer thinner. He examined the building and (on cross-examination) said he estimated that the fire began 45 minutes to an hour before his arrival. He diagnosed the blaze as a "flash over" fire, a very hot fire which will not burn long because it lacks the necessary oxygen for the amount of fuel in the building.

Without objection Talton further testified as follows. The fire started in the northeast corner of the building and flashed across to the southwest corner. The second window from the northeast corner of the building had been broken and the glass had fallen on the inside of the building. The floor sloped downward from the northeast corner to the southwest corner, there being a drop of some three to four inches from the center of the building to the southwest corner. A 55 gallon drum containing lacquer thinner was found on the floor in the center of the building and was approximately one-third full. The right leg of the stand supporting the drum was broken and marks were on the leg. The drum was on its side with the spout on the face of the drum so situated that it did not touch the floor. The spout was ruptured where it screwed into the barrel and was dented on the left side. There was so much lacquer thinner on the floor that it had to be washed out.

The floor was dirty except there was a clean area about a foot and a half wide where there had been a swirling fire, apparently the result of burned off lacquer thinner. This clean area was in the form of a trail leading from the door back to the drum and from the door over to the window. It circled around the window, went between the cars in the shop and came back to the door. The floor area around the 55 gallon drum was also clean. There was evidence of trash on other areas of the floor.

Talton further testified that "a person would be dead if he stood inside and set the fire. He could not have survived the explosion."

Defendant was called at his home to notify him of the fire and he arrived at the scene some thirty minutes later. Talton testified:

> "When I saw him, I had reason to believe that the fire had been intentionally set. When Mr. Caron drove up, he was dirty which is natural for a working man, but he was smutty looking and had soot coming out of the corner of his nose and up and around about a half inch over his nose. I noticed smut on his clothes, on his face and hands. He was dressed in work clothes. It was not a clean uniform. I am sure that I saw the smut and not grease or oil."

Defendant gave statements to Officer R. B. Tant on two separate occasions. Tant got the first statement from defendant on the afternoon of 23 January 1974 as part of his normal investigation of the fire. Defendant was not a suspect at this time, but was interviewed because he operated the body shop. Defendant told Tant that he had two insurance policies on his business—a $20,000.00 policy on contents in the building and a $5,000.00 policy covering up to five vehicles inside the building. Defendant added that on the night of the fire he had left the building at approximately 7:10 p.m. on 21 January 1974 and named several persons who were at the building at the time he left. Defendant told the officer, "I can't explain why there was any soot on my face when I got back to the fire."

On the evening of 23 January, defendant called Officer Tant, informed him that his earlier statement was not correct and said that he wished to correct the statement. Tant set up an appointment at the police station for the afternoon of 25 January. Defendant told Tart that on the night of the fire he had

returned to the body shop following the late movie on television and had stayed there for about thirty minutes. The only work he did while there was to empty the trash. Defendant estimated that he left the shop about 2:30 a.m., stopped at a coffee shop and returned to his home at about 3:00 a.m.

At the time of the fire the body shop was operated by defendant and the insurance policies, effective 25 April 1973, were in defendant's name, doing business as Roger A. Caron Body Shop. On 9 August 1973 defendant formed a partnership with Charles Edward Caudle and the insurance policies were placed in the name of both men, Caron and Caudle, doing business as "C and C Body Shop." On 3 January 1974, following some disagreement between Caron and Caudle, the policies were placed back in defendant's name, doing business as Caron Body Shop. At this time the amount of fire insurance was increased from $8,000.00 to $20,000.00. Caudle was not told of the changes in the insurance. Following several disagreements between Caudle and defendant it was agreed that Caudle would leave the business. He was supposed to have left during the week that the fire occurred. Caudle's personal boat was in the building at the time of the fire and was destroyed.

Caudle testified that Caron purchased a 55 gallon drum of lacquer thinner on the day before the fire. He built a stand and placed the drum on it. At the time there was another 55 gallon drum of lacquer thinner in the building which had approximately 30 gallons left in it after three to four months of use.

Defendant offered evidence that his wife had loaned him the money to finance his business. Defendant was habitually dirty because of the nature of his job in the body shop, there was a shortage of lacquer thinner at the time defendant purchased the 55 gallon drum of thinner, and that defendant's change of insurance was initiated through a recommendation of a bookkeeper in his accountant office. Defendant did not testify.

When the evidence is considered in the light most favorable to the State it is sufficient to take the case to the jury on every element of the offense charged. The structure that was burned falls within the definition of the statute. The evidence of the incendiary origin of the fire and that it was started by defendant is substantial. Defendant's motion for nonsuit was properly overruled.

Defendant's other assignment of error is that the court erred in that portion of the charge to the jury to the effect that defendant's failure to testify was not to be considered against him. The instruction was not requested by defendant. Our Supreme Court has repeatedly said that, in the absence of a request, it is the better practice to give no instruction concerning the failure of defendant to testify. The court has also said many times that if the instruction is given, the judge should use the language employed in the statute. Although we do not approve the form of the instruction given in this case, it does not constitute prejudicial error and require a new trial.

We find no prejudicial error in defendant's trial.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ARTHUR WHITNEY

No. 7526SC182

(Filed 2 July 1975)

1. **Criminal Law § 66— in-court identification — pretrial showup**

Burglary victim's in-court identification of defendant was of independent origin and not tainted by a showup at which defendant was exhibited to the victim while sitting alone in a police car.

2. **Criminal Law § 48— no admission by silence**

An officer's testimony concerning a statement, made in defendant's presence, that defendant had been caught as a "Peeping Tom" was hearsay and not competent as an implied admission where the statement was not made to defendant but to an officer and the statement did not call for a reply.

3. **Criminal Law § 34— evidence of other offenses**

In a prosecution for burglary, the trial court erred in permitting a witness to testify that defendant broke into her house and committed the offenses of rape and crime against nature ten days before the alleged burglary in question since the evidence went beyond the scope necessary for the limited purpose for which it was offered of showing identity and *modus operandi.*

APPEAL by defendant from *Falls, Judge.* Judgment entered 13 November 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1975.

Defendant was indicted on a charge of first degree burglary. He pleaded not guilty and was tried before a jury.

Prior to trial defendant moved to suppress in-court identification. The court conducted a *voir dire* hearing, made findings of fact, and concluded that the identification testimony was admissible. On *voir dire* and again at trial Patricia Bailey, of 1932 Pegram Street, Charlotte, testified that on 10 June 1974, around 3:00 a.m., she had been asleep in her bedroom when she awakened and saw a young man with her pocketbook in his possession. He put his hand to his lips and approached the bed. There was a light on in the room, and Miss Bailey looked into the man's face. Then he touched her and she screamed. The man fled with the pocketbook. He apparently had entered through a torn window screen.

Approximately 24 hours later Officer A. L. McCoy brought Arthur Whitney to Miss Bailey's home and told her he had a suspect. She identified Whitney sitting alone in the police car. She was later shown six to eight photographs from which she selected that of defendant.

Officer McCoy testified that he investigated Miss Bailey's complaint on the night of June 10, and she gave the following description of the man whom she had seen in her room: young Negro male, age 16 to 20 years, 5'6" to 5'7" in height, medium complexion, medium bush, wearing blue jeans and tennis shoes. The next night, about 2:00 a.m., two Negro males brought Arthur Whitney to Officer McCoy and reported that they had caught him trying to peep in their porch window. Whitney told McCoy his name and address, the 1900 block of Pegram Street. Since he fitted the description given by Miss Bailey, the officer immediately took him to the witness's home.

Dorothea Faulkner, of 1621 Pegram Street, testified that on 31 May 1974, at approximately 2:00 a.m., she had been sleeping on her sofa when she awoke and saw Arthur Whitney bending over her with a razor. He raped her and forced her to to perform an act of fellatio. He then fled with money from her pocketbook. It was discovered that a screen was missing from a bedroom window. The court instructed the jury to consider Mrs. Faulkner's testimony only as it tended to show intent, design, guilty knowledge or the identity of defendant.

The jury returned a verdict of guilty as charged and the court sentenced defendant to life imprisonment. He appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Parks H. Icenhour and Associate Attorney Isaac T. Avery III, for the State.

Richard M. Mitchell for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to suppress the in-court identification testimony of Patricia Bailey on the ground that it was tainted by an improper show-up procedure. The rule, as set out in *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974), is as follows:

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts." [citations omitted.]"

Accord, State v. Shore, 285 N.C. 328, 204 S.E. 2d 682 (1974). In its order denying defendant's motion, the court found that Miss Bailey's identification "was not tainted in anywise by any suggestive remarks made by the police, but was based solely and exclusively upon her identification of the defendant in her bedroom shortly after 3:00 a.m. of June 10, 1974 . . . . " These findings are supported by competent evidence, and we are bound by them.

[2] Defendant further contends that it was error to allow testimony concerning the statement, made in his presence, that he had been caught as a "Peeping Tom." We agree. The trial court apparently treated this evidence as an implied admission or an admission by silence, an exception to the hearsay rule. *See generally* McCormick's Handbook of the Law of Evidence § 270, at 651-53 (1972). In *State v. Guffey,* 261 N.C. 322, 325, 134 S.E. 2d 619, 621 (1964), the North Carolina Supreme Court said:

> "To render evidence of an admission by silent acquiescence competent, the statement must have been made in

> the presence and hearing of the defendant, he must have understood it, he must have understood that it contained an accusation against him, it must be of such content or made under such circumstances as to call for a reply, that is, it must be such as to render a reply natural and proper, the declarant or some person present must have the right to the information, and there must have been an opportunity for reply."

See also 2 Stansbury, N. C. Evidence (Brandis rev.), § 179. The statement in question was made not to defendant but to a police officer as defendant was being placed in custody. It did not call for a reply. Officer McCoy's testimony was proffered in lieu of testimony by the men who made the statement. It was hearsay and therefore incompetent.

[3] Finally, defendant contends that the court erred in allowing Dorothea Faulkner to testify that defendant broke into her house and committed certain sex offenses ten days before the alleged burglary at the Bailey residence. Again we agree. Under the general rule, evidence of other offenses is inadmissible for the purpose of proving the offense charged. 1 Stansbury, *supra*, § 91. It is true that evidence relevant to the questions of identity or *modus operandi* is admissible notwithstanding the fact that it involves an independent crime. *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944). "But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. [citations omitted.]" *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923), *quoted in State v. McClain*, 240 N.C. 171, 177, 81 S.E. 2d 364, 368 (1954). *See also State v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901). In the case at bar, such evidence went beyond the scope necessary for the limited purpose for which it was offered and included details which could only relate to defendant's character and inflame the mind of the jury. Defendant was indicted on a charge of burglary, not rape. We hold that the admission of irrelevant portions of Mrs. Faulkner's testimony was prejudicial error requiring that defendant be given a new trial.

New trial.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. CHARLES LARRY WOLFE

No. 7517SC315

(Filed 2 July 1975)

1. **Searches and Seizures § 1— heroin in plain view — warrantless seizure proper**

An officer who saw a transparent plastic bag containing small tinfoil packets on the floorboard on the driver's side of a car while the officer was standing beside the car needed no warrant to seize the contraband which was in plain view.

2. **Criminal Law §§ 34, 96— defendant's guilt of other offense — withdrawal of evidence**

Defendant was not prejudiced by a State witness's reference to the fact that defendant was on parole for an offense similar to that for which he was being tried where the trial court, immediately after the testimony was given, instructed the jury not to consider it.

3. **Narcotics § 4— heroin in car driven by defendant — sufficiency of evidence of possession**

In a prosecution for possession of heroin, evidence was sufficient to be submitted to the jury where it tended to show that heroin was found in a car driven but not owned by defendant and defendant had had exclusive control of the car for three days when the heroin was discovered.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 23 January 1975 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 17 June 1975.

Defendant was charged in bills of indictment with possession of heroin, a controlled substance included in Schedule I of the North Carolina Controlled Substances Act. He was found guilty, and a sentence of two years was imposed, with a recommendation that defendant be paroled after serving eight months.

At 3:50 p.m. on 9 October 1974, Roger Fisher, a trooper with the State Highway Patrol, was called to the scene of an accident on N. C. 87. A 1960 Chevrolet was lying upside down in a ditch near the highway. Its driver, the defendant, was sitting in the front seat of an ambulance. He was very upset and nearly hysterical. Soon after Fisher got to the scene of the accident, a wrecker arrived and began to remove the car from the ditch. Fisher directed the wrecker operator to tow the car down the road to relieve the traffic congestion caused by the accident. About one-quarter mile down the road, the wrecker pulled over.

Fisher approached the car and, while standing beside it, noticed a transparent plastic bag containing small tinfoil packets. The bag was lying on the floorboard on the driver's side of the car. Fisher had reasonable grounds to believe that the packets inside the bag might contain illegal substances, so he took possession of the bag. Fisher then contacted the State Bureau of Investigation. The packets contained heroin.

Special Agent W. M. Rigsby of the State Bureau of Investigation later spoke with the defendant at the Rockingham County Jail. The defendant admitted he was the driver of the wrecked car. Although the defendant was not the owner of the car, he had had exclusive control of the car for approximately three days prior to the accident.

Defendant did not offer evidence.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Benjamin R. Wrenn, for the defendant-appellant.

BROCK, Chief Judge.

[1] Defendant raises three arguments for our consideration. In his first argument defendant challenges the application of the plain view doctrine to this case. Second, defendant argues that the trial court should have declared a mistrial when it became known that defendant was on parole for a similar offense. Third, defendant argues that his motion for nonsuit should have been granted because there was only circumstantial evidence on which to convict defendant, the evidence having been found in a car operated, but not owned, by him.

Defendant's first argument warrants little discussion. "The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand." *State v. Harvey,* 281 N.C. 1, 11, 187 S.E. 2d 706 (1972). This doctrine clearly is applicable here. Fisher saw the packets while standing outside the car, looking into it. He needed no warrant. The contraband was in "plain view." This argument is overruled.

[2] Defendant contends his motions for mistrial should have been granted when the following responses were elicited from the State's witnesses on cross-examination:

> "Q. And you stated that he had sole custody of the vehicle and stated that he had no knowledge of any drugs?
>
> "A. No, sir, we had talked about drugs, the fact that he had just gotten out of prison for drugs."
>
> * * *
>
> "Q. What did he say when Mr. Rigsby asked if he had any knowledge of drugs?
>
> "A. You want me to—well he stated that he, to my knowledge, was trying to stay away from drugs, that he had just gotten out of prison and was on parole for drugs."

Defendant objected to these responses, and the trial judge immediately instructed the jury not to consider the testimony. "[A] motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion, and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye,* 281 N.C. 592, 596, 189 S.E. 2d 481, 483 (1972). No abuse of discretion is shown here. Defendant's second argument is overruled.

[3] In defendant's final argument he contends that the evidence was insufficient to support a conviction and asserts that his motion for nonsuit should have been granted. It is well known that on a motion for nonsuit the evidence is to be considered in the light most favorable to the State.

Neither party has cited the following case which, in our opinion, controls the disposition of this argument. In *State v. Glaze,* 24 N.C. App. 60, 210 S.E. 2d 124 (1974), the defendant moved for nonsuit, arguing that the evidence showed only that burglary tools were found under the hood of a car that the defendant was driving, but did not own. We noted that had the defendant owned the car, an inference that he was in constructive possession would have arisen. *State v. Glaze, supra* at 64. Because the owner of the car could have placed the tools under the hood, the defendant there contended that the inference should not be allowed.

The same argument is made here. While it is true that people viewing the wreck milled about the car driven by

defendant, the trial judge found that "no one opened the doors or got in the car at any time after Fisher arrived. . . . " The car had been in defendant's exclusive control for three days when the accident occurred.

In *Glaze* we said:

> "The driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Thus, where contraband material is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the owner of a vehicle loans it to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.
>
> "In the case at bar defendant offered no evidence concerning his knowledge of the contents of the car. In fact, the evidence indicates that defendant had control over the car and its contents. We believe, accordingly, that the State may overcome a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the contraband as to justify the jury in concluding that the contraband was in the accused's possession. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706."

Defendant's motion for nonsuit was properly denied.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. FRED JONES

No. 753SC287

(Filed 2 July 1975)

Assault and Battery § 5— pointing gun at two officers — two assaults

There is no merit in defendant's contention that there was but one assault on police officers when defendant held a gun on two officers, and defendant was properly prosecuted on separate bills of indictment for two assaults.

State v. Jones

APPEAL by defendant from *Browning, Judge.* Judgments entered 5 February 1975 in Superior Court, CARTERET County. Heard in the Court of Appeals 11 June 1975.

Defendant was charged in four separate bills of indictment with three counts of felonious assault with a firearm upon a police officer and one count of felonious assault with intent to kill upon one J. T. Brown. Of the three counts of felonious assault upon a police officer, two counts arise from the defendant's holding a gun on two officers. The fact that defendant was charged with two counts of assault for holding a gun on the officers, rather than one count of assault, is the basis of this appeal. At the close of the State's evidence, defendant's motion for nonsuit as to the charge of assault with intent to kill J. T. Brown was allowed. Defendant was found guilty of the other three charges. A sentence of four years on each count was imposed. The sentences are to run concurrently.

At 10:44 p.m. on 24 November 1974, officers Condie and Wilson arrived in separate police cars at 1303 Arendell Street in Morehead City. A man was lying on the porch of the house there. A chair was overturned, and the man was moaning. Condie and Wilson went to his aid and discovered that the man was "pure drunk." While they were kneeling over the man, Wilson heard someone say something. Defendant came out of the house pointing a shotgun at Wilson. Wilson nudged Condie, and Condie turned to face the defendant, who pointed the gun at him. Defendant also carried a butcher knife in his belt. He ordered Condie and Wilson to carry the drunken man into the house. They picked him up and put him on his feet in such a manner that the man shielded the officers from the defendant. While the defendant was trying to point the gun at them, Condie and Wilson jumped off the porch and sought cover. Wilson made his way to his patrol car and radioed for assistance. As Condie attempted to approach his car, defendant emerged from the house and shot at Condie's car. Condie resumed approaching the car when the defendant went back inside. However the defendant immediately reemerged and shot at Condie. Other men started to arrive about this time, and the defendant left 1303 Arendell Street. When he was later apprehended, defendant was carrying a loaded 12-gauge, double-barrel shotgun.

The defendant testified that he was carrying the gun and the knife as protection against some dogs he had anticipated encountering when he went to his brother's house earlier that day.

He arrived at 1303 Arendell Street at about 10:30 p.m. A drunken man was lying on the porch, and "the law" arrived to investigate. Defendant went to the porch. He carried his shotgun, loaded but opened. After some conversation, Condie and Wilson left. The defendant thought he saw someone lurking around the house, so he fired his gun in the air. He then walked about seven or eight blocks away to another house where the officers found him. Defendant testified that when he was called out of the house by loudspeaker, he came out carrying the opened gun. Defendant dropped the gun and sat down on the steps where "fifteen or twenty of them jumped on top of me. . . . "

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

Wheatly & Mason, by L. Patten Mason, for the defendant-appellant.

BROCK, Chief Judge.

This appeal presents two issues for our resolution. First, defendant argues that it was error to allow him to be prosecuted on two separate bills of indictment charging assault on Condie and Wilson; defendant contends there was but one assault on the officers. Second, defendant argues that the trial judge violated G.S. 1-180 in charging the jury.

Defendant bases his first argument on *State v. Ballard,* 280 N.C. 479, 186 S.E. 2d 372 (1972), and *State v. Potter,* 285 N.C. 238, 204 S.E. 2d 649 (1974). *Ballard* involved a double jeopardy issue. The defendant robbed an A & P store and went to trial on an indictment charging him with armed robbery by threatening the life of, and taking $1,501.17 from, one Kane Parsons. Parsons was an employee of the A & P; the money actually had been taken from two other employees, Britt and Smith. Nonsuit was allowed for variance between the indictment and proof. A second trial was held on a new indictment in all respects the same as the first except it alleged that the lives of Britt and Smith were endangered and that the $1,501.17 was taken from Britt and Smith. The defendant was convicted, and the Supreme Court reversed, holding that the nonsuit at the first trial precluded further prosecution.

In *Potter* defendant was charged in one indictment with the armed robbery of $265.00 from one Hall. A second indictment charged defendant with the armed robbery of $265.00

from one Harrell. Hall and Harrell were employees of a store; the money ($265.00) belonged to their employer, not them. Citing *Ballard,* the Court stated:

> "Although double jeopardy and collateral estoppel are not directly involved in the present case . . . when the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed." 285 N.C. at 253.

The Court ordered not only that the two verdicts were to be considered the same as a single verdict of guilty of armed robbery, but also that the judgments were to be considered as if a single judgment had been pronounced.

In our opinion defendant's first argument is untenable. This case is not analogous to the violations of G.S. 14-87, discussed in *Ballard* and *Potter,* wherein the money of one business enterprise is taken, albeit the money is taken from more than one employee. Here we think it clear that there were at least three separate assaults upon police officers: Condie was assaulted when defendant fired at him, and both he and Wilson were assaulted when defendant held his gun on each of them. Defendant's argument, although novel, is inapplicable to this kind of situation. Had both Condie and Wilson been shot and killed by defendant, we would not be sympathetic to an argument that only one murder took place. Furthermore the sentences for the assaults on officers Condie and Wilson are specified to run concurrently with the sentence for the second assault on Condie. There is no dispute over defendant's conviction on this latter charge. We fail to see a practical reason for defendant's efforts to contest the convictions concerning which he has appealed.

Defendant's second argument challenges certain portions of the trial court's instructions to the jury. We have read the entire charge and are of the opinion that the charge both ably stated the law and applied that law to the facts.

No error.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF: THE WILL OF E. C. EDGERTON, SR., DECEASED

No. 754SC284

(Filed 2 July 1975)

Rules of Civil Procedure § 56— hearing on motions for summary judgment — failure to give 10 days' notice

Where the executrix and executors filed a motion asking the clerk to dismiss a caveat to the will in question, the clerk transferred the motion to the superior court judge, the judge allowed movants' oral requests to amend their motions to dismiss to show that they were proceeding under Rule 12(b)(1),(2) and (6) and Rule 56, and the court conducted a hearing in which oral testimony was allowed, thereby converting the motions to dismiss into motions for summary judgment, the trial court erred in hearing the motions without first giving caveator 10 days' notice prior to such hearing.

APPEAL by caveator from *Walker, Judge.* Judgment entered 4 December 1974 in Superior Court, SAMPSON County. Heard in the Court of Appeals 10 June 1975.

This is a caveat proceeding instituted by E. C. Edgerton, Jr., (hereinafter sometimes referred to as caveator) to have set aside the purported last will and testament of E. C. Edgerton, Sr. Caveator appeals from judgment dismissing the caveat on the ground that caveator did not have proper standing to contest the purported will.

The proceedings are summarized in pertinent part as follows:

(1) Testator died on 30 December 1973 and on 7 January 1974 his widow (Mrs. Edgerton) caused to be probated in common form a paper writing dated 20 August 1973 purporting to be his last will and testament. Under the purported will Mrs. Edgerton was given one-third of the net estate, modest provision was made for a sister of testator, but the greater part of the estate was left in trust for the use and benefit of the North Carolina Yearly Meeting of the Religious Society of Friends (Society of Friends) and certain of its programs, a local Quaker church and the Salvation Army. No provision was made for caveator, a son of the testator.

(2) On 18 September 1974 E. C. Edgerton, Jr., filed a caveat to the purported will, alleging lack of mental capacity on the part of testator and undue influence. The clerk thereupon

issued appropriate orders and citations required by law and the citations were duly served on all parties having an interest in the estate.

(3) On 2 October 1974 Mrs. Edgerton, Ed Mendenhall, and Scott Parker, who had qualified as executrix and executors of the estate, filed a motion asking that the caveat be dismissed for the reason that caveator did not have standing under G.S. 31-32 to file a caveat. Attached to the motion as an exhibit is a paper writing bearing date of 9 May 1973, purportedly signed by caveator, in which writing the movants claim caveator renounced and released all rights in his father's estate. On 15 October 1974 the Society of Friends filed a similar motion. Notices were issued and served advising caveator and others interested in the estate that movants would make their motions to dismiss before the Clerk of Superior Court of Sampson County at 10:00 a.m. on 17 October 1974.

(4) On 15 October 1974 the Society of Friends filed an answer to the caveat, pleading several defenses, including the paper writing purportedly signed by caveator.

(5) On 16 October 1974, the clerk, on his own motion, entered an order determining as a matter of law that the motion to dismiss filed by the executrix and executors must be passed on by a judge of the superior court for that the filing of the caveat immediately transferred the proceeding to the superior court. The clerk ordered that the motion be heard "by the Judge Presiding at the next ensuing term of the Superior Court of Sampson County to be held on November 11, 1974 at 10:00 a.m. o'clock, subject to any motion hereinafter filed by any party for a change in said time."

(6) On 18 October 1974 the executrix and executors filed an answer to the caveat, pleading several defenses including the paper writing purportedly signed by caveator.

(7) On 7 November 1974 caveator filed a response to the 2 October 1974 motion to dismiss. In his response, caveator alleged, among other things, that the paper writing dated 9 May 1973 does not constitute a valid release or renunciation of any rights which he might have in the estate.

(8) When the cause came on for hearing (evidently on 11 November 1974), upon oral requests of the movants the court allowed them to amend their motions to dismiss to show that

the motions were made "pursuant to the provisions of Rule 12(b)(1), (2) and (6) and Rule 56, Rules of Civil Procedure, G.S. 1A-1, and any and all other applicable rules." Caveator moved for a continuance of the hearing until another session of the court for the reason that, among others, attorneys for the caveator had not had sufficient time to prepare for a hearing. The court denied the motion to continue until a subsequent session but, in its discretion, postponed the hearing until 14 November 1974.

(9) At the hearing (evidently conducted on 14 November 1974), movants introduced three witnesses, including Mrs. Edgerton, whose testimony related primarily to the circumstances surrounding the execution of the alleged release by caveator. Caveator objected to all evidence presented by movants and offered no evidence. Upon the pleadings filed and evidence offered, the court entered judgment finding numerous facts, concluding that caveator had released and renounced any and all rights "which he might have as a prospective heir of" testator and that he did not have proper standing to caveat the will, and ordering that the caveat be dismissed.

Caveator appealed.

McLeod & McLeod, by Max E. McLeod, and W. A. Johnson, for caveator appellant.

Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan, and Haworth, Riggs, Kuhn & Haworth, for propounders appellee.

BRITT, Judge.

Caveator contends that by allowing the movants to amend their motions and then conducting a hearing in which oral testimony was allowed, the trial court converted the motions to dismiss into motions for summary judgment, and that the court erred in hearing the motions without providing caveator with sufficient notice or time to prepare for the hearing. We think the contention has merit.

There is nothing in the record to show that when caveator appeared in superior court on 11 November 1974 that there was anything before the court except the motion filed by the executrix and executors asking the clerk to dismiss the caveat, which motion, on the clerk's initiative and over the objection of mov-

ants and caveator, was transferred to the judge for hearing. In fact, the record does not disclose that the motion to dismiss filed by the Society of Friends was ever transferred from the clerk. It is our view that 11 November 1974, when the court evidently allowed movants' oral requests to amend their motions to dismiss to show that they were proceeding under Rule 12(b)(1), (2) and (6) and Rule 56, was the earliest date that caveator had notice of any motion for summary judgment. G.S. 1A-1, Rule 56(c) expressly provides for at least 10 days' notice of the date set for the hearing on a motion for summary judgment.

Our Supreme Court has stated several times that ". . . [s]ince this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue . . . . " *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823 (1971); *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); and *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). *See also* J. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Intra. L. Rev. 1, 27 (1969).

By receiving oral testimony, the trial court clearly proceeded under Rule 56 and caveator was not given proper notice. G.S. 1A-1, Rule 12(b). For that reason, the judgment must be vacated.

We express no opinion as to the merits of the caveat or the validity of the writing purportedly signed by caveator. Under proper circumstances the validity and effect of the writing might be tested by motion for summary judgment.

The judgment is vacated and the cause is remanded for further proceedings.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JOHNNY DUNN

No. 7514SC88

(Filed 2 July 1975)

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

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that defendant pointed a rifle in the victim's face and demanded his money and defendant and his companions picked up the victim's groceries after they had threatened, beaten, and driven him away.

2. **Robbery § 5— armed robbery — failure to submit lesser included offenses — no error**

The trial court in an armed robbery prosecution did not err in failing to instruct the jury on lesser included offenses where the State's evidence showed that defendant was guilty, if guilty of any offense, of the offense charged, and where defendant's testimony at trial was that he was not present at all when the offense was committed.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 4 October 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 April 1975.

Defendant was charged in an indictment with the armed robbery of Phillip Fortune, a violation of G.S. 14-87. He pled not guilty.

At trial the State's evidence tended to show: On 26 February 1974 at approximately 8:45 p.m., Phillip Fortune, the prosecuting witness, was walking near the corner of Umstead and Dalton Streets in Durham carrying a number of grocery items valued at approximately $12.00. When he was under the street light on that corner, a man whom he identified at trial as defendant ran up to him, put a .22 caliber rifle in his face and said, "Give me your money." Defendant was joined immediately by Mike Harris and Dennis Harris, the latter of whom held Fortune while Mike Harris beat him in the face. Fortune dropped his groceries, broke away from the Harrises, and ran. Defendant told Fortune not to run and he shot at Fortune with the rifle. After hiding in some bushes, Fortune saw defendant and the others laughing and saw Mike Harris pick up the groceries as the three left. A .22 caliber rifle, obtained by Durham Police Officers from defendant's mother, was identified by Fortune as the weapon defendant pointed in his face.

Defendant testified that he was at his sister's house on 26 February 1974, that he did not own a rifle, and that he did not rob Fortune.

Defendant was found guilty as charged, and judgment was imposed on the verdict.

Attorney General Edmisten by Associate Attorney General Archie W. Anders for the State.

Ann F. Loflin for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the overruling of his motions for nonsuit. He contends that the evidence shows only that Fortune dropped the groceries in order to aid his escape and that it fails to show that the groceries were taken from Fortune's person by use of a rifle. We find the evidence amply sufficient to allow the case against defendant to go to the jury.

"The gravamen of the offense [of armed robbery, G.S. 14-87] is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Ballard,* 280 N.C. 479, 485, 186 S.E. 2d 372, 375 (1972). While in common-law robbery a taking is necessary, in armed robbery either the taking or the attempt to take will support a verdict under G.S. 14-87. *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964). In the present case the State's evidence showed that defendant pointed a rifle in Fortune's face and demanded his money. This evidence would be sufficient to submit the case to the jury because it satisfies the statutory requirements of an attempted taking by force or putting in fear by the use of firearms or other dangerous weapons. *See State v. Harris,* 8 N.C. App. 653, 175 S.E. 2d 334 (1970). The evidence that defendant and his companions picked up the groceries, after they had threatened, beaten and driven Fortune away, also satisfies the element of a taking. The evidence shows one continuing transaction amounting to armed robbery, with the elements of violence and of taking so joined in time and circumstance as to be inseparable. *See State v. Reaves,* 9 N.C. App. 315, 176 S.E. 2d 13 (1970). This assignment of error is overruled.

[2] Nor did the trial court err, as defendant now contends, in not instructing the jury on lesser offenses included in the crime

charged. Here, the State's evidence shows that defendant was guilty, if guilty of any offense, of the offense charged. Defendant's testimony at trial was that he was not present at all when the offense was committed, but was then at his sister's house. "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. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547 (1954). Defendant's testimony that he did not own a rifle does not create such a conflict in the evidence as to require submission to the jury of an issue as to common-law robbery.

Defendant assigns error to other portions of the charge, each of which we have carefully reviewed and have found no reversible error therein. Read contextually, the court's instructions were adequate and not misleading regarding how the jury should view defendant's testimony. Nor did the court err in charging that under the evidence in the case the taking away of the groceries from where they had been dropped by Fortune would in law be a taking of property from the person and presence of Fortune. *State v. Reaves, supra.*

Defendant finally contends that the trial court erred in denying his motions for a new trial and for judgment notwithstanding the verdict made immediately upon return of the jury's verdict. The record shows no basis presented for such motions and we find no error in their denial. Later, prior to the trial court's pronouncing sentence, defendant was allowed to state to the court that his testimony at trial was largely untrue. Defendant then stated what he then contended the true facts to be. That defendant may have committed perjury in his trial testimony is no basis for granting him a new trial.

In defendant's trial and in the judgment appealed from, we find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BATTLE

No. 757SC145

(Filed 2 July 1975)

1. **Jury § 7— challenge for cause — attitude toward undercover investigation**

In a prosecution for possession of LSD, the trial court did not err in allowing the State's challenge for cause of prospective jurors who stated that their feelings about undercover investigations would prejudice their decision as to the guilt or innocence of defendant.

2. **Criminal Law § 99— remarks by trial court — no expression of opinion**

Comments by the trial court to defendant while he was on the witness stand were made in an effort to assist defendant and to secure a clearer and more orderly recitation of the evidence and did not constitute an expression of opinion in violation of G.S. 1-180.

APPEAL by defendant from *Webb, Judge.* Judgment entered 19 November 1974 in Superior Court, NASH County. Heard in the Court of Appeals 6 May 1975.

Defendant was charged with possession of lysergic acid diethylamide, a Schedule I controlled substance, in violation of G.S. 90-95(a) (3). 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 five years, sentence to be served concurrently with the sentence imposed in 74CR14416, defendant appealed.

State's evidence tended to show that at approximately 5:45 p.m. on 6 September 1974 an undercover agent for the State Bureau of Investigation went to the defendant's trailer and attempted to purchase a large quantity of LSD; that the defendant informed the agent "that he had a thousand hits of LSD but he was going to sit on them and sell them one at the time"; that the defendant later agreed to sell the agent "five (5) dosage units of LSD"; and that the defendant handed "Five (5) tinfoil packets" of LSD to the agent and the agent gave the defendant "$15.00 in cash, a $10.00 bill and a $5.00 bill." Other evidence offered by the State tended to show that a chemist with the State Bureau of Investigation, who qualified as an expert in the field of chemical analysis, "performed an analysis on the contents of one of the aluminum foil packages" and found that it contained lysergic acid diethylamide, commonly known as LSD.

The defendant testified that he did not see the SBI agent on 6 September 1974; that he neither used drugs nor had anything to do with drugs, and that at the time of the alleged sale, he was at a baseball game. The defendant offered the testimony of several witnesses who stated that they saw the defendant at a baseball game at approximately 7:30 p.m. on the night in question. Several character witnesses for the defendant testified that his general reputation in the community was good.

The State offered rebuttal testimony on the question of whether there was a baseball game on the date in question and also offered testimony attacking the general character of the defendant.

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

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Howard A. Knox, Jr., and Robert D. Kornegay, Jr., for defendant appellant.

MORRIS, Judge.

The judgment in this case was entered 19 November 1974. The record on appeal was filed more than 90 days later, on 20 February 1975. No order was issued by the trial court extending the time for docketing the record on appeal. Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina provides that the record must be "docketed within ninety days after the date of the judgment, order, decree, or determination appealed from." Defendant's appeal is treated as a petition for a writ of certiorari which is granted in order that the case may be considered on its merits.

[1] At the trial the Assistant District Attorney was permitted to challenge for cause prospective jurors "who stated that their feelings about undercover investigations would prejudice their decision as to [the] guilt or innocence" of the defendant. In his first assignment of error defendant contends that the exclusion of these veniremen deprived him of his Sixth Amendment right to a jury which reflects a fair and representative cross-section of the community. We disagree. It is well established that "[e]ach party to a criminal trial is entitled to a fair and unbiased jury and may challenge for cause a juror who is

prejudiced against him." 5 Strong, N. C. Index 2d, Jury, § 7, Supp. p. 36. Furthermore, as our Supreme Court noted in *State v. Spence,* 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968),

> "According to the Federal Court decisions 'the function of challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.' The purpose of challenge should be to guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held.' (Citations omitted.)"

To insure the impartiality of the panel, it has been held that a prospective juror may be asked "whether he is so prejudiced against informers as to prevent him from giving the testimony of such person its lawful weight, and whether he would accord due weight to a paid investigator's testimony," 50 C.J.S., Juries, § 275(b), p. 1044; whether he is prejudiced against a detective, or law enforcement officers in general, annot. 99 A.L.R. 2d 7, 65-66, 71-72 (1965); and whether he is prejudiced against government agents making plans to procure evidence. *State v. Lovell,* 127 Kan. 157, 272 P. 666 (1928). In our opinion, a prospective juror likewise may be asked whether his feelings about undercover investigations would prejudice his decision as to the guilt or innocence of the defendant. Where, as here, prejudice is shown, the juror may properly be challenged for cause. This assignment of error is overruled.

[2] In his only remaining assignment of error defendant contends the trial judge violated G.S. 1-180 by making certain comments to the defendant while he was on the stand. We find no merit in this assignment of error. Counsel for the defendant candidly concedes that "the defendant had trouble getting his points across due to his lack of education and problems with expressing himself." We interpret the comments made by the trial judge as efforts to assist the defendant and to secure a clearer and more orderly recitation of the evidence.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. LARRY LESLIE AUSBORN

No. 7512SC304

(Filed 2 July 1975)

1. **Arrest and Bail § 3— arrest without warrant — when permissible**

An officer may arrest a person without a warrant when the officer has probable cause to believe that the person has committed a felony in his presence, and the officer may then search the person incident to the arrest. G.S. 15-41.

2. **Arrest and Bail § 5; Searches and Seizures § 1— acts constituting arrest — search incident thereto**

When an officer drew a revolver on the defendant, ordered the defendant to take his hand out of his pocket, to get out of his car, and to lean against the vehicle, and informed the defendant that he was suspected of being in the possession of cocaine, the defendant was "arrested" and placed in the custody of the officer just as effectively as he would have been had the officer formally stated that the defendant was under arrest; thus the search which followed defendant's leaning against the automobile was subsequent to and incident to a lawful arrest, and the material found and seized as a result thereof was properly admitted into evidence.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 21 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 June 1975.

The defendant was charged in separate bills of indictment, proper in form, with the felonies of (1) possession of heroin and (2) possession of cocaine.

The defendant pleaded not guilty and was found guilty of both charges. The court imposed an active prison sentence of six months in the heroin case and a sentence of five years, which was suspended for five years, in the cocaine case. Defendant appealed.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III for the State.

Elizabeth C. Fox for defendant appellant.

HEDRICK, Judge.

The defendant's four assignments of error raise the one question of whether the court erred in concluding that the search of the defendant's person was legal and that the controlled substances discovered pursuant to the search should be admitted into evidence.

With respect to the search of the defendant's person, the evidence disclosed the following: At about 11:00 p.m. on 19 December 1973, Special SBI Agent John Walker, who was assigned to the investigation of narcotics violations in Cumberland County, received a telephone call from a confidential informant who had given Walker reliable information with respect to drugs on at least ten prior occasions. The informant stated that the defendant was attempting to sell him cocaine at the King Cole Motel, that the defendant had the cocaine on his person, and that the defendant was preparing to leave the motel. He described the defendant as "a white male, about five feet ten inches tall, weighing about one hundred fifty-five pounds with long dark brown hair . . . . " The informant also gave Walker the license plate number of the defendant's automobile. Accompanied by several other officers, Agent Walker immediately proceeded to the King Cole Motel where he observed a white Chevrolet automobile bearing a license tag with the number given him by the informant. Several minutes later the defendant got into the automobile and drove into Fayetteville. The defendant parked his car on Hay Street in front of Rick's Lounge, and the officers maintained surveillance of the vehicle. When the defendant returned to the automobile, Agent Walker approached the defendant and identified himself as a police officer. The defendant put his hand in his right coat pocket, and Walker drew his revolver and ordered the defendant out of the automobile. Walker made the defendant lean against the vehicle and told the defendant he had information which caused him to believe that the defendant was in the possession of cocaine. Walker then searched the defendant and found in his right coat pocket an empty Kool cigarette pack which contained two small tinfoil packets. Walker then advised the defendant that he was under arrest. Upon analysis, it was determined that one of the tinfoil packets contained heroin and that the other packet contained coctaine.

On voir dire the defendant testified that he was getting his keys out of his pocket when Walker ordered him out of his car and told him he was suspected of being in possession of cocaine. After Walker found the two tinfoil packets, Walker placed the defendant in the police car and advised him of his constitutional rights. He was, however, not told that he was under arrest until he was taken "downtown and they typed up the warrants."

At the conclusion of the voir dire, the trial judge made findings substantially as detailed above and concluded that the

search of the defendant's person was legal and that the evidence found pursuant to the search was admissible.

[1] It is well-settled in this State that an officer may arrest a person without a warrant when the officer has probable cause to believe that the person has committed a felony in his presence, G.S. 15-41; *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970), and that the officer may then search the person incident to the arrest, *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971); *State v. Roberts, supra.* The defendant contends in this case, however, that the search of his person was illegal because it occurred prior to his arrest. We disagree.

[2] In our opinion, the evidence supports the conclusion that the search was legal and that it followed a lawful arrest of the defendant. Based on the information received from a reliable informant, which was corroborated by the officer's observations, Agent Walker had probable cause to believe that the defendant was in the possession of cocaine and that the defendant was thereby committing a felony in his presence. See generally, *State v. Ketchie,* 286 N.C. 387, 211 S.E. 2d 207 (1975). When Walker (1) drew a revolver on the defendant, (2) ordered the defendant to take his hand out of his pocket, to get out of his car, and to lean against the vehicle, and (3) informed the defendant that he was suspected of being in the possession of cocaine, the defendant was "arrested" and placed in the custody of the officer just as effectively as he would have been had the officer formally stated that the defendant was under arrest. *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202 (1971); *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967); see also *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973). "A formal declaration of arrest by the officer is not a prerequisite to the making of an arrest. 5 Am. Jur. 2d, Arrest, § 1. The officer's testimony that the defendant was or was not under arrest at a given time is not conclusive." *State v. Tippett, supra* at 596, 155 S.E. 2d at 275. Thus, the search of the defendant's person followed and was incident to a lawful arrest, and the material found and seized as a result thereof was properly admitted into evidence. These assignments of error are overruled.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WILL ARNOLD

No. 751SC269

(Filed 2 July 1975)

1. **Homicide § 19— deceased as violent man — testimony of specific acts inadmissible**

The trial court in a murder prosecution did not err in excluding testimony of a public officer concerning specific incidents of violence involving deceased, but the officer was properly permitted to testify that the deceased had a reputation in his community for cutting.

2. **Homicide § 19— deceased as violent and fighting man — admissibility of evidence**

In prosecutions for homicide and assault where there is evidence tending to show that the killing or assault was in self-defense, evidence of the character of the deceased as a violent and dangerous fighting man is admissible if such character was known to the accused or the evidence is wholly circumstantial or the nature of the transaction is in doubt.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 5 November 1974 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 29 May 1975.

Defendant was charged in a bill of indictment with murder in the first degree of John Littlejohn, Jr. At trial, the State elected to seek only a conviction of murder in the second degree to which defendant pled not guilty.

The State's evidence tended to show that on 18 August 1974, defendant and Littlejohn were engaged in an argument in the area of Road and Shepard Streets in Elizabeth City; that Littlejohn left the porch where he and defendant had been sitting; and that they had another confrontation whereupon defendant pulled a .25 caliber pistol and shot Littlejohn in the head killing him. An officer who investigated the crime testified that he found an unopened pocketknife under the victim's left arm. Defendant was subsequently arrested and confessed to having shot Littlejohn, but complained that Littlejohn was coming at him with a knife.

The defendant did not testify, but he offered the testimony of four witnesses which tended to show that the deceased was advancing on the defendant with an open knife and had threatened to cut his throat. Plenary evidence was introduced that the deceased had a reputation in the community for being a violent

and dangerous person and had a reputation for "cutting." There was evidence that both the defendant and the deceased had been drinking before the shooting; that the deceased was drunk and cursing; and that he started backing the defendant up with the knife until the defendant could not back up anymore so defendant shot him.

The jury returned a verdict of guilty of murder in the second degree. From a judgment imposing a term of imprisonment, defendant appealed.

Attorney General Edmisten by Associate Attorney Thomas M. Ringer, Jr., for the State.

Twiford, Abbott, Seawell, Trimpi & Thompson by C. Everett Thompson for the defendant.

CLARK, Judge.

[1] Defendant brings forward an assignment of error relating to the exclusion of answers to questions asked one of the investigating officers during voir dire out of the presence of the jury. The questions related to specific acts of violence of the deceased which were within the knowledge of the investigating officer. While these questions were never tendered for admission before the jury, they were nevertheless properly objectionable since the officer testified that he did not know the deceased's reputation for violence in the community but only had knowledge of the specified acts. There was no showing that defendant was present during the commission of the prior acts or that he had knowledge thereof prior to the alleged murder. In these circumstances, the specific incidences of violence were properly excluded. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); *State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913). The officer was permitted to testify that the deceased had a reputation in his community for cutting.

[2] Of the two other exceptions brought forward relating to exclusion of evidence of his reputation in the community for being a violent and dangerous man, we find the questions repetitious and the exclusion not prejudicial because all four witnesses for defendant were allowed to testify regarding the deceased's reputation as a violent and dangerous fighting man. In prosecutions for homicide and assault, where there is evidence tending to show that the killing or assault was in self-defense, evidence of the character of the deceased as a violent and danger-

ous fighting man is admissible if (1) such character was known to the accused, or (2) the evidence is wholly circumstantial or the nature of the transaction is in doubt. 1 Stansbury, N. C. Evidence, § 106 (Brandis rev. 1973).

In the trial below, we find

No error.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. THOMAS EDWARD BOHANNON

No. 7521SC229

(Filed 2 July 1975)

Indictment and Warrant § 12— driving "after" license suspended — amendment of warrant — "while" license suspended

The trial court properly denied defendant's motions to quash the warrant and to dismiss the charges due to the running of the statute of limitations where the warrant issued on 2 January 1972 charged defendant with driving *after* his license was suspended and the warrant was amended on 16 October 1974 to substitute *while* for the word *after*.

APPEAL by defendant from *Albright, Judge*. Judgment entered 14 January 1975. Heard in the Court of Appeals 15 May 1975.

Defendant was charged under a warrant issued 2 January 1972, which provided that:

". . . on or about the 1st day of January, 1972, the defendant named above did unlawfully, wilfully, ~~and feloniously~~ Drive a motor vehicle upon a public highway within the State of North Carolina, to-wit: 1400 Blk. of East 26th Street, Winston-Salem, N. C., ~~after~~ while his operator's license has been suspended indefinately on April 2nd 1971. (Warrant amended to delete *after* & place the word *while*. 10/16/74 ABNER ALEXANDER, Judge.)"

In October 1974, the case came on for trial in the district court whereupon defendant pled not guilty. At that time, Judge Alexander amended the warrant to delete the word "after" and

insert the word "while." The court found the defendant guilty, and from a judgment imposing a term of imprisonment, defendant appealed de novo to the superior court.

The case came on for trial in the superior court on 13 January 1975 whereupon defendant moved (1) to quash the warrant and (2) to dismiss the charges due to the running of the statute of limitations. Both motions were denied and the defendant pled not guilty. The jury returned a verdict of guilty of driving while license suspended and from a judgment imposing a term of imprisonment, defendant appealed.

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

Carol L. Teeter for the defendant.

CLARK, Judge.

This appeal presents the following question: Was the affidavit supporting the warrant for arrest so defective that it was void on its face and not subject to amendment by the District Court prior to trial?

The defendant contends that the warrant, though issued on 2 January 1972, was so fatally defective that it could not be cured by amendment and did not toll the statute of limitations, and that more than two years having expired since the date of the alleged offense, the prosecution was barred.

The defendant relies on the following quotation from 4 Strong, N. C. Index 2d, Indictment and Warrant, § 12 at 357 (1968): "Where a warrant . . . is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment." Strong cites the following cases in support of this rule: *State v. Tarlton,* 208 N.C. 734, 182 S.E. 481 (1935); *State v. Cole,* 202 N.C. 592, 163 S.E. 594 (1932); *State v. Haigler,* 14 N.C. App. 501, 188 S.E. 2d 586, *cert. denied,* 281 N.C. 625, 190 S.E. 2d 468 (1972). An examination of these cases reveals that both the *Haigler* and *Cole* cases involved not warrants but indictments which had been returned by a grand jury; and that *Tarlton* held that the Superior Court had no authority to amend a warrant *after verdict* where a material element of the offense is omitted.

Nor does *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638 (1963) support defendant's position. The *Sossamon* case held

that a warrant charging the operation of a motor vehicle on the public highway *after* his driver's license had been revoked or suspended fails to charge a violation of G.S. 20-28 since the statute required that the operation occur *while* or during the period of suspension, and that the defective warrant did not support the verdict, which the court arrested. *Sossamon* did not involve an amendment before trial as did *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26 (1957), where the warrant charged the operation of a motor vehicle "after his operator's permit having been permanently revoked." The Superior Court allowed the State to amend by adding, "Said license having been permanently revoked by the Department of Motor Vehicles by reason of the defendant having been convicted in the Municipal Court . . . on the 24th day of March, 1950." The Supreme Court found no error and stated: " 'under our practice, our courts have authority to amend warrants defective in form and even in substance: Provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant.' " *State v. Moore, supra,* at 370. See also *State v. McHone,* 243 N.C. 231, 90 S.E. 2d 536 (1955); *State v. Brown,* 225 N.C. 22, 33 S.E. 2d 121 (1945).

But where the warrant does not contain sufficient information to notify the defendant of the nature of the crime charged and fails to contain even a defective statement of the offense, it is fatally defective and cannot be cured by amendment. *State v. Thompson,* 233 N.C. 345, 64 S.E. 2d 157 (1951); *State v. Williams,* 1 N.C. App. 312, 161 S.E. 2d 198 (1968).

In this case the original warrant contained a defective statement of the offense charged, adequately notified the defendant of the offense charged, and, therefore, was properly cured by amendment before trial. Upon issuance of the warrant on 2 January 1972 the statute of limitations was tolled.

The other assignments of error having been abandoned, we find

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. MAMIE HUNTER AND SYLVESTER GRAY

No. 757SC320

(Filed 2 July 1975)

1. **Criminal Law § 66— in-court identification — pretrial photographic and lineup identifications**

Robbery victim's in-court identification of defendants was of independent origin and not tainted by pretrial photographic or lineup identifications of the female defendant or by a pretrial lineup identification of the male defendant.

2. **Criminal Law § 102— question and argument by solicitor**

In an armed robbery case in which defendant testified that he had obtained money by selling marijuana, the trial court did not err in allowing the solicitor to ask defendant where he got the marijuana and to argue to the jury that defendant "was selling grass, preying upon the weakness of his fellow human beings."

APPEAL by defendants from *Small, Judge.* Judgments entered 27 February 1975 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 17 June 1975.

Defendants were charged in bills of indictment with the armed robbery of C. P. Killebrew on 31 October 1974. They entered pleas of not guilty and were tried before a jury.

Killebrew testified that he was alone in his store about 5:55 p.m. on the day in question. The lights were turned on. He heard the front door close, looked around, and saw a black woman standing inside. Behind her was a black man holding a sawed-off shotgun. The man told Killebrew he wanted his money and meant business. While the man pointed the gun at Killebrew, the woman removed between $430 and $450 from the cash register. Killebrew identified defendants Hunter and Gray as his assailants.

Defendants moved to strike the in-court identification, and the court conducted a *voir dire* hearing. Killebrew testified that on 12 December 1974 he identified defendant Hunter in a police lineup. A few days earlier he had been shown a single photograph of Hunter which he also had identified. About a week later Killebrew identified defendant Gray in a police lineup. The trial court made findings of fact and ruled that the identification testimony was admissible.

Defendant Gray testified that he was at home between 5:00 p.m. and 7:00 p.m. on 31 October 1974. He denied taking part in the robbery and offered the testimony of a witness corroborating his alibi.

The jury found both defendants guilty as charged. From judgments imposing prison sentences, they appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Fountain and Goodwyn, by George A. Goodwyn, for defendant appellants.

ARNOLD, Judge.

[1] Defendants contend that their in-court identification by the robbery victim was based on impermissible pretrial identification procedures and therefore was erroneously admitted. This contention is without merit.

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. [Citations omitted]."

State v. Tuggle, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974); *accord, State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974); *State v. Richmond,* 23 N.C. App. 683, 209 S.E. 2d 535 (1974).

Before concluding that Killebrew's testimony was admissible, the court conducted a thorough *voir dire* hearing, made detailed findings of fact, and determined that the witness had had ample opportunity to observe each defendant at the time of the robbery and that the in-court identification was of independent origin and not based on any illegal out-of-court identification. These findings are based on competent evidence. The in-court identification was admissible.

[2] Defendants next contend that it was error to allow Gray to answer the solicitor's question, "Where did you get your mari-

juana?" and to allow the solicitor to argue that Gray "was selling grass, preying upon the weakness of his fellow human beings." This contention also is without merit.

Whether the solicitor exceeded the wide latitude afforded counsel in argument before the jury is a question which rests largely in the trial court's discretion. *See State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *modified* 408 U.S. 939 (1972); 2 Strong, N. C. Index 2d, Criminal Law § 102, pp. 641-45. Defendant Gray testified that he had obtained money by selling marijuana. In response to the solicitor's question, he said he was unable to recall the name of his supplier. The solicitor's characterization of Gray was inferable from Gray's own testimony. The argument was not improper.

Defendants further contend that the court erred in denying their motions for nonsuit. We find no merit in this contention. Viewed in the light most favorable to the State, the testimony of C. P. Killebrew was sufficient to require that the case be submitted to the jury.

Finally, defendants contend that the court's charge contained an inadequate definition of reasonable doubt. This is a feckless contention. The North Carolina Supreme Court approved an almost identical instruction in *State v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146 (1940). *See also State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917 (1972). We have examined the charge and find it adequate in all respects.

Defendants have received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

SAMUEL WAYNE PASCHALL v. CORA CHOPLIN PASCHALL

No. 7514DC226

(Filed 2 July 1975)

Divorce and Alimony § 24— child custody — change in circumstances — custody award changed

Evidence was sufficient to support the trial court's conclusion that there had been a change in circumstances sufficient to warrant a

change of custody of the minor child of the parties where such evidence tended to show that at the time the prior order was entered defendant mother was carrying on an adulterous relationship which was harmful to the child, the mother subsequently married the man with whom she had the relationship, the minor child had emotional problems and needed one stable home with one set of parents, and the mother was best able to provide an environment conducive to the best interests and welfare of the child.

APPEAL by plaintiff from *Moore, Judge.* Judgment entered 24 October 1974 in District Court, DURHAM County. Heard in the Court of Appeals 15 May 1975.

The parties to this action were granted a divorce on 26 July 1971, and defendant was awarded custody of their only child, Tonya Waynette Paschall. Plaintiff subsequently filed a motion for change of custody on the ground that defendant had maintained an adulterous relationship with James Ronald Walters and that exposure to this relationship had created emotional problems for the child. The district court granted the motion, and in *Paschall v. Paschall,* 21 N.C. App. 120, 203 S.E. 2d 337 (1974), this Court affirmed.

On 19 April 1974 defendant moved that custody be returned to her, alleging that, since the entry of the order awarding custody to plaintiff, defendant has married and is living with James Ronald Walters, and there has been a substantial change in circumstances. She offered as evidence the testimony of neighbors and members of the community concerning her reputation and relationship with Tonya Waynette. The child's former teacher testified that she had had problems with her school work. Dr. William M. Petrie, who had conducted a psychological evaluation of Tonya Waynette at the request of the court, testified that she was having emotional problems but not as a result of defendant's relationship with Walters. Rather, "Tonya is confused as to who owns her," and is worried about "who is going to take care of her." Plaintiff's only evidence was his testimony that he had taken good care of Tonya Waynette and she was interested in a variety of activities.

The court found facts which include the following: (1) A psychiatrist from the Durham Child Guidance Clinic, William M. Petrie, M.D., testified that the emotional problems of the child were due not to past exposure to adulterous conduct but to inconsistent applications and that her greatest need was "one stable home with one set of parents." (2) Both parties are fit

and proper persons to have custody, but "from all the evidence presented, the Court, in its discretion, finds that the defendant, Cora Choplin Paschall (Walters) is best able physically, financially and emotionally to provide an environment for said Tonya Waynette Paschall that would be most conducive to the best interests and welfare of said child."

The court then concluded that there had been a material change in circumstances, particularly the fitness of defendant, concerning the custody of Tonya Waynette Paschall. From the order awarding custody to defendant, with visitation rights to plaintiff, plaintiff appealed.

Blackwell M. Brogden for plaintiff appellant.

Charles Darsie for defendant appellee.

ARNOLD, Judge.

The decision to modify a custody order rests largely in the discretion of the trial court, guided by the "polar star" which is the welfare and best interest of the child. *Hinkle v. Hinkle,* 266 N.C. 189, 196, 146 S.E. 2d 73, 79 (1966), *quoting In re Lewis,* 88 N.C. 31, 34 (1883). On the basis of the record before us, we cannot say that this discretion has been abused.

"As children develop their needs change; nevertheless, the needs must be supplied by the parent whose ability to supply them may change. For these reasons orders in custody proceedings are not final." *Stanback v. Stanback,* 266 N.C. 72, 75, 145 S.E. 2d 332, 334 (1965). "[I]n a contest between parents over the custody of a child the welfare of the child at the time the contest comes on for hearing is the controlling consideration. [Citations omitted.]" *Hardee v. Mitchell,* 230 N.C. 40, 42, 51 S.E. 2d 884, 885 (1949). The court found that the sole ground for the prior change in the custody of Tonya Waynette no longer existed. The court further found that the child's greatest need is for a stable environment. These findings, based on competent evidence, will not be disturbed on appeal. *See Teague v. Teague,* 272 N.C. 134, 157 S.E. 2d 649 (1967); *Hensley v. Hensley,* 21 N.C. App. 306, 204 S.E. 2d 228 (1974). They fully support the conclusion that there has been a change in circumstances sufficient under G.S. 50-13.7(a) to warrant a change of custody.

The order of the trial court is

Affirmed.

Judges BRITT and CLARK concur.

SWIFT AND COMPANY v. DAN-CLEVE CORPORATION AND F. ROLAND DANIELSON AND BILL CLEVE TRADING AND DOING BUSINESS AS SHERATON MOTOR INN AND SHERATON MOTOR INN RESTAURANT

No. 755DC303

(Filed 2 July 1975)

1. **Venue § 1— waiver — failure to pursue until motion for sanctions**

Defendants did not waive the defense of improper venue by their failure to pursue the motion until plaintiff filed its motion for sanctions for defendants' failure to answer interrogatories some four months after defendants moved in their answer for change of venue. G.S. 1A-1, Rule 12(b)(3).

2. **Venue § 7— motion to remove to proper county — verification — affidavits**

Defendants' motion for a change of venue to the proper county was not required to be verified or supported by affidavits.

APPEAL by defendants from *Barefoot, Judge.* Order entered 28 February 1975 in District Court, NEW HANOVER County. Heard in the Court of Appeals 11 June 1975.

Plaintiff instituted this action on 20 September 1974 seeking to recover on an open account for products sold to defendants. In their answer defendants denied the debt and moved for change of venue on the grounds that none of the parties resided in New Hanover County and the action did not arise there.

On 16 January 1975 plaintiff filed interrogatories. When defendants failed to answer within 30 days, plaintiff filed a motion for sanctions whereupon defendants filed notice of hearing on their motion for change of venue. A hearing was held on the motions, and the court entered an order denying defendants' motion and holding that they had impliedly waived their motion for change of venue. Defendants appealed to this Court.

Stevens, McGhee, Morgan & Lennon, by Charles E. Sweeney, Jr., for plaintiff appellee.

Vaughan S. Winborne for defendant appellants.

ARNOLD, Judge.

The question presented by this appeal is whether the trial court's findings of fact support its conclusion that defendants impliedly waived their motion for venue change as a matter of right.

Venue is not jurisdictional. It may be waived "unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county. . . ." G.S. 1-83. *See Nelms v. Nelms,* 250 N.C. 237, 108 S.E. 2d 529 (1959); *Roberts v. Moore,* 185 N.C. 254, 116 S.E. 728 (1923). Under G.S. 1A-1, Rule 12(b) (3), the defense of improper venue may be raised in the answer if no pre-answer motions have been made. If not raised in the answer, the defense is waived. Nevertheless, the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county. *Mitchell v. Jones,* 272 N.C. 499, 158 S.E. 2d 706 (1968); *Teer Co. v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E. 2d 54 (1952).

[1] The court below found as a fact that defendants' demand was timely. Thus, the sole basis for the court's conclusion that defendants impliedly waived venue was its finding that they did not pursue their motion until plaintiff filed its motion for sanctions. While failure to press a motion to remove may constitute waiver under certain circumstances, *see, e.g., Wynne v. Conrad,* 220 N.C. 355, 17 S.E. 2d 514 (1941), there is no implication of waiver in a delay of only four months. The fact that it was plaintiff's motion which prodded defendants into action is immaterial. Having made timely demand, defendants were entitled to show that venue was improper.

[2] Plaintiff, citing *Chow v. Crowell,* 15 N.C. App. 733, 190 S.E. 2d 647 (1972), contends that defendants have filed no verified motion or affidavits pursuant to G.S. 1-85 and have failed to carry the burden of proving facts alleged in their motion to remove. We disagree.

Nothing in the Rules of Civil Procedure requires that the motion be verified. *See* G.S. 1A-1, Rule 7(b) (2), Rules 11(a)

and (b), and Rule 12(b)(3). The requirement of G.S. 1-85 that affidavits set forth particularly and in detail grounds for removal refers only to G.S. 1-84 (removal for fair trial) and not to G.S. 1-83 (removal where county designated not proper). G.S. 1-83 requires only that a demand for venue change be in writing.

Furthermore, the *Chow* case requires affidavits of a moving party only when opposing affidavits are submitted. In the case at bar, plaintiff filed no affidavits opposing defendants' motion on its merits. Defendants' failure to file affidavits or verified motion therefore is not fatal.

Since the trial court's findings of fact are clearly insufficient to support its conclusion that defendants waived their motion to remove, the order denying the motion must be reversed and the cause remanded for a determination of proper venue under G.S. 1-82.

Reversed and remanded.

Chief Judge BROCK and Judge PARKER concur.

ROBERT M. THOMPSON v. JEWELL R. THOMPSON

No. 7523DC174

(Filed 2 July 1975)

Pleadings § 11; Rules of Civil Procedure § 13— treating answer as counterclaim

In an action in which plaintiff husband alleged that defendant wife fraudulently induced him to convey real property owned by him to plaintiff and defendants as tenants by the entirety wherein defendant alleged that plaintiff conveyed the property to himself and her so it could be used as collateral for a loan to remodel their house and that she repaid two-thirds of the loan from her own funds, the trial court did not err in allowing defendant's motion at pretrial conference to try the case on the theory that her answer stated a counterclaim for the amount she had expended from her own funds to repay the loan. G.S. 1A-1, Rule 13(b).

APPEAL by plaintiff from *Osborne, Judge*. Judgment entered 6 December 1974 in District Court, ALLEGHANY County. Argued in the Court of Appeals 27 May 1975.

Plaintiff is the husband of defendant. The parties are now separated. Plaintiff commenced this action on 16 August 1974, alleging in his complaint that defendant fraudulently induced him to convey real property owned by him to plaintiff and defendant as tenants by the entirety. Defendant denied these allegations and answered that plaintiff conveyed the property to himself and her so that it could be used as collateral for a loan. The loan, for remodeling their house, was in the amount of $12,000.00, $8,000.00 of which defendant repaid from her own funds. At the pretrial conference defendant moved to try the case on the theory that her answer stated a counterclaim for the amount she had expended from her own funds to repay the loan, and her motion was granted.

The events surrounding the conveyance of the property occurred in 1966. Plaintiff was living in Alaska, where he worked for the United States Air Force. Defendant lived in Sparta. Plaintiff testified that defendant sent him a blank deed and asked him to sign it. She needed this done because "she could not secure the loan the way the original deed was written," and "it was necessary for (plaintiff) to sign another deed so she could get the money to complete the building." Plaintiff testified that "[n]othing at all was said about her name being put on the new deed, and I did not have any such understanding at the time I signed it." Plaintiff first found out that defendant had recorded the deed with plaintiff and herself as grantees in October, 1973.

Defendant testified that she did not send the deed "in blank" to plaintiff. An attorney for Watauga Savings and Loan had prepared the deed when it was mailed. Defendant had written to plaintiff, telling him that in order to get the loan he would have to convey the property to himself and her as tenants by the entirety. She testified that plaintiff wrote back that he was "perfectly agreeable" and "said that it was all right with him that the property was ours." Defendant worked while plaintiff was in Alaska and repaid over $8,000.00 of the loan. She testified that she "paid the greater part because I didn't depend on him for any payments. I never knew if he would send me any money or not." Plaintiff returned to Sparta in 1967.

The jury found that plaintiff executed the deed with the intention of creating an estate by the entirety between himself and defendant and that he did not act through mistake, inad-

vertance, or misrepresentation. Judgment was entered for the defendant, and the plaintiff appealed.

Edmund I. Adams, for the plaintiff-appellant.

Worth B. Folger and Dan R. Murray, for the defendant-appellee.

BROCK, Chief Judge.

Plaintiff presents four arguments for our consideration. His first argument challenges (1) the failure of the trial judge to strike defendant's allegations that she repaid a portion of the bank loan; (2) the judge's treating the defendant's answer as a counterclaim; and (3) the admission of evidence concerning defendant's repayment of the loan. The gist of plaintiff's argument is that these matters concerning defendant's repayment of the loan constitute a "new cause of action" having "no substantial relation to the controversy between the parties." This argument is feckless. The cases cited by plaintiff as authority for his argument were written long before the adoption of the North Carolina Rules of Civil Procedure and do not support his contentions. G.S. 1A-1, Rule 13(b) provides:

> "*Permissive counterclaim.*—A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

To further bolster his first argument, plaintiff asserts that he was "unfairly surprised" when the court allowed the defendant to inject her counterclaim into the case "in the middle of the trial." The record shows that the defendant's motion to treat her answer as a counterclaim was granted at the pretrial conference. Plaintiff had sufficient time to prepare a defense. In our opinion plaintiff's argument is wholly without merit.

Plaintiff's remaining arguments are directed to the instructions given by the trial judge to the jury. We have reviewed these instructions and find them to be adequate and fair. In our opinion plaintiff had a fair trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DAVID LEE FLEMING

No. 7525SC250

(Filed 2 July 1975)

Narcotics § 4— marijuana in car — possession by driver — sufficiency of evidence

In a prosecution for possession of marijuana, evidence was sufficient to be submitted to the jury where it tended to show that defendant was the driver of an automobile which an officer stopped because the vehicle did not have a taillight working, the patrolman observed a passenger hiding something behind his leg on the floorboard of the car, the patrolman obtained defendant's permission to search the car, defendant told the passenger to get rid of the bag, and the bag seized by the patrolman contained marijuana.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 29 January 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 28 May 1975.

Defendant was charged with possession of more than one ounce of marijuana. 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 nine months, defendant appealed.

In the light most favorable to the State the evidence tended to show the following: At approximately 10:00 p.m. on 20 May 1974 a patrolman with the Morganton Police Department observed the defendant operating a 1971 Toyota automobile with "[n]o taillights." After stopping the defendant, and advising him that "he did not have a taillight working on his vehicle," the patrolman observed a passenger in the defendant's automobile "hiding something behind his leg on the floorboard of the car." The patrolman advised the defendant of his constitutional rights and the defendant stated that he understood his rights. The patrolman then obtained the defendant's consent to search the automobile. As the patrolman approached the left door of the defendant's automobile, which was open at the time, the patrolman overheard the defendant tell his passenger to "Get rid of the bag." The patrolman next observed the passenger reach down and take a brown paper bag from behind his leg and toss it into the back seat of the automobile.

The patrolman testified that he "did not actually have to search the car to get the bag." He saw the bag, picked it up and

discovered that it contained a "vegetable type of material," which was later identified as marijuana by an expert chemist with the State Bureau of Investigation.

The defendant testified that he was driving an automobile titled in his mother's name, when he was "flagged" down by someone he knew, but had not seen for "at least a year and a half." His friend was carrying a paper bag and wanted a ride home. Defendant testified that after he and his friend had travelled "about three or four blocks" a patrolman got in behind him, then turned on his blue light and pulled him over on the side of the road. According to the defendant it was not until he was in the process of getting out of the automobile that his friend told him "there was pot in the bag." Defendant admitted that he subsequently told his friend to "get rid of that bag."

Defendant's mother and stepfather testified as to his good behavior during a period of probation.

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

John H. McMurray for defendant appellant.

MORRIS, Judge.

In his first assignment of error defendant objects to the denial of his motion for a directed verdict made at the close of all the evidence. He argues that the evidence is insufficient to show constructive possession and that the evidence shows only proximity of the defendant to a controlled substance and not "the power and intent to control its disposition and use." We disagree.

> "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxta-

> position to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' (Citations omitted.)" *State v. Harvey,* 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972).

Moreover, as we noted in the case of *State v. Brim,* 25 N.C. App. 709, 714, 214 S.E. 2d 622, 625 (1975):

> " '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)."

The trial court instructed the jury as follows:

> "Furthermore, one possesses marijuana only if he has knowledge of his power of control over that substance.
>
> If the defendant, David Fleming, had marijuana within his power of control, but was unaware of that fact, then he is not guilty of the possession of it . . . . "

Whether the defendant was aware that marijuana was in the automobile was properly a question for the jury. As there was sufficient evidence to go to the jury, this assignment of error is overruled.

In his only remaining assignment of error, defendant asserts that the trial court's charge to the jury was insufficient with respect to the application of the law of possession to the facts of this case. We note that the trial court did charge the jury on constructive possession. However, defendant maintains the instruction was insufficient in light of the fact that the jury asked for clarification of the law on three separate occasions. We find no merit in this contention. We have examined the charge and conclude the charge was adequate and fair to all parties.

Defendant received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

VIRGINIA L. COLE v. JOHN J. EARON

No. 7521DC175

(Filed 2 July 1975)

1. **Husband and Wife § 10; Courts § 21— separation agreement — what law governs**

The validity and construction of a separation agreement are to be determined by the law of the state where executed.

2. **Husband and Wife § 11; Divorce and Alimony § 23— child support — wife's violation of visitation provisions**

Under the law of New York, which governed this action to recover child support payments due under a separation agreement, the wife's violation of visitation provisions in the separation agreement precludes her from maintaining against the husband an action to recover unpaid installments of child support stipulated under such agreement.

APPEAL by defendant from *Clifford, Judge.* Judgment entered 30 December 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 17 April 1975.

Plaintiff, a resident of New York, brought this civil action against defendant, a resident of North Carolina, to recover judgment in the amount of unpaid installments for child support due under a separation agreement. In her complaint plaintiff alleged that the parties were married on 26 November 1955, had one child, entered into a separation agreement on 21 September 1960 wherein defendant agreed to pay $20.00 per week to plaintiff for the support of the child, and that since 1 July 1969 defendant had not paid the weekly installments as agreed. Defendant admitted these allegations of the complaint and in a further answer alleged as a defense that plaintiff had breached the separation agreement by refusing to let him visit the child at any time after 1 March 1969 in violation of an express provision of the separation agreement. The court allowed plaintiff's motion made under Rule 12(c) and entered judgment on the pleadings in favor of plaintiff.

Billings & Graham by William T. Graham for plaintiff appellee.

William Z. Wood, Jr. for defendant appellant.

PARKER, Judge.

Defendant having admitted the contract and his failure to pay, plaintiff is entitled to judgment on the pleadings unless the facts alleged in the further answer constitute a valid defense. This depends upon whether the law of New York or of North Carolina applies. In New York the wife's violation of visitation provisions in a separation agreement precludes her from maintaining against the husband an action to recover unpaid installments of support stipulated under such agreement, this result being based on the reasoning that "where monies are to be paid for the support of persons whom the father has a right to see under the terms of the separation agreement, this right to see his children is tied into and is dependent upon his covenant to provide agreed sums of money for their support." *Baumann v. Goldstein,* 201 N.Y.S. 2d 575, 578 (1960); *accord, Duryea v. Bliven,* 122 N.Y. 567, 25 N.E. 908 (1890); *Magrill v. Magrill,* 16 Misc. 2d 896, 184 N.Y.S. 2d 516 (1959); Annot., 95 A.L.R. 2d 118, § 10, pp. 155-56 (1964). In North Carolina the support provisions of the separation agreement are considered as being independent of the provisions relating to the husband's visitation rights, with the result that the wife's breach of her covenant not to interfere with the husband's visitation rights with the children does not excuse the husband from making the support payments in conformity with the separation agreement. *Williford v. Williford,* 10 N.C. App. 451, 179 S.E. 2d 114 (1971).

[1, 2] A copy of the separation agreement involved in the present case was attached to the complaint. This reveals that the parties were married in New York, owned real property in New York, and on the date of the agreement had addresses at locations within New York. Each party acknowledged execution of the agreement before a notary public in New York. The validity and construction of a contract are to be determined by the law of the state where executed. *Fast v. Gulley,* 271 N.C. 208, 155 S.E. 2d 507 (1967). This principle, applicable to contracts generally, applies as well to separation agreements. *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306 (1967); Annot., 18 A.L.R. 2d 760 (1951). We hold, therefore, that the law of New York is to be applied in determining the construction and effect of the separation agreement now before us and in determining the validity of the defense which defendant has alleged. "With regard to contractual matters, whatever is a good defense on the merits of the case, in the jurisdiction where the contract was made, is a

good defense in the place where the action is brought." 16 Am. Jur. 2d, Conflict of Laws, § 77, pp. 122-23.

The judgment appealed from is

Reversed.

Judges BRITT and VAUGHN concur.

JAMES SALEM v. NYAL FLOWERS

No. 753DC93

(Filed 2 July 1975)

1. **Trial § 57— nonjury trial — rules of evidence**

The ordinary rules as to the competency of evidence in a jury trial are to some extent relaxed in a trial before the court without a jury.

2. **Appeal and Error § 28— exceptions to admission of evidence — necessity for exceptions to findings**

In order to present for appellate review exceptions relating to admissions of evidence made by the court in a nonjury case, proper exceptions must be made to the findings of fact.

3. **Appeal and Error § 49— exclusion of evidence — harmless error**

In an action to recover the balance of the purchase price of a boat hull and motor, defendant was not prejudiced by the court's exclusion of defendant's testimony explaining his delay in discovering a defect in the motor where the court, on competent evidence, found that such a defect did not exist.

4. **Appeal and Error § 57— absence of exceptions to findings — appellate review**

The appeal itself is an exception to the judgment, but absent an exception to any of the court's findings of fact, review is limited to the question of whether the facts found support the conclusions of law and whether these support the judgment.

APPEAL by defendant from *Whedbee, Judge.* Judgment entered 5 December 1974 in District Court, CRAVEN County. Heard in the Court of Appeals 10 April 1975.

This is a civil action to recover $500.00 balance of purchase price of a boat hull and motor sold by plaintiff to defendant. The case was tried before the court sitting without a jury. At the conclusion of all of the evidence the court entered judgment

making findings of fact, stating its conclusions of law, and adjudging that plaintiff recover the sum of $500.00 with interest and costs.

Robert G. Bowers for plaintiff appellee.

McCotter & Mayo by Hiram J. Mayo, Jr. for defendant appellant.

PARKER, Judge.

[1, 2] Appellant noted ten assignments of error. In his brief he expressly waived argument in support of Assignment of Error No. 5, and that assignment is abandoned. Assignments of Error 1, 2, 3, 7 and 8 all relate to the court's rulings admitting evidence. These assignments of error are overruled. "In a trial before the judge, sitting without a jury, 'the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found.'" 1 Stansbury's N. C. Evidence (Brandis Revision) § 4a, p. 10. Moreover, in order to present for appellate review exceptions relating to admissions of evidence made by the court in a nonjury case, it is also necessary that proper exceptions be made to the findings of fact, *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242 (1955); *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351 (1950), and appellant here has failed to note a single exception to any of the court's findings of fact.

[3] Assignment of Error No. 6 relates to the court's action sustaining plaintiff's objection to defendant's testimony explaining the reasons for defendant's delay "in discovering the defect in the motor." Finding of Fact No. 8 in the judgment appealed from is as follows:

> "8. That on the date that the defendant took possession of the engine, it was in good working order and complied with any express or implied warranty that the plaintiff may had [sic] made."

Defendant has not shown how he was prejudiced by the court's exclusion of evidence, the only purpose of which was to explain his delay in discovering a defect in the motor which the court, on competent evidence, found did not exist. This assignment of error is overruled.

Assignment of Error No. 4 is directed to the court's denial of defendant's motions for involuntary dismissal made at the close of plaintiff's evidence and renewed at the close of all of the evidence. Because of appellant's failure to note exception to any of the court's findings of fact, appellant's assignment of error presents nothing for our review. *Burnsville v. Boone, supra.*

[4] The appeal is itself an exception to the judgment, 1 Strong, N. C. Index 2d, Appeal and Error, § 26, but absent an exception to any of the court's findings of fact, our review is limited to the question of whether the facts found support the conclusions of law and whether these support the judgment. Here, the court's findings of fact fully support the conclusions of law and these support the judgment rendered. We find no error in appellant's remaining assignments of error.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

SHIRLEY R. MARTIN v. FRED D. MARTIN

No. 7526DC286

(Filed 2 July 1975)

Divorce and Alimony § 16— alimony given in consent judgment — remarriage — termination of alimony

Defendant's obligation under a consent judgment to pay plaintiff $100 per month for five years as alimony for the plaintiff ceased as a matter of law pursuant to G.S. 50-16.9(b) when the plaintiff remarried.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 17 January 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 June 1975.

In 1968 plaintiff brought this action against her husband for alimony without divorce. A consent judgment was entered on 1 October 1969, providing that plaintiff would be entitled to custody of the minor children and that defendant would have

visitation privileges; that defendant would be required to pay plaintiff $100 per month as alimony for five years, and $100 per month for child support without any time limitation; that plaintiff was to convey to defendant all her interest in the family home; and that plaintiff would be entitled to all the furniture, appliances and other personal property in the family home and would have 30 days to remove this property from the premises.

Plaintiff remarried on 30 July 1971. On 19 September 1974 she moved to hold defendant in contempt, alleging that he was in arrears in his alimony payments in the amount of $3,850, having failed to make any payments since 24 August 1971. In his reply to plaintiff's motion, defendant alleged that plaintiff's remarriage had relieved him of any duty to make alimony payments.

On 17 January 1975 the District Court issued an order granting plaintiff's motion. The court found as a fact that defendant was in arrears in the amount of $3,850. It held that even though the $100 monthly payments were designated as alimony in the judgment of 1 October 1969, they were actually "in the nature of a property settlement" and that plaintiff's remarriage did not relieve defendant of the duty to make these payments. Defendant was held in contempt and sentenced to thirty days in jail, with the right to purge himself of contempt by making up the arrearage in full.

Defendant appealed.

Scarborough, Haywood & Merryman by Charles B. Merryman, Jr. for plaintiff appellee.

Sigmon, Clark & Mackie by William R. Sigmon for defendant appellant.

HEDRICK, Judge.

This appeal turns on the interpretation to be given the following provision of the consent judgment entered on 1 October 1969:

> " . . . pay, or cause to be paid, into the Office of the Clerk of Superior Court for Mecklenburg County, North Carolina, the sum of One Hundred ($100.00) Dollars per month each and every month for a period of five (5) years. Said payments are to be made at the rate of Fifty ($50.00) Dol-

lars on the 1st and Fifty ($50.00) Dollars on the 15th day of each and every month beginning on the 1st day of October, 1969, and a like and similar payment on the 1st and 15th day of each and every succeeding month for a period of five (5) years. It is understood and agreed by the parties hereto that said payments are to be made not later than the 1st and 15th day of each and every month. That the aforesaid payments are made for the use and benefit and as alimony for the plaintiff;"

Defendant contends the payments were "alimony" and that his obligation to make such payments ceased when plaintiff remarried on 30 July 1971 pursuant to G.S. 50-16.9(b), which provides:

"If a dependant spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate."

Plaintiff contends the trial court correctly interpreted the consent judgment when he concluded that the payments were not alimony but were "in the nature of a property settlement."

A consent judgment must be construed in the same manner as a contract to ascertain the intent of the parties. *Bland v. Bland,* 21 N.C. App. 192, 203 S.E. 2d 639 (1974). Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms. 2 Strong, N. C. Index 2d, Contracts § 12 (1967). The language in the consent order with respect to the defendant's obligation to pay to the plaintiff $100.00 each month for five years is clear and unambiguous and leaves no room for construction. It is clear the parties intended and the court ordered the defendant to pay *alimony* to the plaintiff at the rate of $100.00 per month for five years. Even if the payments had not been denominated alimony, the circumstances surrounding the entry of the consent judgment and the motives which prompted each party to consent to it, as can be gleaned from the record before us, dictate a conclusion that the payments were intended to be alimony. *Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E. 2d 71 (1967).

Therefore, defendant's obligation to make the payments ceased as a matter of law pursuant to G.S. 50-16.9(b) when the plaintiff remarried, and the court erred in holding him in contempt for his failure to make the payments. The order appealed from is

Reversed.

Judges BRITT and MARTIN concur.

BARBARA S. STEVENS v. LLOYD B. STEVENS

No. 758DC316

(Filed 2 July 1975)

Infants § 9— custody proceeding — private interview of child by court — failure to object

Plaintiff's failure to object and except to the trial court's interview of a minor child in a child custody proceeding when plaintiff was given an opportunity to object estops her from asserting it as error on appeal.

APPEAL by plaintiff from *Pate, Judge.* Order entered 4 February 1975 in District Court, WAYNE County. Heard in the Court of Appeals 18 June 1975.

This is an action for custody of a ten-year-old child. The parties to the action, parents of the child, are divorced. Under prior orders of the court the child was placed in the custody of plaintiff. On 4 February 1975 the orders were modified and the child was placed in the custody of defendant. Plaintiff now appeals from that order.

Kornegay & Bruce, P.A., by Robert T. Rice, for plaintiff appellant.

Taylor, Allen, Warren & Kerr, by John H. Kerr III, for defendant appellee.

VAUGHN, Judge.

There was competent evidence to support the court's finding that there was a sufficient change of circumstances to justify modifying the prior order. The evidence also supports the

court's findings that the best interest and welfare of the child will be served by placing him in the custody of defendant. Plaintiff's assignments of error to the contrary are overruled.

Plaintiff's other assignment of error is that the court erred in privately interviewing the minor child in the absence of the plaintiff and her attorney.

Immediately following the close of plaintiff's evidence the following appears in the record:

> "(Conference with the Court and the counsel in the Judge's Chambers.)
>
> (Without objection of either counsel, the Court privately interviewed the minor child, Henry Stevens.)"

Thereafter defendant offered his evidence. The child was not called as a witness by either party or by the court.

Plaintiff relies upon *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782 where the Supreme Court ordered a new trial because the judge privately conferred with the child in chambers. In *Raper,* however, there was nothing in the record to indicate that the parties consented to the interview or had the opportunity to object to its being held. Reference to the interview appeared for the first time in the court's findings of fact. In the case before us the record indicates that the interview was conducted with the informed acquiescence of both parties. Obviously the parties were given the opportunity to object and did not do so. That is the clear meaning of the term "without objection."

The primary goal of the court is to do what is best for the child and this is an awesome responsibility for any judge. In many cases the judge can gain valuable insight into the problem by quietly talking with the child in a neutral atmosphere.

The interests of the parents are secondary. Nevertheless, as litigants they can insist on their legal right that the judge consider nothing except evidence duly developed in open court. They can, however, waive that right. If plaintiff had objected to the private interview it could not have been conducted. In that event defendant, at trial, would have had the opportunity to elect whether to offer the child as a witness in the hostile atmosphere of a courtroom battle between his parents. More importantly, the judge would have had an opportunity to make his own decision on whether to interrogate the child in the presence

of both parents and subject the child to further examination by all of the parties.

We hold that plaintiff's failure to object and except to the procedure at trial when given the opportunity now estops her from asserting it as error on appeal.

The judgment is affirmed.

Affirmed.

Judge MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. BOBBY J. SMITH

No. 7512SC322

(Filed 2 July 1975)

1. **Criminal Law § 88; Robbery § 3— restriction of cross-examination — possibility of blank pistol**

The trial court in an armed robbery case did not unduly limit cross-examination of the victim in sustaining the State's objection to a question as to whether the weapon used in the robbery could have been a blank pistol where the victim had testified that a .25 caliber pistol was used, he stated for the record that he "knew it was a pistol," and he testified on cross-examination that he did not hear the pistol fired, did not look down the barrel, did not know that it was loaded, and did not know whether the gun was capable of being fired.

2. **Robbery § 4— use of actual firearm — sufficiency of evidence**

There was sufficient evidence of the use of an actual firearm for an armed robbery case to be submitted to the jury where the victim testified that a .25 caliber pistol was used in the robbery.

APPEAL by defendant from *Walker, Judge.* Judgment entered 13 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 17 June 1975.

Defendant was charged with the armed robbery, by the use of a pistol, of Allen Brown Strippoli on 1 September 1974. He pled not guilty, the jury returned a verdict of guilty as charged, and from judgment imposing prison sentence of not less than six nor more than ten years with credit for 164 days confinement awaiting trial, he appealed.

Attorney General Edmisten, by Assistant Attorney General Charles J. Murray, for the State.

Assistant Public Defender H. Gerald Beaver for the defendant appellant.

BRITT, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in sustaining objections to defense attorney's questions concerning the nature of the weapon alleged to have been used in the perpetration of the alleged robbery. The prosecuting witness, Strippoli, testified on direct examination that two men robbed him (one of which was defendant); that the second man "put a .25 caliber pistol on my head" and told me to go into an alley. There was no objection to this evidence. Strippoli further testified that after proceeding into the alley, the second man struck him on the head with the pistol and defendant "smacked" him in the face with his fist. On cross-examination the following occurred:

STRIPPOLI: . . . I didn't hear anyone fire the pistol that night.

Q. Could have been a blank pistol, couldn't it?

(This question was objected to by the State and sustained.)

The answer appears in the record, "I knew it was a pistol."

Later, the same question was asked again. There was an objection and it was sustained. Defense counsel asked that the answer be read into the record, but the trial judge stated that it had already been read into the record and to move on.

Defendant argues that his counsel was unduly restricted in the cross-examination of the prosecuting witness. We reject this argument. It is well settled that the scope of the cross-examination must rest largely in the discretion of the trial judge who may properly exclude questions or testimony which are merely repetitious. 2 Strong, N. C. Index 2d, Criminal Law, § 88, at 609-10. In the case at bar, the prosecuting witness had testified that a .25 caliber pistol had been used and on cross-examination stated for the record that "I knew it was a pistol." Furthermore, he stated on cross-examination that he did not hear the pistol fired, did not look down the barrel, did not know that it was loaded, and did not know whether the gun was capable of

being fired. All this was before the jury. We hold that the court did not unduly limit the cross-examination and the assignment is overruled.

[2] Defendant contends in his third assignment of error that the court erred in denying his motion for nonsuit "down to the charge of common law robbery." The basis of the assignment is that since there was no conclusive evidence of the use of an actual firearm, then the court should have nonsuited the armed robbery charge. We find no merit in the contention. As stated above, the prosecuting witness stated without objection that a .25 caliber pistol was used. Viewing the evidence in the light most favorable to the State, the question as to whether there was an armed robbery was one for the jury to answer. *State v. Evans*, 25 N.C. App. 459, 213 S.E. 2d 389 (1975).

Next, defendant contends that the court should have instructed on common law robbery. As stated above, the evidence tended to show armed robbery, not common law robbery, therefore, the trial judge was not required to instruct on the lesser offense. It will be noted that the sentence imposed is well within the limits for common law robbery.

As to the remaining assignments of error, suffice it to say that we have carefully reviewed the records and briefs with respect to them and find them to be without merit.

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

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. TAFT WASHINGTON LANEY

No. 7530SC197

(Filed 2 July 1975)

Kidnapping § 1; Rape § 18— kidnapping and assault with intent to commit rape — sufficiency of evidence

In a prosecution for kidnapping and assault with intent to commit rape, evidence was sufficient to support the jury's verdicts of guilty where the evidence tended to show that defendant forced his

victim into her car, he drove several miles and turned onto a dirt road where he stopped the car, defendant threatened to kill his victim after he raped her, and defendant ordered his victim to disrobe and placed his hands on her private parts.

APPEAL by defendant from *Friday, Judge.* Judgment entered 31 October 1974 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 8 May 1975.

Defendant was charged in separate bills of indictment with the felonies of kidnapping and assault with intent to commit rape.

The jury returned verdicts of guilty on each charge and from judgments imposed thereon, defendant appealed.

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

William A. Hoover, Jr., for defendant appellant.

MARTIN, Judge.

Following the return of the verdicts by the jury, defendant apparently moved to have them set aside as being contrary to the weight of the evidence. The denial of his motion forms the basis of the first assignment of error. While defendant does not support this assignment of error with any argument, we give it full consideration due to the gravity of the offenses.

A motion to set aside the verdict as being contrary to the weight of the evidence is addressed to the sound discretion of the trial judge, and in the absence of abuse of discretion it is not reviewable on appeal. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974).

In brief summary, the evidence for the State tends to show the following facts. Mrs. Lucille D. Gault testified that she was sixty-four years of age, five feet and three inches in height, and one hundred and ten pounds in weight. She was a school teacher, and in 1962 defendant was in her homeroom. On 29 July 1974, defendant entered her home without knocking and offered her a drink of bourbon. She refused and continued with her household chores. Defendant was intoxicated at the time, and after some thirty minutes he asked Mrs. Gault to take him to Jim Mason's place. Being terrified and thinking that it would be a good way to get rid of him, Mrs. Gault drove defendant to

Mason's home which was a distance of approximately one mile. Defendant would not get out of the car, so Mrs. Gault turned her car around and went back down the hill. As she did, defendant reached over and snatched the car keys while the motor was running. Eventually, the car stopped. Defendant forced Mrs. Gault from the car, twisting her arm. They scuffled over the keys and Mrs. Gault was forced into some poison ivy. Thereafter, Mrs. Gault was forced back into the car, and defendant drove down the hill. With his arm around her, defendant drove past a blacksmith shop, and Mrs. Gault, who was terrified, screamed that Taft (Taft Laney) was abducting her. They drove for a couple of miles on a paved road called "Little Brasstown Church," and defendant threatened to hang or choke to death Mrs. Gault after he had raped her. After several miles, they turned onto a dirt road where defendant stopped the car and again repeated his threats. Mrs. Gault was ordered to remove all of her clothes. She immediately complied, being afraid of him. Some twenty minutes elapsed, during which time defendant touched her private parts. The sheriff found both of them in the back seat of the car, took defendant from the car, and placed him under arrest.

Defendant testified, denying that he kidnapped Mrs. Gault and claiming that she volunteered to go with him and voluntarily took off her clothes.

No abuse of discretion has been shown in the court's denial of defendant's motion to set aside the verdicts. In addition, pursuant to G.S. 15-173.1, we have reviewed the sufficiency of the evidence to sustain the verdicts. When viewed in the light most favorable to the State, the evidence was sufficient to go to the jury and sustain the verdicts against defendant.

Defendant's remaining two assignments of error challenge the court's charge to the jury regarding the willingness of Mrs. Gault to get into the car and the court's final mandate on kidnapping. Neither of these contain merit. The charge presents the law fairly and clearly to the jury and accurately applies the law to the facts of the case.

In the trial we find no prejudicial error.

No error.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. AUBURN GLENN JOHNSON

No. 7514SC289

(Filed 2 July 1975)

1. **Robbery § 4— armed robbery — theatre employee — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in an armed robbery prosecution where it tended to show that defendant held the money bag during a robbery of a theatre employee while defendant's companion held a shotgun which he fired several times.

2. **Criminal Law § 92— armed robbery and conspiracy to commit armed robbery — consolidation proper**

The trial court did not err in consolidating for trial charges of armed robbery and conspiracy to commit the armed robbery, since the charges were for "acts or transactions connected together," and under G.S. 15-152 the court had authority to order them to be consolidated.

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

Defendant was tried on his plea of not guilty to an indictment charging him with armed robbery. The State's evidence showed: On the evening of 15 December 1973 the defendant, together with two other men, Weldon Mason and Joe McGill, entered the lobby of the Yorktown Theatre in Durham. Mason held a shotgun, which he fired into the ceiling. Defendant went to the cashier's counter, where he held a green money bag into which the cashier put money. After the cashier said, "That's all I have," defendant and his two companions left the theatre, defendant still carrying the money bag. As they were leaving, Mason again fired the shotgun several times, striking and wounding the theatre manager with three shots. According to the theatre records, $340.00 was missing.

Defendant testified that he accompanied Mason and McGill to the theatre and held the money bag only because he was afraid of Mason. He also testified that he did not want any of the money and that he took part of the money only after Mason pointed the gun at him and made him do so.

The jury found defendant guilty, and from judgment on the verdict imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney General T. Lawrence Pollard for the State.

Paul, Keenan, Rowan & Galloway by Karen Bethea Galloway for defendant appellant.

PARKER, Judge.

[1] Defendant's assignments of error directed to denial of his motions for nonsuit and to set aside the verdict as against the greater weight of the evidence are overruled. It would be difficult to imagine a case in which evidence to justify a finding of guilt could be more overwhelming. Defendant's testimony that he was an unwilling participant in the robbery and that he was coerced by his fear of Mason was for the jury to evaluate.

[2] The only other assignment of error brought forward on this appeal is directed to the court's action in consolidating for trial the armed robbery charge with a charge of conspiracy to commit the armed robbery. By separate bill of indictment defendant, Mason, and McGill were jointly charged with the crime of conspiring with each other to commit the crime of armed robbery at the Yorktown Theatre. In apt time defendant objected to the consolidation of this charge with the charge of armed robbery on which he was ultimately convicted. His objection was overruled. However, at the close of the evidence his motion for nonsuit as to the conspiracy charge was allowed and only the armed robbery case was submitted to the jury.

We find no error in the consolidation of the two cases for trial. The two charges were for "acts or transactions connected together," and under G.S. 15-152 the court had authority to order them to be consolidated. Consolidation was a discretionary matter to be determined by the trial judge. *State v. Johnson,* 280 N.C. 700, 187 S.E. 2d 98 (1972). Moreover, defendant has failed to show how he has been prejudiced by the consolidation in this case.

In defendant's trial and in the judgment appealed from we find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM DONALD HAMRICK

No. 7527SC274

(Filed 2 July 1975)

1. **Criminal Law § 50— invasion of province of jury**

In a prosecution for conspiracy to commit armed robbery, a witness's testimony, "We made plans to rob my father," did not invade the province of the jury and was competent.

2. **Criminal Law § 82— attorney-client privilege**

In a prosecution for conspiracy to commit armed robbery, the trial court properly sustained the State's objection to cross-examination of a coconspirator involving communications with his attorney in order to protect matters covered by the attorney-client privilege.

3. **Conspiracy § 6— conspiracy to commit armed robbery — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for conspiracy to commit robbery with a firearm where a witness testified that he, defendant and another made plans to rob the witness's father, that he and defendant drew plans of his father's house and discussed the fact that the father usually carried large sums of money but rarely kept guns in the house, and that some days later defendant told the witness that "they" had gone to his father's house, drawn guns and robbed him.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 13 December 1974 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 10 June 1975.

Defendant was charged in an indictment, proper in form, with conspiracy to commit armed robbery. He pleaded not guilty and was tried before a jury.

The State's principal witness, Johnny Ray Black, testified that two or three days after he was released from prison on 8 February 1974 he saw defendant at the Royal Poolroom in Shelby. Accompanied by a third man, they left and went to defendant's apartment where they made plans to rob Black's father. Defendant and Black drew plans of the father's house. On 13 February 1974, James O. Black was robbed at gunpoint of nine hundred seventy dollars. He was unable to identify the two men who robbed him.

The jury found defendant guilty as charged. From judgment sentencing him to eight to ten years' imprisonment, he appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein and Associate Attorney David S. Crump, for the State.

Julian B. Wray for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first two assignments of error concern portions of Johnny Black's testimony. He contends that Black's statement, "We made plans to rob my father," invaded the province of the jury. We disagree. Black further testified giving details of his discussion with defendant. He was not expressing an opinion but was testifying from personal knowledge. The jury had only to determine his credibility. This assignment of error is overruled.

[2] Defendant also contends that the court erred in sustaining the State's objection to cross-examination involving Black's communications with his attorney. It is clear that the court ruled properly to protect matters covered by the attorney-client privilege. *See generally* 1 Stansbury, N. C. Evidence (Brandis rev.), § 62. This assignment of error also is overruled.

[3] Defendant next assigns error to the court's denial of his motion for nonsuit. He contends that there was no evidence of an agreement to commit robbery with a firearm on James O. Black. This contention is without merit. Viewed in the light most favorable to the State, Johnny Black's testimony was ample evidence of an agreement between defendant and another to commit the offense. *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. Miller*, 15 N.C. App. 610, 190 S.E. 2d 722, *cert. denied*, 282 N.C. 154, 191 S.E. 2d 603, *cert. denied*, 410 U.S. 990 (1973). Black testified that a few days before 13 February 1974 he and defendant drew plans of his father's house and discussed the fact that he usually carried large sums of money on him but rarely kept guns around. He also testified that sometime after 13 February 1974 defendant told him that "they" had gone to his father's house, drawn guns, and robbed him. Defendant's motion for nonsuit was properly overruled.

Finally, defendant assigns error to several portions of the court's charge to the jury. We have carefully examined the charge and find it adequate in all respects. These assignments of error are overruled.

Defendant has received a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge PARKER concur.

JOHN MICHAEL CHRISTOPHER v. BRUCE-TERMINIX COMPANY AND SAM NEWMAN, JOINTLY AND SEVERALLY

No. 7515SC205

(Filed 2 July 1975)

Rules of Civil Procedure § 54— dismissal against one defendant — judgment not appealable

Where plaintiff brought an action for damages for assault and battery against defendants, alleging that the individual defendant violently assaulted him while individual defendant was acting within the scope of his employment with defendant company, the judgment of the trial court dismissing plaintiff's claim against defendant company adjudicated the rights and liabilities of fewer than all the parties and contained no determination that there was no just reason for delay; therefore, it was not a final judgment and was not appealable.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 6 February 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 8 May 1975.

Plaintiff brought this action seeking to recover actual and punitive damages for assault and battery. He alleged in his complaint that prior to 25 February 1974 he was employed by defendant Bruce-Terminix Company. Defendant Sam Newman was a vice-president of Bruce-Terminix, and one of his duties was to meet with persons who left the company's employment and discuss the reasons for their departure. On 25 February 1974 plaintiff terminated his employment with Bruce-Terminix, and on March 1, he went to the company's Alamance County office to pick up his final paycheck and meet with Newman. When plaintiff told Newman that he had left Bruce-Terminix to work for Braam Pest Control, Inc., Newman allegedly became enraged and violently assaulted plaintiff causing severe and permanent injuries. Plaintiff further alleged that when Newman assaulted him, Newman was acting within the scope of his employment.

Bruce-Terminix moved pursuant to G.S. 1A-1, Rule 12(b)(6), to dismiss the complaint for failure to state a claim for relief. Upon the order of the trial court granting the motion, plaintiff gave notice of appeal.

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

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and Vance Barron, Jr., for defendant appellee.

ARNOLD, Judge.

Rule 54 of the North Carolina Rules of Civil Procedure provides in part:

> "(b) *Judgment upon multiple claims or involving multiple parties.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The judgment dismissing plaintiff's claim against Bruce-Terminix adjudicates "the rights and liabilities of fewer than all the parties" and contains no determination that "there is no just reason for delay." It therefore is not a final judgment and is not appealable. *See Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C.

App. 18, 212 S.E. 2d 41 (1975); *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974). Plaintiff's appeal is

Dismissed.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. NATHAN GLENN COGDELL

No. 751SC248

(Filed 2 July 1975)

1. **Criminal Law §§ 87, 89— transcript of interrogation — refreshing recollection — use in cross-examination**

The trial court did not err in allowing a police chief to refresh his memory by referring to a transcript of an interrogation of defendant at the police station or in allowing the solicitor to use the transcript to cross-examine defendant as to prior inconsistent statements without first giving defendant an opportunity to read the transcript.

2. **Criminal Law § 89— credibility of witness — possession or use of narcotics**

The trial court in an armed robbery case did not err in permitting the district attorney to ask a defense witness whether he had ever used or possessed controlled substances.

APPEAL by defendant from *Cohoon, Judge*. Judgment entered 10 December 1974 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 9 June 1975.

Defendant was indicted on a charge of armed robbery. He pleaded not guilty and was tried before a jury.

The victim, William Alexander, testified that he was alone in his grocery store about 11:00 a.m. on 31 March 1973 when defendant entered, displayed what appeared to be a pistol, and demanded money. Defendant pushed Alexander to the floor and said, "If you get up, I am going to shoot you." He then removed some $50.00 from the cash register and left the store.

Defendant denied participating in the robbery or ever having been in Alexander's store. He testified that he was with friends on the campus of Elizabeth City State University from approximately 10:30 a.m. until shortly afternoon on the day in

question. He offered testimony from four corroborating witnesses.

The jury found defendant guilty of common law robbery. From judgment imposing a sentence of 8 to 10 years' imprisonment, he appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General W. A. Raney, Jr., for the State.

John H. Harmon for defendant appellant.

ARNOLD, Judge.

[1] Defendant objects to the District Attorney's cross-examining him from a transcript of interrogation at the police station. He contends that it was unfair to allow the police chief to testify from the transcript while refusing to allow defendant to do the same. This contention is without merit.

It is well settled that a witness may refresh his recollection from a memorandum prepared by him or in his presence. 1 Stansbury, N. C. Evidence (Brandis rev.) § 32. It is equally clear that a witness may be impeached by proof of prior inconsistent statements. *State v. McPeak,* 243 N.C. 273, 90 S.E. 2d 505 (1955); *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773 (1954). Chief Owens was testifying on direct examination while defendant was being cross-examined with respect to his alibi defense. The court's rulings on the use of the transcript therefore were not error.

[2] Defendant further objects to the District Attorney's asking a defense witness, Leon Thomas, whether he had ever used or possessed controlled substances. He contends that anything which discredited the witness also discredited his case, and, of course, he is correct. Nevertheless, it is fundamental that on cross-examination a witness may be impeached by inquiry into specific acts of misconduct. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1971); *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). *See generally* 1 Stansbury, *supra,* § 42. The scope of cross-examination rests in the discretion of the trial judge, which in the instant case was not abused.

Defendant has received a fair trial free from prejudicial error.

No error.

Judges MARTIN and CLARK concur.

STATE OF NORTH CAROLINA v. JIMMY ASHE

No. 7530SC240

(Filed 2 July 1975)

Robbery § 4— common law robbery — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for common law robbery where it tended to show that defendant walked his victim home from a poolroom late at night, defendant fell behind the victim, the victim testified that he told defendant to come on whereupon defendant hit the victim in the head with a rock, ran into him with his body, and took the victim's pocketbook.

APPEAL by defendant from *Friday, Judge.* Judgment entered 30 October 1974 in Superior Court, CHEROKEE County. Heard in the Court of Appeals 27 May 1975.

Defendant was tried on a bill of indictment charging him with the crime of common law robbery.

The jury returned a verdict of guilty as charged. Judgment was entered imposing a sentence of imprisonment.

Attorney General Edmisten, by Associate Attorney G. Jona Poe, Jr., for the State.

Creighton W. Sossomon, for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the court's refusal to grant his motions for nonsuit.

Viewed in the light most favorable to the State, the evidence tends to show the following. In the late afternoon of 11 April 1974, E. A. Browning, age 68, went to a poolroom in Murphy. Defendant, age 28, was also there. Browning has known defendant for about five years. Both of them had been

drinking and shooting pool during the evening. Defendant had lost all of his money shooting pool. On the night of the robbery he borrowed $200.00 from the operator of the poolroom. Browning remained at the poolroom until about 1:00 a.m. When he left, defendant followed. Defendant told the operator of the poolroom that he would walk defendant home. They went out the back door and walked together down a deserted street. No one else was with them and Browning saw no one else on the street. Browning was walking pretty fast and defendant dropped a few steps behind. Defendant said, "Hey, wait for me." Browning replied, "Well, come on." Browning's testimony continued, " . . . I took about two steps, and a rock hit me on the head, he ran into me . . . he ran into me with his body, and liked to knock me off my feet, and the same time hit me with a rock in the head . . . and reached in my pocket and got my pocketbook." Browning had about $300.00 in his pocketbook and all of it was taken. Defendant returned to the poolroom about thirty minutes after he had left with Browning. Defendant stayed at the poolroom until about 3:00 a.m. A police officer discovered Browning in the street about 7:15 a.m. He was carried to the hospital where he was found to have a fractured hip and bruises about his head. He was very confused and the doctor concluded he had suffered a cerebral concussion.

The motion for nonsuit was properly denied. That the State's evidence of the identity of defendant as the robber was weakened on cross-examination and by the defendant's evidence is of no consequence on a motion for nonsuit. The evidence must be considered in the light most favorable to the State.

Defendant's remaining assignments of error have been considered and found to be without merit.

Defendant having failed to show prejudicial error, the verdict and judgment must be upheld.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE WEBB

No. 7528SC131

(Filed 2 July 1975)

1. **Crime Against Nature § 2— constitutionality of statute**

The crime against nature statute, G.S. 14-177, is not unconstitutionally vague.

2. **Crime Against Nature § 1; Rape § 17— crime against nature — assault with intent to commit rape — two offenses — no double jeopardy**

Elements of the crime against nature, G.S. 14-177, and assault with intent to commit rape, G.S. 14-22, are distinct and different, and convictions for both charges upon the evidence in these cases did not twice put defendant in jeopardy for one crime.

ON *writ of certiorari* to review trial before *Jackson, Judge.* Judgments entered 24 April 1974 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 April 1975.

Defendant was charged in indictments proper in form with the following: Case No. 72CR19196, rape; Case No. 72CR19020, kidnapping; Case No. 72CR19195, crime against nature. In Case No. 72CR19019 he was arrested under a proper warrant charging him with carrying a concealed weapon. In Case No. 72CR19196 defendant was tried on his plea of not guilty to assault with intent to commit rape. He also pled not guilty in each remaining case. All cases were consolidated for trial. The jury found defendant guilty on each charge, and judgment was imposed in each case.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

Michael Edward Vaughn for defendant appellant.

PARKER, Judge.

[1] Prior to his pleading not guilty to the charge of committing a crime against nature, defendant's motion to quash the indictment of that charge was denied. He assigns error to this denial, contending that the statute upon which the indictment was based, G.S. 14-177, is unconstitutionally vague. This specific question was decided adverse to defendant's contention in *State v. Moles,* 17 N.C. App. 664, 195 S.E. 2d 352 (1973) and in *State v. Crouse,* 22 N.C. App. 47, 205 S.E. 2d 361 (1974). *See Perkins v. State of North Carolina,* 234 F. Supp. 333 (W.D.N.C. 1964).

[2] Defendant also urges that the trial court erred in denying his motion to arrest the judgment on his conviction of committing a crime against nature. His contention is that the crimes of assault with intent to commit rape, G.S. 14-22, and committing a crime against nature, G.S. 14-177, are essentially the same offense, and convictions for both charges upon the evidence in the cases on this appeal constitute putting defendant twice in jeopardy for one crime. We disagree. The elements of each offense are distinct and different. Furthermore, the record discloses ample and separate evidence to support verdicts on the charges contained in the indictments numbered 72CR19196 and 72CR19195.

We have carefully reviewed the record and find no error appearing therein with respect to the indictments, arraignments, the trial and the judgments.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. EARL DOUGLAS STOKES AND WAYNE EARL WATKINS

No. 7518SC181

(Filed 2 July 1975)

Criminal Law § 155.5— failure to docket record in apt time

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from, the time for docketing not having been extended by the court's order extending the time for serving the case on appeal. Court of Appeals Rule 5.

APPEAL by defendants from *Rousseau, Judge.* Judgments entered 17 October 1974, in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 May 1975.

These cases were consolidated for trial. Both defendants were charged with armed robbery. Upon their pleas of not guilty, the jury returned verdicts of guilty as charged against both defendants. From judgments sentencing each of them to imprisonment for a term of not less than 25 nor more than 30

years, with credit to both defendants for 58 days spent in jail awaiting trial, defendants appealed.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Z. H. Howerton, Jr., for defendant appellants.

MORRIS, Judge.

The judgments in this case were entered on 17 October 1974. The record on appeal was filed more than 90 days later, on 5 March 1975. The trial court granted motion of defendants' court appointed counsel for an extension of time to serve the case on appeal but no order was entered extending the time for docketing the record on appeal. "[A]n order extending the time within which to serve the case on appeal does not have the effect of extending the time to docket the appeal," *State v. Hopkins*, 24 N.C. App. 687, 688, 212 S.E. 2d 171, 172 (1975), and, in accordance with the practice of this Court, the defendants' appeal is dismissed for failure to comply with the rules of this Court. Rule 5, Rules of Practice in the Court of Appeals of North Carolina.

Appeal dismissed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. CASS McGAHA, JR.

No. 7530SC233

(Filed 2 July 1975)

Criminal Law § 155.5— docketing of record not timely — appeal dismissed

Appeal is dismissed where the record on appeal was filed more than ninety days after judgment in the case was entered.

APPEAL by defendant from *Friday, Judge.* Judgment entered 14 November 1974 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 27 May 1975.

Defendant was charged with operating a motor vehicle on a public street or public highway "[w]hile his chauffeur's license

was revoked" and "[w]hile under the influence of intoxicating liquor; this being his second offense" of operating a motor vehicle while under the influence of intoxicating liquor. Upon his plea of not guilty, the jury returned a verdict of "guilty as to both offenses." From judgments on the verdict, defendant appealed.

Attorney General Edmisten, by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Alfred N. Salley, for the State.

Miller, Alley & Killian, by Leon M. Killian III, for defendant appellant.

MORRIS, Judge.

The judgment in this case was entered on 14 November 1974. The record on appeal was filed more than 90 days later, on 24 March 1975. Although the trial judge entered an order extending the time to serve the case on appeal, no order was issued extending the time for docketing the record on appeal. Under Rule 5 the record on appeal must be docketed within 90 days after the date of the judgment appealed from, unless the trial judge extends the time, not exceeding an additional 60 days to docket the record on appeal. Nor is an extension of time within which to docket the record on appeal accomplished by the obtaining of an extension of time within which to serve the case on appeal. *Clark v. Williams*, 22 N.C. App. 341, 206 S.E. 2d 310 (1974).

Appeal dismissed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM DONALD PERRY

No. 759SC296

(Filed 2 July 1975)

ON *certiorari* to review the trial of defendant before *Hall, Judge.* Judgment entered 29 August 1974 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 12 June 1975.

The defendant was charged in separate bills of indictment, proper in form, with the armed robbery of William Eaton and with assaulting William Eaton with a deadly weapon with intent to kill inflicting serious injury. At trial, the State offered evidence tending to show that on 22 December 1973, between four and five o'clock in the morning, the defendant and another man came to a motel near Franklinton where Eaton was working and inquired about a room. The defendant was carrying a "suit bag" over his shoulder. Defendant pointed a shotgun at Eaton and struck him several times with "some solid object." The defendant fired the shotgun and part of the load went into an adding machine with some of the shot striking Mr. Eaton in the hand. Approximately $180.00 was taken from Mr. Eaton. The witness testified that he recognized both of the men as having been at his motel inquiring about the price of a room several weeks earlier.

The investigating officers found a letter in the suit bag addressed to the defendant. The defendant signed a confession stating that he and "June Bug" planned and executed the robbery of Mr. Eaton at the motel.

The defendant offered no evidence at trial. The defendant was found guilty of armed robbery and assault with a deadly weapon inflicting serious injury.

From a judgment imposing a prison sentence of not less than twenty (20) nor more than twenty-three (23) years in the armed robbery case and a prison sentence of not less than four (4) nor more than five (5) years in the assault case, he appealed.

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

Smith & Banks by James W. Smith for defendant appellant.

HEDRICK, Judge.

By four assignments of error, based on exceptions duly noted in the record, the defendant contends: (1) The trial court erred "in failing to grant a mistrial based on the statement made by the District Attorney to the jury which stated 'The defendant is charged along with another defendant who will be tried next week' "; (2) The trial court erred in concluding that Mr. Eaton's "testimony as to identification was admissible in evi-

dence"; (3) The trial court erred "in concluding that the defendant's statements were freely, voluntarily and understandingly made without undue influence, compulsion or duress, and that said statements are admissible in evidence"; (4) The trial court erred "in allowing the State to introduce into evidence State's Exhibits Nos. 3 and 7, being adding machine and shotgun."

The principles of law raised by these assignments of error and the arguments advanced in support thereof are so well-settled that further elaboration thereon by us in this case would serve no useful purpose. The record before us of defendant's trial demonstrates that the able trial judge correctly followed and applied approved principles of criminal law and procedure in making the rulings challenged by these exceptions. In our opinion, the defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. WALTER ANDRE GOODSON

No. 7526SC152

(Filed 2 July 1975)

APPEAL by defendant from *Falls, Judge.* Judgments entered 23 October 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1975.

Defendant was charged in two bills of indictment with (1) the felony of armed robbery and (2) the felony of assault with a deadly weapon with intent to kill, inflicting serious injuries.

The State's evidence tended to show the following: On 27 May 1974, at approximately 5:45 p.m., defendant entered Broadway's Furniture Company on Rozzells Ferry Road in the City of Charlotte. The only persons in the store at that time were Mr. Broadway and his secretary, Mrs. Arnold. Defendant walked directly to the desk where Broadway was working. When defendant was about three feet from Broadway, he pulled a pistol from under his jacket and announced: "[T]his is a holdup,

give me your money." Defendant took Broadway's watch and wallet, and the money from the cash drawer. Defendant then walked about fifteen feet toward the front door, stopped, turned around, and shot Broadway in the forehead. Defendant proceeded another five feet toward the front door, stopped again, turned, and shot Broadway in the groin. Broadway's wallet contained his driver's license, a check payable to Broadway in the sum of $437.00, and a check payable to Broadway in the sum of $48.78. Broadway was hospitalized for several days for treatment of the gunshot wounds, and suffered total blindness of his right eye. About three to four hours after the robbery, defendant undertook to cash the $48.78 check at Midget Supermarket, but was refused. The day after the robbery the investigating officer found the $437.00 check, the $48.78 check, and Broadway's driver's license near the Southside Apartments. Each of the items had been torn up. Defendant was arrested at his sister's apartment in Southside Apartments.

Defendant denied the robbery and the shooting. He offered evidence which tended to account for his actions throughout the day of the robbery and shooting. His evidence tended to show that he was not in the vicinity of Broadway's Furniture Company or Midget Supermarket during the entire day in question.

Attorney General Edmisten, by Associate Attorney George J. Oliver, for the State.

Edmund A. Liles, for the defendant.

BROCK, Chief Judge.

We have examined all assignments of error properly brought forward. In our opinion they are wholly without merit. Defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD STURDIVANT

No. 7520SC293

(Filed 2 July 1975)

APPEAL by defendant from *Kivett, Judge.* Judgment entered on 12 December 1974 in Superior Court, ANSON County. Heard in the Court of Appeals on 12 June 1975.

Defendant, together with one Fred Pegues, was charged in an indictment with the armed robbery, by the use of a knife, of Purcell Tillman. Defendant pled not guilty, a jury returned a verdict of guilty as charged, and from judgment imposing prison sentence of not less than 12 nor more than 18 years, he appealed.

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

Henry T. Drake for the defendant appellant.

BRITT, Judge.

Purcell Tillman, the victim of the alleged robbery, testified substantially as follows: On 10 August 1974, at approximately 5:00 p.m., he was waiting for his sister to arrive at the bus station in Wadesboro. While waiting he was walking up and down the street. It was daylight and he could see. He entered an alley and Fred Pegues grabbed him and "throwed a knife around (his) neck." The point of the knife was against his throat. At about the same time, defendant grabbed him around the waist and reached into his pocket. When defendant grabbed him around his waist he was looking squarely into defendant's face. They "slammed" Tillman against the wall, took his wallet, and "slammed" him down. Tillman managed to get away and ran down the street with Pegues in pursuit. Pegues was stopped by a policeman and arrested for public drunkenness. Defendant came up to the policeman and asked that Pegues be released. The officer refused. While the officer was taking Pegues to the station, Tillman "flagged" the officer and told him that Pegues and defendant had robbed him.

In his brief, defendant contends (1) the bill of indictment is defective, (2) the court commented on the evidence in violation of G.S. 1-180, (3) the court erred in allowing the district

attorney to lead the State's witness, and (4) the court erred in failing to grant defendant's motion for a mistrial. It suffices to say that we have carefully considered each of the contentions and find no merit in any of them. We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. FRANK WALLACE PUGH

No. 7512SC309

(Filed 2 July 1975)

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 25 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 17 June 1975.

Defendant was charged in a two-count indictment with possession with intent to sell and deliver heroin, and felonious sale and delivery of heroin, in violation of Schedule I of the Controlled Substances Act. He pleaded not guilty and was tried before a jury.

Albert Stout, Jr., testified that on 4 April 1974 he was working in Cumberland County as an undercover agent for the State Bureau of Investigation. On that day defendant sold Stout two foil packets later shown to contain heroin. Defendant denied knowing Stout or making the sale.

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.

Cherry and Grimes, by Sol G. Cherry, for defendant appellant.

ARNOLD, Judge.

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

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JODIE V. AUSTIN

No. 7520SC321

(Filed 2 July 1975)

ON *certiorari* to review the trial before *Smith, Judge.* Judgment entered 20 August 1974 in Superior Court, UNION County. Heard in the Court of Appeals 18 June 1975.

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

Keith M. Stroud, for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. PRESTON WILLIAMS

No. 754SC276

(Filed 2 July 1975)

ON *certiorari* to review defendant's trial before *Cohoon, Judge.* Judgment entered 13 August 1974 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 June 1975.

Attorney General Edmisten by Assistant Attorney General George W. Boylan for the State.

Strickland and Gurganus by James R. Strickland for defendant appellant.

BRITT, HEDRICK and MARTIN, Judges.

No error.

INDUSTRIAL CIRCUITS COMPANY v. TERMINAL COMMUNICATIONS, INC.

No. 7510SC290

(Filed 16 July 1975)

1. **Rules of Civil Procedure § 59— disregard of jury instructions — change of verdict by court improper — new trial proper**

Where the jury manifestly disregarded the trial court's instructions with respect to damages, it was not within the authority of the court to enter an order, "as an alternative to entering a new trial," eliminating an item of damages awarded by the jury and reducing the verdict by that amount; therefore, the action must be remanded for a new trial on the issue of damages. G.S. 1A-1, Rule 59.

2. **Uniform Commercial Code § 20— breach of contract — measure of damages**

In an action for breach of contract where plaintiff agreed to produce for defendant 6000 printed circuit boards at a stated price per board, six designs were to be used, if defendant requested less than 1000 boards of any design the charge would be more than the amount designated therefor in ascending scales from 200 to 999, this arrangement was referred to as the "bill back" provision, defendant purchased less than 200 boards in each design and then repudiated the contract, and plaintiff computed a "bill back" charge based on its normal sales price for an order of the size filled since the "bill back" provision did not cover quantities of less than 200, the trial court properly instructed the jury to exclude from its consideration of damages the amount charged by plaintiff as the "bill back" item, since the proper measure of damages in the action was the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in G.S. 25-2-710, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. G.S. 25-2-708(2).

3. **Contracts § 27— breach of contract — motion for directed verdict properly denied**

The trial court did not err in denying defendant's motion for directed verdict in an action for breach of contract where plaintiff offered evidence of the contract between the parties for the production and sale of printed circuit boards, plaintiff's compliance with the contract and defendant's breach thereof, and plaintiff's items of damage.

BOTH plaintiff and defendant appealed from *McLelland, Judge*. Judgment entered 20 November 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 11 June 1975.

In its complaint filed 8 May 1972, plaintiff alleged that on or about 17 March 1970 the defendant had entered into a

contract to buy printed circuit boards, a type of equipment used in the electronics industry, from the plaintiff, and that the defendant subsequently had breached the contract. In its answer defendant denied it had breached the contract and counterclaimed alleging the plaintiff had breached the contract by failing "to manufacture printed circuit boards of the quality required" and by failing "to comply with agreed delivery schedules."

At the trial plaintiff offered evidence tending to show the following: Printed circuit boards are designed by the buyer and are produced by the manufacturer in strict accordance with the specifications of the buyer. Therefore, a printed circuit board produced for one buyer ordinarily cannot be used by any other buyer and has no market price. On 17 March 1970 plaintiff and the defendant entered into a contract providing that plaintiff would produce "one thousand pieces each of five different printed circuit boards" for a total of 5000 boards and defendant would pay "a price of $21.00 for each with a total dollar value of $105,000." The contract was later modified to provide that a "6th type of circuit board" would be added to the purchase order "[a]gain, for a thousand pieces," but that the dollar value of the order would remain "roughly the same, $105,000" due to an adjustment in the pricing on one of the parts.

The contract did not contemplate that all 6,000 boards would be sent to the defendant in one shipment; instead, the defendant would have the right to request that a specified number of boards be shipped at any time. Defendant then would pay the plaintiff $21.00 for each board shipped. The contract contained a "bill back" clause providing that if the total number of boards requested by the defendant for a particular design did not amount to 1,000, but instead was between 500 and 999, the price per board would be raised to $25.00. Similarly, if the defendant requested only 200 to 499 boards of a particular design, the price per board would be raised to $30.00. This additional charge would be "billed back" to the defendant when the contract was completed. The reason for the "bill back" clause was that through economies of scale, plaintiff was able to produce a larger quantity of printed circuit boards at a lower cost per board than it could a small quantity.

Between 17 March 1970 and 1 December 1970 defendant requested, and plaintiff shipped, a total of 338 printed circuit boards to the plaintiff for all six designs. Defendant requested

less than 200 boards of each design. For these 338 boards defendant paid the plaintiff $6,268.50. On 7 December 1970, plaintiff received a cancellation notice from the defendant, dated 1 December 1970, repudiating the contract "due to poor quality and nondelivery." Since a total purchase of only 338 boards for all six designs was not covered by the "bill back" clause of the contract, the plaintiff computed a "bill back" charge based on its normal sales price for an order of this small size, and this "bill back" amounted to $8,168.51.

Other evidence introduced by the plaintiff tended to show that before repudiating the contract the defendant had repeatedly asked the plaintiff to ship the printed circuit boards more quickly after they were requested and therefore plaintiff had proceeded to build some boards in advance, so that they could be sent to the defendant immediately when a request was received. When the defendant repudiated the contract the plaintiff was "stuck" with boards which had cost it $3,413.15 to produce.

The plaintiff's President and General Manager testified that 10% of the total contract price was the plaintiff's "normal profit on the large quantity type of order like this." On the basis of this testimony the plaintiff maintained it was entitled to lost profits in the amount of $9,853.65 [($105,805—$6,268.50) × 10%] for the unsold boards, not $10,500 ($105,000 × 10%) for the whole contract. As computed by the plaintiff it sustained total damages of $21,630.29 as a result of the defendant's breach of the contract:

"(a) Additional or bill back charges for lesser quantities than included in the original purchase order, as amended.		$8,168.51
(b) Charges for		
(I) Raw material	$ 835.48	
(II) Work in Progress	3,413.15	
Subtotal		$4,248.63
(c) Loss of profits on cancellation of balance of entire purchase order computed as follows:		
Gross amount of purchase order	$105,805.00	
Less boards shipped	6,268.50	
Balance of order at time of cancellation	$ 98,536.50	

Margin of profit	10%	
Loss of profits		$9,853.65
Subtotal		$22,270.79
Less credit for boards paid for and returned		640.50
Plaintiff's asserted cancellation charges		$21,630.29"

Defendant's evidence tended to show that the plaintiff breached the contract by failing to manufacture printed circuit boards of the quality required and by failing to comply with agreed delivery schedules; that as a result of the breach defendant incurred extra costs and expenses incident to the use of the plaintiff's boards in its terminal computers; that defendant was finally forced to obtain its printed circuit boards from another supplier at additional expense to itself; and that later defendant purchased equipment and began producing its own boards. As a result of the plaintiff's breach defendant contended it was justified in terminating the contract and that it was entitled to damages of $32,656.00.

The jury found that the defendant had wrongfully breached its contract with the plaintiff. On the issue of damages, the jury found that the plaintiff was entitled to a total recovery of $20,794.81, apparently computed as follows:

(1)	Bill back charge for reduced quantity releases	$8,168.51
(2)	Charge for work in progress	3,413.15
(3)	Charge for lost profit on the order	9,853.65
	Subtotal	$21,435.31
(4)	Less: Credit for boards returned	— 640.50
		$20,794.81

In its charge the trial court had instructed the jury that the plaintiff was not entitled to recover the "bill back" charge of $8,168.51. Because the jury violated the trial court's instructions the court reduced the plaintiff's damages by $8,168.51 and entered judgment for the plaintiff in the amount of $12,626.30. Both parties appealed.

Allen, Steed and Pullen, P.A., by Arch T. Allen III, for plaintiff appellant Industrial Circuits Company.

Joslin, Culbertson & Sedberry, by William Joslin, for defendant appellant Terminal Communications, Inc.

MORRIS, Judge.

[1] The court, in its instructions to the jury, specifically directed the jury that they could not consider the "bill back" figures as damages for breach of contract. From the jury verdict, it is apparent that the jury disregarded this instruction and included the bill back charges. From the evidence presented, there is no other way the jury could have arrived at the verdict it did. The court found that the verdict on the third issue (damages) constituted a "manifest disregard by the jury of the instructions of the Court" within the language of G.S. 1A-1, Rule 59(a)(5), one of the grounds upon which a new trial may be granted upon motion of a party or on the initiative of the court. G.S. 1A-1, Rule 59(d). We think the court properly found that the jury had disregarded his instructions on this issue. However, we do not agree that the court acted properly or with authority when it entered an order, "[i]n its discretion, as an alternative to ordering a new trial," eliminating the "bill back" item of $8,168.51 and reducing the verdict to $12,626.30, without the consent of the interested party. The rule is stated in *Bethea v. Kenly,* 261 N.C. 730, 732, 136 S.E. 2d 38, 40 (1964):

> " 'It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where it is allowed by law and has not been included in the findings of the jury.' 2 McIntosh, North Carolina Practice and Procedure. § 1691 (2d ed. 1956); *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433."

We find nothing in the new Rules of Civil Procedure which would grant to the court the authority to modify the verdict by changing the amount of the recovery. See 2 McIntosh, North Carolina Practice and Procedure, §§ 1596, 1691 (2d ed. 1956) and §§ 1596, 1691 (Phillips Supp. 1970).

Each appellant purportedly excepts to the action of the court in reducing the verdict, although no objection or exception thereto appears in the record until after the notice of appeal, appeal entries, and orders extending time for serving case on appeal. However, the appeal itself is considered as an exception to the judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 24, p. 147. There must be a new trial on the issue of damages.

[2] We are of the opinion that the court was correct in instructing the jury to exclude from its consideration of damages the amount charged by plaintiff as the "bill back" item. The measure of damages is controlled by the applicable portions of the Uniform Commercial Code. In this case G.S. 25-2-708(2) is applicable and provides that the measure of damages "is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this article (§ 25-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale."

G.S. 25-2-710 provides:

> "Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach."

As is stated in G.S. 25-1-106, the remedies of the Uniform Commercial Code are to be "liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this chapter or by other rule of law."

The Code, however, does not change the measure of damages in North Carolina in cases such as the one before us. The measure of damages suggested by the Code was substantially the measure of damages effective in this State prior to the adoption of the Code. The Supreme Court in *Service Co. v. Sales Co.*, 259 N.C. 400, 415-417, 131 S.E. 2d 9, 21-23 (1963), spoke to the subject in a clear and unambiguous manner. Speaking through Justice Moore, the Court said:

> "For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for the breach. Where one violates his contract he is liable for such damages, including *gains prevented* as well as *losses sustained,* which may fairly be

supposed to have entered into the contemplation of the parties when they made the contract. *Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606; *Chesson v. Container Co.*, 215 N.C. 112, 1 S.E. 2d 357.

By 'gains prevented' is meant loss of profits, if any would have been realized from the completed transaction. In determining loss of profit, the following rules are applicable in appropriate circumstances: The measure of damages for the buyer's breach of a contract for the manufacture of goods, where the goods have already been manufactured or produced and where there is an available market therefor, is the difference between the contract price and the market price at the time fixed for delivery. However, if the goods are manufactured for a particular purpose, or for other reasons have no general market value, the rule of damages based on the difference between the contract price and the market price does not apply. In such case, the measure of damages has been generally stated to be the difference between the contract price and the cost of manufacture. If at the time of the breach a part of the goods has been manufactured and delivered, the seller may recover as damages the full contract price (less any credits) for the goods delivered and, as to the portion of the goods not delivered, may recover the difference in the contract price of the undelivered goods and what it would have cost the seller to manufacture and deliver the undelivered portion. *Springs Co. v. Buggy Co.*, 148 N.C. 533, 62 S.E. 637; *Clements v. State*, 77 N.C. 142; 78 C.J.S., Sales, s. 479(c), pp. 145-6; 44 A.L.R., Anno; Damages—Sales—Buyer's Breach, p. 215, supplemented in 108 A.L.R. 1482; 3 Williston, Sales (Rev. Ed. 1948) s. 583a, p. 246.

'In addition to lost profits, the seller may recover expenditures for labor and materials reasonably made in part performance of the contract, to the extent that they are wasted when performance is abandoned.' 78 C.J.S., Sales, s. 479(d), p. 147; *Leiberman v. Templar Motor Co.*, 140 N.E. 222, 29 A.L.R. 1089 (N.Y. 1923). In this category of damages 'any expenses which might be reasonably contemplated by the buyer as the probable result of his failure to comply with the contract are properly included' (78 C.J.S., Sales, s. 482, p. 150)—provided, of course, they are wasted expenses, expenses attributable to undelivered goods. But re-

covery of damages and expenses referred to in the two preceding sentences are limited to such as accrued prior to notification by the buyer that he would accept no further deliveries. *Advertising Co. v. Warehouse Co.*, 186 N.C. 197, 119 S.E. 196. In determining damages for wasted materials, the market or salvage value of unused materials is to be deducted from the cost of the unused materials. The seller must use reasonable diligence to minimize damages. 78 C.J.S., Sales, s. 479(d), pp. 146-7; *Bennett v. S. Blumenthal & Co., Inc.*, 155 A. 68 (Conn. 1931); *Atalah v. Wilson Lewith Machinery Corp.*, 200 F. 2d 297 (4th Cir. 1952).

There is also the question whether, in determining lost profits by ascertaining the difference between the contract price of the undelivered goods and what it would have cost to manufacture and deliver these goods, the cost should include overhead expenses and fixed charges reasonably applicable to the undelivered portion of the contract. In cases, such as the one at bar, where the seller has an established and going business and is manufacturing and selling goods to various buyers, overhead and fixed charges constitute elements of cost of manufacture and are the subject of proper inquiry, and they are susceptible of approximate ascertainment. *Worrell & Williams v. Kinnear Mfg. Co.*, 49 S.E. 988 (Va. 1905). It follows, in such case, that overhead and fixed charges are elements of damages for wasted labor and expenses, insofar as they are reasonably applicable thereto. In passing, it should be noted that in cases where the contract requires the seller to build a factory or expend large sums in particular preparation to supply the particular buyer for a long period of time, the cost of production is computed without including therein any allowance for overhead or fixed charges. *Georgia Power & Light Co. v. Fruit Growers Express Co.*, 190 S.E. 669 (Ga. 1937)."

Applying those rules the Court said that if defendant had breached the contract, plaintiff could recover as damages:

"(a) The unpaid balance of the contract price for the units manufactured and delivered; (b) lost profits with respect to the undelivered portion of the purchase order, that is, the difference between the contract price of the undelivered units and what it would have cost to manufacture and deliver them. The cost of manufacture is to include the cost of materials necessary to manufacture the undelivered units, the cost of direct labor thereon, and overhead and fixed

charges. Overhead, of course, includes such items as factory overhead, administrative costs and selling costs. (c) Cost of materials, labor, overhead and fixed charges wasted by reason of the breach, but only such as accrued prior to the notification to cease deliveries. The amount of damages for materials wasted is to be determined by the difference between the cost of the materials on hand at the time of notification and the market or salvage value of such materials."

We think the measure of damages set out by the court is the same as that prescribed by the Code. Of course, in the case before us, defendant would be entitled to credit for goods returned.

In addition to the question of reducing the verdict of the jury raised by both plaintiff and defendant on appeal and questions with respect to the measure of damages presented by both parties on appeal, defendant appellant contends that the trial court erred in refusing to grant its motion for a directed verdict, in its phrasing of the first issue submitted to the jury, and in its charge to the jury on the first issue.

According to the record before us, the defendant made no objection at the time of trial to the court's denial of its motions for directed verdict made at the close of plaintiff's evidence and renewed at the end of all the evidence. Exception to the ruling of the court appears for the first time at the end of plaintiff appellant's grouping of exceptions and assignments of error and just before defendant appellant's grouping of exceptions and assignments of error. Nor does the record reveal defendant's objection to the issues submitted by the court. The order on final pre-trial conference does indicate that each party had its own idea of the issues to be submitted and were not, at that time, in agreement on the issues. However, the record does not reveal that either party ever tendered issues to the court and excepted to the court's refusal to submit the tendered issues. Nor does the charge of the court contain exceptions thereto raised by either party. Defendant's exceptions to the charge appear for the first time in the record in the same manner as its exceptions to the court's failure to grant its motion for directed verdict. Even there, the Court is not referred to the page of the record where the alleged error in the instructions appear, nor does the assignment of error indicate what appellant contends the court should have charged. Nevertheless, in spite of the failure properly to bring exceptions to the attention of the

Court, we have chosen to discuss defendant's purported exceptions, as we did plaintiff's purported exceptions which are subject to the same criticism.

[3] The parties stipulated as follows: "Plaintiff and Defendant entered into a contract on or about March 17, 1970, for Plaintiff to manufacture and sell to Defendant certain 'PC Boards.' These goods are printed circuit boards containing series of interrelated and connecting circuits. These boards were components of computer terminals manufactured by Defendant." Plaintiff introduced evidence tending to show that the contract between the parties provided that plaintiff would produce 1000 "PC Boards" in accordance with each of five designs submitted by defendant for a total of 5000 boards. Defendant would pay plaintiff $21 per board for a total price of $105,000. The contract was later changed by purchase order dated 13 May 1970 to add a sixth design, denominated as #0231 PC Board, from which 1000 boards would be manufactured. The price for this design would be $10.50 per board and the price for #0230 PC Board was changed to $10.50, leaving the total price at $105,000. It was not contemplated that all 6000 boards would be delivered in one shipment. Rather, defendant had the right to request a specified number which would be manufactured, shipped, and payment made upon delivery. The contract provided that if defendant should request less than 1000 boards of any design the charge would be more than the amount designated therefor in ascending scales from 200 to 999. This is referred to as the "bill back" provision, the additional charge to be billed back to defendant when performance of the contract was completed. Plaintiff testified that the reason for this provision was that it could produce larger quantities at a lower cost per board than it could a small quantity. Defendant requested and plaintiff shipped a total of 338 boards for all six designs, less than 200 of any one design. Defendant paid for these boards $6,268.50. Defendant then repudiated the contract. Since the bill back clause did not cover quantities less than 200, plaintiff computed a bill back charge based on its normal sales price for an order of the size filled and billed defendant for $8,168.50. Plaintiff further testified that defendant, prior to repudiating the contract, repeatedly requested more prompt delivery after request. Accordingly, plaintiff began to manufacture boards ahead of request so that requests could be filled more quickly. When defendant repudiated, plaintiff had a supply of boards on hand and its expense in producing them was $3,413.15. Plaintiff further testified,

without objection, that its normal profit on an order the size of this one was 10%. We think the evidence is sufficient to withstand a motion for directed verdict.

Defendant's evidence tended to show that the boards manufactured by plaintiff were defective in many ways, that delivery was not as promised and that defendant was justified in repudiating the contract. Defendant further testified that it was common practice in the industry "to have a bill back clause with a purchase agreement"; that it did not assume that defendant was obligated to purchase 1000 of each of the six type boards; and that although the contract might say 1000 it really meant something less than that.

The contract itself provides in paragraph 9:

"Minimum Order Quantities:

To qualify for pricing under this purchase order, the following minimums shall be observed:

Per Order

Each release issued must have a dollar value of not less than *NA*.

Per Item

Each item ordered must be ordered in a dollar value of not less than *NA*."

Paragraph 10 provides:

"In the event that the reject rate for any item is in excess of one percent at Terminal Communications, Inc. receiving inspection, the price adjustment schedule in paragraph 12 for that item will no longer apply, regardless of quantities released, since this reject rate can cause the release schedule to change."

Paragraph 11 is entitled "Delivery Schedule" and immediately following the title the words "Planning Purposes only" appear in parenthesis. The paragraph sets up a schedule of delivery dates beginning with 3-31-70 and ending with 4-30-71. The contract in paragraph 1 thereof apparently was for deliveries from 3 March 1970 through 3 March 1971. The delivery schedule provides for delivery of four of each item on 3-31-70 and provides for deliveries each month thereafter to and including 30 March

1971 and 30 April 1971—both dates presumably after the time for performance—and provides for a delivery of a total of 1004 of each item.

Paragraph 12 is entitled "Price Adjustment Schedule." It is the "bill back" clause referred to and provides:

> "In the event Terminal Communications, Inc. does not purchase the estimated total quantity from March 3, 1970 through March 3, 1970 the following adjustment schedule will be applied. Terminal Communications, Incorporated will be invoiced for the difference between the price for the quantity range actually purchased and the lower initial price.

	Quantity		
Item No.	200-499	500-999	1000
#0226	30.00	25.00	21.00
#0227	30.00	25.00	21.00
#0228	30.00	25.00	21.00
#0229	30.00	25.00	21.00
#0230	30.00	25.00	21.00."

It is obvious that the contract is ambiguous. The jury ascertained its meaning in favor of plaintiff upon an issue submitted without objection and without tender of an alternative issue. *Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113 (1962). Ordinarily, "[t]he number, form and phraseology of the issues lie within the sound discretion of the trial court," and where the issue is "sufficiently comprehensive" to resolve the controversy, its submission will not be held for error. *Chalmers v. Womack,* 269 N.C. 433, 435-436, 152 S.E. 2d 505, 507 (1967). The issue submitted was sufficient to resolve the controversy arising upon the pleadings and the evidence.

Defendant contends that the court erred in charging the jury that under the evidence they might find that plaintiff's reasonably anticipated profit from the full performance of the contract was 10% of the total value of the contract. Plaintiff was allowed to testify in this vein, without objection by defendant. As we have previously noted, the charge contains no bracketed or otherwise identifiable portions to which defendant excepts. However, since the matter will be for retrial on the issue of damages, this question on this appeal is moot. Perhaps upon retrial defendant will, by proper objection, be able to prevent what it deems incompetent evidence from being presented to

the jury. In any event, proper objection and exception in the record will allow the question to be presented on appeal.

Defendant also raises the question of the impropriety of the court's order reducing the verdict. This question has been discussed; and, as previously indicated, the error of the court results in the necessity of a new trial on the issue of damages.

New trial on damages issue only.

Judges VAUGHN and CLARK concur.

BRANDENBURG LAND COMPANY, A CORPORATION v. ARTHUR F. WHITE, FLOYD D. WHITE, HAZEL WHITE, LATHAM RIGGS, GEORGE EVANS, LEE THOMAS WRIGHT AND AMOS SYKES

No. 754SC267

(Filed 16 July 1975)

1. **Trespass to Try Title § 2— burden of proof**

When defendants in an action in trespass to try title denied plaintiff's ownership of the subject tract, the burden was upon plaintiff to prove (1) title, (2) the location of its boundaries, and (3) the trespass and damage.

2. **Trespass to Try Title § 4— missing link in chain of title**

In this action in trespass to try title, there was a missing link in plaintiff's chain of title where defendant offered in evidence a 1900 trust deed in which the State Board of Education and two individuals conveyed the land to trustees with provision that the trustees would pay $25,000 to the Board out of the proceeds of sale of the land and any proceeds over that amount to three named individuals and that the trustees would reconvey to the Board any land remaining unsold on 1 July 1904, plaintiff offered no evidence of any conveyances or other action taken by the trustees under the 1900 trust deed, and the trust deed contained no reversionary clause which would vest title in the State Board of Education or the other named trust beneficiaries.

APPEAL by defendants from *Webb, Judge.* Judgment entered 3 December 1974 in Superior Court, JONES County. Heard in the Court of Appeals 29 May 1975.

This is an action in trespass to try title wherein plaintiff alleges that it is the owner of a certain tract of land (particularly described but acreage not stated); that defendants tres-

passed upon the same by cutting and removing timber; and praying for double damages as provided by G.S. 1-539.1.

All defendants filed answer denying plaintiff's ownership and possession.

Trial by jury was waived.

Plaintiff offered evidence of a connected chain of title to it from the State as follows:

"(a) Land grant No. 505 issued to David Allison by the State of North Carolina for 13,705 acres of land in Jones County, North Carolina, dated the 27th day of December, 1794, duly registered in the office of the Secretary of State of North Carolina (and recorded in Book 778 at Page 405, Craven County Registry); . . .

(b) Land grant No. 551, issued to David Allison by the State of North Carolina for 1,280 acres in Jones County, North Carolina, dated 1795, recorded in Book 1 at Page 152, Jones County Registry, . . .

(c) Indenture, dated the 26th day of November, 1800 from Edmund Hatch, Sheriff of Jones County, to His Excellency the Governor of North Carolina, recorded in Book 3 at Page 354, Jones County Registry, conveying the above Allison Grants Nos. 505 and 551, among others;

(d) Deed from the North Carolina State Board of Education to Jones-Onslow Land Company, dated the 16th day of November 1909, recorded in Book 55 at Page 359, Jones County Registry, which conveys the lands described in (c) above, from Sheriff of Jones County to the Governor;

(e) Deed from William C. Blossom, Trustee in Liquidation of Jones-Onslow Land Company, to Brandenburg Land Company, the plaintiff herein dated the 8th day of January, 1971, recorded in Book 161 at Page 491, Jones County Registry, conveying to the plaintiff all interest of Jones-Onslow Land Company in any lands situate in Jones and Craven Counties, . . ."

Charles J. Brooks, Registered Land Surveyor, for the plaintiff, testified that the subject tract of land was comprised of parts of the two adjoining tracts, Grant No. 505 (13,705 acres) and Grant No. 551 (1,280 acres); that he platted the two tracts,

first establishing the beginning corner of Grant No. 505 which begins at "Hezekiah Merritt's beginning line of his 100-acre patent dated the 2nd day of October, 1782," using two old maps—the "Noble Map" made in 1905 for the State Board of Education, which included surveys of Grants Nos. 505 and 551, and the map entitled "Halifax Timber Company—Miller Heirs Tract, by William H. Utley, Surveyor," dated December 1961, recorded in Map Book 5, page 74, Jones County Registry, which included surveys of the Hezekiah Merritt 100-acre patent and other adjoining tracts. The beginning corner of Grant No. 551 (1,280 acres) was the third corner of the Merritt 100-acre patent. He made a physical survey of that part of Grants Nos. 505 and 551 which lies within the perimeter of the subject tract described in the complaint, describing in detail what he found on and near the lines and corners. The map he made from this survey was received in evidence.

Plaintiff also offered evidence of the cutting and removal of timber by the defendants.

Defendant introduced into evidence a trust deed dated November 28, 1900, from State Board of Education and Chas. S. Vedder and wife to Stephen W. Isler, Baylis Cade, and Edward Willis, Trustees, recorded in Book 44, page 281, Jones County Registry, conveying Grants Nos. 505 and 551 to the grantees in trust upon payment of $25,000 to the State Board of Education on or before the 1st day of July, 1904. Other provisions of this trust deed are discussed in the opinion.

In rebuttal plaintiff offered in evidence recorded deeds as follows: (1) from Charles S. Vedder and wife to Henry T. Welch, dated 25 July 1904, conveying 1/6th undivided interest in the lands described in the aforesaid trust deed, (2) from Henry T. Welch, dated 15 December 1906, for his interest in said lands to Phoenix Real Estate Company, and (c) from Phoenix Real Estate Company to Jones-Onslow Land Company, dated 26 August 1908, quitclaiming all interest in the subject lands.

The trial court granted motion for directed verdict by defendants Arthur F. White, Floyd D. White, Hazel W. and Lathan Riggs. Judge Webb found facts, concluded that plaintiff had proved title and had located the boundaries of the subject tract; that defendants Lee Thomas Wright, George Evans and Amos Sykes had trespassed by cutting and removing timber having a

market value of $429.37, and adjudged that plaintiff recover of defendants the sum of $858.74, double the value of the timber removed as provided by G.S. 1-539.1. The defendants Lee Thomas Wright, George Evans and Amos Sykes appealed.

Henderson, Baxter & Davidson by David S. Henderson for plaintiff.

Dunn & Dunn by Raymond E. Dunn for defendants.

CLARK, Judge.

The tract of lands described in the complaint is comprised of parts of two tracts of land granted by the State to David Allison as follows: (1) Grant No. 505, dated 27 December 1794, containing 13,705 acres, and (2) Grant No. 551, dated 30 June 1795, containing 1,280 acres. It appears from the descriptions in the grants that the subject tract is located near the Trent River and in or near various swamps and creeks. It is stipulated that Jones-Onslow Land Company has not listed any land for taxation in Jones County since 1927, and that plaintiff has not listed it for taxation at any time, though it claims ownership under the deed from William C. Blossom, Trustee in Liquidation, dated 8 January 1971.

The Court of Common Pleas in Charleston, South Carolina, appointed on 4 October 1969, William C. Blossom "to act as trustee in liquidation of the defendant Jones-Onslow Land Company." The said Trustee filed a petition 25 August 1970, reciting that plaintiff had offered the sum of $3,200 for any real property that Jones-Onslow Land Company "might own in Jones and Craven Counties," and that said Trustee "has been unable to determine that Jones-Onslow Land Company owns any real property in either of the two counties." He recommended acceptance of the offer and sought approval of the Court. However, the record on appeal does not include an order of the court for sale of the land.

It may be reasonably inferred from the foregoing facts that the subject tract is located in a swamp or river lowlands; that it is in an uninhabited and isolated area; that its use is limited to the growing of trees; and that claim of ownership or interest in acquisition of the tract is stimulated from time to time when the merchantable size of the trees combine with a good lumber market to give the tract an attractive market value.

[1] In this action in trespass to try title when defendants denied the ownership of the subject tract, the burden was upon the plaintiff to prove (1) title, (2) the location of its boundaries, and (3) the trespass and damage. *State v. Brooks,* 279 N.C. 45, 181 S.E. 2d 553 (1971); *Johnson v. Daughety,* 270 N.C. 762, 155 S.E. 2d 205 (1967); *Hines v. Pierce,* 23 N.C. App. 324, 208 S.E. 2d 721 (1974); and *Pruden v. Keemer,* 1 N.C. App. 417, 161 S.E. 2d 783 (1968). The plaintiff must rely on the strength of his own title and not on the weakness of defendant's title. *Keller v. Hennessee,* 11 N.C. App. 43, 180 S.E. 2d 452 (1971).

Plaintiff sought to carry the burden of proof "by showing a connected chain of title from the sovereign to [it] for the identical lands claimed by [it]." *Sledge v. Miller,* 249 N.C. 447, 451, 106 S.E. 2d 868, 872 (1959); *accord, Gahagan v. Gosnell,* 270 N.C. 117, 153 S.E. 2d 879 (1967).

Defendants contend that there is a missing link in the plaintiff's chain of title. "Where a link is missing the chain is severed, and no benefit can accrue from the earlier conveyances." *Sledge v. Miller, supra,* at 452, 106 S.E. 2d at 873; *accord, State v. Brooks, supra.* Defendants put in evidence the trust deed from the State Board of Education and Charles S. Vedder and wife, dated 28 November 1900, to Stephen W. Isler, Baylis Cade and Edward Willis, Trustees, which was registered 7 December 1900. Defendants take the position that the quitclaim deed in plaintiff's chain of title from the State Board of Education to Jones-Onslow Land Company dated 16 November 1909 conveyed no title or interest in the subject lands because the State Board of Education some nine years before had conveyed all its interest in and to the lands by the aforesaid trust deed.

[2] Plaintiff in rebuttal offered a deed dated 25 July 1904 from Charles S. Vedder and wife to Henry T. Welch for a 1/6th interest in the subject lands and mesne conveyances into the plaintiff. And plaintiff contends Charles S. Vedder, under the said trust deed, retained an interest in the subject tract, which by mesne conveyances plaintiff now owns; and that either under this Vedder deed or the 1909 quitclaim deed from the State Board of Education, the plaintiff owns some interest in the lands which entitles it to possession and the right to maintain this action. We find, however, that by the said trust deed, a most unusual instrument, both Charles S. Vedder and wife and the State Board of Education conveyed such legal title as they

owned at the time to the named trustees. The trust deed recites that Vedder and wife had brought action to recover the lands from the State Board of Education. Apparently, the subsequent provisions of the trust deed constituted the settlement terms of the land action. In consideration of the sum of $1,500.00 paid to the State Board of Education and the sum of $25,000.00 to be paid to said Board on 1 July 1904, Vedder and wife and said Board conveyed lands (including Grants 505 and 551) in fee simple to the three named trustees. Thereafter, the trust deed provided that the trustees would hold the land in trust, gave them the right to sell the lands or any parts thereof until 1 July 1904; upon failure to sell the lands and pay over to said Board the sum of $25,000.00 on or before 1 July 1904, it shall be the duty of the said trustees to reconvey to the State Board of Education all lands and premises that may on said day remain unsold or unconveyed. The trust deed further provided that "the said Stephen W. Isler and Charles S. Vedder and the said Edward Willis shall be entitled to all the rights and interests in said lands over the above $25,000.00, aforesaid, which is to be paid to the State Board of Education. All net proceeds of sales and all moneys over and above the said $25,000.00 which may be in the lands of the trustees shall be accounted for and paid over . . . in proportion or shares following, that is to say Stephen W. Isler, 1/6th; to the said Edward Willis, 1/6th; to the said Charles S. Vedder, 4/6ths. . . ."

Plaintiff offered no evidence of any conveyances or any other action taken by the named trustees under the terms of the said trust deed. And the trust deed did not contain a reversionary clause which would upon failure to perform vest title to the lands or any part thereof in either the State Board of Education or the other named trust beneficiaries. Under these circumstances, according to the record on appeal, legal title to the subject lands remains in the trustees named in the same trust deed, and neither the State Board of Education in its quitclaim of 16 November 1909 nor Charles S. Vedder and wife by their deed of 25 July 1904 conveyed any interest in and to the subject lands.

Since there is a break in plaintiff's purported connected chain of title, we find error in the failure of the trial court to grant the motions for directed verdict made by the defendants Lee Thomas Wright, George Evans, and Amos Sykes. The judg-

ment is reversed and the cause is remanded with the direction that the action against all defendants be

Dismissed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONNIE GANTT AND STEVE ARNETTE

No. 7525SC245

(Filed 16 July 1975)

1. **Burglary and Unlawful Breakings § 7— failure to instruct on nonfelonious breaking and entering**

In a prosecution for breaking and entering with intent to commit the felony of larceny, the trial court did not err in failing to charge on the lesser offense of nonfelonious breaking and entering where the State's evidence tended to show that an attempted larceny took place in the pharmacy broken into and defendants denied that they took part in the break-in.

2. **Criminal Law §§ 9, 113— failure to instruct on aiding and abetting**

In this prosecution for felonious breaking and entering, the trial court did not err in failing to instruct on aiding and abetting where the State's evidence tended to show that defendants entered the building along with three others, and defendants contended that they had nothing to do with the break-in and had no knowledge of it and were not acting as lookouts.

3. **Criminal Law § 121— instructions on entrapment**

Trial court's instructions on entrapment which substantially followed the North Carolina Pattern Jury Instructions were proper.

4. **Criminal Law § 122— additional instructions — failure to recharge on entrapment**

The trial court did not err in failing to recharge the jury on the defense of entrapment after the jury returned and asked whether they should vote on one verdict altogether or the three charges separately, and the court again set forth the possible verdicts and instructed the jury to consider the charges separately.

ON *writ of certiorari* to review *Thornburg, Judge.* Judgments entered 9 August 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 9 June 1975.

The defendants were charged in bills of indictment with (1) breaking and entering a building occupied by Viewmont

Pharmacy in Hildebran with intent to commit a felony, to wit, larceny; (2) felonious possession of housebreaking implements; and (3) attempted safecracking. Both defendants pled not guilty to the charges.

The evidence for the State tended to show that Detective Lee Brittain received a call sometime after 11:00 p.m. on 31 January 1974 that someone had seen subjects run through a yard and into the Viewmont Pharmacy in Hildebran. Detective Brittain and an Officer Thomas responded to the call and set up surveillance of the building. Brittain observed Gantt and Arnette along with three other boys at the back door of the pharmacy and Arnette was carrying a black bag in his hand. Several of the boys lifted Gantt up to remove the light bulb from its receptacle over the back door, but the attempt was unsuccessful. Another boy eventually removed the bulb. Brittain then heard a noise at the door whereupon the door flew open and all five boys went into the building. Some time later after reinforcements had been called, the officers rushed the door and Arnette and Gantt were observed running by the side of the building. One of the remaining three came out of the building and gave himself up. The other two were found inside the building.

Inside the pharmacy, the officers found a safe from which the dial had been forcibly removed and various tools scattered about on the floor and on a small table near the safe. A bluish-black bag was also found and was introduced into evidence along with the tools which were identified as belonging to one of the perpetrators. William Anderson, a pharmacist at the pharmacy, testified that when he arrived at the scene after the break-in, he discovered that the back door had been forced open; that the dial had been completely broken off the safe and that approximately $34.00 in change had been removed from the cash registers.

Defendants offered evidence tending to show that Tommy Propst, one of the two boys found inside the building, had been paid funds by Detective Brittain to procure stolen merchandise from various people in the county and had been used as an informer or an undercover agent. A Steve McCall, who was not present at the break-in testified that Tommy Propst and his brother Arnold, who were involved in the break-in had come to him and begged him to go into the drug store with them. After refusing, the two brothers presumably approached the defend-

ants. Another one of the perpetrators, J. B. Cherry, testified that the tools and bag belonged to Tommy Propst and that it was Tommy and not Arnette who was carrying the bag on the night of the break-in.

Both defendants testified that neither knew about any plans to break into the pharmacy; that they had merely accepted an invitation to ride around that night. Right before the break-in took place the defendants were told of the plans and both testified that they told the others that they wanted no part of it. Upon arriving at the pharmacy, both contended that they took no part in the actual break-in but remained outside and were not acting as lookouts. Arnette denied carrying the black bag and Gantt denied having attempted to remove the bulb from over the back door.

In rebuttal, the State offered Detective Brittain who denied ever having said that Tommy Propst was an undercover agent. S.B.I. Agent Robert Thomas testified in corroboration of Brittain's testimony that he saw Gantt attempt to remove the light and Arnette carrying the black bag in which were the burglary tools. Thomas also observed all five individuals enter the pharmacy.

Defendants' motions for judgment as of nonsuit were denied at the close of the State's evidence and after all the evidence.

In the case against defendant Gantt, the jury returned a verdict of guilty of felonious breaking and entering and not guilty of attempted safecracking and felonious possession of housebreaking implements. In the case against defendant Arnette, the jury returned verdicts of guilty as charged on all bills. From judgments imposing terms of imprisonment, the defendants appealed.

Attorney General Edmisten by Assistant Attorney General T. Buie Costen for the State.

Robert E. Hodges for the defendant Gantt.

C. Gary Triggs for defendant Arnette.

CLARK, Judge.

[1] The defendants contend that the trial court committed prejudicial error in failing to charge the jury on the lesser included offense of nonfelonious breaking and entering. The neces-

sity for such a charge, however, 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. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged." *State v. Hicks,* 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547 (1954). Both defendants rely on the lack of evidence of felonious intent to commit a felony inside the pharmacy as the basis for this assignment of error. The evidence for the State, however, was uncontradicted that an attempted larceny took place at the pharmacy. In fact, some money was discovered missing by a pharmacist who worked there. The only evidence which was controverted by defendants was whether they ever actually entered the building or even took part in the break-in, both denying that they had participated in any manner whatsoever. The State's proof of intent was largely circumstantial arising in part from the evidence adduced that all five individuals entered the building. It is noted in this regard that there is a presumption that people intend the natural consequences of their acts, 22 C.J.S., Criminal Law, § 33 (1961); and that intent is a mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred. *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473 (1968); *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345 (1970); 2 Strong, N. C. Index 2d, Criminal Law, § 2 (1967). Under the circumstances in the present case, we find the only evidence introduced was evidence from which the jury could either infer that the defendants broke and entered the building with the intent to commit a felony or that they committed no breaking and entering at all. Consequently, there was no error in failing to charge on the lesser included offense.

[2] The defendants next contend that the trial court erred in failing to include an explanation of the difference between aiding and abetting and acting in concert. The judge essentially charged on acting in concert but did not instruct on aiding and abetting. The defendants assert that this was error under G.S. 1-180 and *State v. Mitchell,* 24 N.C. App. 484, 211 S.E. 2d 645 (1975), in that the judge failed to instruct on the law arising from the evidence. However, there must be evidence that defendants were aiding and abetting, to wit, that they were actively or constructively present and did no act necessary to constitute

the crime, but aided and abetted the others in the commission of the crime charged. See *State v. Mitchell, supra; State v. Crawford,* 13 N.C. App. 146, 184 S.E. 2d 893 (1971). The State's evidence tended to show that all five of the individuals actually entered the building. The defendants' position at trial was that they had nothing to do with the break-in, had no knowledge of it, and were not acting as look-outs at the scene. The only reason they were present was because they had accepted an invitation from the other perpetrators to take a ride. Under these circumstances, there was no evidence of aiding and abetting upon which the judge would be required to instruct.

[3] The defendants further allege that the trial judge erroneously instructed the jury on the defense of entrapment. "It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense." *State v. Burnette,* 242 N.C. 164, 169, 87 S.E. 2d 191, 194 (1955). In the charge to the jury on the law of entrapment, the court substantially followed the North Carolina Pattern Jury Instructions, Criminal, 309.10. Suffice it to say these instructions on the law of entrapment, its application to the facts in the present case, and its availability as a defense to the offenses charged were exemplary.

[4] There is also the assertion by the defendants that the trial court erred in failing to recharge the jury on the defense of entrapment after the jury returned and asked whether they should vote on one verdict altogether or the three charges separately. The trial court answered the question by again setting out the possible verdicts on each individual charge and instructing them to consider each separately. Having answered the particular question propounded, the court was under no further obligation to again present the defendants' contentions with respect to entrapment. See generally *State v. Murray,* 216 N.C. 681, 6 S.E. 2d 513 (1940). "What was said by the judge in response to the request for further instructions upon a particular phase of the case must be considered in connection with the charge as a whole. . . ." *State v. Murray, supra,* at 686.

We find that there was sufficient evidence to support the jury verdicts, and that both defendants had a fair trial.

In the trial below, we find

No error.

Judges MARTIN and ARNOLD concur.

MARY PERGERSON EARLES v. RALPH W. EARLES

No. 7517DC251

(Filed 16 July 1975)

1. **Divorce and Alimony § 8— abandonment — sufficiency of evidence**

There was sufficient evidence to go to the jury on the issue of abandonment in this action for divorce from bed and board where there was evidence tending to show that the parties moved into a motel room, defendant moved out of the room while plaintiff was confined in a mental hospital for a week, after being released from the hospital plaintiff asked defendant to return, and defendant refused and has never returned to the plaintiff.

2. **Divorce and Alimony § 17— dependent and supporting spouses — determination by court**

In an action to obtain alimony upon divorce from bed and board, the trial court erred in submitting to the jury issues of whether plaintiff was the "dependent spouse" and defendant the "supporting spouse" since these issues should be determined by the trial court and not the jury.

3. **Divorce and Alimony § 4— failure to instruct on condonation — denial of amendment to allege condonation**

In this action for divorce from bed and board wherein only the issue of abandonment was submitted to the jury, the trial court did not err in failing to instruct the jury on condonation where there was no evidence that plaintiff condoned defendant's abandonment; furthermore, any error in the court's refusal to allow defendant to amend his answer to allege condonation was harmless since the only evidence of condonation related to condonation of indignities and the issue of indignities was not submitted to the jury.

4. **Divorce and Alimony § 14; Evidence § 12— divorce action — wife's testimony against husband — statements that husband loved another woman**

In this action for divorce from bed and board based on abandonment, testimony by plaintiff regarding defendant's statements that he loved another woman and would continue to see her was not ren-

dered incompetent by G.S. 8-56 or G.S. 50-10 since there was no accusation or attempt by plaintiff to prove adultery and the testimony did not tend to show adultery.

5. **Evidence § 12— letters and statements of husband to wife — no confidential communications**

In an action for divorce from bed and board, letters written by defendant to plaintiff and defendant's oral statements to plaintiff that he loved another woman and would continue to see her were not inadmissible as privileged confidential communications between husband and wife where defendant made no specific objection to the admission of statements in the letters and it is clear that the oral statements were not intended to be confidential since defendant made similar statements to several other persons; furthermore, the admission of the letters and oral statements was not prejudicial since they related to the issue of indignities and such issue was not submitted to the jury.

APPEAL by defendant from *Clark, Judge.* Judgment entered 17 December 1974 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 28 May 1975.

Plaintiff instituted this action against her husband on 25 August 1972, seeking permanent alimony, child custody and support, counsel fees and a divorce from bed and board. In her complaint plaintiff alleged abandonment by her husband and "such indignities . . . as to render the plaintiff's condition intolerable." Defendant averred in his answer that plaintiff had abandoned him.

At the trial plaintiff offered evidence tending to show that she and the defendant were married in 1953 and have three children; that throughout the marriage the defendant has been in the Air Force, and until May 1971, plaintiff and the children travelled with him from one assignment to another; that in May 1971, defendant was scheduled to retire from the Air Force in two years and he and the plaintiff purchased a home in Ruffin, North Carolina, and decided that the plaintiff and the children would live in Ruffin for the next two years, rather than continuing to travel with the defendant. Other evidence offered by the plaintiff tended to show that in March 1972, while he was stationed at Barksdale Air Force Base in Louisiana, the defendant telephoned plaintiff and told her that although he still cared for her, he had fallen in love with another woman; that from March 1972, until August 1972, defendant continued to tell plaintiff that he loved her but he also was in love with another woman; that as a result, plaintiff became "very upset and nervous" and on one occasion she tried to commit suicide

by taking an overdose of sleeping pills; that in August 1972, plaintiff and the children went to Louisiana to live with the defendant, and the family moved into two rooms at a motel which the defendant had obtained; that on the day of their arrival the plaintiff and defendant had a discussion about their marriage and the defendant stated that even if they stayed "he would continue to see the other person"; and that plaintiff then took another overdose of sleeping pills and was "sent to a mental hospital" where she stayed "for about a week." Plaintiff offered other evidence tending to show that she discovered that the defendant had moved out of the motel room when she was released from the hospital, and that she found him and asked him to return but he refused.

Defendant testified that his relationship with the plaintiff had been difficult since shortly after their marriage; that their sex life was "varied and quite infrequent" and the "marriage was kept together because of the smaller children." According to the defendant, in July 1972, he and the plaintiff agreed to settle their differences and attempt a reconciliation. Accordingly, the family came to Louisiana, where he was stationed. Shortly after her arrival, however, the plaintiff tried to commit suicide and was hospitalized. When she was released from the hospital for a day to go with the defendant to visit some friends in Long View, Texas, plaintiff mentioned the possibility of a separation. Defendant testified that he moved out of their motel room because he had been ordered to prepare for an assignment in Taiwan; that he intended to return and did not leave with the intention of abandoning the plaintiff. When the plaintiff was released from the hospital the defendant "told her that the apartment was still there if they wanted to live there" but the plaintiff insisted on returning to Ruffin. At no time did he tell her to go back to North Carolina.

The following three issues were submitted to the jury, and answered in favor of the plaintiff:

> "1. Was the Plaintiff a citizen and resident of North Carolina at least 6 months immediately preceding the filing of this action?
>
> ANSWER Yes.

2. Did the defendant, Ralph W. Earles, abandon the plaintiff, Mary Pergerson Earles, on or about August 8, 1972, as alleged in the complaint?

ANSWER Yes.

3. If so, was the plaintiff a dependent spouse and the defendant a supporting spouse, as alleged in the complaint?

ANSWER Yes."

From the entry of judgment granting plaintiff a divorce from bed and board, with the amount of permanent alimony and attorney fees postponed for later determination, defendant appealed.

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

Gwyn, Gwyn and Morgan, by Melzer A. Morgan, Jr., for plaintiff appellee.

Bethea, Robinson, Moore and Sands, by Alexander P. Sands, for defendant appellant.

PARKER, Judge.

[1] In his first and eighth assignments of error defendant argues that "if the court sustains Assignment of Error Nos. 4 and 5, there is insufficient competent and admissible evidence to sustain the judgment in this matter." We disagree. At the trial there was evidence that the parties moved into a motel room; that the defendant subsequently moved out; that after being released from the hospital the plaintiff asked him to return; and that the defendant refused, and never has returned to the plaintiff. As there was sufficient evidence to go to the jury on the issue of abandonment, defendant's motions for a directed verdict were properly denied. These assignments of error are overruled.

[2] Defendant next asserts that it was error for the trial court to submit to the jury the issues of whether the plaintiff was the "dependent spouse" and the defendant the "supporting spouse." We find merit in this contention. In *Bennett v. Bennett*, 24 N.C. App. 680, 211 S.E. 2d 835 (1975), we held that the issues of who is a "dependent spouse" and who is a "supporting spouse" are mixed questions of law and fact which can

be best determined by the trial judge when he sets the amount of permanent alimony. Since these issues should have been decided by the trial court and not the jury, the verdict of the jury on these issues should be stricken from the record. A determination on these issues will have to be made by the trial judge.

[3] In his third assignment of error defendant contends that (1) he should have been permitted to amend his answer to allege condonation; and (2) the jury should have been instructed on the issue of condonation. We find this assignment of error without merit. At the trial there was no evidence that the plaintiff condoned the defendant's abandonment; we therefore conclude the trial court properly refused to give instructions on this issue. Furthermore, the only evidence of condonation offered by defendant tended to show that the plaintiff condoned the indignities to which defendant subjected her. Since the issue of indignities was not submitted to the jury, any error in the trial court's refusal to allow the defendant to amend his answer to allege condonation was harmless. This assignment of error is overruled.

[4] Defendant next argues that the plaintiff should not have been allowed to testify regarding defendant's statements that he loved another woman and would continue to see her. Defendant maintains that such evidence was inadmissible under G.S. 8-56, which provides in part that "[n]othing herein shall render any husband or wife, competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery" and under G.S. 50-10 which provides in part that "[o]n such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." We disagree. The factual situation of this case clearly precludes the defendant from invoking the prohibitions contained in G.S. 8-56 since this was not an "action or proceeding in consequence of adultery," or an "action or proceeding for divorce on account of adultery." Moreover, while our Supreme Court has held that the provisions of G.S. 50-10 are not limited to actions in consequence of adultery or actions for divorce on account of adultery, but apply in *"all* divorce actions, including actions for alimony without divorce," *Hicks v. Hicks*, 275 N.C. 370, 378, 167 S.E. 2d 761, 766 (1969), here there was no accusation or attempt by the plaintiff to prove adultery. Adultery has

been defined as "voluntary sexual intercourse of a married person with one other than his or her spouse." 1 Lee, N. C. Family Law, § 65, p. 254. Plaintiff's testimony tended to show only that the defendant saw another woman and that he loved her, not that he had sexual intercourse with her. The case of *Phillips v. Phillips*, 9 N.C. App. 438, 176 S.E. 2d 379 (1970), relied on heavily by the defendant is distinguishable from the case at bar. In *Phillips* we held that a husband should not have been permitted to testify that he caught his wife in the woods with another man. This testimony clearly implied an act of sexual intercourse and tended to show adultery; it thus differs from the plaintiff's testimony in this case. We also note that even if the plaintiff's testimony should have been excluded, which we do not concede, this error was harmless because this testimony related only to the issue of indignities, which was not submitted to the jury. For the foregoing reasons, this assignment of error is overruled.

[5] At the trial, counsel for the plaintiff cross-examined the defendant concerning certain personal letters he wrote to the plaintiff in 1971 and 1972. In his fifth assignment of error defendant contends that these letters were privileged confidential communications between husband and wife. He also maintains that his oral statements to the plaintiff that he loved another woman and would continue to see her were privileged. These contentions are without merit. We note that the defendant objected only to certain portions of the letters, while allowing other similar portions to be admitted without objection. At no time did counsel for the defendant make a specific objection to the admission of this evidence. Furthermore, it seems clear that the oral statements made by the defendant to the plaintiff were not intended to be confidential. The record shows that the defendant made similar statements to several other persons. Finally, as we have already pointed out, the admission of defendant's letters and oral statements to the plaintiff could not have been prejudicial, even if erroneous, since this evidence related to the issue of indignities, which was not submitted to the jury.

In his sixth and seventh assignments of error defendant argues that in its instructions to the jury the trial court failed to give a clear statement of the facts and failed adequately to explain the law applicable to the facts. We have examined the charge as a whole, and conclude the trial court adequately stated the facts and the applicable law.

The judgment entered must be modified by deleting therefrom the third issue and the answer thereto. This issue must be left for determination by the court. In all other respects the judgment is affirmed.

Modified and affirmed.

Chief Judge BROCK and Judge HEDRICK concur.

JANE CAROLINE WOODALL SHANKLE v. ROBERT JACK SHANKLE

No. 7515DC189

(Filed 16 July 1975)

1. **Marriage § 2— reputation of plaintiff as married woman — evidence admissible**

In an action by plaintiff against her former husband seeking to recover alimony allegedly due under a separation agreement entered by the parties where defendant claimed that he was no longer obligated to pay plaintiff alimony by virtue of her remarriage, the trial court erred in excluding certain questions asked of the plaintiff and the parties' 19 year old daughter concerning plaintiff's reputation as the wife of one Rolland Cole.

2. **Husband and Wife § 12— separation agreement — alimony provision — termination upon remarriage — directed verdict improper**

Trial court erred in granting plaintiff's motion for directed verdict in an action to recover alimony allegedly due under a separation agreement where evidence was sufficient to support defendant's allegation of plaintiff's remarriage.

3. **Divorce and Alimony § 19; Husband and Wife § 12— separation agreement — alimony provision — change in circumstances — finding required**

In an action to recover alimony allegedly due under a separation agreement between the parties where defendant alleged a change in plaintiff's financial circumstances entitling him to a reduction in alimony, the trial court upon a rehearing should determine whether there has been a change in circumstances and if so whether the change requires or justifies a modification.

4. **Estoppel § 8— remarriage of plaintiff — denial — sufficiency of evidence of estoppel**

In an action to recover alimony allegedly due under a separation agreement, the trial court did not err in failing to submit to the jury an issue as to whether plaintiff should be estopped to deny that she remarried where defendant contended that he increased the

amount of alimony payments only when plaintiff represented to him that she was about to marry one Rolland Cole, shortly thereafter plaintiff obtained her divorce, defendant knew that plaintiff then travelled with or was in Florida with Rolland Cole, but defendant nevertheless continued to make alimony payments to plaintiff for nearly five years.

APPEAL by defendant from *Allen, Judge*. Judgment entered 10 October 1974 in District Court, ORANGE County. Heard in the Court of Appeals 27 May 1975.

This is a civil action instituted by the plaintiff against her former husband seeking to recover amounts allegedly due under a separation agreement entered into by the parties on 13 October 1967, and under an amendment to the separation agreement entered into 2 August 1968. Both agreements were entered into and executed in Orange County, North Carolina, and both agreements were approved in a divorce decree granted to the plaintiff on 23 September 1968 by the District Court for the County of Clark in the State of Nevada. In her complaint filed 17 July 1973, plaintiff alleged that by virtue of these agreements and the decree she was entitled to receive alimony payments of $300 per month from the defendant and that since she had received no payments since December 1972, she was entitled to recover the sum of $2,100 as of 17 July 1973, the date of the filing of the complaint in this action.

By way of answer filed 3 October 1973 defendant admitted that he had entered into a separation agreement and amended separation agreement under which he agreed to pay the plaintiff $300 per month until she remarried or died; that these agreements were "fully incorporated" into the Nevada divorce decree; and that he had not made any alimony payments to the plaintiff since December 1972. Defendant denied, however, that his refusal to make payments since December 1972 was in violation and breach of the separation agreements because: (1) the plaintiff had remarried, and under the terms of the agreements he was no longer required to make any payments, and (2) there had been "a significant change of circumstances as between the plaintiff and the defendant . . . rendering it appropriate that the Court exercise the power granted to it by contractual agreement to amend and revise said Agreement of Separation and the subsequent Amended Separation Agreement as referred to hereinabove so as to delete any contractual requirement or obligation of the defendant to pay alimony to the plaintiff for her support. . . ."

Evidence offered at the trial, viewed in the light most favorable to the defendant, tended to show that in September 1967 the plaintiff met Rolland Cole, and in October 1967, plaintiff and defendant separated and executed a separation agreement calling for monthly alimony payments of $200; that in August 1968 after the plaintiff and Rolland Cole told defendant they intended to be married as soon as possible, the plaintiff and defendant executed an amended separation agreement, increasing the defendant's alimony payments to the plaintiff to $300; that on 23 September 1968 the plaintiff obtained a Nevada divorce from the defendant, that from the time of the separation until 1970 the plaintiff lived with Rolland Cole most of the time, and from 1970 until June 1972 the plaintiff lived continuously with Rolland Cole in a condominium in Palm Beach, Florida; that during this period plaintiff used the name Jane Cole and held herself out as the wife of Rolland Cole at the Pine Tree Country Club and that after Rolland Cole's death the Club allowed her to have a special women's membership which was in the name of Mrs. Jane Cole; that she was known generally at that time as the wife of Rolland Cole; and that plaintiff was with Rolland Cole at the hospital in Hendersonville, North Carolina, during his last illness and she used the name Jane Cole. Other evidence tended to show that after Rolland Cole's death in July 1972, plaintiff continued to use the name of Jane Cole until July 1973 and that under the will of Rolland Cole, plaintiff is to receive income from his entire estate for ten years, and if she is still living ten years after his death, she will receive the entire estate in fee. The estate is worth in excess of $130,000.

At the close of all the evidence the trial court entered a directed verdict for the plaintiff for the sum of $6,600 and the costs of the action. Defendant appealed.

Allen, Hudson & Wright, by Katherine S. Wright, for plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by James M. Tatum, Jr., and Josiah S. Murray III, for defendant appellant.

MORRIS, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in excluding certain questions asked of the plaintiff and Jill Shankle, the parties' 19-year-old daughter, con-

cerning plaintiff's reputation as the wife of Rolland Cole. Plaintiff, on the other hand, argues that this evidence was properly excluded because: (1) it violated hearsay, opinion and firsthand knowledge rules, (2) the questions dealt with "specific acts" or a "general course of conduct" rather than "general reputation" and (3) the questions addressed to Jill Shankle did not refer to the plaintiff's reputation in the entire community or in the community where Jill Shankle lived. Reputation evidence, however, by its very nature, constitutes hearsay and opinion and is not based on a witness's firsthand knowledge; it is admissible as an exception to the hearsay rule. 5 Wigmore, Evidence 3d, § 1602, pp. 464-466; see McCormick, Evidence 2d, § 324, pp. 748-749. Furthermore, our courts have often held that evidence of a person's reputation for being married is admissible. *Green v. Construction Co.*, 1 N.C. App. 300, 161 S.E. 2d 200 (1968); *Carter v. Reaves*, 167 N.C. 131, 83 S.E. 248 (1914); *Forbes v. Burgess*, 158 N.C. 131, 73 S.E. 792 (1912); *Jones v. Reddick*, 79 N.C. 290 (1878); *Jackson v. Rhem*, 59 N.C. 141 (1860); *Whitehead v. Clinch*, 3 N.C. 3 (1797); *Felts v. Foster*, 1 N.C. 164 (1799); and evidence of "specific acts," the "declarations and conduct of the parties," and "general course of conduct" is admissible under the *Green, Jones, Jackson* and *Felts* cases. The strict rules that have developed concerning the wording of questions with respect to a person's reputation for moral character, for the purpose of impeachment or corroboration of his testimony, have not been applied to questions with respect to a person's reputation for being married. Finally, evidence of general reputation in the family and in the neighborhood in which the parties lived has long been held admissible to prove their marriage. *Carter v. Reaves, supra; Green v. Construction Co., supra;* and *Jackson v. Rhem, supra.* For the foregoing reasons, defendant's first assignment of error is sustained. It is interesting to note that plaintiff herself testified on cross-examination, without objection, that she was known generally as the wife of Rolland Cole.

[2] Defendant next contends it was error for the trial court to grant a directed verdict to the plaintiff because evidence offered at the trial was sufficient to reach the jury on one or more of the defendant's affirmative defenses. We agree. Plaintiff correctly points out that common law marriage is not recognized in either North Carolina, Florida or Nevada. 1 Lee, N. C. Family Law, § 9, p. 35 and cases cited therein; 21A Fla. Stat. Ann. § 741.211 (1968); Nev. Rev. Stat. § 122.010 (1973). Circum-

stantial evidence, however, may be used to prove a ceremonial marriage in North Carolina, and direct evidence of a ceremony apparently is not required:

> "By the common law . . . in civil cases, except in actions for criminal conversation, . . . reputation, cohabitation, the declarations and conduct of the parties, are competent evidence of marriage between them." *Jones v. Reddick, supra;* accord, 1 Stansbury, N. C. Evidence 2d, § 98, pp. 313-314; 1 Lee N. C. Family Law, § 15, pp. 55-56; *Jackson v. Rhem, supra;* and *Felts v. Foster, supra.*

We conclude there was sufficient evidence to support the defendant's allegation of remarriage. Therefore, it was error for the trial court to grant plaintiff's motion for a directed verdict on this issue.

[3] The defendant next argues there has been a change in plaintiff's financial circumstances, entitling him to a reduction in the amount of alimony. Here there was some evidence to support defendant's assertion that there has been a change in the plaintiff's financial circumstances, and the separation agreement entered into by the parties clearly provides that it may be modified by the trial court. Both the separation agreement and the amended agreement were ratified, confirmed, and approved by the divorce decree and the Nevada court ordered the parties "to do each and every act required by said agreement and amendment thereto." G.S. 50-16.9(a) provides that upon a showing of a change in circumstances the amount of alimony may be modified or vacated at any time upon motion in the cause, that is, upon a motion addressed to the trial judge. The statute does not contemplate that the jury should pass on requests for reductions in alimony because of changed circumstances. The court merely allowed plaintiff's motion for a directed verdict on this defense. From the record we cannot say whether the court was of the opinion that he was without jurisdiction to enter an order with respect to the defense, whether he was of the opinion that the question was one for the jury and the evidence presented by defendant insufficient to present to the jury, or whether he was of the opinion that the determination was for him but that the evidence did not warrant a modification. He found no facts and made no conclusion upon defendant's evidence in support of this defense. Upon a rehearing the court should find whether there has been a change of circumstances

and if so whether the change requires or justifies a modification.

[4] Defendant's final contention is that he only agreed to execute the amended separation agreement, increasing the amount of alimony, when the plaintiff represented to him that she was about to marry Rolland Cole, and that since this representation proved to be false, plaintiff should be estopped to deny that she remarried, and the issue of estoppel should have been submitted to the jury. We find no merit in this contention and conclude that a directed verdict on this issue was entirely proper. An estoppel by representation is created when a party reasonably relies upon another party's misrepresentation to his detriment. It is common knowledge that couples sometimes change their minds and call off their planned wedding at the last minute. The record clearly shows that the amended separation agreement was entered into 2 August 1968. Plaintiff obtained her divorce 23 September 1968. Defendant was well aware of the divorce. Subsequent thereto he was also aware that plaintiff was either travelling with or in Florida with Rolland Cole. Nevertheless, he continued the payments of $300 per month until early 1973. During a good part of this time, he mailed the monthly checks to her in Florida. At no time until this action was brought did defendant voice any objection or suggest he should be justified in relying upon plaintiff's representation that she intended to marry Rolland Cole. This assignment of error is overruled.

Reversed and new trial.

Chief Judge BROCK and Judge HEDRICK concur.

BETSY FITCH v. JOE DENNIS FITCH

No. 7526DC313

(Filed 16 July 1975)

1. Contempt of Court § 6; Divorce and Alimony § 21— child support — contempt of court — present ability to pay

The evidence supported the trial court's finding that defendant was presently able to pay $3,570.55 needed to comply with a child support order and that he was in contempt for failure to make such payment where there was evidence tending to show that defendant withdrew $750 from an automobile sales partnership operated by

him some two months before the hearing, he withdrew at least $5,265 from the partnership the preceding year, he loaned the partnership $1,000 the preceding month, defendant contributed $80 per month to his church, defendant paid his attorney $1,000 in legal fees during the prior three months, and 28 days before the hearing the partnership had an inventory of $29,700 and debts of only $6,000. G.S. 50-13.4(f)(9).

2. **Divorce and Alimony § 23— child support — contempt proceeding — refusal to hear motion to reduce payments**

In a contempt hearing for failure of defendant to make child support payments, defendant was not prejudiced by the court's refusal to consider defendant's pending motion to reduce the payments based on the emancipation of one of the children of the parties where the court nonetheless admitted evidence of emancipation and granted the relief sought by defendant by retroactively reducing his child support payments; furthermore, defendant failed to give plaintiff notice of intention to have the motion heard as required by G.S. 1A-1, Rule 6(d).

3. **Judgments § 2— difference between decision announced in court and written order**

Fact that court's written order may differ from the decision announced in open court does not constitute error since the judgment was not "rendered" until entry of the written order signed by the court. G.S. 1A-1, Rule 52(a)(1).

APPEAL by defendant from *Robinson, Judge.* Order entered 31 January 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 June 1975.

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

On 4 September 1973, the plaintiff filed a motion for an increase in payments alleging that a substantial change in circumstances and cost of living and an increase in defendant's income required and justified increased support payments for her two unemancipated children. A third child had become

emancipated by that time. The defendant was ordered to appear at the 23 October Session of District Court. The matter came on for hearing on 26 October 1973, and by order of 2 November 1973, the defendant was ordered to pay stipulated arrearages in child support of $825.00, $40.00 per week for future child support, and certain medical expenses and attorney's fees. From this order, no appeal was taken.

On 23 January 1974, upon motion of plaintiff, an order was entered directed to the defendant to show cause on 14 February 1974 why he should not be held in contempt. At this time the defendant changed lawyers and filed a motion dated 5 March 1974, which was 19 days after he was to appear, seeking for the first time to set aside the 2 November 1973 order.

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

In *Fitch v. Fitch*, 24 N.C. App. 112, 210 S.E. 2d 113 (1974), we affirmed the order entered 21 March 1974, which refused to vacate the 2 November 1973 order. On 16 January 1975, upon motion of plaintiff, an order was entered, directed to the defendant, to show cause on 27 January 1975 why he should not be held in contempt for his alleged willful disobedience of the 2 November 1973 order. At the hearing, the trial court refused to hear two outstanding defense motions dated 5 March 1974 and 21 March 1974 before the plaintiff's contempt charge.

Plaintiff testified that pursuant to the 2 November 1975 order she had received only $400 as back child support and that she had "not received anything since that time for the support of the two children." On cross-examination counsel for the defendant elicited testimony from the plaintiff that the child support "was primarily for Joe Dennis, Jr." and that Joe Dennis, Jr., was employed in 1974 and earned about $3,000 working part time. Plaintiff then called the defendant as a witness and questioned him about his income. The defendant stated that he was in the business of repairing and selling automobiles and that his business had sustained a loss of $25,908.16 during 1974. The defendant, however, admitted that he had drawn $5,265 from the business, that he had contributed $80 per month to his church and that he had paid about $1,000 to his attorney.

On 29 January 1975, at the conclusion of the evidence, the trial court instructed counsel for the plaintiff to prepare an order containing findings of fact which he verbally suggested.

On 31 January 1975 a written order signed by the trial judge was entered. It contained 13 findings of fact from which the court made six conclusions of law. Among the findings of fact was the following:

> "12. From November 2, 1973, until present, the Defendant possessed the means to comply with the Order of November 2, 1973, and he willfully, intentionally and deliberately failed to comply with said November 2, 1973 Order."

Both parties gave notice of appeal, but only defendant perfected his appeal.

Nelson M. Casstevens, Jr., for plaintiff appellee.

Lila Bellar and Marshall H. Karro for defendant appellant.

MORRIS, Judge.

Defendant first argues that it was error for the trial court to find that he was in present and continuing contempt of court and to order that he be imprisoned indefinitely because of such contempt, "in that there was no determination based on competent evidence that Defendant was presently able to comply with the Order of the Court."

It is well settled in this State that the courts possess the authority to confine a person who willfully violates the terms and provisions of the orders of a court. More specifically G.S. 50-13.4(f)(9) gives the courts authority to punish individuals for willful disobedience of orders for the payment of child support, with punishment for contempt to be as provided in G.S. 5-8 and G.S. 5-9. As we noted in *Bennett v. Bennett,* 21 N.C. App. 390, 393, 204 S.E. 2d 554, 556 (1974), under these statutes "[w]hen a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt and the court may commit such defendant to jail for an indefinite term, that is, until he complies with the order. Under such circumstances, however, there must be a specific finding of fact supported by competent evidence to the effect that such defendant possesses the means to comply with the court order." Although the 31 January 1975 order con-

tains such a finding, defendant maintains there is no evidence to support it. We disagree.

[1] A careful examination of the evidence shows that between 22 November 1974 and 20 December 1974, the defendant withdrew $750 from Matthews Auto Sales, a partnership operated by him; that during 1974 the defendant withdrew at least $5,265 from the partnership; that on 10 December 1974 the defendant loaned the partnership $1,000; that from the entry of the 2 November 1973 order "until recently" the defendant has contributed $80 per month to the Gospel Chapel Church, and that since 2 November 1973, the defendant has paid his attorney $1,000 in legal fees. Furthermore, defendant's own evidence, which consisted in part of an income statement from Matthews Auto Sales for the year ending 31 December 1974, indicates that the partnership had an inventory of $29,700 and outstanding debts of only $6,000 on 31 December 1974, some 28 days prior to the hearing of this matter. On the basis of the foregoing evidence, we are of the opinion that the trial court was entirely justified in finding that the defendant possessed sufficient assets to enable him to pay the $3,570.55 needed to comply with the 2 November 1973 order. We are aware that defendant failed to except to the finding of fact. However, because of the lengthy and bitter litigation between the parties, we have spoken to the merits of the question raised.

[2] Defendant next argues that the trial court abused its discretion by refusing to consider a motion filed by the defendant on 5 March 1974 seeking a "reduction of child support payments based on the emancipation of the minor child of Plaintiff and Defendant." He asserts that the motions, which alleged emancipation of his children, bore upon his duties under the 2 November 1973 order, and consequently, upon his alleged contempt. We fail to see how the defendant was prejudiced by the trial court's failure to hear his motion since the court nonetheless admitted evidence on emancipation and granted the relief sought by the defendant by retroactively reducing his child support payments. In any event, we note that the plaintiff did not receive notice from the defendant, as required by G.S. 1A-1, Rule 6(d), of defendant's intention to have his motion heard. This assignment of error is overruled.

[3] In his final argument defendant contends the 31 January 1975 written order differs substantially from the decision announced in open court on 29 January 1975 and that this consti-

tutes reversible error. We disagree. In our opinion no judgment was "rendered" in this case until 31 January 1975. *Cutts v. Casey,* 275 N.C. 599, 170 S.E. 2d 598 (1969). On 29 January 1975 the trial court merely instructed the plaintiff's attorney to prepare an order containing certain specific findings of fact, these findings to be in addition to other necessary and pertinent findings of fact.

G.S. 1A-1, Rule 52(a)(1), in pertinent part, provides that in nonjury trials "the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Here the trial court did not direct that any conclusions of law be placed in the order nor did the court issue any other orders. We conclude judgment was not in fact rendered until the entry of the order of 31 January 1975, which both parties agree was properly signed by the judge and entered.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. JOHNNIE B. HANKERSON

No. 757SC268

(Filed 16 July 1975)

1. **Homicide § 21— exculpatory statements of defendant — introduction by State — sufficiency of evidence of murder**

Defendant in a murder prosecution was not entitled to judgment as of nonsuit on the ground that the State introduced exculpatory statements of defendant which were not contradicted and by which the State was bound where the State's evidence tended to show that deceased died from a wound intentionally inflicted by defendant with a pistol, thus creating the presumption that the killing was unlawful and was done with malice, and thus placing upon defendant the burden of satisfying the jury that the killing was committed without malice so as to mitigate it to manslaughter or that it was justified on the ground of self-defense.

2. **Homicide § 28— not guilty by reason of self-defense — failure to instruct — additional instructions proper**

Defendant was not prejudiced by the trial court's failure to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury where the court included such a charge in

its additional instructions given the jury after they had deliberated for some time.

Judge ARNOLD dissenting.

APPEAL by defendant from *Webb, Judge.* Judgment entered 21 November 1974 in Superior Court, NASH County. Heard in the Court of Appeals 29 May 1975.

Defendant was charged with second degree murder and entered a plea of not guilty.

Evidence for the State tended to show the following facts. Gregory Ashe died 29 September 1974 as the result of a gunshot wound to the heart. On the night of 29 September 1974, Lorenzo Dancy, Wilbert Whitley, and the deceased, Gregory Ashe, left a dance hall and drove to a poolroom. Ashe was driving his car. Upon arrival at the poolroom, they discovered that it was closed. When Ashe was unable to start the car, Whitley announced that he was going home and began walking. Dancy and Ashe were also walking away from the car when Ashe said that he was going back to "crank" the car. Dancy indicated that he was going with Whitley. He yelled for Whitley to wait and then proceeded to walk behind Whitley. A gun fired, and Dancy heard Ashe exclaim that he was shot. A yellow and black Plymouth "Satellite" was observed pulling away at a fast rate of speed.

According to Dancy, it was difficult to find Ashe due to darkness. Around 12:00 o'clock that night, Ashe was discovered lying facedown in a field. A cigarette, which had been lit, was found in Ashe's hand.

After determining the identity of the owner of the Plymouth, police officers went to defendant's home, advised defendant of his rights, and proceeded to question him. At that time, defendant told Officer Reams that the subject had grabbed him and had tried to cut his throat. Officer Reams testified that defendant's car was searched and a knife was found on the seat to the right of the driver's seat. Also, blood was observed on the driver's side of the car, just behind the door. Officer Reams further testified that defendant gave him a shirt, showed him a grease spot on the shirt, and stated that was where he had been grabbed. On cross-examination, Officer Reams gave the following account of defendant's statements. Defendant was driving his Plymouth "Satellite" automobile near the poolroom when a man stopped him and asked for a light. Defendant gave the man the cigarette lighter from the dash of his automobile. After defendant had returned the lighter to its holder, the man

reached into the car and put a knife to defendant's throat and had a hand on defendant's chest. Defendant reached down, got a revolver from the car seat, and shot.

Several witnesses testified for the State that they had never seen the deceased with a knife like the one offered in evidence.

Defendant testified giving the following account of the incident. He was driving his Plymouth automobile slowly over a road containing large holes when someone asked him for a light. Through his car mirror, defendant could see two men. One of them walked up to the car and defendant reached over to the dash of the car, pushed in the cigarette lighter, and gave the lighter to him. Feeling his car move some, defendant looked and noticed the second man standing on the right-hand side of the car. As he turned back to his left, the first man reached into his car, seized defendant by the left shoulder, and put a knife to defendant's throat. According to defendant he felt the knife at his throat and grabbed his gun. He shot because the knife was around his neck. Defendant surmised that his assailant dropped the knife in the car. A number of witnesses testified concerning defendant's good character.

The jury found defendant guilty of second degree murder and from judgment imposing prison sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, and Assistant Attorney General Charles M. Hensey, for the State.

L. S. Diedrick, W. O. Rosser, and Roland Braswell, for defendant appellant.

MARTIN, Judge.

[1] Defendant assigns as error the denial of his motions for judgment as of nonsuit. He earnestly argues that the State introduced in evidence exculpatory statements of defendant which were not contradicted or shown to be false by other facts or circumstances in evidence; that these exculpatory statements establish a complete defense—i.e. self-defense; that the State was bound by these statements; and that, consequently, defendant was entitled to judgment as of nonsuit.

There was plenary evidence that deceased died from a wound intentionally inflicted by defendant with a pistol, thus creating the presumption that the killing was unlawful and that it was done with malice. Upon the jury finding that deceased died from a wound intentionally inflicted by defendant with a pistol, it became incumbent upon defendant to satisfy the jury that the killing was committed without malice so as to mitigate it to manslaughter or that it was justified on the ground of self-defense. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970).

While the exculpatory statement of defendant introduced in State's evidence was competent to be considered on the motion to nonsuit, "it may not be regarded as conclusive if there be other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407 (1953). The State was not bound by the statement if other evidence offered pointed to a different conclusion and raised the reasonable inference from all the testimony that the shooting was intentional and unlawful. *State v. Bright, supra.*

Brief consideration of the evidence shows that the State's evidence did not make out a defense for defendant, and that there was sufficient evidence to carry the case to the jury.

Defendant admitted that he was at the scene of the crime and that he shot at someone. When Officer Reams went to the home of defendant to investigate, defendant stated that he was in the process of buying the gun which was used in the shooting and that he had returned the gun to its owner. In his testimony at trial, defendant admitted that he had not returned the gun and that it was in fact in the house at that time. Annie Hankerson, defendant's mother, testified that police officers asked her about the gun and that she got it from a drawer where defendant kept his personal things and gave it to them. Pursuant to defendant's statement that grease marks had been left on his shirt when the man had grabbed him, Officer Reams examined the hands of the deceased but found no grease. In addition, Officer Reams testified that the knife, which was found on the front seat of defendant's car, had some bark on it and looked like it had been cutting wood. According to Officer Reams, defendant worked at a lumber yard. Several witnesses testified that they had never seen the deceased with the knife. Furthermore, defendant left the scene, went home, and did not report

to the police that he had been assaulted by someone with a knife. The motions for judgment as of nonsuit were properly denied.

[2] In assignment of error number six, defendant concedes that the trial court properly instructed the jury regarding the law of self-defense, but he contends that error was committed because of the court's failure to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury. Under the authority of *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974), we would be required to sustain this assignment of error except that in the present case the trial court cured its error by giving additional instructions. After the jury had deliberated for some time, they returned for additional instructions, and the court specifically charged them as follows: "Also, I want to instruct you that the charge I gave you as to self-defense would apply equally to manslaughter as it would to second degree murder in that if you find the defendant was justified or excused in the killing because he was acting in self-defense then you would find him not guilty as to either one."

Defendant's other assignments of error are without merit.

In the trial we find no prejudicial error.

No error.

Judge CLARK concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

Defendant's motion for nonsuit should have been granted. The exculpatory statements introduced into evidence by the State were not contradicted. All the evidence and reasonable inferences are consistent with defendant's innocence by reason of self-defense as established by the exculpatory statements.

I respectfully dissent from the majority and vote for reversal.

Bank v. Wallens and Schaaf v. Longiotti

NORTH CAROLINA NATIONAL BANK, PLAINTIFF v. G. C. WALLENS AND WIFE, J. W. WALLENS AND DONALD SCHAAF AND WIFE, DORIS SCHAAF, DEFENDANTS

— AND —

DONALD SCHAAF, THIRD-PARTY PLAINTIFF v. SAMUEL LONGIOTTI, THIRD-PARTY DEFENDANT

Nos. 7515SC177 and 7515SC178

(*Filed 16 July 1975*)

Contracts § 3— memorandum until complete documents drawn up — enforceable contract

A paper writing containing the statement, "This letter is to serve as a memorandum agreement until proper complete documents can be drawn up to consummate this transaction," is not unenforceable as a contract as a matter of law since it cannot be said that the execution of a later agreement was a condition precedent to any contractual rights which might otherwise pertain, and the reference to more "complete" documents does not necessarily indicate that material portions of the agreement have been left open to future negotiation.

APPEAL by third-party plaintiff Donald Schaaf from *Braswell, Judge.* Judgments entered 9 January 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 7 May 1975.

For purposes of appeal, Cases Nos. 74CvS302 and 74CvS570 have been consolidated.

In its complaint filed 28 February 1974, plaintiff bank sought to collect on a note, alleging in part that on or about 18 March 1970, defendants executed and delivered to plaintiff a note in the amount of $141,996.96; that defendants had defaulted in their payments; that plaintiff's demand for payment was refused; and that a balance of $88,377.00 was due.

In a second complaint filed 24 April 1974, plaintiff bank sought to collect on a second note, alleging in part that on or about 2 March 1973 defendant G. C. Wallens, on behalf of Koretizing Mart of Chapel Hill, executed and delivered to plaintiff a note in the amount of $76,370.25; that the Koretizing Mart had defaulted in payments; and that a balance of $52,102.76 was due. Pleading in the alternative, plaintiff sought recovery from defendants by first alleging that they had guaranteed all debts of the Koretizing Mart of Chapel Hill pursuant to a writing dated 23 July 1970. Secondly, plaintiff alleged that this note

was only a renewal of an earlier note signed by defendants G. C. Wallens and Donald Schaaf.

In both actions, defendant Donald Schaaf filed a third-party complaint against Samuel Longiotti seeking indemnification if Schaaf should be found liable in the primary actions. In the third-party complaints it was alleged that on or about 27 May 1971, the third-party defendant, Longiotti, and the third-party plaintiff, Schaaf, entered into an agreement whereby Longiotti agreed to indemnify Schaaf for liability and loss on the claims now being asserted against Schaaf. The alleged agreement was attached to the pleadings in each case.

Pursuant to G.S. 1A-1, Rule 12(b)(6), Longiotti moved to dismiss each of the third-party complaints for the reason that they failed to state a claim upon which relief could be granted. Having expressly determined that there was no just reason for delay, the trial court entered judgments dismissing the third-party complaints. From these judgments, third-party plaintiff, Schaaf, appealed.

Manning, Fulton & Skinner, by Howard E. Manning, Thomas C. Worth, Jr., and Lawrence W. Hill, Jr., for third-party plaintiff appellant.

Midgette, Page, Higgins & Niles, by Robert J. Page, Keith D. Lembo, and W. Laurens Walker, for third-party defendant appellee.

MARTIN, Judge.

The original defendant, Donald Schaaf, as third-party plaintiff, alleges that the third-party defendant, Samuel Longiotti, is liable to him for all of the plaintiff's claim against him. His claim is based on a writing which appears in the record as follows:

"PA PLAZA ASSOCIATES INC.

Post Office Box 2208 Chapel Hill, North Carolina 27514
May 27, 1971
CERTIFIED MAIL

Mr. Don Schaaf
51 Compass Lane
Fort Lauderdale, Florida 33308

Dear Don:

This letter is to serve as a memorandum agreement until proper complete documents can be drawn up to consummate this transaction.

Mr. Longiotti hereby agrees to guarantee Mr. Schaaf against any claims due on the four (4) bank notes involving the Koretizing ventures which Mr. Schaaf and Mr. Wallens own jointly, i.e., Chapel Hill, Elizabeth City, Henderson, and Roanoke Rapids. In return for this Mr. Schaaf surrenders his interest and any claims in these Koretizing ventures to Mr. Longiotti and Mr. Wallens and as additional consideration to them he agrees the rental through May 1971 for Henderson and Elizabeth City are properly chargeable against funds due him from Mr. Longiotti. Also, Mr. Schaaf agrees that the rental due from Gerry Wallens and Sam Longiotti for the Chapel Hill location is to be reduced to one-half (½) the normal rent for the months of June, July, August, and September 1971, thereafter to resume at full rental.

ACCEPTED BY:
s/ SAMUEL LONGIOTTI

Sworn to and subscribed before
me this 27th day of May, 1971.
s/ ALMA G. ANDREWS
Notary Public
My Commission Expires: June 2, 1975

ACCEPTED BY:
s/ DON SCHAAF

Sworn to and subscribed before
me this 17th day of June, 1971.
s/ ALLEN J. RICHTER
Notary Public
My Commission Expires:"

Apparently, no subsequent documents were executed.

The issue presented for decision is whether the third-party complaint affirmatively pleads facts which necessarily negate

and defeat the third-party plaintiff's right to relief. Resolution of this issue, in turn, depends upon whether the alleged agreement of 27 May 1971 is unenforceable as a matter of law.

According to the third-party defendant, Samuel Longiotti, the crucial language is contained in the first paragraph which states, "This letter is to serve as a memorandum agreement until proper complete documents can be drawn up to consummate this transaction." Relying on *Boyce v. McMahan,* 285 N.C. 730, 208 S.E. 2d 692 (1974), it is argued that this language makes clear the preliminary nature of the alleged agreement and, further, that it destroys the efficacy of the writing as a contract as a matter of law.

In *Boyce v. McMahan, supra,* the paper writing in question contained the following language: "WHEREAS the OWNER AND DEVELOPER . . . desire to enter into a preliminary agreement setting out the main features as to the desires of both parties and to execute a more detailed agreement at a later date; . . . That the parties hereto agree to supplement this preliminary agreement by executing a more detailed agreement at some specific and subsequent date to be agreed to by the parties hereto." No further contract or agreement had been executed in that case. This Court held that the writing was unenforceable as a contract, and our Supreme Court affirmed that result by stating that "[t]he writing itself carries the terms which destroy its efficacy as a contract."

The Court's reasoning in *Boyce* is clear. Generally, a contract, or offer to contract, which leaves material portions open for future agreement is nugatory and void for indefiniteness. The reason is that if a preliminary contract fails to specify all of its material and essential terms so that some are left open for future negotiations, then there is no way by which a court can determine the resulting terms of such future negotiations. Hence, there is no basis upon which to ascertain what damages, if any, might follow from a refusal to enter into such future agreement. By its own terms, the writing in *Boyce* was *incomplete* and subject to *supplementation* by a more *detailed agreement.* We find *Boyce* to be distinguishable.

Clearly, if the parties in the present case had manifested an intent not to become bound until the execution of a more formal agreement or document, then such an intent would be given effect. However, they stated that the writing would *serve*

as an agreement until "proper complete documents" could be drawn. From such language it cannot be said that execution of a later agreement was a condition precedent to any contractual rights which might otherwise pertain. Furthermore, reference to a more "complete" document does not necessarily indicate that material portions of the agreement have been left open for future negotiation. It could mean only that immaterial matters, which are of no consequence, will be added to complete the agreement. Also, the writing under consideration was sent to the third-party plaintiff by the third-party defendant, Samuel Longiotti, who now seeks to repudiate it.

As stated in *Boyce*, "In the usual case, the question whether an agreement is complete or partial is left to inference or further proof." "The subsequent conduct and interpretation of the parties themselves may be decisive of the question as to whether a contract has been made even though a document was contemplated and has never been executed." 1 Corbin, Contracts, § 30, pp. 107-8 (1963).

In the present case there is nothing about the writing itself which destroys its efficacy as a contract as a matter of law. Therefore, we hold that it was error to dismiss the third-party complaints for failure to state a claim upon which relief could be granted.

Reversed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. KENNETH LEE WOODS

No. 751SC159

(Filed 16 July 1975)

1. Searches and Seizures § 3— issuance of search warrant — neutrality of issuing magistrate

A warrant to search defendant's premises for drugs was not invalid because it was not issued by a neutral and detached magistrate where the magistrate overheard a person against whom he was preparing an arrest warrant make a statement about drugs being in the possession of defendant, the magistrate told an officer that the person making the statement had been a reliable informer to police in con-

nection with drug investigations, and the magistrate suggested to the officer that he telephone the chief of the Kill Devil Hills Police Department.

2. **Searches and Seizures § 3— search warrant — sufficiency of evidence to support probable cause finding**

Where testimony at a *voir dire* hearing to determine validity of a search warrant indicated that ample evidence was placed before the magistrate prior to issuance of the warrant to support the probable cause finding, it was not necessary that the affidavit contain within itself all the evidence properly presented to the magistrate.

3. **Searches and Seizures § 3— search warrant — description of premises adequate**

Description in a search warrant of the premises to be searched was adequate.

APPEAL by defendant from *Lanier, Judge.* Judgments entered 3 October 1974 in Superior Court, DARE County. Heard in the Court of Appeals 17 April 1975.

In the early morning of 15 August 1974 police officers of Kill Devil Hills and deputy sheriffs of Dare County, acting pursuant to a search warrant, searched a house trailer occupied by defendant and found a large quantity of various drugs. As a result, defendant was subsequently convicted in five cases for violations of the North Carolina Controlled Substances Act. On this appeal from the judgments imposed in those cases, defendant challenges the validity of the search.

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

Herbert L. Thomas for defendant appellant.

PARKER, Judge.

[1] Defendant first contends that the search warrant was invalid because it was not issued by a "neutral and detached magistrate." In this connection, testimony presented at the voir dire hearing conducted by the court to determine validity of the warrant shows the following: On the evening of 14 August 1974 Magistrate Ralph Swain, a duly appointed and qualified magistrate in Dare County, was at the Dare County Courthouse in Manteo. At that time Officer J. C. Stuart of the Kill Devil Hills Police Department brought to the courthouse one Robert Ken Hansen, whom he had arrested on a drug-related charge. While Magistrate Swain was preparing the arrest warrant

against Hansen, he overheard Hansen making a statement to Officer Stuart concerning a "cache of pills, a suitcase full, thousands of dollars worth," in the possession of defendant Woods. Magistrate Swain was acquainted with Hansen and knew that on a number of occasions Hansen had been an informer to the police in connection with drug investigations in Dare County. Magistrate Swain told Officer Stuart of the reliability of Hansen as an informer, and suggested that Stuart telephone Chief Bray of the Kill Devil Hills Police Department. Stuart did so, and both Stuart and Swain talked with Chief Bray on the phone. In these conversations Chief Bray confirmed that on a previous occasion Hansen had provided accurate information which resulted in an arrest and conviction. On the basis of this information, Officer Stuart then signed the affidavit upon which the search warrant was issued by Magistrate Swain.

At the conclusion of the voir dire hearing the court entered an order making findings of fact from which it concluded as a matter of law that the search warrant was valid. In this we find no error. Certainly the issuing magistrate must be "neutral and detached," *Shadwick v. City of Tampa,* 407 U.S. 345, 32 L.Ed. 2d 783, 92 S.Ct. 2119 (1972), but there has been no showing in this case that Magistrate Swain at any time failed to occupy that status. Quite to the contrary, he performed his duties throughout in a correct and admirable manner. Certainly it is entirely consistent with a properly judicial and detached neutrality for the magistrate to inform the officer of the type of information which must be supplied to support a finding of probable cause. As the magistrate in this case testified, "[a]t the time when an officer comes for a search warrant, you have to furnish him with the knowledge of what information he needs." Nor was there anything improper in this case in the magistrate, because of information which he already possessed, suggesting to the officer that he contact the police chief in order to obtain further information.

[2] We also find no merit in defendant's contention that the search warrant was invalid because the affidavit did not itself contain a sufficient recitation of the underlying circumstances to support the magistrate's finding of probable cause. As testimony at the voir dire hearing made clear, ample evidence was placed before the magistrate prior to issuance of the warrant to support the probable cause finding, and it is not necessary

that the affidavit contain within itself all the evidence properly presented to the magistrate. *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972). Our statute, G.S. 15-26(b), applicable to the warrant here in question, requires only that the affidavit indicate the basis for the finding of probable cause. (For changes in our statutory requirements in this respect, reference should be made to our new Criminal Procedure Act, particularly G.S. 15A-245(a), applicable to criminal proceedings begun on and after 1 September 1975.)

[3] Finally, defendant contends that the search warrant was invalid because it did not adequately describe the place to be searched. In this connection the premises was described in the warrant as the premises of the defendant, Kenneth Woods, particularly described as:

> "A Aqua and White mobile home owned by James Luther Bateman about 60 yards beyond Joe Kays Camp Ground the first dirt road to the left off RPR 1215 the first house trailer on the right."

All that is required is that the premises be described with reasonable certainty, and we find the description here to be adequate. Testimony at the voir dire that the mobile home was not owned by James Luther Bateman, as was stated in the warrant, but was actually owned by his father, Luther Lawrence Bateman, who rented it to the defendant, did not render the description fatally defective. Nor was the description shown to be inadequate by testimony that there was in the vicinity another aqua and white mobile home not owned by either Bateman and not occupied by defendant.

In defendant's trial and in the judgments appealed from we find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRED WILLIAM HOBBS

No. 7526SC281

(Filed 16 July 1975)

1. **Receiving Stolen Goods § 5— receiving stolen TV — sufficiency of evidence**

In a prosecution for receiving stolen goods of a value of more than $200 knowing them to have been stolen, evidence was sufficient to be submitted to the jury where it tended to show that a witness asked to borrow defendant's truck to do some housebreaking, the witness and another later stole a TV worth between $400 and $500, and the two subsequently sold the stolen TV to defendant for $150.

2. **Receiving Stolen Goods § 6— instruction as to knowledge — error**

In a prosecution for feloniously receiving stolen goods, the trial court committed reversible error in instructing the jury that they must find that defendant knew or believed the TV he received was stolen.

3. **Criminal Law § 150— defendant's right to appeal — delay — no prejudice**

Although defendant's appeal was delayed, he was not deprived of his right to appeal where the Court of Appeals granted his petition for a writ of certiorari.

ON *writ of certiorari* to review proceedings before *Grist, Judge.* Judgment entered 29 September 1972 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 June 1975.

Defendant was charged with receiving stolen goods of a value of more than $200 knowing them to have been feloniously stolen, in violation of G.S. 14-71. 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 four nor more than six years with Work Release recommended, defendant appealed.

The State presented Joseph Edward Sanders and William Harris who testified that Sanders borrowed the defendant's truck explaining that he was going to use it for housebreaking; that they stole a television from an apartment and that they sold the television to the defendant. Mrs. Cornelia Faye Martin testified that her television set was stolen and that its value was $400 to $500. The State also presented two police officers who testified that they saw the defendant standing on the load-

ing dock at his place of business with Sanders and Harris at about 8:00 p.m. on 9 February 1972.

The defendant presented his father who testified that he heard Sanders ask to borrow the defendant's truck to move. Several witnesses testified they were with the defendant on the evening of 9 February 1972 and that the defendant did not leave their company all evening.

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

Attorney General Edmisten, by Assistant Attorney General Sidney S. Eagles, Jr., and Associate Attorney Thomas Lawrence Pollard, for the State.

Sanders, Walker & London, by Robert G. Sanders and Robert C. Stephens, for defendant appellant.

MORRIS, Judge.

[1] Defendant'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 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. Mull,* 24 N.C. App. 502, 504, 211 S.E. 2d 515 (1975), citing *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 nonsuit should be denied when there is sufficient evidence, direct, circumstantial, or both, from which the jury could find that the offense charged has been committed and that defendant committed it. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Here there was evidence that the witness Sanders asked to borrow the defendant's truck "to do some housebreaking"; that Sanders and Harris later stole a television worth "between Four Hundred and Five Hun-

dred Dollars" from the home of Mrs. Martin and that they subsequently sold the stolen television to the defendant for "One Hundred Fifty Dollars." We conclude there was sufficient evidence to withstand the defendant's motion for nonsuit. This assignment of error is overruled.

[2] Defendant next contends that the trial court committed reversible error in the following portions of the instructions to the jury:

> "Now, I charge you that for you to find the defendant guilty of feloniously receiving stolen goods, the State must prove five things beyond a reasonable doubt: 1. That a Magnavox T.V. was stolen by someone other than the defendant; 2. That the defendant received that property; *3. That the defendant at the time he received that property knew or believed it was stolen.*" (Emphasis supplied.)
>
> "I charge you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about February 9, 1972, Fred William Hobbs, with a dishonest purpose received by taking into his possession a Magnavox T.V. and paying $40.00 to the State's witness Sanders, with a promise of paying $110.00 more and the Magnavox T.V. was worth more than $200.00, *which he knew or believed someone else had stolen, . . .* " (Emphasis supplied.)

This assignment of error must be sustained. Similar instructions have been found to constitute prejudicial error in *State v. St. Clair,* 17 N.C. App. 22, 193 S.E. 2d 404 (1972), and *State v. Miller,* 212 N.C. 361, 193 S.E. 388 (1937). As was said in *State v. Miller, supra,* at pp. 362-363:

> " 'To reasonably believe' and 'to know' are not interchangeable terms. While the latter may be implied or inferred from circumstances establishing the former, it does not follow that reasonable belief and implied knowledge are synonymous. The State must establish that the defendant received the goods 'knowing the same to have been feloniously stolen or taken,' and this is not necessarily accomplished by establishing the existence of circumstances 'such as to cause the defendant to reasonably believe' the goods were stolen. Knowledge connotes a more certain and definite mental attitude than reasonable belief, and whether knowledge is implied from circumstances sufficient to establish reasonable belief is a question for the jury. 'Where

the defendant in a criminal action is charged with a statutory crime, it is incumbent on the State to satisfy the jury beyond a reasonable doubt, by the evidence, of all the facts which constitute the crime as defined by the statute.' *S. v. Folger,* 211 N.C., 695."

Defendant is entitled to a new trial for the error assigned.

[3] Defendant next argues that he has been effectively denied his right to review because his attorney negligently delayed his appeal. We disagree. The record discloses that judgment was entered against the defendant on 29 September 1972 and defendant gave notice of appeal; that on 30 July 1974 the State moved to dismiss the appeal for the defendant's failure to perfect; and that the motion was allowed and a capias was issued for the arrest of the defendant, who had been free on bail pending the appeal. Subsequently the defendant moved for a stay of judgment, asserting that he had paid his attorney to carry through with his appeal, that he had repeatedly contacted his attorney and had been assured that everything was in order, and that he had started a business and was making a good living for his family. The judgment was stayed on 8 October 1974, and defendant applied to this Court for a writ of certiorari. Pursuant to an order from this Court, a hearing was held on 19 December 1974 as to why defendant's appeal had not been perfected. At that hearing, the defendant's trial attorney admitted that he had been guilty of inexcusable neglect, and the trial court took disciplinary action. Certiorari was then allowed and defendant has been represented by his present counsel for review of his trial. Although the defendant's appeal was delayed, we conclude that he has not been deprived of his right to appeal for the obvious reason that this right has been afforded the defendant by our granting his petition for writ of certiorari. Furthermore, defendant has failed to show that a delay in the appellate review of his case has prejudiced him in any way. This assignment of error is overruled.

In light of the fact that the defendant is entitled to a new trial for errors in the charge, his remaining assignments of error, which relate to allegedly improper comments made by the District Attorney in his argument to the jury, are of no import.

New trial.

Judges VAUGHN and CLARK concur.

ATLANTA KING TAYLOR v. WILBUR J. TAYLOR, SR.

No. 755DC221

(Filed 16 July 1975)

1. **Divorce and Alimony § 16— alimony — transfer of real property — order improper**

The trial court in an action for alimony erred in directing that defendant transfer title to certain real estate to plaintiff. G.S. 50-16.7(a).

2. **Divorce and Alimony § 16— amount of alimony — improper purpose for award**

In an action for alimony the trial court erred in ordering defendant to pay plaintiff $100,000 in cash and to transfer real estate with a value in excess of one million dollars to plaintiff where the judgment sought to reward plaintiff for her part in the development of defendant's business, to extend defendant's obligation to support his wife beyond his death, and to divide defendant's estate, rather than to provide for plaintiff's reasonable support.

3. **Divorce and Alimony § 18— attorney's fee — award proper**

The trial court in an action for alimony did not err in ordering defendant to pay plaintiff's counsel where defendant stipulated that plaintiff did not have sufficient means to defray and employ the necessary legal expenses of suit and was entitled to an order allowing counsel fees in accordance with G.S. 50-16.4.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 23 October 1974 in District Court, NEW HANOVER County. Heard in the Court of Appeals 14 May 1975.

This is an action for alimony.

On 18 February 1974 an order was entered allowing alimony *pendente lite* and counsel fees. Among other things the order awarded plaintiff $2,000.00 per month and $8,867.15 in counsel fees and suit expenses. The parties stipulated that plaintiff was entitled to alimony and counsel fees.

On 15 October 1974 the case came on for hearing before the judge without a jury. The question for determination was the amount of alimony. The court entered judgment awarding alimony in a lump sum as follows. Defendant was ordered to pay $100,000.00 in cash. The judgment also transferred title to real estate from defendant to plaintiff. Plaintiff had alleged that the value of the real estate the court ordered transferred to plaintiff was in excess of one million dollars. Defendant was

also ordered to pay plaintiff's counsel the additional sum of $20,000.00.

Defendant appealed.

Stevens, McGhee, Morgan & Lennon, by Karl W. McGhee and Charles E. Sweeny, Jr., for plaintiff appellee.

W. K. Rhodes, Jr., and Murchison, Fox & Newton, by Joseph O. Taylor, Jr., for defendant appellant.

VAUGHN, Judge.

We need not refer to the evidence. The judgment awarding alimony is, on its face, so affected by errors of law that it must be vacated.

G.S. 50-16.7, in pertinent part, is as follows:

> "How alimony and alimony pendente lite paid; enforcement of decree.—(a) Alimony 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."

[1] This section does not authorize the court to direct that alimony be paid by the transfer of title to real estate. In a proper case it may transfer possession of real estate. The court may order that defendant's security interest in real estate be transferred. The security interest to which the statute refers is an interest in real estate which secures the payment of an obligation.

The evidence indicates that plaintiff, age 61, has assets which include the following: real estate, $68,000.00; bank checking account, $5,468.24; savings account, $1,036.50; bank certificates of deposit, $30,000.00. The last item is pledged to secure a loan. Plaintiff refused to say how the loan proceeds were being used except to say, " . . . I still have it in another form as far as my wealth goes."

Defendant, age 72, is a man of considerable wealth. The court found that, in addition to the real estate ordered transferred to plaintiff, defendant owns real estate valued at $970,000.00 and other property valued at $266,500.00. There was some speculation that defendant had large sums of cash in safety

deposit boxes and elsewhere. At any rate it is clear that defendant has ample means to pay almost any amount of alimony if that amount is lawfully determined in accordance with the statute.

We quote relevant parts of the judgment.

"2. That the plaintiff has during her 40 years of marriage with defendant been instrumental in the defendant's businesses and has, through her efforts, materially helped the defendant in his business enterprise.

* * *

3. That the Court takes judicial notice of the defendant's right to obtain an absolute divorce, and that upon the granting of an absolute divorce the plaintiff will be completely divested of rights to inheritance, elective life estate, and any dower in any real estate owned by the defendant, and also will terminate the defendant's obligation to support the plaintiff, except as herein ordered.

* * *

5. That the plaintiff is 61 years of age, and that the defendant will be 72 years of age in December of 1974, and the life expectancy of each would require a lump sum award rather than a monthly, quarterly, or yearly continuing allowance."

[2] These and other parts of the judgment make it clear that the emphasis is not on providing for the reasonable support of the wife as contemplated by the statute.

The judgment erroneously seeks to reward plaintiff for her part in the development of defendant's business. Unlike the plaintiff in *Eggleston v. Eggleston,* 228 N.C. 668, 47 S.E. 2d 243, the plaintiff here did not seek to establish the existence of a partnership with her husband. Defendant has a duty to provide reasonable support for his wife and it is to that duty that the statute speaks. Defendant is a wealthy man. The award should be "commensurate with the normal standard of living of a wife of a man of like financial resources." *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5. It should also be noted that this is not a "Community Property" state and only the Legislature could properly make it one. The lawmaking branch having declined to enact that or a similar concept, it should not come to

be by judicial dictum, however well intentioned or fair-minded it may appear in a particular case.

Defendant's obligation to provide support for his wife will terminate at his death. It is error to require him to establish, in effect, a fund that is calculated to extend that obligation.

Plaintiff's right to receive support from defendant will terminate at her death. It may, of course, terminate earlier. It is error to require defendant to establish a fund calculated "to increase an estate for his estranged wife to pass onto her next of kin." *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218.

The judgment is more in the nature of a division of defendant's estate than it is an award of alimony, and this is wrong. "The purpose of the award is to provide for the reasonable support of the wife, not to punish the husband or to divide his estate." *Schloss v. Schloss, supra.*

[3] On this record, it was not error to order defendant to pay plaintiff's counsel. Defendant stipulated that plaintiff did not have sufficient means to "defray and employ the necessary legal expenses" of suit and made an unrestricted stipulation "that the plaintiff is entitled to an order allowing counsel fees in accordance with G.S. 50-16.4." We will not go behind those stipulations and consider whether an award would have been proper in their absence. No abuse of discretion has been shown in the amount allowed.

For the reasons stated the judgment is vacated. The case is remanded for proceedings not inconsistent with this opinion.

Judgment vacated.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLIE BRYANT NEWCOMB

No. 759SC199

(Filed 16 July 1975)

Homicide § 21— death by shooting — involuntary manslaughter — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter where it tended to show that

defendant knowingly took a loaded pistol to a public area where he knew others had a right to gather, defendant ostentatiously brandished the weapon when deceased walked up to his car, and the gun discharged killing deceased.

APPEAL by defendant from *Hall, Judge.* Judgment entered 8 November 1974 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 8 May 1975.

Defendant was charged in a bill of indictment with the felony of murder. After a plea of not guilty and the presentation of the State's evidence, the court allowed defendant's motions for nonsuit as to second degree murder and voluntary manslaughter but overruled the motion for nonsuit as to involuntary manslaughter.

Following defendant's presentation of evidence and his renewal of his motion for nonsuit, the jury returned a verdict of guilty of involuntary manslaughter and defendant was sentenced to four years in the custody of the Commissioner of Correction as a "Committed Youthful Offender."

Attorney General Edmisten, by Associate Attorney T. Lawrence Pollard, for the State.

Currin & Cross; Watkins, Edmundson & Wilkinson, by James E. Cross, Jr., for defendant appellant.

VAUGHN, Judge.

The only question is whether defendant's motion for nonsuit made at the close of all the evidence should have been allowed.

It was stipulated that Gary Curl died as a result of a pistol wound inflicted when a pistol held by defendant was discharged.

The evidence, taken in the light most favorable to the State, tends to show the following.

On the afternoon of 27 April 1973, defendant took a pistol from his father's wardrobe. About 11:00 p.m. he took the loaded weapon to the "Tasty Freeze" in Creedmoor. He went there to talk with Billy Turner about a girl the two had been dating. Defendant and one Wayne Tippett were seated in defendant's automobile. Michael Turner and Billy Turner were outside the car. The Turners and defendant were discussing a previous misunderstanding. Defendant had the pistol in his belt. He

"showed" the gun to the Turners. He told Billy Turner that the reason he had the pistol was because he was aware of prior trouble between Turner's cousin and defendant's brother. The misunderstanding among the group was apparently clarified and they were "just talking, laughing, and carrying on." There was beer in the car but defendant said that he had not had but one swallow.

Gary Curl, the deceased, walked up to the passenger side of the car and was talking to Tippett. Defendant had never seen Curl before. Defendant took the pistol from his belt to "show" it to Curl. Defendant raised the pistol to chest level, it fired and the bullet entered Curl's head through the left eye. Defendant said, "Goddamn, did I hit him?" Defendant threw the pistol on the floor of the car and left the scene. He left his car at a bank. A police officer later stopped a car operated by Tippett as it was going along U. S. Highway 15. Defendant, a passenger in that vehicle, was arrested and taken to jail. Defendant's father later gave the police the pistol and stated that he had not known that defendant had taken the gun.

The evidence must not only be considered in the light most favorable to the State but the State must be given the benefit of every reasonable inference that might arise therefrom. We hold that the evidence was sufficient to go to the jury on the question of involuntary manslaughter.

> "Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner . . . '[c]ulpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' " *State v. Williams,* 231 N.C. 214, 56 S.E. 2d 574.

The evidence clearly permits the jury to find that the deceased was killed because of defendant's reckless, heedless and thoughtless disregard of the safety of others. Defendant knowingly took a loaded pistol to a public area where he knew others had the right to gather. His avowed reason was to discuss an earlier "misunderstanding." That misunderstanding having been resolved he ostentatiously brandished the pistol first to the

Turners and again when the deceased walked up. The inherent danger of a loaded pistol is manifest. Defendant's failure to use care commensurate with the dangerous character of the weapon is culpable negligence.

> "Where one engages in an unlawful and dangerous act, such as 'fooling with an old gun,' i.e., using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter." *State v. Hovis,* 233 N.C. 359, 64 S.E. 2d 564.

In *State v. Trollinger,* 162 N.C. 618, 77 S.E. 957, defendant was walking along a public road with a group of people. The crowd was talking and laughing. Defendant had a pistol "fooling with it, and it went off . . . had it out, messing with it, pulling the cartridges out." Another member of the group was shot and killed. Although the court found error in the judge's charge, it held that the case was one for the jury and ordered a new trial. When death ensues from the unjustifiable and reckless use of a gun, it is manslaughter even if it was unintentionally discharged. *State v. Turnage,* 138 N.C. 566, 49 S.E. 913.

The judge's charge is not a part of the record. We assume that the judge properly explained the law arising on the evidence (including that favorable to defendant) to the jury. The finders of the truth have resolved the inferences arising on the evidence against the defendant.

No error.

Judges BRITT and PARKER concur.

GERALD P. WILLIS, ADMINISTRATOR OF THE ESTATE OF DAVID S. WILLIS, DECEASED v. DUKE POWER COMPANY, A CORPORATION

No. 7526SC227

(Filed 16 June 1975)

Contempt of Court § 8— no penalty imposed for contempt — order not appealable

No legal impediment bars a person who is penalized as for contempt from obtaining a review of the judgment entered against him in superior court by direct appeal; however, where the contempt

order in question expressly refrained from imposing a fine or penalty for contempt of court but provided that defendant could purge itself by complying with an earlier court order to answer plaintiff's interrogatories, the order was not final and was not appealable.

ATTEMPTED appeal by defendant from *Falls, Judge.* Judgment entered 9 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 May 1975.

This is a wrongful death action brought by plaintiff as the administrator of the estate of David S. Willis. The complaint alleges that intestate died as a result of electrical shock received when an aluminum ladder, which he was holding, came too close to some uninsulated, high voltage lines. It further alleges that defendant maintained the lines as part of its service in providing electrical power to the residents of the area and that one year prior to the electrocution of David Willis, another man, Nelson Hale, was killed by electrical shock at the same place and under substantially similar circumstances. Plaintiff seeks both compensatory and punitive damages based on the alleged negligence and gross negligence of defendant.

Defendant answered, denying any negligence on its part and asserting contributory negligence on the part of plaintiff's intestate.

On 30 July 1974, plaintiff served on defendant a first set of interrogatories, and pursuant to G.S. 1A-1, Rule 34, plaintiff also requested the production of documents used in answering the interrogatories. The requested documents included investigation reports made by defendant in connection with the deaths of David Willis and Nelson Hale. Defendant objected to certain of plaintiff's interrogatories as being burdensome and irrelevant and on 12 August 1974 filed a motion for a protective order pursuant to G.S. 1A-1, Rules 30(b) and 33, requesting that it not be compelled to answer the interrogatories nor to produce the documents sought by plaintiff. On 25 November 1974, the trial court denied defendant's motion for a protective order and ordered that defendant answer plaintiff's interrogatories and that defendant produce and permit plaintiff to inspect and copy the documents therein designated. Since defendant was not represented at the 25 November 1974 hearing, the trial judge permitted a rehearing of the matter on 26 November 1974; however, the order of 25 November 1974 was allowed to stand without modification.

On 12 December 1974, plaintiff petitioned the court for an order requiring defendant to appear and show cause why it should not be held in contempt for failure to comply with the 25 November 1974 order. The requested order was issued and the matter was heard on 6 January 1975.

On 9 January 1975 the court filed its order finding that defendant had willfully failed to comply with the order of 25 November 1974 in that defendant had not answered plaintiff's interrogatory number 1(b) and had willfully failed and refused to produce the documents designated in interrogatories 13, 16, 17 and 33. It further found that defendant's conduct tended to defeat and prejudice the rights of plaintiff and adjudged defendant to be in contempt. The court made it clear that it was proceeding "as for contempt." The order provided that defendant could purge itself of contempt by (1) supplying plaintiff with the names of those members of its claim department who conducted or participated in the investigation of the Hale and Willis incidents, and (2) producing the investigation files for plaintiff's inspection. The court decreed that it would not impose a fine or other penalty on defendant provided defendant purged itself by complying with the order.

Defendant objected and excepted to the order and gave notice of appeal.

Cansler, Lassiter, Lockhart & Eller, P.A., by Thomas Ashe Lockhart and Joe C. Young, for plaintiff appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe, William I. Ward, Jr., and W. Edward Poe, Jr., for defendant appellant.

BRITT, Judge.

Plaintiff contends the order from which defendant attempts to appeal is not appealable. We find merit in the contention.

It is well established in this State that no legal impediment bars a person, who is *penalized* as for contempt, from obtaining a review of the judgment entered against him in superior court by direct appeal. *Luther v. Luther,* 234 N.C. 429, 67 S.E. 2d 345 (1951).

In the present case, the 9 January 1975 contempt order expressly refrained from imposing a fine or penalty for contempt of court, provided defendant purge itself by complying

with the terms of the orders. Until some punishment is imposed, such order is not final and does not affect a substantial right so as to render it directly appealable. 17 C.J.S., Contempt, § 114, p. 300. *See generally* Annot., 33 A.L.R. 3d 448, 564 (1970).

In *Alexander v. United States*, 201 U.S. 117, 121, 50 L.Ed. 686 (1906), the trial court directed witnesses to produce documents in compliance with a subpoena *duces tecum* and to answer questions propounded by the government in an anti-trust suit. Claiming that the information was irrelevant and self-incriminatory, the witnesses sought immediate review of the order. Holding that review was unavailable at that point, the Supreme Court of the United States declared:

> ". . . Let the court go farther, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case. . . ."

It is our opinion that the attempted appeal of defendant should be dismissed and it is so ordered.

Appeal dismissed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. ALLEN D. HELMS

No. 7530SC306

(Filed 16 July 1975)

1. **Indictment and Warrant § 12—amendment of warrant — change in date of offense**

The trial court did not err in permitting the State to amend an indictment charging possession of marijuana with intent to sell and sale of marijuana by changing the date of the offenses from 31 January 1974 to 29 January 1974.

2. **Constitutional Law § 30— preindictment delay — due process**

Defendant was not denied due process by an eight-month delay between offenses of possession of marijuana with intent to sell and sale of marijuana and indictment of defendant for those offenses.

3. Criminal Law § 117— instructions — scrutiny of witness's testimony — absence of request

The trial court did not err in failing to instruct the jury to scrutinize the testimony of an informer who testified for the State absent a request by defendant for such an instruction.

APPEAL by defendant from *Thornburg, Judge.* Judgments entered 5 December 1974 in Superior Court, JACKSON County. Heard in the Court of Appeals 12 June 1975.

On 30 September 1974, indictment No. 74-2727 was returned by the grand jury charging that (1) on 31 January 1974 defendant did unlawfully sell and deliver to Tom Boyles more than five grams of marijuana and (2) on 31 January 1974 defendant did unlawfully possess more than five grams of marijuana with the intent to sell and deliver same. A second indictment, No. 74-2728, was returned on 30 September 1974 charging that (1) on 18 January 1974 defendant did unlawfully sell and deliver to Tom Boyles more than five grams of marijuana and (2) on 18 January 1974 defendant did unlawfully possess more than five grams of marijuana with the intent to sell and deliver same. (At trial, indictment No. 74-2727 was amended to read 29 January 1974.)

The case was tried in the Superior Court of Jackson County at the 2 December 1974 Session. By motion dated 4 December 1974, defendant asked that the court dismiss the indictments on the grounds that he had been irrevocably prejudiced by the State's delay in commencing the prosecution. In an affidavit supporting his motion, defendant stated that he could not prepare a proper defense because he had no way of knowing where he was or whom he was with on the dates when the alleged offenses were committed.

In the hearing on the motion, Agent James T. Maxey testified that charges against defendant resulted as part of an eight month drug investigation at Western Carolina University. The investigation commenced in January 1974 and ended in August and September of 1974. Defendant's was only one of thirty or forty cases which resulted. Agent Maxey further testified that the identity of the informer would have been revealed if the evidence against defendant had been presented to a grand jury at an earlier date.

Assistant District Attorney John Snow testified that the delays in securing the indictments were not meant to gain any

advantage for the State but were solely for the purpose of bringing the investigations to a conclusion without revealing the identity of the informants.

The trial judge found that "although earlier date of charge would have made easier the preparation of a defense to the charge lodged against the defendant, it is clear that the State delayed issuance of the bill of indictment or the initiation of a charge for the purpose of bringing to a successful conclusion a massive effort to curtail or possibly destroy the illegal distribution of controlled substances in the Western Carolina College area;". Defendant's motion to dismiss was denied.

At trial, State's evidence tended to show the following facts. On 18 January 1974 Thomas Boyles was introduced to Helms, and upon invitation he entered Helms' trailer. At that time, he purchased some marijuana from Helms for $20.00. Boyles was accompanied by two men, one of whom he learned to be Helms' roommate. On 29 January 1974, Boyles purchased another bag of marijuana at defendant's trailer. State's evidence also tended to show a complete chain of custody of the substances purchased. Based on his chemical analysis, Jerry M. Dismukes, a chemist at the State Bureau of Investigation, identified the substances as marijuana.

Defendant denied that he sold marijuana to Boyles on 18 January 1974 and 29 January 1974. He testified that he did not remember where he was or what he did on those dates.

In Case No. 74CR2727, the jury found defendant guilty as charged, and judgment was imposed sentencing defendant to a term of imprisonment for not less than three nor more than five years. In Case No. 74CR2728, defendant was also found guilty as charged and judgment was imposed sentencing defendant to imprisonment for a term of years with execution of the sentence suspended upon compliance with specified conditions.

Defendant appealed.

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

Holt, Haire & Bridgers, by W. Paul Holt, Jr., and Ben O. Bridgers, for defendant appellant.

MARTIN, Judge.

[1] In open court, over the objection of defendant, the State was permitted to amend bill of indictment No. 74-2727 by changing the date of the offense as alleged therein from 31 January 1974 to 29 January 1974. Suffice to say that we find no error in this regard and defendant's first assignment of error is overruled.

Defendant also assigns as error the denial of his motion to dismiss due to the delay in bringing charges against him. It is contended that the delay violated due process guaranties and his right to a speedy trial.

[2] As in *State v. Hackett,* 26 N.C. App. 239, 215 S.E. 2d 832 (1975), the present case does not involve defendant's Sixth Amendment right to a speedy trial because this provision has no application until defendant is accused, either by indictment, information, or arrest. The legal effect of the preindictment delay must be judged by the due process clause of the Fourteenth Amendment.

Since most of the cases cited by defendant are treated in *State v. Hackett, supra,* further discussion of them is unnecessary. In our opinion, the preindictment delay in the present case did not deprive defendant of due process of law.

[3] In his fourth assignment of error, defendant contends that the court committed error by failing to instruct the jury to scrutinize the testimony of an informer who testified for the State. It is submitted that such instruction was necessary, regardless of any request by defendant. We disagree. An instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate feature of the case which does not require the trial judge to give the cautionary instruction unless there is a request for such instruction. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975).

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

No prejudicial error appears in the trial.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. YATES L. BAKER

No. 7525SC242

(Filed 16 July 1975)

1. **Criminal Law § 43— photograph of deceased — admissibility**

The trial court in a second degree murder prosecution did not err in allowing into evidence a photograph of deceased.

2. **Constitutional Law § 33; Criminal Law §§ 48, 96— defendant's silence — withdrawal of evidence and curative instruction**

Defendant was not prejudiced by testimony of an officer concerning defendant's silence when questioned by the authorities after the incident where the trial court allowed defendant's motion to strike and instructed the jury that defendant's silence was proper and should not be held against him in any way.

ON *writ of certiorari* to review trial before *Thornburg, Judge.* Judgment entered 6 August 1974 in Superior Court, BURKE County. Heard in the Court of Appeals 9 June 1975.

Defendant was charged in a bill of indictment, proper in form, with first degree murder. He was placed on trial for the lesser included offense of second degree murder.

The State's evidence tended to show the following. The defendant, Yates Baker, and the deceased, Jimmy Ray Shook, engaged in an altercation in the kitchen of a place known as "Willie's Party House." Thereafter, Shook pulled a pistol from his pocket and shot at least twice in the kitchen area. He then followed Baker out of the kitchen and shot two more times into the ceiling or into the floor of the main room of the building. Then Shook walked over to Sue Williams. He kneeled or crouched in front of her and began talking with her. At that time, Baker, who had left the building, returned with a pistol. He placed the pistol across the top of Mrs. Williams and told Shook that he had been hit by a bullet from Shook's gun a few minutes earlier. As Shook began to stand, Baker shot him in the face, and Shook died as a result of the bullet wound.

Defendant offered evidence which tended to show that during the altercation, Shook cursed Baker, and as a result, Baker struck at him. Shook then pushed back from the table, pulled a gun, and started shooting. One of the shots hit Baker in the leg. They proceeded into the front area of the building where Shook continued shooting at Baker. At this point, Baker went outside

where he attempted to find someone to take him to the hospital. Being unable to find anyone, he came back into the building. As Baker stopped near Sue Williams, Shook cursed him and stated that he would shoot Baker again. Shook had a gun in his right hand and began to stand up. As Shook came up with his pistol, Baker shot him in order to protect himself.

The jury found defendant guilty of second degree murder and from sentence imposed thereon, defendant appealed.

Attorney General Edmisten, by Associate Attorney Alan S. Hirsch, for the State.

Robert E. Hodges, for defendant appellant.

MARTIN, Judge.

[1] Defendant first assigns as error the action of the court in allowing the introduction of a particular photograph into evidence. He contends the photograph does not illustrate the testimony of the doctor and is prejudicial because it depicts a man covered with blood. The photograph illustrates the doctor's previous testimony concerning the cause of death of the deceased, and according to the doctor's testimony, it correctly and accurately depicts the entrance wound into the face of the deceased. If a photograph is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, will not alone render it inadmissible. 1 Stansbury, N. C. Evidence 2d, § 34, pp. 96-97 (Brandis Revision). Testimony and photographs illustrating the cause of death of the deceased is clearly relevant and this assignment of error is overruled.

Defendant next contends the court committed prejudicial error in not allowing him to request a limiting instruction regarding the admission of photographs. The record indicates that after the photograph had been ruled admissible counsel for defendant renewed his objection as to admissibility but did not attempt to request limiting instructions. Defendant was in no way prevented from requesting such instructions at that time. This assignment of error is without merit and is overruled.

[2] Next, defendant assigns as error the action of the court in allowing testimony regarding defendant's silence when questioned. Officer Whisnant testified that defendant remained silent when questioned by the authorities after the incident. Immedi-

ately after the admission of this testimony, the court allowed defendant's motion to strike, and then instructed the jury that:

> "Members of the Jury, you will not consider any portion of the witness' answer relating to the failure of the defendant, Baker, to make any statement to him, and the Court instructs you as a matter of law that the defendant had a perfect right to remain silent if he chose to do so, and that you may not at any time in your deliberations consider against this defendant the fact that he gave no statement to this or any other officer of law."

Defendant relies on the recent cases of *State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974) and *State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132 (1975) and argues that his in-custody silence may not be used against him after he was properly warned of his right to remain silent. In the case at bar, the trial court instructed the jury that defendant's silence was proper and should not be held against him in any way. This was a correct statement of the law and cured any error that may have occurred by admission of the testimony. Unlike *Castor* and *McCall,* no error prejudicial to defendant has resulted in the present case.

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

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges CLARK and ARNOLD concur.

WILLIAM J. HOUCK, ADMINISTRATOR, C.T.A., UNDER THE WILL OF EMMA J. STEPHENS; JOE R. STEPHENS; AND THEODORE STEPHENS, PETITIONERS v. PATRICK STEPHENS; WILLIAM E. STEPHENS; THOMAS STEPHENS; KATHERINE S. BOWMAN AND HUSBAND, ODELL BOWMAN; AND MELVIN HUDSON, RESPONDENTS

No. 7525SC266

(Filed 16 July 1975)

Deeds § 13— conveyance to testatrix and children after her — vested remainder

A deed conveying land to testatrix "and her children after her" created a vested remainder in the children and did not impose a requirement of survivorship upon the remaindermen.

APPEAL by respondent Patrick Stephens from *Ervin, Judge.* Judgment entered 18 November 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 29 May 1975.

Petitioners instituted this action under the provisions of the Declaratory Judgment Act (G.S. 1-253 et seq.) to construe a deed.

The underlying facts are not in dispute. Emma J. Stephens died on 2 October 1970 leaving a will which devised all of her real property of which she was seized at the time of death to Patrick Stephens, Theodore Stephens, Joe R. Stephens, and William E. Stephens. Each was to receive a one-fourth interest. However, the administrator C.T.A. was in doubt as to the nature and extent of her interest in certain real property due to a deed dated 2 February 1905 from William Burns and wife, Hulda Burns, to "Emer (sic) J. Stephens and her children after her."

In the 2 February 1905 deed some 101.5 acres of land was conveyed by use of a form deed to Emma J. Stephens, and wherever the phrase "heirs and assigns" appeared it was struck out and the phrase "and her children after her" was inserted.

The trial court found, *inter alia:*

"3. That the husband of Emma J. Stephens, Jesse E. Stephens, predeceased her.

4. That the children of Emma J. Stephens are as follows:

(a) Fred Stephens, born June 13, 1894, who died on the 18th day of August, 1934, survived by his wife Trilby S. Stephens, who died in June 1970, and a son, William

E. Stephens, a daughter Katherine S. Bowman, and a son, Thomas Stephens.

(b) Rose Stephens, born August 31, 1900 who died on November 8, 1946, survived by her son, Joe R. Stephens. The said Rose Stephens was never married.

(c) Ann S. Hudson, born March 18, 1898, who died the 11th day of January, 1963, intestate, survived by her husband Melvin L. Hudson, and her mother Emma J. Stephens.

(d) Barry Stephens, born May 22, 1903, who died in childhood on/or about September 4, 1903.

(e) Patrick Stephens, born January 3, 1891.

(f) Theodore Stephens, born October 27, 1904."

The trial court adjudged that the 2 February 1905 deed by William Burns and wife, Hulda Burns, to Emma (Emer) J. Stephens and her children after her conveyed a life estate in the lands to Emma J. Stephens with a vested remainder as tenants in common to Fred Stephens, Rose Stephens, Ann S. Hudson, Patrick Stephens, and Theodore Stephens.

Respondent Patrick Stephens objected and excepted to this judgment and gave notice of appeal.

J. Carroll Abernethy, Jr., for petitioner appellee William J. Houck.

Richard A. Williams, for respondent appellant Patrick Stephens.

Steve A. Austin, for respondent appellee Thomas Stephens.

MARTIN, Judge.

Appellant Patrick Stephens is dissatisfied with the trial judge's construction of the deed. He first takes the position that the language "to Emer J. Stephens and her children after her" conveys to Emma J. Stephens a life estate with a contingent remainder to her children so that only those children who can answer the roll upon the death of Emma Stephens acquire any interest in the lands. This is so, he argues, because the words "after her" limit the remainder interest to those surviving the life tenant.

Appellant's contention relies too heavily on the words "after her." They are the only words which manifest an intent to convey a life estate to Emma J. Stephens with a remainder to her children. However, appellant would have them perform the additional task of imposing a requirement of survivorship upon the remaindermen. The most that can be said in favor of appellant's position is that from the language of the deed it is unclear whether the grantor intended to convey a vested or contingent remainder to the children of Emma J. Stephens. This being so, the trial judge properly construed the deed as conveying a vested remainder to the children.

"In 24 A. and E. Enc., 394, the author says: 'Where a remainder is given to a class, as, for instance, the children of a designated person, it will be held a vested remainder unless the terms of the instrument creating it clearly show that the ascertainment of the individuals composing the class is to be postponed until the determination of the preceding estate. But such a remainder, though vested, will open to let in members of the class who may be born during the continuance of the preceding estate.' " *Powell v. Powell,* 168 N.C. 561, 84 S.E. 860 (1915).

Failing in his contention that the remainder interest was contingent, appellant resourcefully advances two other interpretations of the deed. Neither contains merit.

Judge Ervin properly construed the deed as conveying a life estate to Emma J. Stephens with a vested remainder in her children Fred Stephens, Rose Stephens, Ann S. Hudson, Patrick Stephens, and Theodore Stephens.

Affirmed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. CECIL DAVID DARK

No. 7510SC314

(Filed 16 July 1975)

Robbery § 4— armed robbery — use of dangerous weapon — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where the evidence tended to show that the

night manager of a motel sensed an object against his head which felt like a pistol barrel and he heard it click, a toy pistol was found in defendant's room, and money and a .38 caliber pistol were taken in the robbery.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 6 March 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 June 1975.

Defendant was charged in a bill of indictment with armed robbery. He entered a plea of not guilty.

State's evidence tends to show that George E. Fortune, the night manager of the Ramada Inn in Apex, North Carolina, was working during the early morning of 10 November 1974 and had locked the front door. Someone knocked on the door, stating that he wanted a room. As Fortune proceeded to unlock the door, he was grabbed from behind and his arms were pinned to his sides. Then, according to Fortune, "what felt like a weapon was put to my head. I heard it click. I was told not to move and to do as they said. I felt cold steel. It felt like a pistol barrel." Fortune's hands were tied, and he was told to lie on the floor. Over $400.00 was taken along with a .38 caliber pistol which was beneath the counter. Fortune identified defendant, Cecil Dark, as one of the men who robbed him and stated that he had no doubts about it. Also, a toy pistol, found in defendant's room, was introduced in evidence.

Defendant offered evidence which tends to show that on the evening of 9 November 1974 he was at home with his mother. He and his mother along with three other people played cards that evening. After the card game, defendant went to bed and did not leave the house at any time that night. Defendant denied any participation in the robbery.

In rebuttal, the State offered evidence which tends to show that defendant's mother had made an earlier statement to the police to the effect that defendant was in Harnett County with his girl friend on the weekend in question.

The jury found defendant guilty of robbery with a dangerous weapon. From judgment imposing a prison sentence, defendant appealed.

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

Jordan, Morris and Hoke, by Joseph E. Wall, for defendant appellant.

MARTIN, Judge.

Defendant assigns as error the denial of his motions to dismiss and to set aside the verdict as contrary to the weight of the evidence. He strenuously argues that there was no evidence that the object placed against the night manager's head was a dangerous weapon and that, consequently, it was error to submit the question of armed robbery to the jury. He relies on *State v. Keller,* 214 N.C. 447, 199 S.E. 620 (1938).

In *Keller* the victim testified that he did not see a pistol and the evidence only tended to show that defendants sought to make the victim believe they had a pistol by placing a finger to the victim's head. The Court held that the presence of a firearm was a constituent element of the crime of robbery with a firearm and ordered a new trial for failure of the trial court to so instruct the jury. Furthermore, it was pointed out that the trial court failed to charge on the offense of common law robbery.

Keller is clearly distinguishable. In the present case the night manager testified that he sensed an object against his head which felt like a pistol barrel and that he heard it "click." The trial judge charged the jury on both armed robbery and common law robbery, and specifically instructed that a "toy pistol would not be a dangerous weapon as a matter of law." Also, the jury was instructed that in order to find defendant guilty of robbery with a firearm or other dangerous weapon, the State must prove that defendant had in his possession a dangerous weapon and that defendant obtained the property by endangering or threatening the life of the night manager with a dangerous weapon.

It is true, as defendant points out with emphasis, that the State's witness never testified that he saw the object used in the alleged robbery. Nevertheless, eyesight is not the only sensory mechanism by which one can experience an object. Viewing the evidence in the light most favorable to the State, the question as to whether there was an armed robbery was one for the jury to answer. *State v. Smith,* 26 N.C. App. 511, 216 S.E. 2d 403 (1975); *State v. Evans,* 25 N.C. App. 459, 213 S.E. 2d 389 (1975).

Defendant's remaining assignment of error is overruled.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY, APPLICANT; CHEMSTRAND RESEARCH CENTER, INC.; NORTH CAROLINA CONSUMER'S COUNCIL, INC.; NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP; AFL-CIO OF NORTH CAROLINA; GREAT LAKES CARBON CORPORATION; DUKE UNIVERSITY; R. J. REYNOLDS TOBACCO COMPANY, INTERVENORS v. RUFUS L. EDMISTEN, ATTORNEY GENERAL

No. 7510UC107

(Filed 16 July 1975)

Utilities Commission § 6— electric rates — temporary increase — reasonableness — failure to order refund

The Utilities Commission did not err in failing to order a refund of revenues previously collected by a power company under bond pursuant to G.S. 62-135 where the Commission found in its final order that the temporary rates were just and reasonable, notwithstanding changes in the rate design effective on and after the date of the order will result in lower rates for some users than were applied during pendency of the application.

APPEAL by Intervenor, the Attorney General of North Carolina, from an order of the North Carolina Utilities Commission entered on 10 October 1974. Heard in the Court of Appeals 9 April 1975.

Attorney General Edmisten, by Deputy Attorney General I. Beverly Lake, Jr., and Associate Attorney General Jerry J. Rutledge, for appellant.

Commission Attorney Edward B. Hipp and Associate Commission Attorneys Lee W. Movius and John R. Molm, for the North Carolina Utilities Commission.

Steve C. Griffith, Jr., George W. Ferguson, Jr., George M. Thorpe, Clarence W. Walker and John M. Murchison, Jr., attorneys for plaintiff appellee, Duke Power Company.

VAUGHN, Judge.

The record on appeal does not contain any of the evidence taken at a series of hearings on the application (filed 14 September 1973) seeking an adjustment in rates which would produce about $60,380,000.00 in additional revenue. The Commission's findings of fact are, therefore, conclusive.

Intervenor has not taken exceptions to the rate increase allowed or the modification of the rate structure ordered by the Commission.

Intervenor's only contention is that the Commission erred in not ordering a refund of revenues previously collected under bond pursuant to G.S. 62-135. The part of G.S. 62-135 that is relevant to the appeal is as follows:

> "(d) If the rate or rates so put into effect *are finally determined to be excessive,* the public utility shall make refund of the excess plus interest to its customers within 30 days after such final determination, and the Commission shall set forth in its final order the terms and conditions for such refund." (Emphasis added.)

Here the Commission did not determine that the temporary rates were excessive. It expressly found them to be just and reasonable. Its findings include the following:

> "12. That under the rates in effect prior to the authorization of the interim rates herein and the bonded rates herein, Duke was not and would not be earning an adequate rate of return on the property used and useful in its service to the public in North Carolina and under said prior rates Duke could not continue in operation as a viable electric utility in North Carolina, and that if said interim rates and bonded rates are not approved, Duke cannot maintain its ability to compete in the market for capital funds on terms reasonable and fair to its customers and its existing investors, and could not continue the construction of plants presently being built and necessary for the continued service to the public in its service area, and the full amount of the increase applied for and the retention of the interim and bonded rates is necessary to continuation of adequate service in Duke's service area.
>
> * * *
>
> 17. That the rates filed herein in Docket No. E-7, Sub 159, are found to be just and reasonable rates for all amounts heretofore collected thereunder and for all amounts to be collected thereunder, without any refund therefor, pending implementation of the modified rate designs provided and approved in this Order for future application.
>
> 18. That Duke's interim and temporary rates are not unlawfully discriminatory and that the revenues collected

by Duke under provision of refund should be retained by Duke, in that the total annualized amount of revenue collected does not exceed the allowed annual general rate increase of $61,080,000 granted in this Order."

Included in the Commission's conclusions we find the following:

"The Commission concludes from all of the evidence in this proceeding that it is necessary and essential and in the public interest to approve the revenues presently being collected from interim rates and temporary rates under provisions of G.S. 62-135, and that it is further necessary and essential in the public interest to modify the rate designs upon which said rates are structured, for collection of such revenues in the future. Failure to approve said interim and temporary rates, and the revenues collected thereunder, as just and reasonable, would jeopardize adequate service to the public, and would place Duke in a weakened financial condition to compete in the market for capital funds. The public interest requires that North Carolina continue to be provided with adequate and reliable electric service to maintain a sound economy and that Duke be financially able to continue the operation of electric service which is essential to the health and welfare of the public of North Carolina. The interim and bonded rates are approved only until such time as modified rate designs to produce the same additional revenues can be placed into effect as provided hereafter in this Order.

* * *

The Commission concludes that although Duke's interim and temporary rates are not unlawful, it is necessary to reprice the residential and industrial schedules in such a manner that the rates of return on these classes of service would be more nearly equal and more closely meet the other objectives set out heretofore. The Commission is of the opinion that the rate schedules listed as 'Approved' in Exhibits 1, 2, 3 and 4 (R, RW, RA, I and IP rate schedules) would produce this result and, therefore, should be substituted for Duke's proposed rate schedules under the rate section of the appropriate tariffs. All other terms and conditions of those schedules, as well as all other tariffs included in this Application, should be approved as filed. The total additional annual revenues obtained by Duke from

the rate schedules approved will be no greater than $61,080,000."

The effect of the modification of the rate design is effective on and after the date of the order to reduce rates for certain users and increase them for others. Overall, the revenue to be produced under the new rate structure is not less than that sought in the original application. The changes in the rate structure are prospective. The changes will, in the future, result in lower rates for some users than were applied during the pendency of the application. This, however, does not negate the Commission's findings that the temporary rates were just and reasonable.

The order is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION, NORTH STATE TELEPHONE COMPANY, DEFENDANT, BARNARDSVILLE TELEPHONE COMPANY, CAROLINA TELEPHONE & TELEGRAPH COMPANY, CENTRAL TELEPHONE COMPANY, CHAPEL HILL TELEPHONE COMPANY, CITIZENS TELEPHONE COMPANY, CONCORD TELEPHONE COMPANY, EASTERN ROWAN TELEPHONE COMPANY, ELLERBE TELEPHONE COMPANY, GENERAL TELEPHONE COMPANY OF THE SOUTHEAST, HEINS TELEPHONE COMPANY, LEXINGTON TELEPHONE COMPANY, MEBANE HOME TELEPHONE COMPANY, MID-CAROLINA TELEPHONE COMPANY, MOORESVILLE TELEPHONE COMPANY, NORFOLK & CAROLINA TELEPHONE COMPANY, NORTH CAROLINA TELEPHONE COMPANY, RANDOLPH TELEPHONE COMPANY, SALUDA MOUNTAIN TELEPHONE COMPANY, SANDHILL TELEPHONE COMPANY, SERVICE TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, THERMAL BELT TELEPHONE COMPANY, UNITED TELEPHONE COMPANY OF THE CAROLINAS, INC., WESTCO TELEPHONE COMPANY, AND WESTERN CAROLINA TELEPHONE COMPANY, RESPONDENTS v. NATIONAL MERCHANDISING CORPORATION, COMPLAINANT

No. 7510UC265

(Filed 16 July 1975)

Telephone and Telegraph Companies § 1; Utilities Commission § 6— order prohibiting attachment of auxiliary covers to telephone directories

Utilities Commission order which prohibits the attachment to telephone directories of any binder, holder, insert, or auxiliary cover not furnished by the telephone utility except a subscriber-provided binder, holder, insert or auxiliary cover which is attached so that it does not obstruct vital and essential information such as the identity of exchanges covered by the directory, the effective date of the directory and laws and regulations pertaining to telephonic communications *is held* valid.

Judge BRITT dissents.

APPEAL by National Merchandising Corporation from an order filed by the North Carolina Utilities Commission on 7 November 1974. Heard in the Court of Appeals 29 May 1975.

Commission Attorney Edward B. Hipp, Assistant Commission Attorney Maurice W. Horne and Associate Commission Attorney John R. Molm, for the North Carolina Utilities Commission.

Jerry W. Amos, for North State Telephone Company, The Concord Telephone Company and Lexington Telephone Company.

Taylor, Brinson & Aycock, by William W. Aycock, Jr., for Carolina Telephone and Telegraph Company.

A. Terry Wood, for Central Telephone Company.

Associate General Counsel William C. Fleming, for General Telephone Company of the Southeast.

Kimzey, Mackie & Smith, by James M. Kimzey, for United Telephone Company of the Carolinas, Inc.

Bynum M. Hunter and Benjamin F. Davis, Jr., for National Merchandising Corporation.

VAUGHN, Judge.

The question presented is the propriety of the following uniform tariff provision required by the Commission in the order from which only National Merchandising Corporation appealed.

"GENERAL INVESTIGATION INVOLVING ALL TELEPHONE UTILITIES OPERATING WITHIN THE STATE OF NORTH CAROLINA

DOCKET NO. P-42, SUB 80

PROVISIONS AND OWNERSHIP OF DIRECTORIES

A. Telephone directories shall be issued by each telephone utility operating in North Carolina approximately every twelve months. The directory shall remain the property of the untility until the succeeding issue becomes effective. Current directories shall not be mutilated or destroyed and shall be surrendered upon request of the utility.

B. Directories which are the property of the telephone utility are furnished to subscribers as part of the telephone service. No binder, holder, insert, or auxiliary cover or attachment of any kind not furnished by the telephone utility shall be attached to the telephone directories owned by the utility, except that this prohibition shall not apply to a subscriber-provided binder, holder, insert, or auxiliary cover which is attached so that it does not obstruct vital and essential information such as the identity of the exchanges covered by the directory, the effective date of the directory, emergency numbers and federal and state laws and Rules and Regulations of the Commission pertaining to

telecommunication services, and any person, firm or corporation violating this rule, or permits it to be violated is made subject to having telephone service suspended.

C. All non-telephone utility advertising shall be confined to the yellow pages only."

The Commission and the telephone companies have filed briefs in support of the order.

Appellant is engaged in promotional advertising which involves the manufacture and distribution of plastic covers which may be used to cover telephone directories. Appellant here raises substantially the same questions that were raised in *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 214 S.E. 2d 49. In that case the Supreme Court allowed *certiorari* prior to consideration by this court. Counsel for the appellant here represented the defendant in that case, another promotional advertiser. In material respects, the briefs are identical. In *Telephone Co. v. Plastics, Inc., supra,* the appeal was from a preliminary injunction. The court held that plaintiff had failed to show a reasonable probability of substantial injury pending trial and dissolved the injunction. The court, consequently, did not reach the merits of the questions raised.

A majority of the panel of judges hearing this case on appeal is of the opinion that the order of the Commission should be affirmed. The dissent insures appellant the right of review by the Supreme Court. In view of the foregoing we elect to omit a detailed discussion of the evidence and arguments advanced by counsel.

The order is affirmed.

Judge PARKER concurs.

Judge BRITT dissents.

STATE OF NORTH CAROLINA v. JOHN NOBLE ROBINSON

No. 7526SC318

(Filed 16 July 1975)

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

Assignments of error are deemed abandoned where no exceptions supporting them are brought forward in defendant's brief and no argument or authority is stated in support of them. Rule 28, Rules of Practice in the Court of Appeals.

2. **Criminal Law § 161— exception to signing of judgment — record reviewed**

Exceptions to the signing and entry of judgments present the face of the record for review.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 10 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 June 1975.

Defendant was charged with two separate counts of "receiving stolen property of the value of more than $200.00 knowing the same to have been previously stolen." Upon his plea of guilty, the trial court sentenced the defendant to imprisonment for consecutive terms of six years for each count, with both sentences suspended for a period of five years upon the defendant's compliance with certain specified conditions of probation. Subsequently a probation officer reported that the defendant had "wilfully and without lawful excuse" violated the condition of the probation judgment that he "[r]emain within a specified area and shall not change place of residence without the written consent of the probation officer" by moving to an unknown address without permission. Thereafter on 28 February 1973, a warrant was issued for the defendant's arrest. On 16 October 1974, the probation officer returned the defendant to court and reported that in addition to changing his place of residence without permission, the defendant also "wilfully and without lawful excuse" violated the condition of his probation that he "[v]iolate no penal law of any state or the Federal Government and be of general good behavior" in "[t]hat on or about October 19, 1973, the said probationer was arrested and charged in Hillsborough County, Florida with the felony of Breaking and Entering. On October 4, 1974, in Hillsborough County, Florida the charge was reduced to Buying, Receiving, and Aiding in the Possession of Stolen Property, adjudication of guilt was with-

held and the defendant placed on probation for a period of three (3) years."

Considered in the light most favorable to the State, evidence presented at the probation revocation hearing tended to show that James W. Bryant, a probation officer with the North Carolina Department of Corrections, was assigned to supervise the defendant in January 1972; that in October 1972, in violation of a condition of his probation the defendant left his place of residence in Charlotte, North Carolina, and moved to an unknown address without having previously secured the written consent of the probation officer; and that the defendant was not seen again until October 1974 when he was found to be living in Tampa, Florida. According to probation officer Bryant "[t]he defendant had been arrested in Florida and the Court learned he had been on probation in North Carolina." "The defendant was charged with the offense of felonious breaking and entering on October 19, 1973, but it was amended to buying, receiving, and aiding in the possession of stolen property." The defendant reportedly "entered a plea of guilty" to that charge.

Testifying on his own behalf, the defendant stated that he left Charlotte in October 1972, "because my ex-wife and I weren't getting along, because of the job and I just didn't feel like I was getting anywhere up here, and I just felt depressed and everything else." He further testified that he planned to write his probation officer, but that he "lost his name and everything else." Defendant admitted that in Florida he "pled guilty to aiding and abetting of stolen goods with the terms that after three years of probation that they would drop it, in other words, it would be off my record." He stated that he understood that when he was put on probation he was not to move without permission and that he was not to break any laws.

From entry of an order revoking his probation and activating the previous judgments for receiving stolen property, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Conrad O. Pearson, for the State.

Alexander Copeland III for defendant appellant.

MORRIS, Judge.

[1] Defendant's assignments of error Nos. 1, 2 and 3 are deemed abandoned, since no exceptions supporting them are

brought forward in defendant's brief and no argument or authority is stated in support of them. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] In his sole remaining assignment of error defendant excepts to the signing and entry of the order revoking his probation and to the signing and entry of the judgments and commitments upon revocation of his suspended sentence. These exceptions present the face of the record for review. *State v. Brown,* 20 N.C. App. 483, 201 S.E. 2d 577 (1974), and cases cited therein. We have examined the record proper and find no error.

No error.

Judges VAUGHN and CLARK concur.

RAY D. LOWDER, INC. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 7510SC95

(Filed 6 August 1975)

1. **Highways and Cartways § 9— highway construction contract — inaccurate information as basis for bid — cost overrun**

Provisions of a highway construction contract stating "There is no subsurface information available on this project except as may be shown in the plans" and requiring the contractor to make his own investigation of the subsurface conditions do not place on the contractor the loss occasioned by an unexpected amount of undercut excavation far in excess of that estimated in the contract since (1) a contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory and (2) instructions to bidders to make their own independent investigations of the conditions to be encountered cannot be given full literal reach.

2. **Highways and Cartways § 9— highway construction — overrun in undercut — changed condition**

A highway construction contractor is entitled to an equitable adjustment in the contract price for additional costs incurred by reason of a large overrun in undercut excavation occasioned by unexpected and excessive wetness under the contract provisions governing "Alterations of Plans or Character of Work" and is not limited to recovery under contract provisions relating to "Overruns and Underruns."

3. Evidence § 29— admissibility of business records

Business entries are recognized as an exception to the hearsay rule provided the entries (1) are made in the regular course of business, (2) are made contemporaneously with the events recorded, (3) are original entries, and (4) are based upon the personal knowledge of the person making them.

4. Evidence § 29— compilation of costs — inadmissibility as business record

A report purportedly compiling the costs incurred as a result of an overrun of undercut excavation was not admissible under the business records exception to the hearsay rule because it was not made in the regular course of business and contemporaneously with the events recorded where the report was prepared for use in litigation rather than for routine operation of the business, and it was based on incomplete daily reports and the preparer's personal judgment, discretion and memory some four years after the events occurred.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 1 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 15 April 1975.

Plaintiff Ray D. Lowder, Inc. (hereinafter referred to as Lowder), is a North Carolina corporation doing business as a grading and utility contractor. Defendant North Carolina State Highway Commission (now Department of Transportation; hereinafter referred to as Commission) was authorized by G.S. 136-28 to let contracts for the construction of highways in North Carolina. On 2 March 1965 and again on 16 March 1965 the Commission advertised for bids for the construction of project 8.11618, a portion of Interstate 95 located in Nash County, North Carolina. Lowder submitted a low bid of $1,040,418.21 and was awarded the contract on 1 April 1965. Both parties executed the contract on 20 April 1965. Lowder began construction on 5 May 1965, and completion was scheduled for 1 October 1966.

This litigation arises out of an overrun of the contract estimate of roadbed undercut requirements. Item 22B of the itemized proposals, a part of the contract, called for the removal of 12,000 cubic yards of undercut excavation. Lowder submitted a unit price bid of fifty cents (50¢) per cubic yard for this excavation. However, it soon became apparent that the removal of a greater quantity of undercut excavation would be necessary to complete the project. By the time the project was accepted by the Commission on 28 March 1967, some six months behind schedule, Lowder had removed 259,729 cubic yards of undercut

excavation. This amounted to a 2,064.58 percent overrun in the amount of undercut excavation and a 29.7 percent overrun of the entire contract.

The central questions raised by this appeal are (1) whether Lowder has a right under the contract to recover an additional sum for the overrun over and above the amount paid to it by the Commission at the unit bid price, and, (2) if so, whether Lowder offered competent evidence to establish that additional sum for which it recovered judgment in the trial court.

Operating under one provision of the contract governing "Overruns and Underruns," the Commission paid Lowder the sum of $129,504.74 for the overrun in undercut excavation. This constituted payment at the contract unit price of fifty cents (50¢) per cubic yard. Lowder contends that a provision of the contract governing "Alteration of Plans or Character of Work" controls the issue and entitles it to an "equitable adjustment" of the contract price in the amount of $351,377.09. After the project was accepted by the Commission, Lowder filed a verified claim for this additional compensation. The claim was denied "in its entirety." Lowder subsequently instituted an action in superior court in Wake County. The trial judge made extensive findings of fact and concluded that Lowder was entitled to additional compensation in the amount of $351,377.09.

In order to grasp fully the issues engendered by this appeal, it is necessary to examine in detail the facts surrounding the construction of project 8.11618. Undercut excavation is defined by the contract as "material which is located below a plane parallel to and one foot below the top surface of the roadway grading template and extending to the side slopes." Generally the removal of undercut excavation is designed to prepare the roadway for support of the "coarse aggregate base course," i.e., crushed stone used as a part of the roadway base to support pavement.

Undercut excavation may be removed by several methods. Lowder chose to use the dragline method to do the excavation. Its president, Clyde Huneycutt, stated that "[t]he most expensive method is dragline as far as I know. So when we bid the project, we took into consideration the most expensive way of removing undercut excavation." Lowder owned three draglines. Under ideal conditions one machine can remove approximately 1,000 cubic yards of undercut excavation during a ten-hour day.

These facts were taken into consideration in preparation of the bid.

Lowder also found it necessary to examine the project site before placing its bid. A report of the subsurface soil conditions had been prepared by the Commission's geologists in 1963 for project 8.11618. Boring samples were taken at two to three hundred foot intervals along the centerline of survey for the length of the project. The report was prepared chiefly to give the Commission's Roadway Design Department an indication of the subsurface soil conditions, but, more specifically, was designed to locate all wet cuts (a cut having water within six feet of the grade) and to determine the suitability of excavated soils for later use in the project. Albert Dodson, a geologist employed with the Commission, stated that there was no estimate of the quantity of undercut in the report: "That would be left up to the Roadway Design Department. They would take this profile and make a determination as to how much undercut." Dodson stated that the geologists could determine the limits of the undercut, but the Design Department could better determine the amount.

The 1963 report is important to this litigation in that it was never made available to Lowder. Had Lowder officials seen the report prior to submission of the bid, then it is asserted that Lowder either would not have made a unit price bid for undercut excavation of fifty cents (50¢) per cubic yard, or would not have bid the project. Lowder's president testified that the report

> "seems to have some information that would have been helpful to me when I bid for the job. It is talking about undercut, when—the weather conditions, undercut and backfilling, soil types, ground-water conditions. This information would have helped very much in making the bid per unit for undercut excavation. It would have affected the amount of our bid per cubic yard for undercut excavation. It would have caused us to bid a higher price."

The facts indicate that the report was not intended to portray permanent subsurface soil conditions at project 8.11618. Dodson "emphasized that our report and our recommendations are based on the conditions at that time in the several weeks preceding September 11 [the date of the report]." The report states that "the country side was unusually dry from the lack

of summer rains. As evidence of the dry weather, the swamps were dry and many of the streams and man-made ponds were also dry."

The importance of the report to Lowder is said to be underscored by the proviso found on page 2 of the project special provisions:

> "*Subsurface Information:* There is no subsurface information available on this project except as may be shown in the plans. The contractor shall make his own investigation of the subsurface conditions."

To comply with this requirement and to acquaint themselves with the site of the project, Lowder officials went to Nash County and "walked the project": "The plans showed two or three places, different places on the plans, that they were calling for undercut excavation. We went to these places and looked at those particularly good. From looking at the site and walking over it, we felt like the 12,000 cubic yards estimated on the proposal for undercut excavation was about what should be there." On cross-examination Clyde Huneycutt, president of Lowder, elaborated on this testimony:

> "[W]e located the areas shown on the plans and they were a center line run, there was some center line stakes in with stations on them. We went to these three areas and noticed the undercut excavation. We could not necessarily tell that it was going to have to be undercut by knowing the grade, but the low places and as of that time I don't recall exactly how wet that it was, but it looked like that it would need some undercutting. We could not tell by looking at the project how much it would need. There was no way. We did not conduct any sub-surface investigation."

Grady Meisenheimer, Lowder's superintendent on the project, stated that when he first walked the project, he "noticed the swampy areas. . . . It was just like the plans showed it, those two [swampy areas] that was real bad, but the rest of it, I mean, it looked just like any other ground." The need to undercut this was not apparent from mere observation. Meisenheimer concluded: "I don't believe I have, at any other time in my experience in grading, come across situations where I encountered undercut but (sic) I could not tell it just by looking. You can usually tell pretty well where you are going to have to take it out."

In finding of fact 12 the trial judge found

> "[t]hat subsequent to the advertisement of said project by the Defendant and prior to formulating its bid for the construction of said project, the Plaintiff conducted a reasonable independent examination of the entire area of the said project, including a reasonable investigation of the subsurface conditions thereof."

It was not immediately apparent, once Lowder began construction, that there would be a vast overrun in the quantity of undercut excavation. For the first sixty days of construction, no undercut excavation was removed. This was attributable to Lowder's beginning its operations in an area of high ground that necessitated a considerable amount of grading *down* to the roadbed.

In spite of the fact that no undercut excavation had been encountered, Lowder's progress quickly fell somewhat behind schedule. Progress memoranda were prepared at regular monthly intervals by the Commission and sent with a monthly estimate to Lowder so that progress on the project could be gauged. On the date of the first report, 15 May 1965, four percent of the project was to have been completed. Lowder had completed 0.244 percent. On 15 July 1965 11.5 percent was to have been completed; Lowder had finished 6.9 percent. The problems encountered by Lowder during this time are not apparent from the record. However, a letter from the Commission to Lowder on 27 August 1965 indicates that a Lowder request for an extension of time for priming and paving temporary detours on the project was denied.

By late summer of 1965 Lowder had begun to remove undercut excavation. Although the 15 August 1965 report showed that Lowder had completed 11.491 percent of 18 percent on schedule, progress was, according to the Commission, "highly satisfactory and the quality of the work being performed is above average. . . . " About this time Marion Moore, resident engineer assigned by the Commission to the project, began to believe that there would be an overrun in the amount of undercut excavation:

> "Now, until the project was opened up it was nothing more than an opinion but by late summer 1965, it was apparent that my opinion was correct. The basis of my opinion was my experience in Nash County over the twenty year

period. I am referring to the types of soil and the types of situations we invariably ran into on a project of that magnitude.

"I did not call this to anyone's attention prior to the letting because I had no knowledge of the figures until I received a copy of the proposal which was on—probably was in the same week that the project was let to contract. After I saw the figure, I may have expressed an opinion that I thought that 12,000 cubic yards was too low. I had the opinion that it was going to run more than 12,000 cubic yards. I don't recall making any specific statement to anyone. I don't recall making the statement to any particular person. By the end of the summer, we had already run more than 12,000 cubic yards. I think the 12,000 cubic yards had been exceeded by late summer, as I remember."

From August 1965 until January 1966 Lowder remained from five to eight percentage points behind schedule. However, the 15 January 1966 memorandum indicated that Lowder was almost on schedule: 47 percent was to have been completed, and Lowder had finished 46 percent.

In the winter of 1966 progress began to lag considerably. By 15 February, 46.5 percent of the project was complete, but 52.5 percent should have been done. Lowder's president testified the lag was attributable to "more undercut and also, it was winter weather then." On 15 March, 48 percent had been completed; however, the schedule called for 67 percent to be complete. Huneycutt testified:

"We still had the same equipment and personnel on the job to attempt to do the work that was required by the contract during the period. There was no more progress than this because we were encountering more and more of undercut, which was very difficult to move. As to the differential between the 48 percent and the 67 percent during that period, the weather had something to do with it."

Plaintiff Lowder's exhibit 10 indicates that by 15 January 1966 Lowder had removed 89,500 cubic yards of undercut; by 15 February, 108,000 cubic yards; by 15 March, no additional undercut had been removed; by 15 April, 114,000 cubic yards had been excavated.

On 1 April 1966 Lowder received a letter from R. W. Dawson, the Commission's assistant division engineer, noting that

progress was lagging considerably. The letter contained the following two paragraphs:

> "I have made two inspections of this project along with the Resident Engineer, M. W. Moore, during this week and it was our opinion that with the present forces and equipment you now have on this project there is a serious doubt that you will complete this project by the contract completion date of October 1, 1966. It was also noted on each of these inspections that one or more pieces of your equipment was broken down and inoperative. After reviewing the overall progress on this project and in order to complete the project on time, you should make every effort to place additional men and equipment on the project in order to avoid any liquidating damages which according to the contract would be $200.00 for each calendar day after October 1, 1966.
>
> "If you so desire, I will be glad to arrange a meeting on the project with officials of your company in order that a satisfactory conclusion can be reached regarding this matter. I would appreciate your giving this serious consideration as it is doubtful that the project will be completed on schedule with the forces and equipment now assigned to this project."

After receiving this letter, Lowder "tried . . . to put more equipment and personnel on the project."

Lowder's progress improved somewhat during the spring of 1966, and by 15 May it had completed 64 percent of the project when 79 percent was scheduled to be complete. During May Mrs. Nell Poplin, secretary-treasurer of Lowder, wrote to the Commission, apparently seeking an adjustment in the unit price for undercut excavation. Lowder had removed 134,000 cubic yards of undercut excavation by that time. Huneycutt stated that "we were getting farther and farther behind money-wise and progress-wise. We were real concerned and we felt like we had to do something."

Poplin's letter was answered by Dawson for the Commission. He pointed out that undercut excavation was a minor contract item, not a major item as Lowder had erroneously concluded, and was governed by Article 4.3B of the specifications. This article provides that either an increase or a decrease in the

contract unit price may be authorized. However, Dawson emphasized that it was the Commission's opinion "that the unit price bid of 50¢ per cubic yard is a fair price for the undercut excavation on this project." The letter contained the following response to Lowder's request for an extension of time (made in Poplin's letter) and to the progress on the project:

> "With reference to your request for an extension of time, even though some items in the contract may overrun, this does not relieve the contractor of the responsibility for placing sufficient men and equipment on the project in order that it can be completed in accordance with the contract completion date. If the total amount of the contract is overrun there will be an automatic extension of time based on the percentage of the overrun of the contract estimate. Under date of April 1, 1966 your company was advised that we had serious doubts that you would complete this project on time and suggested that additional men and equipment be placed on the project. Since writing this letter, this has been discussed with your project superintendent several times. It is still noted on various inspections made on the project that there is a considerable amount of your equipment that is broken down, which is causing a slow down in the overall operations on the project."

By 15 June 1966 Lowder had finished 69.4 percent of the project. The schedule called for 87 percent to be complete. Lowder received the following letter from the Commission:

> "In my letter to you of June 6, 1966, I called to your attention the fact that the progress on this project was not satisfactory. It is noted on your last estimate, No. 14 for period ending June 15, 1966, that you are 18% behind schedule. Estimate No. 14 was passed for payment, however, if progress does not improve by the time the next monthly estimate is due, it may be necessary that payment be withheld in accordance with Section 8 of the Standard Specifications.
>
> "The unsatisfactory progress on this project has been called to your attention several times and has been discussed with your project superintendent again this week. It is, therefore, necessary that some action be taken regarding this matter. We are requesting that a meeting be held with officials of your company to resolve this matter.

If it meets with your satisfaction, we will plan to meet with you at the Highway Division Office, 926 East Ward Boulevard, Wilson, North Carolina, on June 30, 1966 at 10:00 a.m."

At the 30 June 1966 conference Lowder "was advised that there was approximately 95,000 cubic yards of borrow excavation and 4,000 cubic yards of undercut excavation still to be moved on this project and that no work had been done on underdrains, catch basins, proof rolling, and erosion control. It was also pointed out that none of the CABC [coarse aggregate base course] paving had been performed on the five Y Lines; even though there were three of these Y Lines on which the contractor could be working." Lowder's progress was also discussed:

"The possibility of placing additional men and equipment on this project was discussed, and the contractor advised they had a project in Mecklenburg County, which they expected to finish in time to move additional men and equipment to this project by July 15, 1966. This will step up the progress on the project, however, since according to the last monthly estimate, No. 14, through June 15, 1966, the contractor was 18% behind his progress schedule it was agreed that he would be allowed to submit a new progress schedule; taking into consideration the additional men and equipment he proposes to place on this project.

"It was pointed out to the contractor that the placing of additional motor graders and bulldozers on this project to dress up the sections where the grading is complete will enable the subcontractors for soil erosion control and fencing to begin their work, and as the remaining items, and outlined in this letter, are usually time consuming it would be to their advanage to prepare the roadway in order the subcontractors could begin immediately."

By the date of the meeting Lowder had removed 154,000 cubic yards of undercut excavation, a 1,283 percent overrun of the original estimate. Lowder requested an extension of time. Extensions are governed by section 8 of the contract specifications, which provides for extensions only when the final estimate exceeds the contract estimate by five percent. Lowder felt that "they should be given an extension of time; even though the final estimate did not exceed the contract estimate by more than 5% as the undercut excavation definitely had slowed prog-

ress on this project." Lowder furthermore "requested an adjustment in unit price as per Article 4.3B of the Standard Specifications." The Commission advised that an adjustment under 4.3B was possible "provided he [Lowder] would supply supporting data showing that his costs exceeded the original contract price of 50¢ per cubic yard, however, that only an adjustment in price could be considered on the undercut excavation in excess of the 200% overrun as called for in Article 4.3B." Lowder's president testified that "I'm not sure that we informed them that we would be keeping up with the expense from now on on a force account basis, but we did actually keep up with it. As I recall, that is the way we left it."

Both parties agreed that "completion of this project by the contract completion date of October 1, 1966, *could be accomplished* provided the additional men and equipment were placed on the project." (Emphasis added.)

Work continued on the project at a slow rate. By 15 July 1966 Lowder had completed 70.5 percent of project 8.11618; 91 percent should have been finished. Because of the lag in progress, a revised schedule was drawn up. The 15 August 1966 estimate indicated that, under the revised schedule, Lowder's progress was more satisfactory: 73.46 percent had been finished; 75 percent should have been completed.

Soon, however, Lowder's progress began to lag, even under the revised schedule. Huneycutt wrote Moore, the resident engineer, "that we [should] be granted an extension of completion time on the above project due to the overrun of quantities." As of 15 September 1966 an overrun of 19.77 percent of the entire contract estimate was apparent. This was sufficient to allow an extension of time, pursuant to the "Specifications of Contract Time," of 14.77 percent of 516 calendar days (original length of time scheduled for completion), or 76 calendar days. The Commission acknowledged this and noted that although the overrun of 19.77 percent could not be guaranteed then, it appeared that "there should be ample overrun to grant an automatic extension of time until the first of December 1966 or later."

Lowder had completed 85 percent of the project when the original completion date expired. It received the following letter from the Commission concerning progress delay and an extension of time:

> "During the past two weeks, along with C. D. Bass, Area Construction Engineer and M. W. Moore, Resident

> Engineer, I have made several inspections on the above project. Each time the progress on this project was progressing very slowly, and it was also noted that some of your equipment was broken down on each occasion. After each inspection a determination was made regarding the amount of progress, and from our inspections it is our opinion that you should make a more determined effort to expedite the completion of this project.
>
> . . . .
>
> "In view of the progress you are now making, your Company should make every effort to place additional men and equipment on this project in order that it can be completed as early as possible."

Lowder's president testified that this letter was the first time he learned that there were insufficient men and equipment on the job: "We felt, prior to the receipt of that letter, that we had sufficient personnel on the job to do what was necessary to do." We note that Lowder had been notified on at least two prior occasions, by letter of 1 April 1966 and by letter of 1 July 1966, that additional men and machinery would be necessary if the project were to be completed on schedule.

The bulk of the earth-moving operations had been completed by December 1966. Undercut excavation had been finished during October 1966, and Lowder was involved in fine-grading the project. Fine-grading is the finishing of a roadway by the movement of one or two inches of fill (material, usually earth or gravel, used to equalize or raise topography to a certain elevation). Lowder complained that it could not fine-grade the project during the winter months because the fill would freeze at night and thaw in the day, turning to mud. It was difficult to finish the fine-grading unless the fill was dry. Lowder thus sought the Commission's permission to close down the job until the weather changed. This request was denied by the Commission on 3 January 1967:

> "In this connection your request for a close down order would be the same as an extension of the contract time and under Article 8.6 of the Supplemental Specifications on Pages 19, 20 and 21, an extension of time can only be allowed for delays due to an act of God or to an act of the Commission. Since normal weather conditions are not considered an act of God and the Commission has not taken

any action to delay this project, your request for a close down order and suspension of calendar days cannot be granted."

The Commission was also concerned that the project was not complete and complained that Lowder's performance was not satisfactory:

"I would like to point out to you that we have been concerned regarding the progress of this project for a considerable length of time and have written you regarding this matter under dates of April 1, 1966, June 6, 1966, June 24, 1966, July 1, 1966 and December 1, 1966. In my letter to you dated June 24, 1966, a meeting with representatives of your Company was set up for June 30, 1966 and a report regarding this meeting was made to Mr. John H. Davis, State Construction Engineer, under date of July 1, 1966, copy of which was sent to your Company. In the last paragraph of this report the following appears: 'It was agreed by all present that completion of this project by the contract completion date of October 1, 1966, could be accomplished provided the additional men and equipment were placed on the project.' Some additional equipment was placed on the project after this meeting, however, it was mostly for the heavy grading and was not the type of equipment conducive to the fine grading operations, which of course, would be started as soon as the rough grading had been completed.

"From our project records fine grading was started November 1, 1966 and at this time all Y Lines had been completed and opened to traffic with the exception of placing the guard rail. From November 1, 1966 to November 14, 1966 fine grading was completed from Station 480 to Station 653 (end of project). Since November 14, 1966, when a new Superintendent arrived on the project, the work has progressed very slowly due to the lack of the proper equipment, and it has been noted on several occasions that where the motor graders are fine grading that no self-loading equipment was available for shifting the small amount of earth-work and this was being done with a pusher and a self-propelled scraper, and as you know, this type of material is hard to load when windrows are involved. It is also noted that since November 14, 1966, there has been no Saturday, Sunday or Holiday work, al-

though until December 13, 1966, weather conditions did not prevent weekend operations. The Superintendent and two Foremen have left the project at 4:00 P.M. each Friday; leaving the motor grader operators to blade without anyone checking to determine if they were actually cutting the grade to the proper elevation.

"In an effort to expedite progress on the project, our personnel, on two occasions, checked the fine grading for the operators and during these two occasions 3,000 linear feet of one lane was fine graded, however, no scraper was available to pick up the windrows. This was done in an effort to acquaint your personnel with the best method for checking grade along with the operators, however, this has not been followed and very little has been accomplished since your supervision on this project are apparently unfamiliar with fine grading and the final clean up and dressing that is necessary to complete a project."

The Commission did acknowledge, however, that Lowder would be unable to continue working until the subgrade (the top surface of a roadbed that is prepared as a foundation for the pavement structure) dried out. It recommended that as soon as the grade was dry enough, "you should put qualified supervision on the project and complete it as early as possible."

Huneycutt, Lowder's president, stated: "We were working people and machinery every available day that we could, between the period October 1, 1966 and March 28, 1967, with the exception of holidays. During this period, equipment was there on the job, that could not be operated because of bad weather. We also had sufficient people there. The weather just wouldn't let us move any faster."

In the late summer of 1966, Marion Moore, resident engineer on the project, began to feel that the project would not be completed on schedule despite the fact that earth-moving operations had been finished. Lowder had only to "dress the job up and finish it." Moore stated that "progress . . . lagged seriously during late summer of '66. . . . There were not enough men and equipment of the type that were needed to do this type of work. Finishing equipment was needed at that time, rather than earth-moving equipment." It was Moore's opinion that five or six graders, minor equipment to pick up excess dirt, and "an awful lot of hand labor" were needed for a project of this size.

"[T]here was a general slowdown or lack of efficiency or change in attitude towards getting this minor work done. . . . I felt that additional motor graders and support personnel for final dressing operations were what was needed rather than large earth-moving pieces of equipment. I discussed that with the superintendent, Grady Meisenheimer. I believe he agreed."

In his daily reports over this period of time, Meisenheimer made references to the lack of equipment and qualified operators with which to finish the project. Equipment on the job was frequently plagued by breakdowns. The following entry on Meisenheimer's 9 September 1966 daily report was introduced into evidence:

> "Ditch for underdrain caved in bed, took a lot of extra sand for a couple of hundred feet. If we don't get another good grader operator to go with the one good one we have, we will be here forever. Never been as out with a bunch in my life. Makes you sick to watch a couple of the operators and then go up on Barnhill's job and see the work that Crawford and Barnes do. Mr. Moore is expecting our slopes and ditches and shoulder points to look as good as theirs. I was up there this A.M.; D-7 is still down, got to fix front end on motor grade 7-E tomorrow."

On 15 January 1967 Lowder had completed 94.6 percent of project 8.11618. The Commission had let a paving contract to Rea Construction Company and was concerned that Lowder's failure to complete the project would result in delay to Rea. A conference was scheduled to discuss completion of the project. The project was divided into three "sections," and the Commission agreed to accept each section as it was completed. The entire project finally was accepted on 28 March 1967. Liquidated damages were imposed for an overrun of 50 calendar days at the rate of $200.00 per day. Pertinent facts concerning construction and overrun of the project, as embodied in the Commission's final estimate, are set forth below:

Total Amount of The Final Estimate	1,349,724.67
Original Contract Estimate	1,040,418.21
Overrun amount	309,306.46
Overrun percentage	29.729%
Overrun in excess of 105%	24.729%
Original Calendar Days	516
Extension in Calendar Days due to overrun	128

Contract Completion Date	October 1, 1966
Revised Completion Date	February 6, 1967
Project Completed	March 28, 1967
Contract Liquidated damages per calendar day	$200.00
Overrun in time	50 Cal. Days
Liquidating damages	$10,000.00

Additional facts necessary for the resolution of this appeal are set forth in the opinion.

Berry, Bledsoe and Hogewood, by Louis Bledsoe and Yates W. Faison III, for Ray D. Lowder, Inc., plaintiff.

Attorney General Edmisten, by Assistant Attorney General Walter E. Ricks III, for the North Carolina State Highway Commission (now Department of Transportation), defendant.

BROCK, Chief Judge.

This appeal raises two important issues for our determination: (1) whether the overrun constitutes a changed condition entitling Lowder to an equitable adjustment in the contract unit price for undercut excavation pursuant to § 4.3A of the specifications; and (2) whether certain entries and reports which were offered to substantiate Lowder's claim for additional compensation were properly admitted as substantive evidence.

Before reaching the questions raised by this appeal, we acknowledge the well-established rule that the Commission is not subject to suit except in the manner provided by statute. *Nello L. Teer Co. v. North Carolina State Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247 (1965). General Statute 136-29 establishes the procedure for the settlement of claims against the Commission by a contractor who claims he has not received "such settlement as he claims to be entitled to under his contract." The statute has been interpreted to mean that recovery is possible only within the terms and framework of the contract. *Nello L. Teer Co. v. North Carolina State Highway Commission,* 4 N.C. App. 126, 166 S.E. 2d 705 (1969).

I.

[1] A threshold question to be resolved is whether the contract provision that "no subsurface information is available" should work to place the loss occasioned by the unexpected amount of undercut squarely on Lowder. This provision is designed ap-

parently to insulate the Commission, the agency responsible for stating estimates in its contract plans and proposals, from liability should those estimates turn out to be erroneous.

There can be little doubt that the contract proposals and plans, as submitted to the bidders for project 8.11618, constituted material representations as to the location and quantity of undercut excavation. Lowder relied on the relative accuracy of the undercut locations and quantities and was reasonably justified in doing so. It had no reason to believe that project 8.11618 would produce an excessive amount of undercut excavation.

As has been noted in the statement of facts, the estimate of 12,000 cubic yards of undercut was based on the results of a 1963 geological test conducted by the Commission's geologists. The results of that test were routed to the Roadway Design Department for computation of the amount of undercut to be used in the proposals for project 8.11618. The estimate of 12,000 cubic yards of undercut was submitted to bidders. However, the 1963 test, the basis of that estimate, was not made available to the bidders. As we have noted, the author of the 1963 test report emphasized that it was based on the conditions prevailing during the weeks preceding 11 September 1963 when "the country side was unusually dry from the lack of summer rains."

The clause in the project special provisions stating "[t]here is no subsurface information available on this project except as may be shown in the plans" cannot limit the Commission's liability. Clauses of this type, stating in effect that the contracting agency does not guarantee the statements of fact in the plans and specifications and requiring the contractor to make his own independent investigation of the site and satisfy himself of the conditions, are not given their full literal effect. *See Morrison-Knudsen Company v. United States,* 397 F. 2d 826, 841 (1968); *Fehlhaber Corp. v. United States,* 151 F. Supp. 817, 825, 138 Ct. Cl. 571, 584 (1957), *cert. denied,* 355 U.S. 877, 78 S.Ct. 141, 2 L.Ed. 2d 108. The information in the plans constituted positive representations upon which Lowder was justified in relying. We are of the opinion, therefore, that (1) a contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory, and (2) instructions to bidders to make their own independent investigations of the conditions to be encountered cannot be given full literal reach. *Hollerbach v. United States,* 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed.

898 (1913); *see* Anderson, *Changes, Changed Conditions and Extras in Government Contracting,* 42 Ill. L.Rev. 29, 44 (1947). It is simply unfair to bar recovery to contractors who are misled by inaccurate plans and submit bids lower than they might otherwise have submitted.

[2] Having decided that Lowder should not solely bear the loss for its misplaced reliance on the contract quantities, we are confronted with the first of the two critical issues raised by this appeal: Did the overrun constitute a changed condition entitling Lowder to an equitable adjustment of the contract price pursuant to § 4.3A of the specifications?

We acknowledge the established principles that (1) an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or superfluous, *see* 4 Williston on Contracts § 619 (3d ed. 1961); and that (2) contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible. *Hol-Gar Mfg. Corp. v. United States,* 351 F. 2d 972, 979, 169 Ct. Cl. 384, 395-396 (1965). A standard provision such as § 4.3A cannot lightly be read out of the contract or deprived of most of its normal substance.

The Commission's argument is that § 4.3A, dealing with "Alterations of Plans or Character of Work," should be ignored in favor of § 4.3B, dealing with "Overruns and Underruns." The gist of this assertion is that § 4.3B is a more specific contract provision and should control the more general § 4.3A. The Commission cites one of Williston's secondary rules of contract interpretation, as reported in the Restatement, Contracts § 236(c), as the basis for this contention: "Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions." This is not an ironclad rule to be followed in every case. It is merely one rule helpful in arriving at an interpretation of a contract.

Section 4.3A, governing "Alteration of Plans or Character of Work," states:

> "The Commission reserves the right to make, at any time during the progress of the work, such increases or decreases in quantities and such alterations in the details of construction, including alterations in the grade or alinement of the road or structure or both, as may be found to

be necessary or desirable. Such increases or decreases in alterations shall not invalidate the contract nor release the Surety, and the Contractor agrees to accept the work as altered, the same as if it had been a part of the original contract.

"Under no circumstances shall alterations of plans or of the nature of the work involve work beyond the termini of the proposed construction except as may be necessary to satisfactorily complete the project.

"Unless such alerations and increases or decreases materially change the character of the work to be performed or the cost thereof, the altered work shall be paid for at the same unit prices as other parts of the work. If, however, the character of the work or the unit costs thereof are materially changed, an allowance shall be made on such basis as may have been agreed to in advance of the performance of the work, or in case no such agreement has been reached, then the altered work shall be paid for by force account in accordance with Article 9.4.

"No claim shall be made by the Contractor for any loss of anticipated profits because of any such alteration, or by reason of any variation between the approximate quantities and the quantities of work as done.

"Should the Contractor encounter or the Commission discover during the progress of the work conditions at the site differing materially from those indicated in the contract, which conditions could not have been discovered by reasonable examination of the site, the Engineer shall be promptly notified in writing of such conditions before they are disturbed. The Engineer will thereupon promptly investigate the conditions and if he finds they do so materially differ and cause a material increase or decrease in the cost of performance of the contract, an equitable adjustment will be made and a supplemental agreement entered into accordingly.

"In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged changed conditions, the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quan-

tity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work."

The section which the Commission contends is solely applicable, § 4.3B, governing "Overruns and Underruns," states:

"Major contract items will be listed in the special provisions. All contract items that are not listed as major contract items will be considered to be minor contract items.

"If the actual quantity of any major contract item overruns or underruns the original bid quantity by more than 15 percent of such original bid quantity, an increase or decrease in the contract unit price may be authorized by the Engineer in accordance with these provisions. Revised contract unit prices pertaining to overruns of major contract items will be applicable only to that portion of the overrun which is in excess of 15 percent of the original bid quantity. Revised contract unit prices pertaining to underruns of major contract items will be applicable to the entire quantity of the affected contract item.

"If the actual quantity of any minor contract item overruns the original bid quantity by more than 200 percent of such original bid quantity, an increase or decrease in the contract unit price may be authorized by the Engineer in accordance with these provisions. Revised contract unit prices pertaining to overruns of minor contract items will be applicable only to that portion of the overrun which is in excess of 200 percent of the original bid quantity. Revisions will not be authorized under these provisions for any contract unit price pertaining to a minor contract item which underruns the original bid quantity.

"Whenever it is anticipated that the quantity of any major contract item may overrun or underrun the original bid quantity by more than 15 percent of such original bid quantity, or that the quantity of any minor contract item may overrun the original bid quantity by more than 200 percent of such original bid quantity, the Engineer may,

either at his own volition or at the written request of the Contractor, issue an authorized modification covering the overrun or underrun and payment therefor will be made as provided below:

"1. Where the Contractor and the Engineer are in agreement on the increase or decrease to be made in the contract unit price, then a supplemental agreement covering the revised contract unit price will be issued in conjunction with the authorized modification.

"2. Where the Contractor and the Engineer are not in agreement on the increase or decrease to be made in the contract unit price, then a force account notice will be issued in conjunction with the authorized modification."

A reasonable interpretation of both § 4.3A and § 4.3B is that the purpose of these provisions is to provide the means to resolve controversies arising when, during construction, (1) one or both parties find its necessary to alter the details of construction; (2) the character of work and the unit costs thereof change from those originally estimated (e.g., when rock is discovered during excavation, and plans indicated that only soil would be excavated); (3) unforeseen conditions are encountered which materially change the cost of performing the contract (e.g., this case); and (4) the contractor is required to do a greater or lesser amount of work, within prescribed percentage limits, than could be originally estimated. Whether § 4.3A or § 4.3B is *more* applicable to this case is not our concern. The main apparent purpose of either section is to provide an immediate remedy for controversy arising during construction.

Our interpretation of the contract is buttressed by the fact that § 4.3B contains no indication that it is to override § 4.3A or that it is intended to be the exclusive remedy for obtaining an adjustment in the contract price. There is no obligation to proceed under § 4.3B. That section dictates how a contractor *may* be compensated; it does not dictate how he *must* be compensated. Although § 4.3B is designed to smooth over problems arising when overruns or underruns occur, it does not, by virtue of that fact, indicate that recovery is not available under § 4.3A when the cost of doing unforeseen added work greatly differs from the stated unit price. To adopt the Commission's argument that § 4.3B is solely applicable to these facts would negate the plain language of that section and of § 4.3A.

Other jurisdictions have grappled with the problems raised on this appeal—specifically, whether a large overrun or underrun can constitute a changed condition necessitating an adjustment in contract price. Generally these jurisdictions have considered large overruns to be within the scope of "changed conditions" clauses. We note, furthermore, that § 4.3A is substantially similar to the language of both Article 4 and Clause 4 of the standard form United States government contract:

> "Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

(This is an earlier version of Clause 4.)

We therefore find it helpful to look to the federal as well as state cases wherein questions of changed conditions have been determined. We do this while keeping in mind that neither our Supreme Court nor this Court has been called upon previously to determine whether the changed conditions language of § 4.3A may be applied to an overrun or underrun situation.

The general rule in cases from other jurisdictions has been to designate significant overruns as being within the purview of changed conditions clauses. *See* Annot., 85 A.L.R. 2d 211 (1962). Thus, important variations "in estimated quantities given by the Government to prospective bidders has been held to constitute a changed condition. While an underrun of ten per cent has been considered insufficient, errors of more than ten per cent ranging upward to fifty per cent have been held to entitle a contractor to an adjustment of his contract price because of changed conditions." Gaskins, *Changed Conditions And*

Misrepresentation Of Subsurface Materials As Related To Government Construction Contracts, 24 Fordham L. Rev. 588, 591 (1956).

In *Hash v. R. J. Sundling & Son, Inc.,* 150 Mont. 388, 436 P. 2d 83 (1967), a subcontractor procured a contract with Sundling, prime contractor for the State of Montana, for excavation work required for the construction of a 5½ mile highway. Hash agreed to do 155,584 cubic yards of unclassified excavation work for 25¢ per cubic yard. Shortly after commencing work, excessive wetness below the subgrade was encountered. This required extensive "dig outs" below the subgrade to provide a solid foundation for construction of the highway bed. The cost of the "dig outs" proved to be 92¢ per cubic yard. Due to a grade change, the amount of excavation work was reduced to 135,000 cubic yards. Although Hash performed 149,000 cubic yards of work, his claim for additional compensation was not based on the overrun, but on a substantial increase in the total cost of excavation work because of the increased ratio of high-priced excavation to low-priced excavation. The court adhered to the principle that "the contractor who encounters substantially different conditions in performing a construction contract from those contemplated and set forth in the plans and specifications contained herein may be entitled to increased compensation for the additional work." 150 Mont. at 394, 436 P. 2d at 86. It noted that Hash justifiably had relied on the plans in making his bid. When the variation occurred, Hash was forced to perform an "entirely different contract than the one agreed upon," 150 Mont. at 395, 436 P. 2d at 86, and was entitled to the reasonable value of his additional services.

Hash is representative of many cases holding that changed conditions may be found from important variations in contract quantities. *(See* Annot., 85 A.L.R. 2d 211 [1962]; Anderson, 42 Ill. L. Rev. 29 [1947]; Gaskins, 24 Fordham L. Rev. 588 [1956] and cases therein cited.) The Commission urges us to find that § 4.3A is designed to cover only the kind of situation arising when unexpected material, such as rock, is encountered during excavation. In our opinion the encountering of unexpected excessive wetness may constitute as much a change of condition as the encountering of unexpected rock. Had Lowder's difficulties not arisen from a latent geological problem, but from a failure to inform itself of reasonably observable physical factors, we would be disposed to reach another conclusion.

Where parties labor under a mutual mistake as to vital facts, the contract, in the interests of fairness, should be flexible enough to permit an equitable adjustment.

The broad purpose of changed conditions clauses, and, indeed, the purpose of § 4.3A, is to encourage low, competent bids.

> "Cost hazards are such in subsurface areas that qualified contractors, prior to the adoption of the article used in standard forms of government contracts, were obliged to make extremely high bids based on the assumption that the worst conditions conceivable would be met in the performance of the work. Drafters of contract forms foresaw greater economy to the government if contractors could be encouraged to bid upon normal conditions, with the assurance that they would be reimbursed in case of abnormal conditions actually encountered and to the extent that they actually increase costs. The revision of the costs due to conditions that are abnormal is accomplished by what the Changes article denominates an 'equitable adjustment'." Anderson, *Changes, Changed Conditions and Extras in Government Contracting,* 42 Ill. L. Rev. 29, 47 (1947).

To ignore this policy is to open the door to disastrous consequences for the State.

Our construction of the terms of the contract and the lesson of precedents from other jurisdictions convince us that § 4.3A permits an equitable adjustment in contract unit prices for materially different, "changed" conditions. The Commission's first argument is overruled.

II.

This brings us to the second critical issue raised by this appeal: Did Lowder's compilation of damages report qualify as a record made in the regular course of business so as to permit its admission into evidence as an exception to the hearsay rule?

The compilation of damages report, which the Commission argues was improperly admitted, is divided into three parts. Part A is a claim for additional compensation by reason of rental of extra equipment for undercut excavation in the amount of $94,310.14. Part B is a claim for additional compensation for labor in the amount of $24,343.67. Part C is a claim for additional compensation for expenses incurred between 1

October 1966, the original deadline, and 30 March 1967, two days after the project was accepted by the Commission. Labor costs in Part C are listed as $91,504.94; bond, insurance, and tax as $14,755.98; miscellaneous expenses as $36,540.70; and equipment rental as $219,796.30. The Part C total is $362,597.92. The aggregate total, less the $129,874.64 paid at the unit bid price by the Commission to Lowder for the overrun is $351,377.09.

The compilation of damages summary was taken from an analysis of daily reports prepared by Grady Meisenheimer, Lowder's superintendent during most of the construction of project 8.11618. Meisenheimer testified by deposition that he kept daily records of "laborers, machinery, and the type of work that we were doing on the job. We kept records of all of the equipment, how many hours it would run, the kind of work we were doing . . . whatever we were doing, we kept a record of it." These reports were filled out each day after work had stopped, and were mailed each night to the Lowder home office in Albemarle. After lying "fallow" for several years in Lowder's files, the reports were used to prepare the compilation of damages report. Mrs. Nell Poplin, secretary-treasurer of Lowder and "custodian of the financial records," stated that Lowder compiled its information from the daily reports and from an analysis of the reports which had been prepared by Meisenheimer. Poplin testified that "[w]e would take the equipment that was used on the undercut excavation, the men who were the operators of that equipment, and the number of hours each worked, equipment and men." "We took off the equipment, the materials that he received, the number of people on the payroll, the total of skilled, total of unskilled; all the information that he had; . . . " Part A of the compilation of damages "came from the daily reports made by Grady Meisenheimer." Part C was "taken directly from our job cost records." Part B "came directly from our payroll accounts." The cost records, which rely on the daily reports also, were compiled by Mrs. Poplin.

We have carefully examined the daily reports prepared by Lowder's superintendents during construction of project 8.11618. Each report is made on a looseleaf, printed form. On the front side of the form there are spaces for reporting weather conditions, the work day, and the number of skilled and unskilled laborers present. The majority of space is allocated to three headings: "Road Way," "Pipe Lines," and "Clearing." Some

space is reserved for "Remarks." On the back side of the form there are two spaces: one is reserved for the listing of "Material Received, Borrowed Or Rented"; the other is reserved for "List of Equipment Nos."

During Grady Meisenheimer's tenure as superintendent, the reports were filled out in some detail. Ample remarks are set out, progress of work is recorded, and equipment on the job site is listed. However, there is, in the majority of the reports, no indication of equipment actually in operation or broken down except as may be reported in the "Remarks." The hours of operation are not set out, and there is no way to tell what equipment was in operation. When equipment appears as "broken down" in the "Remarks," it also appears in the list of equipment on the job site on the reverse side of the form. Although we regard these reports as incomplete, the reports filed after Meisenheimer's departure are practically devoid of information. Little is reported about the nature of work done, and no equipment is listed as being on the job site.

In 1970 the daily reports were reviewed for the first time by Meisenheimer. He stated that he had not been informed, at the time of his review, that Lowder had filed a claim with the Commission for additional compensation. However, Meisenheimer was asked by Lowder officials to return for some reason to help compile the cost records. (Meisenheimer had left the employ of Lowder in November, 1966.) For about two to three weeks, Meisenheimer "glanced through" the daily reports. He had no assistance in this task: "I just gave him the hours and the manpower hours that were involved and the operators. I did not indicate how many hours each individual person spent doing undercut excavation. I stated each piece of equipment, because each piece of equipment has got a man on it, and if that piece of equipment runs ten hours, then that man is bound to be on it ten hours."

Clyde Huneycutt, Lowder's president, maintained that "it would be very hard to look at the daily reports and tell who was doing what other than Mr. Grady Meisenheimer." Huneycutt testified:

> "As to the record of equipment contained in the diaries I am not sure of whether they indicate what equipment was working. . . . I could pretty close tell by looking at the daily report, what equipment was not working and what

equipment was. Mr. Meisenheimer would know it much better than I would. From looking at the daily report dated October 12, 1966 . . . it would have to be draglines or scrapers performing the undercutting. It could be either one. I cannot tell by looking at the diary. It looks now like some undercutting was done but I cannot tell whether it was done that day or not. The date on the report is not necessarily the date that it was done. . . . On this day, October 12th, 1966, he says that total labor, 36—skilled 19, unskilled 17. As to what they were doing, you can only tell as to what he says. He says they are fine grading. . . . I can't tell how many are fine grading. I cannot look at any other entry in the diary and tell what individual persons were doing on the project.

"I cannot tell, by looking at any of the other daily reports, what individual persons are doing, nor can I tell by looking at the number that are working and the work that was done, except if he tells on that particular day."

Similar testimony was elicited from Mrs. Poplin, custodian of the financial records and the official in charge of preparation of the claim for additional compensation:

"From the daily reports, I could tell what equipment was on the job. I could not tell what type of work that equipment was being used for. I could tell how many persons were on the job by looking at the daily reports. I could not tell what those persons were doing. . . . I could not tell what equipment was in operation."

Because the overrun in the amount of undercut excavation altered Lowder's costs on project 8.11618, it was important that accurate cost records be kept. Poplin elaborated on the method of compilation:

"It was not my job to take the equipment off [the daily reports] and say what that piece of equipment was doing. In order to compile records as to costs incurred in the undercut excavation, it was necessary however, that that be done. That equipment was taken off by someone else. . . . I do not know how they did it. . . . I'm not sure how the equipment that was used in undercut was compiled—The equipment was taken from the daily reports that was compiled at the end of the month and given to me. I do not know when it was taken from the daily reports . . . . [However],

> I transferred these figures to the job cost cards. That is the total job cost as I testified to. . . .
>
> "Mr. Meisenheimer helped compile records for the undercut excavation. *I'm not sure when he did this, but it was before our claim was filed with the . . . Commission.* [He] indicated what equipment was used on the undercut on a daily basis. He did not compile the undercut record of equipment every day. He compiled it when he came and helped get the information together for the equipment and the labor. *This was before we filed our claim. It could have been in preparation of the claim.*" (Emphasis added.)

Mrs. Poplin stated that Meisenheimer knew exactly "what went on," even though he was reviewing daily reports which he had not seen in four years and which were not clear to officers of Lowder. During Meisenheimer's employment with Lowder on project 8.11618, he had many conversations with Mrs. Poplin concerning the cost of undercut. Mrs. Poplin did not keep records of these conversations. She also did not keep records of certain labor and equipment costs as they related to undercut: "I'm not sure how they compiled [the records]. During our course of conversations, Mr. Meisenheimer told me what men and equipment were being used in removing undercut excavation, but I did not keep records of [this]. We talked about it quite often."

The reason for Lowder's asking Meisenheimer to return to help compile records is disclosed by Poplin's following statements:

> "I could not tell prior to the time when Mr. Meisenheimer came back exactly what men and equipment had been used in removing undercut excavation. Mr. Meisenheimer was the best person to tell that. He was called back in for the purpose specifically of pointing out which ones. I don't know how he went about pointing out what equipment and which men were used for removal of the undercut excavation. I don't know how he did it, but he did."

Although Mrs. Poplin computed the total job cost, she stated, "I do not now know the cost Ray Lowder incurred, in removing one cubic yard of undercut excavation."

Meisenheimer maintained that he did not know why he was asked to furnish Lowder with information compiled from the

daily reports. He received no compensation for his work. But Meisenheimer did testify that when he first learned of Lowder's lawsuit (it is not clear whether he learned of this before he was asked to return to Lowder), he stated that "they deserved every penny they're asking for and more too because it was worth every bit of what they're asking for and I don't know what that is."

[3] In this jurisdiction business entries have long been recognized as an exception to the hearsay rule provided (1) the entries are made in the regular course of business; (2) the entries are made contemporaneously with the events recorded; (3) the entries are original entries; and (4) the entries are based upon the personal knowledge of the person making them. *See generally Thompson Apex Co. v. Tire Service,* 4 N.C. App. 402, 166 S.E. 2d 864 (1969); 1 Stansbury, N. C. Evidence § 155 (Brandis rev. 1973). Systematic checking by businesses, their regular and continuous recordation, and the experience of businesses in relying on their entries are reasons why entries have traditionally been recognized as being unusually reliable. *See* Laughlin, *Business Entries And The Like,* 46 Iowa L. Rev. 276 (1961).

[4] In our opinion the compilation of damages report was improperly admitted as an exception to the hearsay rule. It cannot meet the requirements of regularly kept business entries because it was made neither in the regular course of business nor contemporaneously with the events recorded. The result is that the report is not so reliable and trustworthy as to reflect accurately the actual costs incurred as a result of the overrun. The sources of information from which the summary was drawn, its method of compilation, and the circumstances surrounding the entire matter indicate a lack of trustworthiness.

The first requirement for the admissibility of business entries, that the entries be made in the regular course of business, is designed to insure a high degree of accuracy "because such books and records are customarily checked as to correctness by systematic balance-striking, [and] because the very regularity and continuity of the records is calculated to train the record-keeper in habits of precision. . . . " McCormick on Evidence § 306 (2d ed. 1972). This requirement is clearly not met by a summary of incomplete daily reports prepared for use in litigation rather than for the routine operation of the business. The evidence indicates that both Meisenheimer (by deposition) and Lowder officials repeatedly sought to convince the court that

the report had not been prepared for litigation. Hence they continually asserted that the summary was completed *before* Lowder's claim was filed. This is immaterial. We find it difficult to believe that Meisenheimer, who was no longer in Lowder's employ, never knew why he was asked to compile his report. On cross-examination Mrs. Poplin admitted that Meisenheimer's information "could have been in preparation of the claim," and not for the routine operation of the business.

We are also of the opinion that the report fails to meet the second requirement for admissibility as well. It was not made contemporaneously with events recorded on the incomplete daily reports. Thus we are asked in this case to find reliable a report which could only have been based, in large part, on one person's personal judgment, discretion, and memory after a lapse of four years. Lowder officials themselves could not glean enough information from the daily reports (the information on the reports is not some kind of specialized information that the officers were untrained to read) to prepare a summarized compilation of damages. Had the daily reports not been incomplete, we might not express reservations about the finalized report. We are not disposed, however, to rely on a report grounded in an undetached judgment and a fading memory. It simply does not rise to the level of reliability commonly accorded business entries.

It is not our intention to require copious entries in business records. But we are of the opinion that entries should be so complete and in such detail as to indicate that they are reliable and accurate. To report that 36 machines are on a job site on a given day is unsatisfactory. It would be better practice to report not only the number of machines on the job but also the number of machines operating, the task each performs, and the length of time each operates. The product of that kind of record-keeping is more likely to bear the earmarks of reliability.

In the area of evidence dealing with the admissibility of reports or summaries of complicated entries, problems of the motivation of informants have been both difficult and the source of disagreement among courts. Where motivation suggests that trustworthiness is not likely to result, and where reports or summaries have been prepared for use in litigation rather than for the systematic operation of a business, courts have found them to be inadmissible as not having been made "in the regular course of business." In *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), the Court upheld a district

court's ruling that an accident report, made by the since deceased engineer and offered by defendant railroad trustees, was inadmissible on those grounds. The Court stated that the accident report was not "typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. . . . Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." 318 U.S. at 113-14.

It is apparent that *Palmer* is factually distinguishable. It is also clear that there can be no objection that regularly-kept business entries are self-serving. *See* Laughlin, *Business Entries And The Like,* 46 Iowa L. Rev. 276, 289 (1961). Nevertheless, we refuse to find reports admissible when they lack minimum requirements of trustworthiness and reliability. The compilation of damages report was prepared for this litigation; it was based on incomplete daily reports; it was not contemporaneous but was the product of Meisenheimer's personal judgment, discretion, and memory some four years later. It simply is not the product of an efficient clerical system, and it has not been made in the regular course of business. In *Palmer,* the Court said that the test of admissibility is to be determined by "the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation." 318 U.S. at 114. Because the report fails to meet the requirements that it be made in the regular course of business and that it be made contemporaneously, the report cannot qualify as an exception to the hearsay rule. We hold it inadmissible as evidence of the truth of its contents. *See Hartzog v. United States,* 217 F. 2d 706 (4th Cir. 1954).

We point out, in conclusion, that a part of § 4.3A, the section permitting an equitable adjustment due to materially changed conditions, provides:

> "In the event that the Commission and the Contractor are unable to reach an agreement concerning the alleged changed conditions, the Contractor will be required to keep an accurate and detailed cost record which will indicate not only the cost of the work done under the alleged changed conditions, but the cost of any remaining unaffected quantity of any bid item which has had some of its quantities affected by the alleged changed conditions, and failure to

keep such a record shall be a bar to any recovery by reason of such alleged changed conditions. Such cost records will be kept with the same particularity as force account records and the Commission shall be given the same opportunity to supervise and check the keeping of such records as is done in force account work."

This is not only a reasonable provision of the contract but also one which the parties clearly agreed upon. The disposition in this case does not require a discussion of this part of § 4.3A, as we have found it necessary only to reach the question of admissibility of the compilation of damages report as a business record.

In our opinion Lowder's claim for an equitable adjustment for additional costs incurred by reason of the large overrun encountered in the undercut operations, occasioned by unexpected and excessive wetness, is cognizable under § 4.3A, Alteration of Plans or Character of Work, of the contract. However, because of the errors discussed above, in admission of evidence of additional costs, the judgment of the trial court is reversed, and the cause is remanded for a

New trial.

Judges PARKER and ARNOLD concur.

C. REES JENKINS AND MRS. BETTY M. JENKINS, ORIGINAL PLAINTIFFS, GREAT AMERICAN INSURANCE COMPANY, ADDITIONAL PARTY PLAINTIFF v. EUGENE KNOX HELGREN; GENE'S ELECTRIC MOTOR REPAIR, INCORPORATED; AND HENRY DIXON IVEY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. BENJAMIN FOSTER COMPANY, THIRD-PARTY DEFENDANT

No. 7516SC122

(Filed 6 August 1975)

1. Fires § 3— use of flammable glue — failure to show source of fire — sufficiency of evidence of negligence

Where there was ample evidence to support a jury finding that defendants negligently permitted a concentration of highly explosive fumes to build up inside an air duct on which they were working and that their negligence created a substantial risk that in some manner the fumes might become ignited, failure of the evidence to establish with certainty any particular source of the spark which ignited the

fumes was not fatal to plaintiffs' claim for damages to their house and contents resulting from the fire.

2. **Fires § 3; Negligence § 27— warning label on glue can — change in label subsequent to fire — evidence inadmissible**

In an action to recover for damages to plaintiffs' house sustained in a fire allegedly caused by defendants' negligent use of a flammable glue, the trial court did not err in refusing to allow evidence concerning a change which was made three years after the fire in the warning label on the glue can, since defendants' conduct must be judged on the basis of the label which actually appeared on the can of glue which they were using when the fire occurred; also, the evidence was properly excluded insofar as the original defendants' claim over against the third-party defendant glue manufacturer was concerned, since evidence of the taking of added precautions after an accident is not admissible as an admission of previous negligence.

3. **Fires § 3; Negligence § 27— fire from use of flammable glue — evidence as to nonflammable glue — admissibility**

In an action to recover for damages to plaintiffs' house sustained in a fire allegedly caused by defendants' negligent use of a flammable glue in installing insulation in an air return duct, the trial court did not err in allowing plaintiffs to introduce evidence concerning a glue made by the same manufacturer of the glue used by defendants which was not flammable and which was suitable for use to adhere insulation to sheet metal, even in the absence of proof that defendants knew that the safer glue existed, since defendants held themselves out as knowledgeable and capable of performing the installation in a safe and competent manner, and defendants by implication represented that they had such knowledge, both as to available materials and safe and appropriate methods of installation, as was generally available in the industry.

4. **Fires § 3; Negligence § 29— warning on glue can — no negligence of manufacturer — directed verdict proper**

The trial court did not err in directing verdict in favor of the third-party defendant glue manufacturer since the cautionary warning which appeared on the can of glue which defendants used was clear, comprehensible and adequate to put them on notice of the danger involved in its use, and the fire which was caused by defendants' allegedly negligent use of the glue and in which plaintiffs sustained damages occurred, not because of any inadequacy of the warning given, but because defendants utterly failed to heed that warning.

APPEAL by original defendants from *Clark, Judge.* Judgment entered 16 September 1974 in Superior Court, ROBESON County. Heard in the Court of Appeals 15 April 1975.

On 19 May 1969 a fire in the home of Mr. and Mrs. Jenkins caused extensive damage to the house and its contents. The

Jenkinses, as original plaintiffs, brought this action to recover damages against the original defendants, alleging that the fire was caused by original defendants' negligence while installing insulation in the air return duct connected to the furnace in plaintiffs' residence. Great American Insurance Company, which provided fire insurance coverage on plaintiffs' home, was joined as an additional party plaintiff. Defendants filed answer in which they denied they were negligent, and in a third-party complaint defendants alleged that if it should be found that they were actionably negligent as alleged in the complaint, then the third-party defendant, Benjamin Foster Company, manufacturer of the glue used by defendants in installing the insulation, was also actionably negligent in causing any damages sustained by plaintiffs in that it failed to give adequate warning to the users of the glue concerning that substance's highly inflammable and explosive qualities.

Plaintiffs' evidence showed the following: In order to reduce noise from a fan in the air circulating system in the Jenkins home, the defendant, Gene's Electric Motor Repair, Incorporated, under an agreement with Mr. Jenkins, undertook to install insulation on the inside of the air return duct in the Jenkins residence. This duct, made of galvanized metal, was 21 inches wide by 15 inches deep and was about four feet long, with about two feet extending above and two feet extending below the floor of the den or family room of the residence. The duct had two right angle turns in it and had two openings, one at the top, covered by a metal grille, facing the inside of the family room, and one at the bottom opening into the air fan and furnace, which were located in the crawl space beneath the floor of the house.

On the afternoon of 19 May 1969 two employees of Gene's Electric, Ivey and Liles, went to the Jenkins residence to install the insulation. It was a warm day, the temperature being about 75 degrees, and it was raining. Ivey worked in the den at the top of the duct, for that purpose removing the metal grille over the duct opening, while Liles worked at the bottom of the duct in the crawl space underneath the house. Prior to commencing work, Ivey turned the thermostat to the "off" position to keep the fan from coming on while Liles was underneath where the fan was, but, except for this, Ivey took no other precautions prior to commencing work. The two men were

approximately 2½ to 3 feet apart and could talk with each other while they worked, and Ivey could see Liles when Liles was working directly beneath him. Liles took measurements of the inside of the duct, gave these to Ivey, and Ivey cut the fiber glass insulation to measurement with a pocket knife. For the purpose of attaching the insulation to the metal on the inside of the duct, the men had brought with them from their employer's Fabrication Shop a one-gallon can of glue. The glue was applied to the metal surface on the inside of the duct with a four-inch paint brush which had a metal band on it about two inches wide. Ivey first applied glue to the interior of the top section of the duct and then handed the can of glue and the brush down through the duct to Liles who commenced applying glue to the interior of the bottom section of the duct. While so doing, he left the opened can of glue inside the duct. After the men worked at the house some forty-five minutes and after Liles had been under the house for ten to fifteen minutes, and while he was in process of painting the glue onto the interior wall of the duct, there was a sudden burst of flame, which Liles described as "just an explosion," inside the duct. Yellow flames completely filled the duct, burning Liles's hand and face. Yellow flames came out of the duct at the top, flowed up the wall above the duct opening, "just flowed up like steam rising, right quick," and from there the fire spread rapidly to the ceiling. Ivey obtained a fire extinguisher from the truck, but the powder in the extinguisher ran out quickly. The Lumberton Fire Department was called and the fire was extinguished. The fire caused extensive damage to the house and its contents.

The glue used by defendants was manufactured by third-party defendant, Benjamin Foster Company, and was known as "Foster Stic-Safe Adhesive 85-15." In its wet state this glue gives off a flammable fume or vapor which burns with a yellow flame. The solvent used as an ingredient in this glue is hexane, and there was testimony that a small percentage of hexane vapor, when mixed with air, will ignite, and at a lower temperature, than is the case with 100 octane gasoline. There was also testimony that hexane vapor is heavier than air and has a tendency to flow to low places and to settle and stay in one place if not ventilated.

The label appearing on the regular gallon container of Foster Stic-Safe Adhesive 85-15 distributed by the Foster Company as of 19 May 1969 contained the following:

CAUTION: FLAMMABLE MIXTURE.
DO NOT USE NEAR FIRE OR FLAME. MVFD C of A 2499
Keep container closed when not in use. Use with adequate ventilation. Avoid prolonged breathing of vapor. Avoid prolonged or repeated contact with skin.

Other evidence will be referred to in the opinion.

The court denied the original defendants' motions for a directed verdict as to plaintiffs' claim against them and allowed the third-party defendant's motion for a directed verdict as to the original defendants' and third-party plaintiffs' claim against it. The jury answered issues as to negligence and damages in favor of the plaintiffs, and from judgment entered, the original defendants appealed.

McLean, Stacy, Henry & McLean by Dickson McLean, Jr. for original plaintiff appellees.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr. for additional party plaintiff appellee.

Quillin, Russ & Worth by D. P. Russ, Jr. for original defendants and third-party plaintifff appellants.

Anderson, Nimocks & Broadfoot by Hal W. Broadfoot for third-party defendant appellee.

PARKER, Judge.

Appellants contend that their motions for a directed verdict as to plaintiffs' claim against them should have been allowed because the evidence did not show the source of the spark which ignited the fumes. The evidence suggested, but fell short of clearly establishing, a number of possible sources. For example, the furnace with which the air return duct was connected was a gas fired furnace which had a pilot light of the type which stayed on continually, and although Liles testified that prior to commencing work in the air return duct he cut off the gas valve leading to the furnace, he also testified that after he cut the valve "[t]here would have been gas remaining in the line between that valve and the pilot light," thus leading to the possibility that the gas remaining in the line past the cut-off

valve could have continued to feed the pilot light. There was also evidence that one of the workmen, presumably Ivey, was seen smoking a cigarette ten or fifteen minutes before the fire started and that his cigarette butt was seen on the floor directly around the corner from the vent in the family room. There was also evidence that while Ivey and Liles were installing the insulation, a TV set was operating in the family room and various electrical and gas fired appliances, none of which had been disconnected, were located in the nearby kitchen and utility rooms. There was also evidence that it was warm and raining, and although there was no lightning, weather conditions at the time were such as to cause a build-up of static electricity in the air.

[1] In our opinion the failure of the evidence to establish with certainty any particular source of the spark which ignited the fumes was not fatal to plaintiffs' cause. There was ample evidence to support a jury finding that defendants negligently permitted a concentration of highly explosive fumes to build up inside of the air duct on which they worked and that their negligence created a substantial risk that in some manner the fumes might become ignited. Certainly it is both probable and foreseeable that fire will be the consequence of a serious fire hazard. Beyond question the fumes which defendants here allowed to accumulate constituted a serious fire hazard as a direct consequence of which the damaging fire occurred. One whose negligence creates the hazard of fire cannot escape responsibility merely because the source of the triggering spark may not be shown. *Ashley v. Jones,* 246 N.C. 442, 98 S.E. 2d 667 (1957); *see generally* Byrd, *Actual Causation in North Carolina Tort Law,* 50 N.C. L. Rev. 261 (1972). Even if the source of the spark was an Act of God, for which defendants could not be responsible, yet they may be held liable if their negligence created the hazardous condition upon which the act operated. Thus, in *Lawrence v. Power Co.,* 190 N.C. 664, 130 S.E. 735 (1925), judgment for plaintiff was sustained in a case in which the evidence showed that the fire which damaged plaintiff's property was started when lightning struck defendant's transmission line causing an insulator on a tower to melt and fall upon inflammable matter below, our Supreme Court finding sufficient evidence of actionable negligence on the part of the defendant in its having permitted dry grass to accumulate on its right-of-way beneath the tower. We hold that the evidence in the present case was sufficient to support the jury's verdict finding that defendants' negligence was a direct and proximate

cause of the fire which damaged plaintiffs' property, and the original defendants' motions for directed verdict as to plaintiffs' claim against them were properly denied.

[2] Appellants contend the court erred in refusing to allow them to introduce evidence concerning a change which was made after the fire in the warning label on the Foster Stic-Safe 85-15 glue can. In 1972, approximately three years after the fire which gave rise to the present case, the label was changed to read:

> "DANGER! EXTREMELY FLAMMABLE VAPORS MAY CAUSE FLASH FIRE.
>
> Vapors may ignite explosively. Prevent buildup of vapors—open all windows and doors—use only with cross ventilation. Keep away from heat, sparks, and open flame. Do not smoke, extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors, and other sources of ignition during use and until all vapors are gone.
>
> Close container after use. Keep out of reach of children."

We find no error in the exclusion of evidence as to the change in the label. Insofar as plaintiffs' claim against the original defendants is concerned, defendants' conduct must be judged on the basis of the label which actually appeared on the can of glue which they were using when the fire occurred, not on the basis of what may have appeared on a similar can some three years later. In this connection, both Ivey and Liles testified that, although they recalled seeing the words "Caution" and "Flammable" on the can which they used, they did not read the remainder of the warning and took no action to provide adequate ventilation while using the glue as the warning on the label advised. Thus, by their own admissions they negligently failed to heed the warning which was actually given them.

Insofar as the original defendants' claim over against the third-party defendant is concerned, the evidence of the change in the label was also properly excluded. It is well settled that evidence of the taking of added precautions after an accident is not admissible as an admission of previous negligence. 2 Stansbury's N. C. Evidence (Brandis Rev.) § 180, p. 58. Appellants acknowledge this, but contend that the evidence should have been admitted in the present case under the exception to the general rule that such evidence is admissible "to show

existing conditions under certain circumstances at the time of the injury," citing *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232 (1927), from which appellants argue that evidence of the changed label was admissible "to show the nature and condition of the product at the time of the fire," pointing to other evidence in the record that no change was made in the chemical formula of the glue between the time of the fire and the time of the appearance of the changed label. If it be granted that the evidence was admissible for that limited purpose, we see no prejudice to appellants, as ample other evidence was admitted which fully established "the nature and condition of the product at the time of the fire." Appellants' assignment of error directed to the exclusion of evidence as to the change in the label is overruled.

[3] The appellants assign error to the court's permitting plaintiffs to introduce evidence over objection concerning the existence, availability, and properties of another Foster Company adhesive product known as "Foster Stic-Fas Adhesive 85-20" as compared with the "Foster Stic-Safe Adhesive 85-15" which defendants used. The evidence showed that this 85-20 product was, like 85-15, suitable for use to adhere insulation to sheet metal, but that, unlike 85-15, it was nonflammable. The evidence also showed that this nonflammable adhesive was on the market and was available in 1969, though at a slightly higher cost than the 85-15 flammable adhesive which defendants used. In their brief appellants state that "[e]ven though a safer product may have existed, the plaintiffs' evidence did not show any knowledge whatsoever by the defendants or its employees of the existence of Foster Stic-Fas 85-20, and it is contended that this failure of proof renders the evidence relating to 85-20 glue totally irrelevant and immaterial." We do not agree. Defendants had recommended the placing of insulation in the air return duct in the Jenkins residence as a means of cutting down noise from a squeaking fan. By agreement with Mr. Jenkins, defendants undertook to perform this work. By clear implication, defendants held themselves out as knowledgeable and capable of performing the work in a safe and competent manner. Included in this was the choice of appropriate materials and methods, both of which were left entirely to defendants. By implication defendants represented that they had such knowledge, both as to available materials and safe and appropriate methods of installation, as was generally available in the industry. Thus, defendants were under a duty to plain-

tiffs, not only to select safe materials and to follow proper methods in their installation, but also to inform themselves as to what safe materials and proper methods were available. Defendants may not now plead as a defense their own ignorance in a field in which they held themselves out to be competent. Evidence of the safer product, concerning which defendants were under a duty to be informed, was properly admitted even in the absence of direct evidence that defendants knew of its existence.

[4] The directed verdict in favor of the third-party defendant was properly entered. The cautionary warning which appeared on the can of glue which defendants used was clear, comprehensible, and adequate to put them on notice of the danger involved in its use. The fire occurred, not because of any inadequacy of the warning given, but because defendants utterly failed to heed that warning. This was not a household product distributed for use by the inexperienced. It was an industrial product, sold and distributed "for industrial use only," as the label on the can expressly stated. In the present case it was in fact being used, as it was intended, not as a consumer product by some unknowledgeable householder, but as a product for industrial use by workmen who held themselves out as being knowledgeable and experienced in its use. The Federal Hazardous Substances Act, Chap. 30 of Title 15 of the U. S. Code, had no application in the present case, and the court properly excluded the provisions of that Act from the jury's consideration.

Appellants have made a number of other assignments of error relating to the court's rulings admitting or excluding evidence and to portions of the court's charge to the jury. We have carefully examined all of these and find no error such as to warrant the granting of another trial.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY, APPLICANT; CHEMSTRAND RESEARCH CENTER, INC., NORTH CAROLINA CONSUMER'S COUNCIL, INC.; NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP; AND AFL-CIO OF NORTH CAROLINA; DUKE UNIVERSITY, R. J. REYNOLDS TOBACCO COMPANY, INTERVENORS v. RUFUS L. EDMISTEN, ATTORNEY GENERAL AND GREAT LAKES CARBON CORPORATION, INC., INTERVENORS

No. 7510UC109

(Filed 6 August 1975)

1. **Utilities Commission § 6— definition of rate — inclusion of formula**

The definition of "rate" contained in G.S. 62-3(24) is worded in such a broad manner as to encompass the use of a formula, and the fact that the formula must be computed each month does not render it so imprecise as to be statutorily impermissible.

2. **Utilities Commission § 6— fuel adjustment clause formula — valid part of rate or rate schedule**

The fuel adjustment clause formula used by Duke Power Company qualified as a valid part of a rate or rate schedule within the meaning of Chapter 62 of the General Statutes.

3. **Utilities Commission § 6— adjustment of utility's rate schedule — procedure followed by Commission proper**

The Utilities Commission correctly followed the statutory procedure outlined in G.S. 62-134(b) where Duke Power Company filed with the Commission on 30 November 1973 its request for a coal adjustment clause and attached thereto schedules of the electric rates then on file with the Commission and a schedule showing the coal clause formula which it proposed to put into effect, Duke further requested that the Commission allow the coal clause to become effective, pending hearing and final determination, on bills rendered on and after 1 January 1974, and on 19 December 1973 the Commission entered an order permitting the coal clause to go into effect on an interim basis on bills rendered on and after 19 January 1974 and consolidated the case for hearing with Duke's pending general rate increase application.

Judge MARTIN dissenting.

APPEAL by Great Lakes Carbon Corporation, Inc., and the Attorney General, Intervenors, from an order of the North Carolina Utilities Commission in Docket No. E-7, Sub 161, entered on 10 October 1974. Heard in the Court of Appeals on 10 April 1975.

On 30 November 1973, Duke Power Company (Duke) filed with the North Carolina Utilities Commission (Commission) a proposed change in its rates and charges. This change was to

take the form of a coal cost adjustment clause (coal clause), which was to be added to each of Duke's retail electric schedules in North Carolina. An affidavit of Mr. B. B. Parker, Duke's Executive Vice-President, was filed along with this application.

On 19 December 1973, the Commission issued an order in Docket No. E-7, Sub 161, allowing the coal clause to go into effect on bills rendered on and after 19 January 1974. This order consolidated Docket No. E-7, Sub 161, with Duke's pending general rate increase application (Docket No. E-7, Sub 159) and in so doing stated: "All evidence heretofore presented in this matter is subject to cross-examination and further review before final disposition as a part of Docket E-7, Sub 159."

On 18 January 1974, the Attorney General, an intervenor in Docket No. E-7, Sub 159, filed notice of appeal and exceptions and a motion to postpone the order of 19 December 1973, pending judicial review, or in the alternative to rescind said order or to modify said order to provide for a refund with interest under bond. This motion was denied by the Commission on 31 January 1974, and the Attorney General appealed to this Court. Oral arguments were heard on 30 May 1974; and on 17 July 1974 this Court in *Morgan, Atty. General v. Power Co.*, 22 N.C. App. 497, 206 S.E. 2d 507 (1974) dismissed the appeal on the grounds that the order of 19 December 1973 was interlocutory in nature and not a final order from which an appeal could be taken. On 24 September 1974 our Supreme Court in a decision reported at 285 N.C. 759, 209 S.E. 2d 282 (1974) denied the petition of the Attorney General for a writ of certiorari and allowed motions of the Commission and Duke to dismiss the appeal.

While the appeal of the Attorney General was pending in this Court, the Commission upon its own motion reconsidered the application filed by Duke on 30 November 1973, which requested that the Commission, upon a hearing, approve a coal clause subject to refund as a part of Duke's rate schedule. In an order dated 16 April 1974 the Commission modified its order of 19 December 1973 to "provide for a refund with interest and Undertaking for refund pending final determination and Order in Docket No. E-7, Sub 161."

Public hearings in Docket No. E-7, Sub 159, and Docket No. E-7, Sub 161, were held for nineteen days between 28 May and 23 July 1974. Evidence was presented by Duke, the Commission, and Intervenors.

On 10 September 1974, the Commission issued an order which rescinded the refund provisions set forth in its order of 16 April 1974 and, pending a final order, confirmed all monies collected and to be collected by Duke pursuant to the coal clause.

On 10 October 1974 the Commission issued its final order in Docket No. E-7, Sub 161. The Commission made the following findings:

1. The largest single item of expense for Duke in 1973 was fuel used for electric generation of which coal is the largest single item. During the test year, 1973, Duke spent approximately 104.6 million dollars for coal used in electric generation.

2. Duke estimates its use of coal to be approximately 13 million tons in the generation of electricity during 1974.

3. Duke's coal consumption for 1973 exceeded the consumption for 1972 by two (2%) percent. The cost of coal "as burned" for 1973, however, exceeded the cost of coal for 1972 by nine (9%) percent. The average price of coal increased from $10.35/ton to$11.26/ton, or from 43.94 cents per million Btu to 47.27 cents per million Btu.

The monthly costs of coal "as burned" increased from 45.04 cents in January, 1973, to 52.56 cents in December, 1973, an increase of 17 percent. Coal received for the same period increased by 25 percent. The cost of coal "as burned" in March, 1974, was 76.90 cents, an increase of 46 percent over that in December, 1973.

Coal as purchased for April, 1974, was 90.16 cents, an increase of 60 percent over December, 1973. Duke had projected an annual cost for 1974 of 77.7 cents with a monthly cost for April, 1974, of 88.6 cents. These sudden and drastic increases in the cost of coal used in steam electric generating stations have resulted in large increases in the cost of producing electric power. Such increases cannot be recovered in Duke's rate design without automatic adjustment for fuel costs without further deterioration of earnings before general rate cases can be filed, properly noticed and heard under the procedure for general rate cases.

4. The demand for coal continually increases, while the production of coal decreases. The electric utility industry is

the single largest consumer of coal in the nation. The coal industry estimates a total consumption of coal of 659 million tons, of which 435 million will be consumed by the electric utilities. The drop in the production of coal appears to stem, in part, from certain laws and regulations. Duke has secured its coal at relatively favorable prices.

5. Duke has been unable to earn the return on its common stock equity found to be fair and reasonable by this Commission. This shortfall in earnings has been caused, in part, by the sharp rise in the cost of fuel. A continuing shortfall in earnings could result in higher rates to the customer and possibly jeopardize service. The higher rates to the customers would be engendered by an increased annual cost of funds raised to finance the plant facilities.

6. At present 194 electric utilities in 43 states have fuel adjustment clauses applicable to some class of service. To a large extent, coal, oil and gas are burned in the same plant facilities, and thus, a reasonable adjustment clause should include all fossil fuels. A fossil fuel clause would allow the pass-through of the increased cost of fuel in the monthly electric bill in an amount to reflect no more than the actual increase in the cost of fossil fuel over the base cost of the fossil fuel clause. Such a fuel clause must be administered so as not to increase the rate of return to Duke. The clause constitutes only a pass-through of the expense incurred by Duke in the production of each kilowatt hour of electricity in the form of a direct surcharge for each kilowatt hour consumed.

7. A "KWH" type of fuel clause, as opposed to a "Btu" type clause, adjusts for improvements in generation efficiency and appropriately passes any savings to the ratepayer.

8. A reasonable base cost in a fossil fuel cost adjustment clause amounts to .5037 (sic) [.5039] cents per kilowatt hour, which was the cost of fossil fuel for the month of October, 1973, using the average heat rate for the year 1973. This base cost is derived from the costs of fossil fuels shown on monthly reports filed with the Commission and is consistent with the level of rates approved by the Commission in Docket No. E-7, Sub 159.

9. In view of the circumstances surrounding the coal and substitute fossil fuel market, the fossil fuel adjustment clause is a reasonable method by which Duke can recover a part of its reasonable operating expenses.

The Commission made conclusions which except where quoted are summarized in part as follows:

(1) Price fluctuations in the price of fuel, an item of great expense to the utility, could seriously impair Duke's ability to earn the return set by the Commission as reasonable and fair.

(2) Duke's estimated need for thirteen million tons of coal to generate electricity during 1974 is reasonable.

(3) "[T]he cost of coal continues to spiral upward exceeding the estimated increases projected by the company."

(4) "Duke has been reasonably diligent in its coal procurement program and practices and . . . comparatively speaking, it has obtained what might be called favorable results, considering the altogether unfavorable condition of the coal market since the fall of 1973. These market forces to which we have alluded and with which Duke has had to deal are beyond the ability of either this Commission or Duke Power Company acting alone to control. Under these adverse and unfortunate circumstances, we are compelled to allow Duke to recoup such great increases in coal cost in a reasonably expeditious and orderly manner, for to do otherwise would imperil Duke's very existence."

(5) "[T]he substantial increase in the cost of coal has contributed to the shortfall in earnings experienced by Duke."

(6) A coal clause is an appropriate and well recognized method of recovering increased fuel costs. "[A] coal cost adjustment clause is insufficient in that such clause does not account for increases or decreases in costs in other fossil fuels, i.e., oil and gas . . . [and] a fossil fuel clause, i.e., a clause that would account for increases and decreases in costs of oil and gas, as well as in costs of coal, is more appropriate." Furthermore, "a monthly monitoring of fuel costs and resulting fuel adjustment factors will limit the possibility of Duke achieving earnings beyond a fair rate of return and will keep the Commission cognizant of the effect of the fuel clause on the ratepayers."

(7) The "savings resulting from improvements in generation efficiency will automatically be passed on to the customers in the operation of the fossil fuel clause."

(8) "During 1973 Duke incurred a cost of coal significantly in excess of that recovered by Duke in the energy portion of the rates charged to its customers. In a fuel market in which there exists steadily increasing prices, Duke will continually experience a shortfall in earnings in that rates designed without an adjustment clause will not permit Duke to recover the cost it incurs in purchasing fossil fuel. In light of these circumstances, a fossil fuel adjustment clause is a reasonable method of recovering the costs Duke incurs in its purchase of fuels.

[T]he cost of fossil fuel incurred by Duke is a reasonable operating expense to the extent that Duke acts in good faith in negotiating with suppliers and to the extent that Duke pays a fair and reasonable price for the fuels purchased.

[A] fossil fuel adjustment clause is a part of the rate to be fixed by the Commission pursuant to G.S. 62-133. The Commission further concludes that G.S. 62-133(b)(5) directs the Commission to fix rates to be charged as will earn in addition to reasonable operating expenses the rate of return on the fair value of the property which produces a fair profit. Thus, the Commission concludes that for the purpose of approving a fossil fuel adjustment clause, the Commission need only determine whether the company's operating expenses are reasonable in that the clause will not increase Duke's rate of return, but will merely slow attrition of the rate of return. The rate of return on the fair value of the property used and useful in providing service has been determined in the general rate case, E-7, Sub 159, consolidated for hearing with this docket, E-7, Sub 161.

[A] system of monitoring the operating of the fossil fuel clause will insure that Duke acts in good faith in its negotiations, as well as protect the ratepayers of North Carolina from Duke recovering more through the fossil fuel clause than its reasonable operating expenses as they relate to cost of fossil fuels increase above the base cost in the fossil fuel clause."

Based on the foregoing findings and conclusions, the Commission ordered (1) that the fossil fuel adjustment clause become effective 1 November 1974, (2) that the coal clause remain in effect until 1 November 1974, (3) that Duke file with the Commission each month a complete Fossil Fuel Adjustment

Clause Memorandum, and (4) that the motion of the Attorney General praying that the Commission reconsider or rescind its Order of 10 September 1974 be denied. From entry of the order of the Commission, Great Lakes Carbon Corporation, Inc., and the Attorney General appealed.

Attorney General Rufus L. Edmisten and Deputy Attorney General I. Beverly Lake, Jr., for intervenor appellant Attorney General of North Carolina.

Byrd, Byrd, Ervin & Blanton, P.A., by Robert B. Byrd for intervenor appellant Great Lakes Carbon Corporation.

Steve C. Griffith, Jr., George W. Thorpe, and Kennedy, Covington, Lobdell & Hickman by Clarence W. Walker and John M. Murchison, Jr., for applicant appellee Duke Power Company.

Commission Attorney Edward B. Hipp and Associate Commission Attorney John R. Molm for appellee North Carolina Utilities Commission.

HEDRICK, Judge.

While the Intervenors challenge the orders of 19 December 1973, 10 September 1974 and the final order of 10 October 1974 in various respects, the primary question for resolution on this appeal is whether a fuel adjustment clause is a valid device to be used in fixing the rate Duke can charge for its service as a public utility regulated by Chapter 62 of the General Statutes of North Carolina.

The fuel adjustment clause approved by the Commission in its 10 October 1974 order permits Duke to adjust its monthly bills for service by means of the use of a formula, which takes into consideration the cost of fossil fuel used to generate electric power. The clause is designed to pass through the increased cost of fossil fuel to the retail user in the form of a surcharge for each kilowatt hour consumed and is not designed to increase Duke's rate of return. As the cost of fossil fuel during the second month preceding the current billing month fluctuates above or below an established base cost of the fuel, the current bills of Duke's retail customers are increased or decreased per kilowatt hour billed by an amount determined by application of the formula.

In their brief, Intervenors review numerous sections of Chapter 62 which they argue will be abrogated if Duke is per-

mitted to implement a fuel adjustment clause. Specifically, Intervenors contend that it is the duty of the Commission "to fix or approve the PRECISE rates and charges, which are to be known quantitatively and . . . which will produce the precise amount of revenue which the Commission determines is necessary to cover the utility's cost of service and produce a fair return to its stockholders on its investment." A fuel adjustment formula, it is argued, cannot qualify as either a "rate" or "schedule of rates"; and by implementing the fuel clause, the Commission has permitted Duke to unilaterally change its rates from month to month without investigation or hearing and without the Commission otherwise taking into consideration those matters required by G.S. 62-133. Thus, the main thrust of Intervenors' argument is simply that the Commission has exceeded its delegated authority by using the fuel clause formula as a means of fixing rates.

Resolution of this question requires an examination of the applicable statutes in light of the following legislative policy, as declared in G.S. 62-2:

> "*Declaration of policy.*—Upon investigation, it has been determined that the rates, services and operations of public utilities, as defined herein, are affected with the public interest and it is hereby declared to be the policy of the State of North Carolina to provide fair regulations of public utilities in the interest of the public, to promote the inherent advantage of regulated public utilities, to promote adequate, economical and efficient utility services to all of the citizens and residents of the State, to provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, to encourage and promote harmony between public utilities and their users, to foster a statewide planning and coordinating program to promote continued growth of economical public utility services, to cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility services, and to these ends, to vest authority in the Utilities Commission to regulate public utilities generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this Chapter."

[1, 2] Under Chapter 62 of the General Statutes, the Commission is given the power and the duty to fix just and reasonable rates for all public utilities subject to its jurisdiction. See, G.S. 62-32; G.S. 62-130. These rates are to be fair both to the public utility and to the customer. G.S. 62-133(a).

G.S. 62-3(24) defines a "rate" as follows:

> " 'Rate' means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification."

It is our opinion that this definition is worded in such a broad manner as to encompass the use of a formula. Furthermore, the fact that the formula must be computed each month does not render it so imprecise as to be statutorily impermissible. In *City of Norfolk v. Virginia Electric and Power Co.*, 197 Va. 505, 516, 90 S.E. 2d 140, 148 (1955), wherein the Supreme Court of Appeals of Virginia upheld the authority of the State Corporation Commission to approve a "purchased gas adjustment provision" (an escalator clause), we find the following:

> "The proposed escalator clause is nothing more or less than a fixed rule under which future rates to be charged the public are determined. It is simply an addition of a mathematical formula to the filed schedules of the Company under which the rates and charges fluctuate as the wholesale cost of gas to the Company fluctuates. Hence, the resulting rates under the escalator clause are as firmly fixed as if they were stated in terms of money."

Likewise, from a reading of the decisions of our Supreme Court in *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962); *Utilities Comm. v. Light Co.*, 250 N.C. 421, 109 S.E. 2d 253 (1959), and *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519 (1955), it appears that fuel clauses have been implemented by the Commission as a valid part of a utility's basic rate structure on several occasions in the past. We therefore conclude that the fuel adjustment clause formula qualifies as a valid part of a rate or rate schedule within the meaning of Chapter 62 of the General Statutes.

[3] We must next consider, however, whether the Commission followed the proper procedure in implementing the fuel clause.

G.S. 62-134(b) provides:

> "Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective."

The record discloses that on 30 November 1973 Duke filed with the Commission its request for a coal adjustment clause and attached thereto schedules of the electric rates then on file with the Commission and a schedule showing the coal clause formula which it proposed to put into effect. Pursuant to G.S. 62-134(b), Duke further requested that the Commission allow the coal clause to become effective, pending hearing and final determination, on bills rendered on and after 1 January 1974. On 19 December 1973 the Commission entered an order permitting the coal clause to go into effect on an interim basis on bills rendered on and after 19 January 1974 and consolidated the case for hearing with Docket No. E-7, Sub 159, Duke's pending general rate increase application. In so doing, the Commission, in our opinion, correctly followed the statutory procedure outlined in G.S. 62-134. See *Utilities Comm. v. Morgan, Attorney General,* 16 N.C. App. 445, 192 S.E. 2d 842 (1972).

Intervenors excepted to the interlocutory orders of 19 December 1973 and 10 September 1974. They also excepted to various findings and conclusions made by the Commission in its

final order of 10 October 1974. We have carefully considered all of these exceptions and the arguments advanced by the Intervenors in support thereof. However, since all of these exceptions and contentions relate to the single issue of whether the Commission has the statutory authority to fix rates by means of a fossil fuel clause, no useful purpose will be served by any elaboration by us on these individual exceptions. Suffice it to say, we have carefully considered the entire record as presented and find it is sufficient to support the findings and conclusions made by the Commission, and these findings and conclusions support the order of 10 October 1974 which is

Affirmed.

Judge BRITT concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

The action of the Commission, in undertaking to determine the issues in this case and to render its decision, without any notice or hearing, is directly in conflict with its statutory authority in Chapter 62 of the General Statutes. Consequently, the requirements of procedural due process have not been fulfilled in this case. The fact that the utility itself has no control over certain of its costs does not, under our law, justify its exemption from regular rate procedures. The exigency of the situation, however meritorious, is not enough to sustain a deviation from statutory requirements. For this reason I vote to reverse.

THE GAS HOUSE, INC. v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 7518SC297

(Filed 6 August 1975)

Contracts § 10; Telephone and Telegraph Companies § 4— mistakes in Yellow Pages — contract limiting liability — public policy

A contract provision limiting a telephone company's liability for errors or omissions in an advertisement in the Yellow Pages of a telephone directory to the cost of the advertisement is unreasonable and

the direct consequence of a real disparity in bargaining power and will not be enforced by the courts as a matter of public policy.

Judge PARKER dissenting.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 21 January 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 June 1975.

Smith, Carrington, Patterson, Follin & Curtis, by Charles A. Lloyd, for the plaintiff-appellant, The Gas House, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Edward C. Winslow III, and C. T. Leonard, Jr., for the defendant-appellee, Southern Bell Telephone and Telegraph Company.

BROCK, Chief Judge.

The question presented by this appeal is whether an advertiser can recover from a telephone company for an error or omission in the yellow pages of a telephone directory when the contract entered into by the parties limits the telephone company's liability for errors or omissions to an amount equal to the cost of the advertisement. Although the question is novel in this jurisdiction, the jurisdictions of California, Florida, Louisiana, Maryland, Missouri, Montana, New Mexico, and Ohio, and many federal courts, have held that the advertiser cannot recover damages beyond the cost of the advertisement because of the limitation of liability. We decline to align ourselves with those jurisdictions, and we hold that plaintiff-advertiser may recover irrespective of the limitation of liability in the contract. This result is dictated by our conclusion that the clause limiting the telephone company's liability is unreasonable and, in this case, the direct consequence of a real disparity in bargaining power. We will not enforce the clause as a matter of public policy.

This is a breach of contract action to recover for loss of profits resulting from Southern Bell's failure to publish plaintiff Gas House's advertisement under the proper classification in its Yellow Pages. In December 1973 plaintiff entered into a written contract with Southern Bell for republication of its advertisement in the 1974 Yellow Pages. The contract provided that plaintiff's name would be published under the classification "Gas—Liquified Petroleum—Bottled & Bulk." When the telephone directory was distributed, plaintiff discovered that its

name had been published under the classification "Gas—Industrial & Medical—Cylinder & Bulk." Plaintiff Gas House does not sell industrial and medical gasses. It asserts that its business has been damaged in the amount of $100,000.00 by the misplacement of the advertisement.

The contract entered into between the parties provides:

> "6. The Telephone Company's liability on account of errors in or omissions of such advertising shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in the then current directory issue and such liability shall be discharged by an abatement of the charges for the particular listing or advertisement in which the omission or error occurred."

Southern Bell maintains that, pursuant to the contract, which was "freely entered into by the parties," it can be liable only for the cost of advertising. It states that it is standing ready to refund to plaintiff Gas House, not only for its error in the Yellow Pages but also for any resultant loss to plaintiff, the sum of $4.70.

After the pleadings had been filed, defendant Southern Bell moved for summary judgment. Plaintiff appeals from the granting of the motion by the trial judge and advances two arguments.

Its first argument is that there was a genuine issue of material fact as to whether the limitation of liability was a part of the contract. Plaintiff relies on the "tomato seeds" case, *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971), for the proposition that the clause, which in this case is neither inconspicuous nor ambiguous, was somehow not a part of the contract. A discussion of the "tomato seeds" case is unnecessary. It was decided in accordance with the law of implied warranties peculiar to the sale of goods and developed as a special mechanism for the protection of retail consumers who are not expected to understand the cryptic significance of disclaimers submerged in fine print by which mass merchandisers of consumer products often seek to limit their liability. There is little merit in plaintiff's reliance upon the *Gore* case.

Plaintiff's second argument, that the limitation of liability violates public policy, is the usual argument made in these cases and the one upon which we choose to focus. Southern Bell's

response to this oft-litigated argument is that it is not required to provide the Yellow Pages and thus is to be treated as a private party when soliciting and contracting advertisements. Because this is within the domain in which a public utility may freely contract in its private capacity, it may lawfully require those who desire to advertise in the Yellow Pages to agree to a limitation of liability in the event of an error or omission in the Yellow Pages. Furthermore, Southern Bell argues that it has no monopoly on advertising, with the result that its bargaining power, while there may be some disparity, "is no more than may be found generally to exist. . . . " *McTighe v. New England Telephone and Telegraph Co.*, 216 F. 2d 26, 28 (2d Cir. 1954).

We cannot say that it is against the public policy of this State for Southern Bell to limit its liability for negligence in all circumstances. A basic concept of contract law recognizes the propriety of parties' contracting as they see fit, even though it be for limiting their liability. But we do adhere to the principle that contract terms should be reasonable, not unconscionable, to be enforced as a matter of public policy.

In *Allen v. Michigan Bell Telephone Co.*, 18 Mich. App. 632, 171 N.W. 2d 689 (1969), a case supporting an award for the advertiser in this situation, the Court stated:

> "Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered. Where goods and services can only be obtained from one source (or several sources on noncompetitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without. Depending on the nature of the goods or services and the purchaser's needs, doing without may or may not be a realistic alternative. Where it is not, one who successfully exacts agreement to an unreasonable term cannot insist on the courts enforcing it on the ground that it was 'freely' entered into, when it was not. He cannot in the name of freedom of contract be heard to insist on enforcement of an unreasonable contract term against one who on any fair appraisal was not free to accept or reject that term." 18 Mich. App. at 637.

In this case it is necessary to look at the relative bargaining power of the parties to determine the reasonableness of the contract clause limiting Southern Bell's liability. Southern

Bell's Yellow Pages directory is the only directory of telephone listing freely distributed to telephone subscribers in the Greensboro area. Although Southern Bell claims that "numerous alternative advertising forums" exist by which plaintiff can reach telephone subscribers, we do not believe this to be the case. No other medium has either the permanency that the Yellow Pages has or the same sense of value to the subscriber. The Yellow Pages, published only annually, is unparalleled as an advertising medium. No other industry in this State save the telephone industry publishes Yellow Pages or anything similar. It is unreasonable to suggest that persons, firms, or corporations should expend large sums of money on newspaper, radio, or television advertisements to mitigate damages for a telephone company's error or omission in a telephone directory.

In this connection we find it interesting that Southern Bell contends that its Yellow Pages is but one form of advertising, in no way unique or monopolistic. We take notice of a case recently decided in this Court in which a wholly antipodal argument is made. In *State of North Carolina Ex Rel Utilities Commission, et al. v. National Merchandising Corporation* (No. 7510UC265; filed 16 July 1975), a manufacturer and distributor of vinyl plastic telephone directory covers (National), upon which advertising space is sold, sued a telephone company to have a tariff prohibiting the use of covers on directories declared unjust and unreasonable. Most telephone companies had similar tariffs, and a general investigation was ordered by the Utilities Commission, which had jurisdiction of the matter. Eventually, a uniform tariff was promulgated by the Commission. On National's appeal to this Court from an adverse ruling of the Commission, the telephone industry in this State (there are twenty-six companies, one of which is the defendant in this case) admits that it has a monopoly on advertising which ought to be protected in the interest of better and less expensive service for the public. Southern Bell's arguments on this point, in that case and in the case at bar, are so protean that they cannot be reconciled.

The parties to this suit are not in positions of equal bargaining power. Southern Bell's Yellow Pages are so important both to subscribers and industry that parties attempting to do business cannot do very well without advertising in them. The clause limiting Southern Bell's liability to the cost of the advertisement is commonly drafted and used by telephone companies in their

advertising contracts. It is useless to pretend, as the Michigan Court in *Allen* pointed out, that the plaintiff could have bargained for different terms in the contract. It was, like many contracts today, strictly a "take it or leave it" proposition. *Allen v. Michigan Bell Telephone Co., supra* at 640.

Unconscionability does not stem solely from superior bargaining power. In some cases there may be unconscionability even though the parties have about equal bargaining power. To find unconscionability, there must be more:

> "[It] has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445, 449, 18 A.L.R. 3d 1297, 1301-1302, 2 U.C.C. Rep. Serv. 955, 958 (D.C. Cir. 1965).

Whether there is a meaningful choice can be determined only by consideration of all the circumstances surrounding the transaction. *Id.* at 449, 18 A.L.R. 3d at 1302, 2 U.C.C. Rep. Serv. at 958. We have concluded that in this case plaintiff Gas House had no choice but to accept Southern Bell's limitation of liability.

Where the limitation of liability terms are substantively reasonable, they will be enforced. Nevertheless, parties at an obvious disadvantage in bargaining power who consequently are forced to accept substantively unreasonable terms placing them at the mercy of other parties' negligence generally can find relief in the courts. *See* Prosser, Law of Torts § 68 (4th ed. 1971). Therefore,

> "it is generally held that a contract exempting an employer from all liability for negligence toward his employees is void as against public policy. *The same is true as to the efforts of public utilities to escape liability for negligence in the performance of their duty of public service.* A carrier who transports goods or passengers for hire, or a telegraph company transmitting a message, may not contract away its public responsibility, and this is true although the agreement takes the form of a limitation of recovery to an amount less than the probable damages. It has been held, however, that the contract will be sustained where it represents an honest attempt to fix a value as liquidated damages in advance, and the carrier graduates its rates according to such value, so that full protection would be

> open to the plaintiff upon paying a higher rate. The same rules apply to innkeepers and public warehousemen." Prosser, Law of Torts § 67 (3d ed. 1964), *quoted in Allen v. Michigan Bell Telephone Co., supra* at 639 (Emphasis supplied).

We think the contract term limiting Southern Bell's liability to $4.70 is patently unreasonable for the reasons set forth above. Gas House could not do without Yellow Pages advertising and had no other good alternative advertising forum available to it. Under the circumstances the enforcement of the limitations clause would be contrary to public policy.

We are aware that there are arguments for defendant Southern Bell's position. Some argue that a decision like ours will raise telephone rates because telephone companies will pass on their litigation costs to their subscribers. One court has pointed out that there is no opportunity to correct errors or omissions in Yellow Pages (short of the publication of an errata supplement) until the next publication while " 'market place' advertisers can correct or mitigate in the next issue or broadcast." *State Ex Rel Mt. States T. & T. Co. v. District Court,* 160 Mont. 443, 450, 503 P. 2d 526, 530 (1972). That court has also stated that "[t]he same problems attendant to damages exist here and if they could be accurately ascertainable they could conceivably run for a considerable period of time, with no opportunity to mitigate or abate." *Id.* We believe the legal system is not immutable. It is big enough to deal adequately with an ever-growing number of problems. There is no reason to deny a just recovery to an aggrieved party because of fear of unrealized problems.

In reaching the conclusion that the limitation of liability clause cannot be enforced as a matter of public policy, we have relied on the Michigan Appellate Court's decision in the *Allen* case. That decision has been criticized as "a departure from the majority view recognizing freedom to contract . . . based upon faulty notions of the public interest, and . . . not in keeping with commercial realities." *Robinson Ins. & Real Est. Inc. v. Southwestern Bell Tel. Co.,* 366 F. Supp. 307, 310 (W.D. Ark. 1973). We are of the opinion that the principles espoused by this Court and the *Allen* court do not do violence to the freedom of contract. "[T]he tide has turned away from the nineteenth century tendency towards unrestricted freedom of contract." Calamari and

Perillo, Contracts § 3 (1970), *e.g., Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69, 75 A.L.R. 2d 1 (1960).

Whether plaintiff can successfully establish damages is a matter upon which we do not speculate.

Reversed.

Judge ARNOLD concurs.

Judge PARKER dissenting:

There was here no showing or contention that the error in the listing of plaintiff's name in defendant's Yellow Pages was the result of gross negligence or willful misconduct on the part of defendant. In the absence of such a showing, I see no sound reason why the plain language of the exculpatory clause in the contract entered into between the parties should not be enforced. The majority refuses to do so "as a matter of public policy" because it finds the clause both "unreasonable" and "the direct consequence of a real disparity in bargaining power." Such disparity as here existed does not appear to me to be materially different from that which exists in many other situations. For example, it is not unusual that a local newspaper may become so dominant in its field of coverage that retail merchants in the area must either use its pages on the terms offered by the publisher or forego any effective newspaper advertising of their merchandise. We are not dealing here with a contract provision directly affecting defendant's functions as a public utility, and I see no sound reason why defendant in this case should be treated differently from publishers of other advertising media. Nor do I see why sound public policy dictates that the courts should rewrite the contract entered into by the parties by deleting, on the grounds that it is "unreasonable," a contract provision limiting liability of the publisher for consequences of an innocent mistake. The majority opinion relies heavily upon *Allen v. Michigan Bell Telephone Co.*, 18 Mich. App. 632, 171 N.W. 2d 689 (1969). I find more persuasive the reasoning in such cases as *McTighe v. New England Telephone and Telegraph Co.*, 216 F. 2d 26 (2nd Cir. 1954); *Robinson Ins. & Real Est. Inc. v. Southwestern Bell Tel. Co.*, 366 F. Supp. 307 (W.D. Ark. 1973); and *State ex rel. Mt. States T. & T. Co. v. District Court*, 160 Mont. 443, 503 P. 2d 526 (1972). *See also* Annot., 92 A.L.R. 2d 917 (1963). I vote to affirm.

Overton v. Boyce

PENELOPE BADHAM OVERTON, AND ALEXANDER BADHAM (ORIGINAL PLAINTIFFS); ROBERT BEMBRY, ADMINISTRATOR OF PENELOPE BADHAM OVERTON AND ROBERT BEMBRY, ADMINISTRATOR OF ALEXANDER BADHAM v. A. C. BOYCE, SOMETIMES KNOWN AS LONNIE BOYCE (ORIGINAL DEFENDANT); CELIA U. BOYCE, WIDOW OF A. C. BOYCE; AND CELIA U. BOYCE AND NAOMI E. MORRIS, EXECUTRICES OF A. C. BOYCE

No. 751SC261

(Filed 6 August 1975)

1. **Frauds, Statute of § 2; Boundaries § 10— patent and latent ambiguity in description**

A description in a deed which leaves the identity of the land absolutely uncertain and refers to nothing extrinsic by which it might possibly be identified with certainty is patently ambiguous and may not be aided by parol evidence; a description which is insufficient in itself to identify the property but which refers to something extrinsic by which identification might possibly be made is latently ambiguous, and extrinsic parol and other evidence may be offered to identify the property.

2. **Boundaries § 10— latently ambiguous description**

A deed conveying a "tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres" contains only a latently ambiguous description; therefore, plaintiff may offer extrinsic evidence to identify the land, and defendants may offer such evidence to show impossibility of identification.

APPEAL by plaintiffs from *Cowper, Judge.* Judgment entered 19 December 1974 in Superior Court, CHOWAN County. Heard in the Court of Appeals 28 May 1975.

The original plaintiffs, Penelope Badham Overton and Alexander Badham, instituted this action on 26 February 1965 to remove cloud from title to a tract of land described as follows:

> "A certain tract of pocosin land adjoining the lands of the late Henderson Luton and others, lying and being in Chowan County, and State of North Carolina, containing by estimation three hundred nineteen (319) acres, more or less, and being the same land conveyed to Hannibal Badham, Sr., by H. H. Page and wife by deed and duly recorded in Chowan County Registry in Book B, Page 198."

These plaintiffs were named parties plaintiff, along with others who claimed to be owners of the lands as heirs of Hannibal Badham, deceased, in a similar action against defendant, A.

C. Boyce which was brought on 2 April 1959. That action was terminated in *Overton v. Boyce,* 252 N.C. 63, 112 S.E. 2d 727 (1960) wherein it was held that a consent judgment entered 13 July 1945 by agreement of the parties was a judgment on the merits barring any other action for the same cause. However, these plaintiffs and some of the other heirs, had the consent judgment set aside as to them. See *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897 (1961), and 255 N.C. 712, 122 S.E. 2d 601 (1961). Thereupon, these plaintiffs brought this action; and the other heirs, not bound by the consent judgment of 13 July 1945, brought a separate action by an attorney-in-fact, which was dismissed on the grounds that the attorney-in-fact was not a real party in interest. See *Howard v. Boyce,* 266 N.C. 572, 146 S.E. 2d 828 (1966). These other heirs have since brought action in their own names *(Howard v. Boyce,* No. 751SC121) and both actions are in this Court on separate appeals.

In this action defendants moved for summary judgment, and in support of their motion submitted the following: (1) deed from H. H. Page and wife to Hannibal Badham dated 30 December, 1899, duly recorded in the Registry of Chowan County; (2) four deeds to Henderson Luten, dated in the years of 1722, 1725, 1785, and 1793, all conveying lands in Chowan County; and the affidavit of W. J. Berryman, now deceased, averring in substance that in 1940 he made surveys in an attempt to locate the 319-acre Badham tract on the ground but was unable to do so.

In reply, plaintiff administrator, both parties plaintiff having died since the action was brought, referred to two recorded survey maps, one dated 19 January 1932 and the other 28 April 1962, purporting to be maps of the Hannibal Badham lands.

Examination of the two maps referred to by plaintiff and the map of W. J. Berryman offered by defendants of the W. S. White tract, now claimed by defendants, reveals overlapping claims in substantial part.

On 19 December 1974, the trial court granted summary judgment for the defendants finding in part as follows:

> "8. That there is no reference in the deed described in the complaint nor the deed from Page to Badham, Book B-2, page 198, which would or does in any way indicate which

Henderson Luton tract it adjoined, if in fact, it did adjoin Henderson Luton land.

9. That in addition to the foregoing findings of fact, the Court finds that W. J. Berryman, now deceased, on the 22nd day of April 1961, filed an affidavit stating that on or about the 17th day of February, 1940, he surveyed a W. S. White tract of land in Chowan County; that at said time and on the ground, he made diligent efforts to locate a certain tract of pocosin land adjoining the lands of the late Henderson Luton and others containing by estimation 319 acres, and he was unable to locate said tract of land.

10. The Court finds that the description hereinbefore set out does not contain such a description or proper reference to something extrinsic by which the description can be made definite. It contains no courses and distances and no reference to any source by which evidence aliunde could identify the land. Chowan County is bordered on one side by Chowan River, another side by Albemarle Sound, another side by Perquimans County and on the North by Gates County. There is much swamp and pocosin land in Chowan County and one would have to resort to conjecture to tell which pocosin tract was intended or which Henderson Luton tract was intended and the description is therefore void."

From the above judgment, plaintiff appealed, whereupon counsel for plaintiff thereafter filed a proposed record on appeal to which counsel for defendants filed a number of exceptions. In an order dated 1 April 1975, the trial judge allowed all of defendants' exceptions to the proposed record and settled the said record for the appeal. Among other materials, the two survey maps offered by the plaintiffs were excluded.

Plaintiff thereupon filed a petition for certiorari for this Court to take notice of the materials stricken by the trial court from the record pursuant to defendants' exceptions, contending that the materials are necessary to a complete understanding of the petitioners' position on this appeal. Without going into the specific details of the allegations and materials stricken from the record, we have decided to take notice thereof for purposes of this opinion.

Further facts pertinent to the disposition of this case will be discussed in the opinion.

Richard E. Powell and Samuel S. Mitchell for the plaintiffs.

Pritchett, Cooke & Burch by J. A. Pritchett, W. W. Pritchett, Jr., and W. L. Cooke for the defendants.

CLARK, Judge.

Plaintiffs' claim of title is based on the deed from H. H. Page and wife to Hannibal Badham, dated 30 December 1899, in which the subject lands are described as follows:

> " . . . A certain tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres."

[1] This description is ambiguous. A deed is a contract which must meet the requirements of the statute of frauds (G.S. 22-2). The crucial issue here is whether the ambiguity is patent or latent. There is a patent ambiguity when the deed leaves the land in a state of absolute uncertainty and refers to nothing extrinsic by which it might possibly be identified with certainty. When the description is patently ambiguous, parol evidence is not admissible to aid it. There is a latent ambiguity if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. In such case extrinsic evidence, parol and other, may be offered with reference to such extrinsic matter tending to identify the property. *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964).

An extended examination of the many cases on the subject of the sufficiency of the description takes us back to *Pearse v. Owens,* 3 N.C. 234 (1803). Cases on the subject have been compiled in *Lane v. Coe, supra; Peel v. Calais,* 224 N.C. 421, 31 S.E. 2d 440 (1944); *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723 (1940); and *Perry v. Scott,* 109 N.C. 374, 14 S.E. 294 (1891). More recent cases are *State v. Brooks,* 279 N.C. 45, 181 S.E. 2d 553 (1971); *Carlton v. Anderson,* 276 N.C. 564, 173 S.E. 2d 783 (1970); and *Barringer v. Weathington,* 11 N.C. App. 618, 182 S.E. 2d 239 (1971).

All of the cases on the subject cannot be reconciled. In *Carlton v. Anderson, supra,* at 565, Justice Higgins stated: "Some descriptions are so precise and definite as to leave no doubt about their sufficiency. Others are so vague and indefinite as to leave no doubt as to their insufficiency. Somewhere between these extremes is a dividing line. Near the line on

either side is a twilight zone where the court must decide on which side a contested description falls. Trouble arises in the borderline cases."

Generalizations are difficult to make. However, the decisions, taken collectively, warrant the conclusion that a deed is void for uncertainty where it purports to convey part of a larger tract but there is an absence of any indication of intent to convey a specific part of the tract. See *State v. Brooks, supra; Carlton v. Anderson, supra; Cathey v. Lumber Company,* 151 N.C. 592, 66 S.E. 580 (1909); *Smith v. Proctor,* 139 N.C. 314, 51 S.E. 889 (1905); and *Robeson v. Lewis,* 64 N.C. 734 (1870).

But where a deed purports to convey an entire tract and the description, though ambiguous and uncertain, points to some source from which extrinsic evidence may be used to make the description complete, the courts have held the deed to be sufficiently definite. Under *Lane v. Coe, supra,* for the plaintiff to maintain his action, the deed description must refer to something extrinsic by which identification *might possibly be made;* then, having cleared this hurdle, the plaintiff has the burden of proving the identity of the land with certainty. In *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29 (1941), the description in the deed "also the tract on Indian Camp Branch known as the Hamlin Tract" was held sufficiently definite, and Justice Winborne (later Chief Justice) in his opinion for the court listed numerous causes in which the court held the deed descriptions to be sufficient. In *Perry v. Scott, supra,* the deed description, somewhat similar to that in the subject case, was "lying and being in the county of Jones, bounded as follows, to wit: On the south side of the Trent River, adjoining the lands of Colgrove, McDaniel and others, containing three hundred and sixty acres, more or less." The court held that the description was not so vague and indefinite as to exclude the introduction of parol evidence to fit it to the land.

[2] In view of the finding by the trial court in granting summary judgment under G.S. 1A-1, Rule 56, that the description is not sufficient and does not contain a "proper reference to something extrinsic by which the description can be made definite," it appears that the court ruled that the deed description was patently ambiguous. If so, we do not agree with the finding.

However, it further appears that the court in granting summary judgment relied heavily on the four deeds to Hender-

son Luten, the Berryman affidavit, and other extrinsic evidence offered by defendants, which could be interpreted as a finding of latent ambiguity. If so, it was the duty of the defendant, having made the motion, to establish by extraneous materials, admissible in evidence, that the land could not by extrinsic evidence be identified. In this regard, it is noted that the four deeds to Henderson Luten were dated more than 100 years earlier than the subject deed in 1899 to Hannibal Badham; it is not established that Luten owned one or more of the tracts at the time of his death before the deed was made in 1899 to Badham, nor that the four tracts comprise one integrated tract. Further, since it is obvious that the plaintiffs' land could not be identified from the deed description alone and that extrinsic evidence must be used to do so, this alone would make inadmissible the Berryman affidavit and the two maps offered by plaintiff without some authenticating information as to what extrinsic evidence, if any, was considered in determining whether the subject land could be identified.

We find that the summary judgment was improvidently entered and erroneously disposed of a genuine issue of fact, *i.e.*, the identity of the land. At trial the plaintiff may offer extrinsic evidence to identify the land, and the defendants may offer such evidence with reference thereto tending to show impossibility of identification.

The summary judgment of the trial court is reversed and this cause remanded.

Judges MARTIN and ARNOLD concur.

Howard v. Boyce

FRANCES BADHAM HOWARD, FANNIE BADHAM, BESSIE B. SMALL, SIDNEY BADHAM, MILES BADHAM, PENELOPE OVERTON, ALEXANDER BADHAM, CHARITY BADHAM, CHARLES BADHAM, PAULINE B. TURNER, FRANK BADHAM, SADIE B. HAWKINS, JAMES BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DECEASED, PETITIONERS v. LONNIE BOYCE (NOW DECEASED), ORIGINAL DEFENDANT, AND CELIA U. BOYCE, INDIVIDUALLY AND CELIA U. BOYCE AND NAOMI MORRIS, EXECUTRICES OF THE ESTATE OF A. C. BOYCE, SOMETIMES KNOWN AS LONNIE BOYCE, RESPONDENTS

No. 751SC121

(Filed 6 August 1975)

1. **Equity § 2— laches — case in litigation**

The trial court erred in holding that petitioners had lost their rights to set aside a 1945 judgment involving the property in question by laches on the theory that respondents were prejudiced because several of their witnesses have died since an action was filed in 1959 to remove cloud from title to the property where the case has been in litigation during various periods from 1959 to the present and no potential and material witnesses for respondents died during the time the case was not in litigation after 1959.

2. **Equity § 2— laches — failure to eject respondent**

Petitioners did not lose their right to set aside a 1945 consent judgment by laches in allowing respondent to remain in possession of the property from 1945 to 1959 without seeking to eject him where the record does not show that petitioners had knowledge that the 1945 judgment had been entered or that respondent was in possession of their property until 1959.

APPEAL by petitioners from *Copeland, Judge.* Order entered 14 November 1974 in Superior Court, CHOWAN County. Heard in the Court of Appeals 28 May 1975.

In 1944 an action was brought against Lonnie Boyce in the Superior Court of Chowan County by plaintiffs who were named in the complaint as the heirs of Hannibal Badham. It was alleged that plaintiffs were the owners of real property consisting of 319 acres and that defendant claimed an interest in the land. They sought to have the cloud removed from their title. On 13 July 1945 a consent judgment was entered dismissing the action as upon nonsuit. The judgment recited that the parties had settled all matters in controversy and that plaintiffs disclaimed any further interest in said controversy.

On 2 April 1959 Penelope Overton and others brought an action against Boyce to remove a cloud from their title to the 319 acres described in the action begun in 1944. Defendant pleaded the judgment rendered in the action begun in 1944. The trial judge held the plea in bar good, and dismissed the action. The Supreme Court affirmed. *Overton v. Boyce,* 252 N.C. 63, 112 S.E. 2d 727 (1960).

In 1960 Penelope Overton and Alexander Badham, two of the (named) plaintiffs in the 1944 action, filed motions in the original cause, seeking to set aside the 1945 judgment. The superior court denied the motions, and on appeal the Supreme Court found error and remanded. *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897 (1961). On remand the superior court granted the motions, and on appeal the Supreme Court held that the judgment had been properly set aside as to Penelope Overton and Alexander Badham, but that it was still binding on the other parties who had not filed motions in the cause. *Howard v. Boyce,* 255 N.C. 712, 122 S.E. 2d 601 (1961).

On 4 March 1965 L. Joseph Overton, acting as attorney in fact for all plaintiffs in the 1944 action, except Penelope Overton and Alexander Badham, filed a motion in the cause to set aside the 1945 judgment. On appeal, the Supreme Court held on 2 March 1966 that the motion could not be made by an attorney in fact, but must be made by the plaintiffs personally. *Howard v. Boyce,* 266 N.C. 572, 146 S.E. 2d 828 (1966).

On 14 March 1966 six of the plaintiffs in the 1944 action, including Frances Badham Howard, filed motions in the cause to set aside the 1945 judgment. Three other plaintiffs filed similar motions in April 1966 and one in August 1966. Boyce died in 1969 and the present respondents were substituted for him.

Petitioners (movants) offered evidence tending to show that the 1944 action was brought by Frances Badham Howard, acting alone. She did not notify the other heirs of Hannibal Badham that she was bringing suit in their name. The case was settled in 1945 and she received a payment of $208.00 from Boyce. She did not pay any of this money to any of the other heirs, or contact any of the other heirs at any time while the 1944 action was in progress.

On 14 November 1974 the trial court entered an order denying the motions to set aside the judgment of 1945 on the

ground that movants had delayed too long in seeking to have it set aside which was prejudicial to respondents and that such action and delay on the part of movants constituted laches. From the entry of judgment petitioners (movants) appealed to this Court.

Richard Powell and Samuel S. Mitchell, for petitioner appellants.

Pritchett, Cooke and Burch, by J. A. Pritchett, W. W. Pritchett, Jr., and W. L. Cooke, for respondent appellees.

MARTIN, Judge.

[1] Petitioner appellants contend that the court erred in holding that they had lost their right to set aside the 1945 judgment because of laches. Laches has been defined as "the negligent omission for an unreasonable time to assert a right enforceable in equity." *Builders Supplies Co. v. Gainey,* 282 N.C. 261, 192 S.E. 2d 449 (1972). The trial court based its findings of laches on the theory that respondents had been prejudiced because since 1959, when the action was filed to remove the cloud from title, several of respondents' potential witnesses had died.

In *Howard v. Boyce,* 254 N.C. 255, 118 S.E. 2d 897 (1961), the Court held that "[o]n the question of laches the record before us shows nothing more than considerable lapse of time and is insufficient to support the finding 'that the movants have been guilty of laches and unreasonable delay.'"

During the periods from 2 April 1959 to 24 February 1960, from 4 March 1965 to 2 March 1966, and from 14 March 1966 to the present, this case has been in litigation, and it cannot be said that petitioners were negligently failing to assert their rights during these periods. Nor can it be argued that petitioners are guilty of laches by waiting twelve days to file their motions after the decision in *Howard v. Boyce,* 266 N.C. 572, 146 S.E. 2d 828, was filed 2 March 1966. As for the period from 24 February 1960 to 4 March 1965, it does not appear that any potential and material witnesses for respondents had died and, thus, no prejudice resulted from delay during that time period. There can be no finding of laches when the adverse party has not been prejudiced. *In re Miles,* 262 N.C. 647, 138 S.E. 2d 487 (1964); *East Side Builders v. Brown,* 234 N.C. 517, 67 S.E. 2d

489 (1951); *Hughes v. Oliver* and *Oliver v. Hughes*, 228 N.C. 680, 47 S.E. 2d 6 (1948). Except for petitioner Frances Badham Howard, the record does not support the court's finding that the action and delay of petitioners constitutes laches.

[2] Respondents contend that petitioners are guilty of laches by allowing Boyce to remain in possession of the property from 1945 to 1959 without seeking to eject him. A person cannot be guilty of laches in failing to seek relief promptly when he does not know of his right or need for relief. *Speight v. Trust Co.*, 209 N.C. 563, 183 S.E. 734 (1936). The record does not show that petitioners, other than Frances Badham Howard, had knowledge that the 1945 judgment had been entered or that Boyce was in possession of their property until 1959. It is true, as respondents point out, that Penelope Overton consulted a lawyer about the case as early as 1951 and that L. Joseph Overton had been familiar with the property since 1945. However, they are not movants in this case.

For the reasons stated, the order of the superior court is affirmed as to Frances Badham Howard and reversed as to the other named movants.

Judges CLARK and ARNOLD concur.

FRANCES BADHAM HOWARD, FANNIE BADHAM, BESSIE B. SMALL, SIDNEY BADHAM, MILES BADHAM, PENELOPE OVERTON, ALEXANDER BADHAM, CHARITY BADHAM, CHARLES BADHAM, PAULINE B. TURNER, FRANK BADHAM, SADIE B. HAWKINS, JAMES BADHAM, AND ALL OTHER HEIRS AT LAW OF HANNIBAL BADHAM, DECEASED v. LONNIE BOYCE (NOW DECEASED), ORIGINAL DEFENDANT, AND CELIA U. BOYCE, INDIVIDUALLY AND CELIA U. BOYCE AND NAOMI MORRIS, EXECUTRICES OF THE ESTATE OF A. C. BOYCE, SOMETIMES KNOWN AS LONNIE BOYCE

No. 751SC262

(Filed 6 August 1975)

Appeal and Error § 16— appeal pending — authority of court — entry of summary judgment

When plaintiffs appealed from an order entered 14 November 1974 denying their motions to set aside a prior judgment, the trial court became *functus officio* and had no authority to enter summary judgment against plaintiffs on 4 December 1974.

APPEAL by plaintiffs from *Cowper, Judge.* Judgment entered 19 December 1974 in Superior Court, CHOWAN County. Heard in the Court of Appeals 28 May 1975.

The facts of this case are set out more fully in the companion cases, *Howard v. Boyce,* No. 751SC121, and *Overton v. Boyce,* No. 751SC261, filed this day. In *Howard v. Boyce, supra,* plaintiffs in the instant case appealed from an order issued 14 November 1974 denying their motions to set aside a prior judgment. On 4 December 1974 defendants filed a motion for summary judgment, and on 19 December the court entered judgment allowing the motion. Plaintiffs appealed.

Richard E. Powell for plaintiff appellants.

Pritchett, Cooke & Burch, by J. A. Pritchett, W. L. Cooke, and W. W. Pritchett, Jr., for defendant appellees.

ARNOLD, Judge.

When an appeal is pending the trial court is *functus officio.* It has no authority to issue further orders in the case. *Wiggins v. Bunch,* 280 N.C. 106, 184 S.E. 2d 879 (1971). Consequently, plaintiffs' appeal from the November 14 order precluded the subsequent entry of summary judgment against them. The December 19 judgment therefore must be vacated and the cause remanded for proceedings in accordance with our opinions in cases No. 751SC121 and 751SC261.

Vacated and remanded.

Judges MARTIN and CLARK concur.

MICHIGAN NATIONAL BANK v. FLOWERS MOBILE HOMES SALES, INC., AND ARMOR MOBILE HOMES MANUFACTURING CORPORATION OF GEORGIA

No. 758SC171

(Filed 6 August 1975)

1. Uniform Commercial Code § 74— sale of secured property — identifiable proceeds — continuance of security interest

G.S. 25-9-306(2) provides that when property subject to a security interest is sold by the debtor, the security interest continues in any identifiable proceeds including collections received by the debtor.

2. **Uniform Commercial Code § 74— security interest in mobile home — sale — proceeds deposited in bank — interest in checking account**

Where plaintiff obtained a valid security interest in $6400 which defendant received from the sale of a mobile home at the time defendant first collected that amount from its customer, the proceeds of the sale remained "identifiable proceeds" so as to be subject to plaintiff's security interest after they were deposited in defendant's regular checking account.

APPEAL by plaintiff from *Cowper, Judge.* Judgment entered 2 November 1974 in Superior Court, LENOIR County. Heard in the Court of Appeals 6 May 1975.

This is a civil action heard by the court without a jury upon stipulated facts and documentary evidence.

On 1 July 1967 plaintiff, Michigan National Bank, and the defendant, Flowers Mobile Homes Sales, Inc., entered into a "Security Agreement (Dealer's Floor Plan)" by which Flowers granted to the Bank a continuing security interest in all of Flowers's inventory, which consisted primarily of mobile homes, and in the proceeds thereof. By this agreement Flowers was authorized to make sales at retail from its inventory in the ordinary course of its business, and Flowers agreed that upon making any such sales it would, within 24 hours thereafter, pay to the Bank for application on any obligation which it owed to the Bank, whether or not then due, an amount at least equal to the value of the inventory sold as contained in schedules agreed to in writing by the Bank. A U.C.C. Financing Statement dated 3 July 1967 was entered into between plaintiff Bank and defendant Flowers, which statement was filed on 3 July 1967 both with the Register of Deeds of Lenoir County, where Flowers had its principal office, and with the Secretary of State of North Carolina. This financing statement covered:

> "House trailers, trailer coaches, trailer equipment and furnishings, or the like, including all products and proceeds thereof, whether in the form of tradeins, cash, chattel paper or the like."

The box on the statement indicating "Proceeds of collateral are also covered" was checked.

On 10 August 1970 Flowers executed a "U.C.C. Floor Plan Promissory Note" payable to the order of the Bank in the amount of $5,727.13 for a 1970 Madison Mobile Home, Serial No. 1629. This note was payable 90 days after date or, at payee's or hold-

er's option, on demand. Plaintiff Bank was the payee and holder of this note. On 18 September 1970 Flowers sold the mobile home referred to in this note to a retail customer for $6,400.00, which it deposited on that date into its regular checking account No. 7-027-845 in Wachovia Bank and Trust Company. On 16 October 1970 Flowers issued its check to plaintiff drawn on this bank account in the amount of $5,607.00 as discounted payment for the above-mentioned "U.C.C. Floor Plan Promissory Note" dated 10 August 1970. This check was presented for payment by plaintiff to Wachovia on 29 October 1970, but was not honored for payment because the account had then been attached under execution issued on a judgment obtained by the defendant, Armor Mobile Homes Manufacturing Corporation of Georgia.

On 23 September 1970 Armor obtained a judgment by default against Flowers in the amount of $20,416.60, and on 21 October 1970 execution was issued on this judgment pursuant to which the Sheriff of Lenoir County on 27 October 1970 levied upon Flowers's bank account No. 7-027-845 in Wachovia. As a result of this execution and levy, the balance on deposit in said account as of 31 October 1970, in the amount of $7,429.90, was paid to the Sheriff who, in turn, delivered said funds to Armor.

Account No. 7-027-845 was used by Flowers as a regular general checking account to pay various obligations, including payments on Floor Plan Promissory Notes executed to plaintiff, payments on notes to Wachovia, salaries to officers of Flowers, salaries and commissions to sales personnel, taxes, insurance, payments to finance companies pursuant to financing arrangements with customers who had bought mobile homes, payments to manufacturers of mobile homes such as Armor, and other miscellaneous expenses. Flowers made deposits to said account from proceeds of sales made by it, payments by customers on dealer financing arrangements made with customers, and from other sources.

Plaintiff commenced this action on 7 September 1971 against both Flowers and Armor seeking recovery in the amount of $5,607.00. When the case was called for trial, Flowers would not waive a jury trial and plaintiff filed a voluntary dismissal without prejudice as to Flowers pursuant to Rule 41(a). Plaintiff Bank and defendant Armor waived trial by jury and filed a stipulation of facts. After considering the stipulated facts and considering documentary evidence introduced by both parties,

the court entered judgment making findings of fact and concluding as a matter of law that the proceeds of the sale of the mobile home "were so co-mingled [sic] as to lose their identity as proceeds from the sale of secured personal property." Accordingly, the court adjudged that plaintiff recover nothing against Armor and that its action against Armor be dismissed with prejudice. From this judgment plaintiff appealed.

Perry, Perry & Perry by Warren S. Perry for plaintiff appellant.

White, Allen, Hooten & Hines, P.A. by Thomas White III for defendant, Armor Mobile Homes Manufacturing Corporation, appellee.

PARKER, Judge.

[1, 2] G.S. 25-9-306(2) provides that when property subject to a security interest is sold by the debtor, the security interest "continues in any identifiable proceeds including collections received by the debtor." Under this statutory provision there can be no question but that plaintiff obtained a valid security interest in the $6,400.00 which Flowers received from the sale of the Madison Mobile Home at the time Flowers first collected that amount from its customer. The question presented by this appeal is whether the proceeds of that sale remained "identifiable proceeds" so as to be subject to plaintiff's security interest after they were deposited in Flowers's regular checking account. We hold that they did.

Under G.S. 25-9-306(3), if the security interest in the original collateral was perfected and the filed financing statement covering the original collateral also covers proceeds, as is true in the present case, the security interest in the proceeds is a "continuously perfected security interest." And under G.S. 25-9-205 "[a] security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral . . . or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral." Although neither of these statutory provisions speaks directly to the problem with which we are here concerned, they do indicate strongly the spirit in which the Uniform Commercial Code is to be applied.

While we have found no statutory definition of "identifiable proceeds" as that term is used in G.S. 25-9-306(2), we also find no express limitation on the right of a secured party to trace proceeds subject to his security interest into a bank account of the debtor. This lack of limitation is not without significance. The U.C.C. provides that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions." G.S. 25-1-103. One such principle, which by analogy has application to the present case, is the doctrine of trust pursuit under which a cestui que trust is enabled to follow the trust funds through changes in their state and form in the hands of the trustee. *Trust Co. v. Barrett,* 238 N.C. 579, 78 S.E. 2d 730 (1953); *see* 7 Strong, N. C. Index 2d, Trusts, § 21. From application of this doctrine in cases throughout this country there has evolved the general rule that the act of a trustee in mingling trust funds in a mixed bank account will not destroy their identity so as to prevent their reclamation. *See* Annot., 102 A.L.R. 372 (1936) (Supplementing annotations in 26 A.L.R. 3 (1923); 35 A.L.R. 747 (1925); and 55 A.L.R. 1275 (1928); D. Dobbs, Handbook on the Law of Remedies, § 5.16 at 427-28 (1973). Although the relationship between a secured party and his debtor is certainly not identical with that between a cestui que trust and his trustee, in each case the problem of tracing and identifying funds is sufficiently similar so that at least some of the tracing rules developed in the context of one relationship have logical application in the other. Under the basic tracing rule developed in the trust situation, it is presumed that any withdrawals made by the trustee for his own purposes form the mixed account subsequent to the deposit of the trust funds are made from the personal moneys of the trustee, and the funds being traced are presumed to remain idle in the bank account.

The record of Flowers's account No. 7-027-845 in Wachovia for the period from 18 September 1970, when the $6,400.00 proceeds from the sale of the Madison Mobile Home were deposited, until 31 October 1970, when the balance in the account was paid over to the Sheriff, which was introduced as an exhibit in this case, discloses a number of deposits and a large number of withdrawals. However, at all times during that period there remained in the account a balance of more than the $5,607.00 on which plaintiff now claims a security interest. Indeed, the balance in the account during that period at all times exceeded the $6,400.00 proceeds from the sale of the original collateral.

Applying the standard tracing rule, the proceeds from the sale of the original collateral would thus be "identifiable," because it is presumed that they remained untouched in the bank from the day of their deposit to the day the checking account was seized. The proceeds in the account thus remained subject to plaintiff's security interest.

It may be conceded that had plaintiff required its debtor, Flowers, to maintain a separate bank account into which there should be deposited only the proceeds of sale of items of original collateral and from which no withdrawals could be made until plaintiff's security interest should be satisfied, and had plaintiff further adequately policed Flowers's handling of such an account, the problem of tracing "identifiable proceeds" would have been greatly simplified. Such cumbersome formalities, however, seem hardly compatible with the stated underlying purpose of the Uniform Commercial Code "to simplify . . . the law governing commercial transactions" and "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." G.S. 25-1-102(2).

Our decision here is supported by the opinions in *Brown & Williamson T. Corp. v. First Nat. Bk. of Blue Island,* 504 F. 2d 998 (7th Cir. 1974); *Universal C.I.T. Credit Corp. v. Farmers Bank of P.,* 358 F. Supp. 317 (E.D. Mo. 1973); *Associates Discount Corp. v. Fidelity Union Trust Co.,* 111 N.J. Super. 353, 268 A. 2d 330 (1970); *Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc.,* 25 Pa. D. & C. 2d 395, 1 U.C.C. Rep. Serv. 531 (Pa. Ct. C.P. 1958).

G.S. 25-9-306(4), referred to in the briefs of the parties, is not here applicable. That section applies "[i]n the event of insolvency proceedings instituted by or against a debtor," and so far as the record before us discloses no such insolvency proceedings have been instituted by or against the debtor in this case.

The judgment appealed from is reversed and this case is remanded for entry of judgment consistent herewith.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. MARVIN T. DAVIS, RONALD L. DOILEY, EDDIE C. PHILLIPS

No. 757SC239

(Filed 6 August 1975)

1. **Criminal Law § 91— recess to obtain witness — denial proper**

The trial court did not err in denying defendant's motion for a one-week recess in the trial for the purpose of obtaining the presence of a witness who lived out of the State and who would allegedly testify to establish an alibi.

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

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that one defendant drove a car, the other two defendants were passengers in the car, the passengers pointed a gun at a pedestrian while they were seated in the car, and they robbed the pedestrian of his wallet.

3. **Searches and Seizures § 2— consent to search vehicle**

Evidence was sufficient to support the trial court's finding that defendant voluntarily signed a consent to search his vehicle, and his consent was not coerced because officers told him that if he did not consent they could get a search warrant.

4. **Criminal Law § 97— introduction of additional evidence by State — no error**

Where the State rested its case just prior to the evening recess, the trial court did not err upon the reconvening of court on the following morning in permitting the State briefly to recall two of its witnesses.

ON writ of *certiorari* to review trial before *Peel, Judge.* Judgments entered 30 August 1974 in Superior Court, WILSON County. Heard in the Court of Appeals 27 May 1975.

By separate indictments, proper in form, each defendant was charged with the armed robbery of Edward Whitehead on 13 October 1973. The defendants were arraigned, each pled not guilty, and without objection the three cases were consolidated for trial.

The State's evidence shows: On the early morning of 13 October 1973, between 5:00 and 5:30 a.m., Whitehead took his dog for a walk on a street near his home in Wilson. It was dark at the time, but the area where Whitehead walked was well lighted by an overhead street light and by lights from a car lot. A two-toned convertible automobile, having on its hood a lighted ornament which appeared like a bird, approached and

stopped. An occupant of the car asked Whitehead where Green Street was. As Whitehead was giving directions, he was confronted with two pistols pointing at him through the opened car windows, one pistol being held by the person on the passenger side in the front seat and the other by the person in the rear. Demand was made that Whitehead surrender his wallet, which contained twelve dollars, with which demand he promptly complied.

At the trial Whitehead identified the defendant, Phillips, as the person who pointed the pistol at him from the passenger side of the front seat, and identified the defendant, Doiley, as the person who pointed the pistol at him from the rear seat of the automobile. Whitehead could not see the driver of the car. After Whitehead surrendered his wallet, he was told to turn around and not look back, and the car drove away. As it did so, Whitehead looked at the license number. Repeating the number to himself, he hurried home and wrote the number "SYS 357," on an envelope. He then telephoned and reported the incident to the police, who received his phone call at 5:35 a.m.

Some 35 to 45 minutes later, officers in a police patrol car observed a black Oldsmobile convertible which had a white top, a lighted bird-like ornament on its hood, and which bore license "FYS 357," turn west on Green Street and stop in the parking lot by Carter's Grill. Defendant Davis was driving the car and the other two defendants, Doiley and Phillips, were the only other occupants. On a subsequent search of the car, two loaded pistols were found under the rear seat.

A Wilson police officer working the 11:00 p.m. to 7:00 a.m. shift on 13 October 1973 testified that earlier in the night at about 12:30 a.m., he had seen Davis, whom he knew, driving the car on East Nash Street.

The defendants did not introduce evidence. The jury found all three defendants guilty, and from judgments imposing prison sentences, defendants gave timely notice of appeal. This Court subsequently granted their petition for writ of certiorari.

Attorney General Edmisten by Assistant Attorney General Conrad O. Pearson for the State.

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

PARKER, Judge.

[1] Defendants first assign error to the denial of their motion for a one-week recess in the trial. This motion was made after the State commenced introduction of evidence and after the trial had been in progress for some time. The reason stated for the motion was that the defendants had discovered on the preceding evening that a witness who would testify to establish an alibi was employed by the Federal government in Washington, D. C., beyond the reach of a subpoena, and that defendants desired the recess for the purpose of having this witness in court to testify on their behalf.

It is well settled that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge and that his ruling thereon is not subject to review absent a showing of abuse of discretion. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). The same rule applies to motions for a recess in a trial which is already in progress. In the present case there was no showing of any abuse of the trial judge's discretion in denying the motion for a recess in the trial. The defendants had been arrested on 13 October 1973. The indictments against them were returned as true bills in November 1973. Their trial took place in August 1974. For some time prior to trial their trial counsel had been appointed to represent them. The motion for a recess was not supported by an affidavit. The record fails to disclose what efforts, if any, were made prior to trial to obtain the attendance of the absent witness and it does not show why defendants discovered only after the trial commenced that he was not then available. The name of the absent witness was not shown nor was there any showing that his attendance at trial could be obtained if the recess was granted. Defendants' first assignment of error is overruled.

[2] Defendants' motions for nonsuit were properly denied. The victim of the robbery testified at the trial and positively identified Doiley and Phillips as the two persons who pointed pistols at him when the robbery occurred. His testimony also disclosed that some third person, whom he could not identify, was driving the automobile in which Doiley and Phillips were then seated. There was evidence to show that earlier on the night of the robbery the defendant, Davis, had been driving the same automobile and that shortly after the robbery Davis, with Doiley and Phillips as passengers, was still driving the car. Viewing all of the evidence in the light most favorable to the State, it

is a reasonable inference which the jury could legitimately draw that Davis was present, driving the car and aiding and abetting Doiley and Phillips, when the robbery occurred.

[3] Defendants assign error to the court's admitting evidence concerning the two pistols found under the back seat of the automobile, contending that these were found as result of an illegal search. Prior to admitting this evidence the trial judge conducted a voir dire examination concerning the circumstances under which the search was made. Evidence presented at this examination discloses that after the defendants were apprehended by the police, they and the car in which they had been riding were taken to the police station. There it was determined that Phillips was the owner of the car. The officers then asked Phillips if he would consent to a search of his car, at the same time informing him that he had a right to deny his consent and that if he did so a search warrant would be obtained. Phillips then consented to the search, and the search was then conducted in his presence. Phillips testified at the voir dire hearing and admitted signing a written consent to the search. The evidence at the voir dire hearing fully supported the court's findings that Phillips's consent to the search "was freely, voluntarily and intelligently given without any coercion, duress or fraud practiced upon the defendant in any respect." There is no merit in Phillips's contention that his consent was coerced because the officers told him that if he did not consent they could get a search warrant. The officers had ample grounds to obtain a valid search warrant, and there was nothing improper in their informing Phillips that they were prepared to do so. We agree with the trial court's conclusion that the search was lawful.

[4] The State rested its case just prior to the evening recess. Upon the reconvening of court on the following morning, the State was permitted over defendants' objections to reopen its case by briefly recalling two of its witnesses. This was a matter within the discretion of the trial judge. *State v. Shutt,* 279 N.C. 689, 185 S.E. 2d 206 (1971). No abuse of discretion has been shown.

We have examined defendants' remaining assignments of error, all of which relate either to the court's rulings upon the

admission of evidence or to its instructions to the jury, and find no prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

HOWARD M. ALLEN AND W. G. ALLEN, JR. v. MARTIN MARIETTA CORPORATION

No. 753SC249

(Filed 6 August 1975)

Railroads § 3— lease of right-of-way to private corporation

The lease of a railroad right-of-way to a private corporation did not constitute an illegitimate private use of a right-of-way originally acquired for a public purpose where the right-of-way was not abandoned by the railroad, but the railroad retained the right to use the right-of-way to serve other industry, the railroad retained the right to terminate the lease if it obtained authority from the Interstate Commerce Commission to operate as a common carrier over the right-of-way, and the railroad entered the lease with the view of securing freight from the private corporation's operations.

APPEAL by plaintiffs from *Webb, Judge.* Judgment entered 1 November 1974 in Superior Court, PITT County. Heard in the Court of Appeals 28 May 1975.

Plaintiffs instituted this action to recover damages for trespass. They alleged that defendant wrongfully entered and trespassed upon their land by operating a locomotive hauling gondola cars along tracks across plaintiffs' land.

The following are undisputed facts presented by the pleadings and stipulations: The railroad bed and tracks were built shortly after 1900 by the East Carolina Railroad Company as a mainline track between Tarboro and Farmville, running through Fountain. In 1965 East Carolina Railroad Company conveyed the right-of-way and tracks to Atlantic Coastline Railroad Company. On 1 January 1967 Atlantic Coastline Railroad Company conveyed the right-of-way from Fountain to Farmville to the Norfolk Southern Railway Company. Norfolk Southern Railway Company entered into a written agreement dated 1 January 1967 with defendant, said written agreement being attached to

defendant's answer filed in this case. The rail distance between Fountain and Farmville is approximately six miles. Defendant purchased from Atlantic Coastline Railroad Company the tracks, crossties, and bridges located on the right-of-way conveyed by Atlantic Coastline to Norfolk Southern. Defendant is a private corporation and operates a rock quarry near the town of Fountain. Defendant has transported crushed stone in railroad gondola cars by means of a locomotive from its quarry site near Fountain along the tracks over plaintiffs' property to a connecting point with Norfolk Southern Railroad tracks at Farmville.

By stipulation the parties agree that the central issue in this case is whether defendant may utilize the land of plaintiffs with its own tracks, crossties, trestles, and locomotive engine under the written agreement attached to defendant's answer, and thereby insulate itself from liability to plaintiffs for the entry upon plaintiffs' land.

Plaintiffs and defendant each made a motion for judgment on the pleadings. These were treated by the trial court as motions for summary judgment. The trial judge denied plaintiffs' motion and allowed defendant's motion. The pertinent conclusions of the trial judge are as follows:

> "2. That the lease between Norfolk Southern Railway Company and Martin Marietta Corporation is a valid lease.
>
> "3. That the right-of-way of Norfolk Southern Railway Company from Fountain to Farmville is leased as an industrial spur track and, as a matter of law, such is a legitimate use of railroad property for railroad purposes.
>
> "AND IT APPEARING that the plaintiffs' motion should be, and the same is hereby denied, and it further appearing that the defendant's motion should be granted, and the same is hereby granted. . . . "

Plaintiffs appealed.

H. Horton Rountree, and James, Hite, Cavendish & Blount, by Kenneth G. Hite, for plaintiffs.

Joyner & Howison, and Speight, Watson & Brewer, by W. T. Joyner, Jr., and Odes L. Stroupe, Jr., for defendant.

BROCK, Chief Judge.

Those portions of the written agreement between Norfolk Southern Railway Company as lessor and defendant as lessee, dated 1 January 1967, which seem pertinent to this controversy are as follows:

"WITNESSETH: THAT WHEREAS Atlantic Coast Line Railroad has conveyed to Norfolk Southern Railway Company a portion of the right-of-way formerly operated as a part of the East Carolina Railway which said right-of-way conveyed to Norfolk Southern Railway Company runs from the tracks of Norfolk Southern Railway Company at Farmville, N. C., to a point near Fountain, N. C., and on which right-of-way there is located a railroad track; and

"WHEREAS the Lessee owns and is presently operating a quarry near Fountain, N. C., and plans to use the premises herein leased and the tracks located thereon as an industrial track between its quarry near Fountain and the Norfolk Southern tracks at Farmville; and

"WHEREAS the Lessee has purchased the rails and crossties located on said leased premises and plans to purchase or lease an engine and move cars of stone from its quarry near Fountain for delivery to the Norfolk Southern at Farmville; and

"WHEREAS Lessor desires to obtain the rail traffic which will be generated by the operation of the quarry near Fountain, North Carolina.

"NOW, THEREFORE, in consideration of the premises and in further consideration of the rental hereinafter provided for and the other covenants and conditions hereinafter set forth, the Lessor does hereby demise and lease unto Lessee all of its rights in the property and right-of-way located in Pitt County, North Carolina, and more particularly described in deed dated ___ day of _____, 1966, from the Atlantic Coast Line Railroad to the Lessor and recorded in Book _____, Page _____, in the Office of the Register of Deeds of Pitt County.

. . . .

"4. In connection with outbound shipments delivered by Lessee to Lessor at Lessor's tracks at Farmville, N. C., and in connection with inbound shipments delivered by

Lessor to Lessee on the tracks on the demised premises, it is understood and agreed that Farmville, N. C., will be the origin point or destination point for such shipments from the railroad standpoint.

"5. Upon the giving of ninety (90) days' written notice to the Lessee, the Lessor may terminate this Lease in the event Lessor should ever seek to obtain and obtain authority from the Interstate Commerce Commission, (and/or from such other public body from which such authority must be obtained), to operate as a common carrier railroad over the property covered by this Lease, in which event the Lessor shall have the right and option to purchase all of the tracks, crossties, bridges, or other improvements on the demised premises at a price to be agreed upon between the parties, which option may be exercised by the Lessor by giving to the Lessee written notice within thirty (30) days after obtaining such authority to operate as a common carrier.

. . . .

"Lessee agrees that it will never seek to become a common carrier to operate over the property covered by this lease nor be a party to any plan to establish a common carrier operation over the property covered by this lease.

. . . .

"7. The maintenance of the right-of-way, and of the track, crossties, bridges and other improvements located thereon shall be the sole responsibility of the Lessee.

"8. The Lessor shall have the right to use the tracks located on the leased premises as an industrial spur track to serve any other industry which is or may be located along said line provided:

"a. There is constructed at no expense to the Lessee a spur track to serve such industry.

"b. The Lessor will operate over the demised premises at all times so that the track will be clear except when an engine of the Lessor is actually moving over said track.

"c. The Lessor will operate its engine and cars on said track only at such times as will not interfere with the operations of the Lessee and before operating such engines and

cars on said track the Lessor will notify the Lessee and obtain its permission to operate at the particular time.

. . . .

"11. The Lessee shall pay all ad valorem taxes assessed against or attributable to the demised premises or any improvements located thereon.

"12. The Lessee shall not permit or authorize the use of the demised premises by or for the benefit of any other person, firm or corporation not a party hereto and Lessee shall not sublease or assign this Lease without the prior written consent of the Lessor."

Plaintiffs argue essentially that Norfolk Southern had a right to use the right-of-way across plaintiffs' land for purposes consistent with its duty as a common carrier. However, when Norfolk Southern entered into an agreement with defendant, a private corporation, whereby defendant could privately use the right-of-way which had been condemned for public use, there was a perversion from the public use it was intended to serve to a private use. Condemnation of land was not intended by the legislature to be for other than public use, and therefore the agreement is unlawful and void. Plaintiffs contend that the principles in *Bradshaw v. Lumber Co.*, 179 N.C. 501, 103 S.E. 69, are controlling in this case.

Defendant argues essentially that the agreement does not constitute a change from a public use to a private use because (1) the use by defendant generates freight for Norfolk Southern, a common carrier, at Farmville; (2) Norfolk Southern retains the right to use the right-of-way to serve other industry; and (3) Norfolk Southern retains the right to terminate the agreement if Norfolk Southern obtains authority from the Interstate Commerce Commission to operate as a common carrier over the right-of-way covered by the agreement. Defendant contends that the principles in *Railroad v. McGuire,* 171 N.C. 277, 88 S.E. 337, are controlling in this case.

In *Bradshaw* the Hilton Railroad and Logging Company (Logging), pursuant to its charter, condemned land belonging to the plaintiff Bradshaw, ostensibly for the purpose of conducting and carrying on the business of a public carrier. It proposed to construct and operate a railroad for transporting passengers.

After condemnation of the Bradshaw land, Logging Company was asked to operate trains for public service over the

road. It refused, stating that it was "not operating at all for the Hilton Railroad and Logging Company." The road was owned not by Logging Company, but by the Hilton Lumber Company. (The contract, if any, was verbal.) Logging Company owned only the right-of-way. Trains were operated over the road solely for the private use of the Hilton Lumber Company. Bradshaw got a judgment granting "a perpetual injunction against the unlawful acts" of the Lumber Company, and the Supreme Court affirmed.

Bradshaw was decided on the ground that "[t]he charter of the logging road [had] been perverted from the public use it was intended to subserve to a private use not contemplated by the Legislature, and not within its power to authorize." 179 N.C. at 504. In our view the case stands solely for the proposition that an injunction will issue against a taking of property for private use. The key fact in *Bradshaw* is that a fraud upon the public was committed when the logging road was chartered and built for the private use and benefit of the Hilton Lumber Company, and not for purposes incident to and connected with the Hilton Logging Company's business operations. We are of the opinion that *Bradshaw* is not dispositive of this appeal.

We do find *McGuire* applicable to the facts of this case. There the Court focused on the question of abandonment of a right-of-way originally purchased by the plaintiff railroad. (We are not able to tell from the record whether the right-of-way in controversy originally was condemned or purchased.) The deed to the railroad provided that the property should revert to the grantor, one Fuquay, in case of permanent abandonment. The right-of-way line was used as a main route for several years until a new main route was constructed north of it. The older route was then used as a spur track. The defendant, who had purchased the property of Fuquay and claimed the right-of-way under the abandonment clause, built a fence across the tracks. The Supreme Court awarded a new trial on plaintiff railroad's appeal from an adverse judgment.

The critical inquiry to be made in this case, as in *McGuire*, concerns the question of abandonment. The facts do not indicate that the right-of-way originally was acquired solely for the private use of a business enterprise, as was the case in *Bradshaw*. Because there was a legitimate public purpose when the right-of-way first was acquired in 1900, and because the right-of-way was used by railroad companies for 67 years, and still

is being used, the situation described in *Bradshaw* does not present itself here. There has been no fraud on the public. Accordingly, abandonment thus becomes a condition precedent to any finding that the right-of-way is being used for an illegitimate, private purpose by defendant Martin Marietta.

To constitute an abandonment, there must be both the intent to abandon and a manifestation of that intent. In *McGuire* the Court recognized that abandonment is not found solely because a railroad leases "a portion of its right of way to a manufacturing company with a view of facilitating the securing of freight therefrom. . . . " 171 N.C. at 282. Indeed, it is well established that leases of a right-of-way to private businesses do not constitute an abandonment where the leases reserve a right to terminate if the land is needed for railroad purposes. *See generally* Annot., 95 A.L.R. 2d 468, 492 (1964), and the cases cited therein. The railroad, as lessor, still retains control over the right-of-way, which, although leased, can be used for a public purpose. The use of the land by the lessee is not wholly incompatible with the use of the land for railroad purposes.

The lease agreement between Norfolk Southern Railway Company and Martin Marietta is sound evidence that (1) the right-of-way has not been abandoned, and (2) there is no resultant private use as in *Bradshaw*. The lease states that Norfolk Southern entered into the agreement because it desired to obtain rail traffic generated by Martin Marietta's operations. It provides that, for railroad purposes, Norfolk Southern may terminate the agreement on 90 days' notice, in which event it has the right to purchase the tracks, crossties, and bridges on the route. Norfolk Southern has also reserved to itself in the lease agreement the right to use the tracks as an industrial spur track to serve other industry. There is clearly no evidence of an intention to abandon the right-of-way, and, consequently, no illegitimate private use.

In *McGuire* the Court stated that it was sufficient if the railroad company used its right-of-way "for purposes incident to and connected with its business. . . . " 171 N.C. at 282. This is the case here. The use of the right-of-way is a legitimate use of railroad property for railroad purposes.

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE LEE NEELY

No. 7527SC307

(Filed 6 August 1975)

1. **Criminal Law § 154— incomplete trial transcript — setting out errors in case on appeal**

In the absence of a complete stenographic record of the trial due to the death of the court reporter before she transcribed the proceedings, the burden was upon defendant to set forth in the case on appeal the errors he contended were committed at the trial, and defendant failed to meet that burden where he contended that the trial court did not conduct a proper *voir dire* or apply constitutional standards, that the police may have used impermissibly suggestive identification procedures, and that errors in the admission and exclusion of evidence may have been committed.

2. **Criminal Law § 86— cross-examination of defendant — evidence of misconduct proper**

The defendant was not prejudiced where the district attorney asked him questions designed to show specific acts of misconduct that defendant had committed, not his prior arrests and indictments.

3. **Criminal Law § 80— telephone company records — denial of subpoena proper**

The trial court did not err in denying defendant's request for subpoenas to the telephone company for records of all long distance calls over a three month period to two residences, since the request was unreasonable and of dubious relevance.

4. **Criminal Law § 139— failure to sentence for minimum term — sentence improper**

Sentence imposed by the trial court which confined the defendant "in the State Prison in Raleigh for a period not to exceed twenty-five years" was improper since it did not specify a minimum term of imprisonment.

ON *certiorari* to review a trial before *McLean, Judge.* Judgment entered 21 November 1972 in Superior Court, GASTON County. Heard in the Court of Appeals 17 June 1975.

Defendant was convicted of armed robbery, and a sentence "for a period not to exceed twenty-five years" was imposed.

On 15 February 1972 Barbara Dow and Dorothy Seward were working at the Dow Grocery Store in Gastonia. The defendant entered the store, threatened the two women with a gun, and demanded money. Mrs. Dow gave him $62.00, and defendant left, fleeing on foot. Mrs. Seward subsequently spent a considerable amount of time trying to locate the person who

had robbed the store. Some four months after the robbery, she recognized the defendant in a courtroom. She left the courtroom and advised a police officer that the man who had robbed the store was in the courtroom. Defendant was taken into custody and charged with armed robbery. Defendant was also identified by Mrs. Dow at his preliminary hearing.

The defendant offered evidence that he was living in Falls Church, Virginia, with his cousin at the time of the robbery.

Attorney General Edmisten, by Associate Attorney Sandra M. King, for the State.

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

BROCK, Chief Judge.

[1] The main assignment of error presented in this appeal is directed to the lack of a complete stenographic transcript of the trial proceedings. The court reporter at the trial died prior to the transcription of the trial proceedings. The other official court reporter for Gaston County supervised the preparation of the transcript of the trial. However, a complete transcript could not be prepared because of difficulties in interpreting the audiograph recordings and because of the method by which notes of the trial were taken. The result is that the stenographic transcript prepared does not contain the direct examination of Mrs. Seward, the State's witness Andrew Strain, and defendant. The entire testimony of the State's witness P. E. Purser also is missing from the stenographic transcript prepared.

Defendant asserts that he is entitled to a new trial because the absence of a complete transcript abridges his right to appeal. Specifically, defendant argues that (1) there may have been errors in the admission and exclusion of certain testimony, and (2) improperly suggestive identification procedures may have been used by the police.

There is a presumption of regularity in a trial. "In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal." *State v. Sanders,* 280 N.C. 67, 72, 185 S.E. 2d 137 (1971).

In an earlier appeal of this case, we stated that when there is an incomplete transcript, "[i]n lieu of the usual narrative

statement of evidence, defendant should set out the facts upon which his appeal is based, any defects appearing on the face of the record, *and the errors he contends were committed at the trial." State v. Neely,* 21 N.C. App. 439, 440-441, 204 S.E. 2d 531 (1971) (Emphasis added). Defendant contends that there was error in the "failure of the trial court to conduct a proper *voir dire* and to apply constitutional standards. . . . " The record on appeal does not show the extent of the *voir dire* or the findings of the trial judge, and defendant does not point out in what respect the *voir dire* was improper or in what way there was a failure to apply constitutional standards. We do not find this contention specific enough to justify a determination that defendant is prejudiced by the incomplete transcript.

Defendant makes no showing that errors were committed. He argues only that the police *may have* used impermissibly suggestive identification procedures and that errors in the admission and exclusion of evidence *may have* been committed. This is not enough to entitle him to a new trial. The record does not show that any incompetent evidence was given by the witnesses Seward, Strain, or Purser, or by defendant, and it does not establish that either Mrs. Seward's or Mrs. Dow's identification of defendant was improperly obtained. Absent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial. *See also State v. Teat,* 24 N.C. App. 621, 211 S.E. 2d 816 (1975). This assignment of error is overruled.

[2] In his next assignment of error defendant contends that questions asked him by the district attorney were prejudicial because they tended to reveal that he had been indicted and arrested for obtaining money by false pretenses. In *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), the Court held that it was improper to impeach a witness by asking him about prior arrests and indictments.

The three exceptions which constitute this assignment of error are as follows:

> Q And then, also, an obtaining some money by false pretenses from Roncum Moore. He was the one that got on you and got you back in March, wasn't he?
>
> Objection — Overruled.
>
> EXCEPTION #10.

"Q Your bondsman didn't get in touch with you?

A Through my father.

Q Through your father, but he had been looking for you, hadn't he? For failing to appear in District Court February 19, 1972, on another case?

A No, he ain't looking for me.

Q And that was the reason, in fact, you failed to appear on February 18th of 1972, wasn't it?

Overruled.

EXCEPTION #11."

* * *

"Q You went to work after you got back and the bondsman got after you?

A Right.

Objection — Overruled.

EXCEPTION #12.

"A I worked at Smyre Mills until I was picked up on a capias. I think it's about two months."

In our opinion the questions propounded by the district attorney did not prejudice defendant. They were designed to show specific acts of misconduct that the defendant had committed, not his prior arrests and indictments. " . . .*Williams* did not change the rule that for purposes of impeachment a witness may be asked whether he has *committed* specific criminal acts. . . . " *State v. Gainey,* 280 N.C. 366, 373, 185 S.E. 2d 874 (1971). The failure of defendant to appear in court for his trial or preliminary hearing is an act of misconduct about which he could be properly questioned. Additionally, even though the objections constituting exceptions #10 and #11 were overruled, no answer was elicited from the defendant. This is, practically speaking, the equivalent of having the objection sustained. Defendant could not have been prejudiced. As to exception #12, suffice to say we are of the opinion that it does not constitute prejudicial error. This assignment of error is overruled.

[3] In his third assignment of error the defendant objects to the denial of his request for subpoenas to the Southern Bell Telephone Company for the production of certain telephone rec-

ords. In his argument defendant asserts that the failure to grant the subpoenas was prejudicial in spite of the fact that, as defendant admits, the "records would not be ultimately dispositive, and that (the) calls might have been made by another." The record discloses that defendant's trial attorney requested six subpoenas "for all long distance telephone calls for the months of January, February and March, 1972, to the residence of Christie Gilmore, 537 Henderson Street, Mountain View Section of Gastonia, and Mrs. Hazel Reid, 2814 Booker Street, Randleman, North Carolina."

General Statute 1A-1, Rule 45(c)(1) provides that the judge may quash or modify the subpoena if it is unreasonable or oppressive. We are of the opinion that the request for records of calls placed over a three-month period to certain persons was unreasonable and of dubious relevance when it is considered that the records could show only, at most, that someone made calls, not that defendant made them. The request was not even limited to records of calls from Falls Church, Virginia, to the residences of Gilmore and Reid. Defendant contended he was in Falls Church, Virginia, and that he made calls from there. Records of calls from any other place to the residences of Gilmore and Reid clearly would have been irrelevant to defendant's defense, and an order to produce them would have been unreasonable. We note that neither Gilmore nor Reid was called as a witness by defendant to corroborate his contention that he made calls to them. This assignment of error is overruled.

We have carefully considered defendant's remaining argument and find that no prejudicial error was committed.

[4] We note, however, that the judgment imposed by the judge confines the defendant "in the State Prison in Raleigh for a period not to exceed twenty-five years." This is an improper sentence. In *State v. Black*, 283 N.C. 344, 353, 196 S.E. 2d 225 (1973), the Court stated:

> "[U]nder an indeterminate sentence law, a sentence cannot be for a definite term of imprisonment. It must be for not less than a specified minimum period and not more than a specified maximum period. There must be a difference between the periods, and a sentence fixing identical minimum and maximum terms of imprisonment is invalid." 283 N.C. at 353, *quoting* 21 Am. Jur. 2d *Criminal Law* § 540.

Although we find no error in the trial, the case must be remanded to the Superior Court, Gaston County, for the entry of a proper judgment.

Remanded for judgment.

Judges PARKER and ARNOLD concur.

H. A. SIMPSON AND WIFE, ROSA PARKER SIMPSON v. RAY T. LEE AND WIFE, ISABELLE PARKER LEE AND T. H. LEE AND WIFE, MILDRED TURNER LEE

No. 7520SC264

(Filed 6 August 1975)

1. **Reference § 7— belated hearings and report — waiver of objection**

Plaintiffs waived any right to object to the failure of the referee to conduct hearings and file his report within the time directed by the court by participating in hearings after the time for filing the report had passed.

2. **Trespass § 8— destruction of crops — damages**

Damages allowable for the unlawful destruction of crops are based on the reasonable value of the crops destroyed at the time and place of their destruction; this value is determined by estimating the probable yield had the crop not been destroyed, calculating the value of that yield in the market, and deducting the value and amount of labor and expense which would have been required to mature, care for and market the crop.

3. **Trespass § 8— destruction of crops — damages — insufficient findings**

Findings of the "total market value" of destroyed crops were insufficient to support an award of damages for destruction of the crops where it does not appear from the findings whether the crops were growing or mature and the findings do not disclose the basis for the determination of market value.

4. **Trespass § 8— wrongful removal of timber — damages — election**

When timber is unlawfully cut the claimant is entitled either to the difference in fair market value of the land before and after the cutting or the market value of the timber at the time and place of its severance plus incidental damages caused in removal, whichever he elects.

5. **Trespass § 8— wrongful removal of timber — damages — insufficient findings**

Finding of the "fair market value" of timber wrongfully cut was insufficient to support an award of damages for the timber where the finding does not disclose on what basis the damages were computed.

6. **Boundaries § 15— processioning proceeding — absence of surveyor's map**

Processioning proceeding is remanded for inclusion of a surveyor's map with the judgment in compliance with G.S. 38-3(c) where the court's judgment referred to a map described as "Defendants' Exhibit A" which contains distances and corners marked with letters but contains no courses or references to monuments.

APPEAL by plaintiffs from *Kivett, Judge.* Judgment entered on 12 November 1974 in Superior Court, ANSON County. Heard in the Court of Appeals 9 June 1975.

In his answer to the processioning petition the defendants allege that the dividing line between the lands of the parties has been established and counterclaimed to recover for destruction of crops and timber. The Clerk transferred the case to the Superior Court and a referee was subsequently appointed with instructions that he file his report by 11 September 1972. This deadline was later extended to 1 December 1972. The referee thereafter held six hearings in January, July, August and November of 1973 and in February of 1974 and filed his report on 2 October 1974. At each of the hearings, all parties were either present or represented by counsel. In his report the referee found that there was considerable evidence establishing that the boundary line contended for by defendants had been used as a boundary line between the parties in the past, but there was no evidence of any monuments along the boundary line proposed by the plaintiffs. The referee concluded that the true boundary line was that proposed by defendants which he described with reference to a map (Defendants' Exhibit A) as follows:

> "The line which begins at point (A) at the mouth of Camp Branch on the Rocky River, as shown on Defendants' Exhibit A, and extends from that point in a generally westerly direction to points (B), (C), (D), (E), (F), and (I)."

The referee further, after hearing evidence offered by defendants relating to crop damage and the cutting of timber harvested by plaintiffs on defendants' land, found facts as follows:

> "IV. Defendants were damaged by Plaintiffs' actions as follows:
>
> (1) Damage to timber on September 8, 1971 on Burns Road, near Carpenter Road, in the amount of $105.30, total market value.

(2) Damage to oat crop, November 20, 1969, in the amount of $770.00 total market value.

(3) Damage to oat crop on March 18, 1970 in the amount of $1,100.00 total market value.

(4) Damage to oat crop on April 22, 1970, in the amount of $1,100 total market value.

(5) Damage to soy bean crop in 1971 in the amount of $2,000 total market value."

The court accepted the referee's report and adopted his findings of fact, conclusions of law and proposed judgment. From said judgment, plaintiffs appealed.

Clark and Griffin by Richard S. Clark and Bobby H. Griffin for the plaintiffs.

No counsel contra.

CLARK, Judge.

[1] Plaintiffs contest the validity of the referee's report on the grounds that under the court orders the referee had no authority to hold hearings and issue a report after 1 December 1972. As the record reveals, however, plaintiffs participated in six separate hearings after the deadline for filing the referee's report had passed. In some of the hearings plaintiffs actually testified, adduced additional evidence and conducted cross-examination of defendants' witnesses. At no point does it appear that plaintiffs ever objected to continuing with the reference or excepted to the report other than by assignment of error on this appeal.

In *Keith v. Silvia,* 233 N.C. 328, 64 S.E. 2d 178 (1951), all parties to a reference continued to participate in the reference after the day fixed for the final report. After the referee's report was filed adverse to the plaintiff, plaintiff attempted to have the referee removed for failing and refusing to file his report on time. The Court said, "[a]ny cause for objection that the referee failed to file the report as in said order directed was *waived.*" 233 N.C. at 331. (Emphasis added.) Therefore, we find that the plaintiffs, by continuing to participate in the reference, have waived any right to object to the failure of the referee to conduct the hearings and file his report within the

time directed by the court. See also *Andrews v. Jordan,* 205 N.C. 618, 172 S.E. 319 (1934).

[2, 3] The plaintiffs assign as error the adoption by the trial court of the referee's findings of fact and conclusions of law with respect to the damages caused by plaintiffs' unlawful destruction of certain crops and timber on defendants' land contending that the findings of "total market value" are vague and uncertain and do not support the award of damages. In this State, damages allowable for the unlawful destruction of another's crops are based upon the reasonable value of the crops destroyed, presumably at the time and place of their destruction. See *Dixon v. Grand Lodge,* 174 N.C. 139, 93 S.E. 461 (1917). By far the most widely accepted method of arriving at this value is "first, to estimate the probable yield had the crop not been destroyed; second, calculate the value of that yield in the market; and third, deduct the value and amount of labor and expense which . . . would have been required to mature, care for, and market the crop." Annot., 175 A.L.R. 159, § 12 (1948). In this case it does not appear from the findings of fact whether the crops were growing or mature, and there are no other findings which serve as a basis or support for the award of damages by the court.

[4, 5] Similarly, the trial court adopted the referee's findings with regard to "total market value" of the timber unlawfully cut by plaintiffs. When timber is unlawfully cut the claimant is entitled to either the difference in fair market value of the land before and after the cutting or the market value of the timber at the time and place of its severance plus incidental damages caused in removal, whichever he elects. See *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786 (1955); *Williams v. Lumber Co.,* 154 N.C. 306, 70 S.E. 631 (1911); and *Jones v. Georgia-Pacific Corp.,* 15 N.C. App. 515, 190 S.E. 2d 422 (1972). The findings, therefore, like those relating to the crops do no disclose on what basis the damages were computed and hence are insufficient to support the award.

[6] Finally, it was found that the referee's conclusions with regard to the true location of the boundary line, which conclusions were adopted by the trial court in its judgment, depended completely on a reference to a map described as "Defendants' Exhibit A." However, Defendant's Exhibit A, which was filed with this court on appeal, reveals only distances and corners marked respectively (A), (B), (C), (D), (E), (F), and (I).

It contains no courses, nor does it contain a sufficient description by reference to monuments; as such, there is some uncertainty from the description in the judgment and its reference to the map as to the exact location of the boundary line. G.S. 38-3(c) provides that when final judgment is given in a processioning proceeding, a survey shall be ordered by the court so that the line or lines may be run and marked. The surveyor is to include a map of the line to be filed with the judgment.

These are the only assignments of error properly brought forward for review. Therefore, for the reasons stated above, the cause is remanded for further hearings, if required, and for findings, not inconsistent with this opinion, on the question of damages to crops and timber and for compliance with G.S. 38-3(c) so that the location of the true boundary line may be properly established. In all other respects, the judgment below is affirmed.

Affirmed in part.

Remanded in part.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. BRUCE ALVIN HARVEY AND ROLAND HENRY, ALSO KNOWN AS LEE NELSON

No. 757SC323

(Filed 6 August 1975)

1. **Criminal Law § 34— evidence of another crime — admissibility for identification**

In this armed robbery prosecution wherein the State's evidence tended to show that defendants fled the crime scene in a 1968 or 1969 lime-green Cougar with a white top, evidence that defendants, between the time of the crime charged and their apprehension, committed a robbery utilizing a pistol and driving a 1968 or 1969 green car was admissible for purposes of identification in view of their defense of alibi.

2. **Criminal Law § 114— instructions — references to alias**

In this armed robbery prosecution, defendant was not prejudiced by the trial court's references to him in the jury instructions as "alias Lee Nelson" where the words "also known as Lee Nelson" appear in

the title of the case following defendant's name, evidence of the alias was admitted without objection, and defendant did not move to strike the alias from the title or object to its use by the district attorney or the trial court.

ON writ of *certiorari* to review proceedings before *Peel, Judge.* Judgments entered 8 November 1974 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 18 June 1975.

Defendants were charged in bills of indictment with armed robbery of Alvin Ray Staton on 21 September 1974. Both defendants pled not guilty and were brought to trial.

The evidence for the State tended to show that on 21 September 1974, Alvin Ray Staton, at approximately 3:30 p.m., went to the bus station in Rocky Mount with Kenneth Umstead to pick up his girl friend; that when his girl friend came out, Staton decided to use the bathroom inside the terminal; that after entering the bathroom he was starting to place a coin into one of the stalls when one of the two defendants standing in the bathroom offered him the use of a free stall; that Staton refused the offer but said that he wanted some tissue out of it; that as he entered, the defendant to whom he had been talking shoved him ino the stall and informed him that this was a "stick-up"; that the other defendant was holding a .22 caliber pistol on him and that he handed over his wallet containing $57.00. After giving them the wallet, Staton was tied up with his belt and trousers. The defendants then fled outside where they were seen by Staton's friend hurriedly getting into a 1968 or 1969 lime-green Cougar with a white top. Shortly thereafter Staton came out of the terminal saying he had been robbed and asked Umstead if he had seen two men come out. Then he drove around for some time looking for the car but were unable to find it, so they reported the robbery to the police. On 25 September 1974, Staton saw the lime-green and white Cougar with the two men in it; he summoned the police who thereafter stopped the car and arrested the defendants after they were identified by Staton as the ones who robbed him.

The defendants' evidence tended to show that they were both with a Mrs. Annie Mae Batts on September 21 from 2:00 p.m. to 4:00 p.m. Neither defendant testified.

The jury returned verdicts of guilty as charged and from judgments imposing terms of imprisonment, the defendants petitioned this court for a review.

Attorney General Edmisten by Assistant Attorney General George W. Boylan for the State.

Howard A. Knox, Jr. for the defendants.

CLARK, Judge.

[1] The State called Mackey Spruill as a witness; and he testified over defendants' objection that on 23 or 24 September 1974, he was fixing a flat tire on his car near Rocky Mount when the two defendants drove up in a 1968 or 1969 green car with New Jersey tags. One of the two defendants held a pistol on Spruill while they robbed him. Later, when the defendants were arrested, Spruill's driver's license was found in their possession. Spruill identified both defendants in court as the same person using the car.

The defendants submit that the admission of this testimony was error for the reason that the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. With this general proposition we agree. However, where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1950). In *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944), defendants were charged with first-degree murder. The evidence established that when the defendants entered the victim's store, the victim's wife and a customer were present. After asking for change for a dollar and some matches, the defendants drew pistols and informed the victim of the hold-up. As the victim then leaned down below the counter, he was fatally shot. The two defendants fled from the store and were seen by two witnesses coming across the street and getting into a blue Ford. Each witness saw the defendants clearly as they passed within ten feet of them. Another defendant was identified as sitting behind the wheel of the Ford awaiting the other two. Evidence was then introduced over objection that these same three defendants, twenty-seven days after the alleged murder, were observed driving the same blue Ford and shortly thereafter were observed entering a filling station and with

pistols robbing the proprietor of $140. The Supreme Court ruled the evidence admissible and competent to show the identity of the persons and the crime under an exception to the general exclusionary rule. We are unable to distinguish the present case from the *Biggs* case. Here much significance was attached to the green car with New Jersey license plates, which led to the apprehension of the defendants. Consequently, the evidence that the defendants, between the time of the crime charged and their apprehension, committed a robbery utilizing a pistol and driving a green car with New Jersey license plates was relevant and admissible for purposes of identification in view of their defense of alibi.

The defendants further complain that even if the evidence was admissible, they were prejudiced by the failure of the trial court to limit its admissibility to its proper purpose. However, at no place in the record does it appear that the defendants requested such an instruction. Under the well-recognized rule, if evidence is competent for one purpose only and not for another, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968); *State v. Alexander,* 16 N.C. App. 95, 191 S.E. 2d 395, *cert. denied,* 282 N.C. 305, 192 S.E. 2d 195 (1972); and 2 Strong, N. C. Index 2d, Criminal Law, § 95 (1967). In view of the foregoing, this assignment of error is overruled.

[2] The defendant Henry assigns as error the repeated reference to him by the trial judge as "alias Lee Nelson" in his instructions to the jury. The word "alias" derives from the term "alias dictus" which literally means "otherwise called," and indicates that the accused is called by one or the other names. 3 C.J.S., Alias, (1973). It is generally known that some criminals assume another name for the purpose of avoiding apprehension, and the word "alias" has come to connote in the public mind some previous criminal activity. The constant repetition of the word during trial *(People v. Klukofsky,* 201 Misc. 457, 114 N.Y.S. 2d 679 (1951)), or loading the accused with a long list of aliases *(D'Allessandro v. U. S.,* 90 F. 2d 640 (3d Cir. 1937)) has been criticized. In *People v. Grizzel,* 382 Ill. 11, 46 N.E. 2d 78 (1943) where the record showed no substantial evidence of any aliases, the court stated it was improper to refer to the defendants by them and reversed for this and other improper re-

marks. However, where there is evidence at trial that the accused was known by a number of names, or that there is uncertainty as to which of a number of names is his true name, it is generally held that the use of the alias in trial is authorized by the evidence and there is no error. *State v. Loston,* 234 S.W. 2d 535 (Mo. 1950); Annot., 87 A.L.R. 2d 1217 (1963).

In the case at bar, in the title of the case following the name of the defendant Henry, the words "also known as Lee Nelson" appear. There was also evidence, without objection, of the alias. It does not appear that at any time before or during trial the defendant moved to strike the alias from the title or objected to the use of the alias by the District Attorney or the trial judge. Where in the title of the case or during trial an alias is used, if the defendant considers it prejudicial, he has the burden of making a timely motion or objection so that the trial court may take appropriate action; and his failure to do so constitutes a waiver. Too, in this case no prejudice is shown because the use of the alias was justified by the evidence.

We find

No error.

Judges MORRIS and VAUGHN concur.

CARGILL, INCORPORATED v. NEUSE PRODUCTION CREDIT ASSOCIATION, INCORPORATED

No. 7511SC317

(Filed 6 August 1975)

Contracts § 16— conditions precedent

Where defendant credit association held notes executed by hog producers and secured by a lien on the hogs, plaintiff, defendant and the hog producers entered an agreement whereby plaintiff would advance feed to the hog producers, the producers would bring checks from the sale of their hogs to defendant and would sign a new note for the amount of the check, the checks would be credited to their account and a check for that amount reissued by defendant to plaintiff in payment for the feed, the execution of new notes by the hog producers was a condition precedent to defendant's obligation to reissue checks to plaintiff, and defendant is not liable for breach of the agreement to reissue the checks to plaintiff where the producers refused to execute new notes to defendant.

Cargill, Inc. v. Credit Assoc., Inc.

APPEAL by plaintiff from *Browning, Judge.* Judgment entered 21 January 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 18 June 1975.

Plaintiff filed a complaint alleging that defendant had a note with F. W. and Lillie Wood secured by a lien on the Woods' hogs; that plaintiff and defendant entered a contract whereby plaintiff would advance feed to the Woods and defendant would, as payments were received from the Woods on its note, reissue checks in the same amount to plaintiff and that defendant received $5,300 in checks from the Woods, but refused to reissue checks to plaintiff. Defendant answered alleging the statute of frauds and lack of consideration as defenses and further denied plaintiff's allegations alleging that the agreement was actually to the effect that defendant would reissue checks in the amount of the Woods' payments only if the Woods would execute new notes to defendant in the same amount as the payments and that the Woods refused to execute new notes and insisted that their payments be credited to their account on the old note. Defendant filed a third-party complaint against the Woods for any liability it might incur.

At trial, plaintiff adduced evidence that prior to May 1971, it had been selling hog feed to the Woods on open account with a maximum allowable credit ceiling of $5,000.00 per month. In May, the Woods submitted requests for additional credit of $11,000 so as to enable them to "finish out" or "top off" the hogs. At that time plaintiff learned that defendant had a first lien on the hogs. Thereafter, plaintiff, through Robert S. Richardson, its District Manager, met with a Mr. Casey, a manager for defendant, to discuss how defendant could release proceeds from the sale of the hogs to pay for the feed bill. Richardson testified that in his conversation with Casey, Casey informed him that the Woods were delinquent in the account with defendant and that the only way defendant could help the plaintiff would be for him to be able to show that the Woods' account was kept current. Pursuant to Richardson's testimony, it was thereupon orally agreed ". . . that the Woods would bring the checks [from the sale of their hogs] to the Neuse Production Credit Association and that they would sign a note to Neuse Production Credit Association for exactly the amount as the check and the checks would then be credited to their account and a check reissued by Neuse Production Credit Association to Cargill for the identical amount." Richardson thereafter ap-

proved the increased credit, Cargill entered a security agreement with the Woods and supplied the Woods with $10,395.59 worth of additional feed. The Woods then sold some of their hogs and deposited checks totaling $5,300 with defendant to be paid on their account, but they refused to sign a new note to defendant. As a result, defendant refused to reissue checks in that amount to plaintiff whereupon plaintiff issued claim and delivery on the Woods' hogs and sold them, resulting in a deficit of "roughly $5,000.00" in the Woods' feed account with plaintiff.

After plaintiff's evidence, defendant moved for a directed verdict citing several grounds. The trial court allowed the motion and entered judgment for the defendant, from which plaintiff appealed.

Robert A. Spence for the plaintiff.

L. Austin Stevens for the defendant.

CLARK, Judge.

In its motion for directed verdict, defendant relied on a number of alternative grounds, one being that plaintiff failed to show that defendant had in any way breached the oral agreement. In this regard, defendant relies on the testimony of plaintiff's district manager who testified that defendant agreed to reissue checks only on the terms which defendant exacted which implicitly required that the Woods execute new notes to defendant before reissuing checks to the plaintiff. It is specifically argued that this was a condition precedent to defendant's obligation to reissue checks to plaintiff.

The plaintiff points out that conditions precedent are not favored by the law, *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946), and that when operative words can be construed as a promise rather than a condition, there is a presumption in favor of promise. Nevertheless, ". . . the supposed presumption of promise rather than condition will not often be the decisive matter in a case. Such a presumption does not relieve the court of the necessity of interpretation; and the process of interpretation will usually be decisive without making use of this presumption." 3A Corbin, Contracts, § 635 at 38-9 (1960).

Conditions precedent ". . . are those facts and events, occurring subsequently to the making of a valid contract, that

must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." 3A Corbin, Contracts, § 628 at 16 (1960). On the other hand, one who makes a promise expresses an intention that some future performance will be rendered and gives the promisee assurance of its rendition.

Basically, two questions, then, are relevant to the issue to be decided: (1) Was the expression intended to be an assurance by one party to the other that some performance by the first would be rendered in the future and that the other could rely on it, or (2) was the expression intended to make the duty of one party conditional and dependent upon some other fact or event? If from the operative words of the agreement, the answer to the former question is in the affirmative, the words are that of promise. If the operative words suggest an affirmative answer to the latter question, the relevant performance, fact or event is a condition.

Of particular relevance to the agreement in the present case is Restatement of Contracts, § 260 (1932) which provides as follows:

> "If in an agreement words that state that an act is to be performed purport to be the words of the person who is to do the act, the words are interpreted, unless a contrary intention has been manifested, as a promise by that person to perform the act. If the words purport to be those of a party who is not to do the act they are interpreted, unless a contrary intention has been manifested, as limiting the promise of that party by making performance of the act a condition."

In the three-party arrangement agreed upon by the plaintiff, defendant and the Woods in the defendant's office with regard to the method by which defendant could aid the plaintiff and the Woods in their hog feed account problem, it is apparent that the operative words by which defendant's performance in reissuing checks would be triggered was the execution *by the Woods* of new notes to defendant. This arrangment enabled the defendant to credit the Woods' old account which showed a deficit while yet providing defendant with new security in the new notes. Consequently, the purported promise to perform the execution of new notes was that of the Woods and, as the agreement manifested, the defendant required that act before it would

reissue checks to plaintiff. That act, being under the volitional control of the Woods, was a condition to defendant's performance. See 3A Corbin, Contracts, § 638 (1960).

Finally, the non-occurrence of a condition will prevent the existence of a duty in the other party and will not create remedial rights unless that other party has promised that it would occur; and the only persons who could conceivably have promised execution of new notes were the Woods. We find that the execution of new notes was a condition precedent to defendant's duty to reissue checks to plaintiff and that no breach therefore is shown either in plaintiff's complaint or evidence. The action of the trial court in granting defendant's motion for directed verdict and entering judgment in accordance therewith is

Affirmed.

Judges MORRIS and VAUGHN concur.

DUKE POWER COMPANY v. FRED J. HERNDON AND WIFE, RUBY LEIGH HERNDON; NANNIE MAE HERNDON (SINGLE); AND CORNELIA B. HERNDON (WIDOW OF W. FRED HERNDON, DECEASED)

No. 7514SC216

(Filed 6 August 1975)

1. **Rules of Civil Procedure § 19— preliminary injunction proceeding — holders of easements — not necessary parties**

In a proceeding to enjoin defendants from refusing to allow plaintiff's agents to conduct a survey over their property to determine what portion, if any, of defendants' property would be needed for a right-of-way for power lines, the controversy between the parties could be fully adjudicated without the presence of additional parties who allegedly already had rights-of-way across defendants' property.

2. **Injunctions § 1— restraint of entry to make land survey — preliminary injunction proper**

In an action to enforce the statutory right of plaintiff under G.S. 40-3 to enter upon defendants' lands for the purpose of making a survey of the proposed route for a power line, defendants' contention that the preliminary injunction granted all relief plaintiff might obtain in a trial on the merits and thereby changed the status quo is untenable because: (1) since plaintiff had the statutory right to enter upon the property to make its preliminary survey, the status *quo was a condition of action, not one of rest,* and (2) the trial judge weighed the relative convenience and inconvenience and comparative

injuries to the parties and to the public which would arise from granting or refusing the preliminary injunction and found the equities to lie with plaintiff and the public.

3. Eminent Domain § 2— entry to make survey — no taking of land

Entry upon lands for the purpose of making a preliminary survey of the route proposed for purchase or condemnation does not amount to a taking of private property, and G.S. 40-3 providing for such entry is constitutional.

APPEAL by defendants from *Hall, Judge.* Order entered 18 December 1974 in Superior Court, DURHAM *County.* Heard in the Court of Appeals 14 May 1975.

Plaintiff, a public utility, instituted this action, alleging in substance that plaintiff believes it will be necessary to construct lines over the properties of defendants for the purpose of transmitting electricity between plaintiff's Parkwood substation and other substations operated by plaintiff; that in order to determine what portion, if any, of defendants' properties will be needed for a right-of-way for the lines, it is necessary for plaintiff's agents to go upon defendants' properties for the purpose of conducting a survey; and that plaintiff has requested of defendants, and defendants have denied, permission for plaintiff's agents to go upon defendants' properties to conduct a survey. Plaintiff prayed that defendants be enjoined from interfering with the exercise of plaintiff's rights and duties under G.S., Chap. 40.

Plaintiff served upon defendants on 27 November 1974 a notice of its motion for a preliminary injunction. The motion for preliminary injunction was heard by Judge Hall at the 9 December 1974 and the 16 December 1974 Sessions of Superior Court held in Durham County. The hearing was upon the complaint, plaintiff's affidavits, and argument of counsel. On 18 December 1974 Judge Hall entered a preliminary injunction which enjoined defendants from interfering with plaintiff's agents in going upon defendants' properties for the purpose of surveying and locating the right-of-way proposed by plaintiff.

Defendants appealed.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson, by James L. Newsom, James T. Hedrick, and K. Byron McCoy, for the plaintiff.

Harriss, Ruis & Milligan, by Ronald H. Ruis, for the defendants.

BROCK, Chief Judge.

[1] Prior to the hearing in the trial court, defendants filed a motion to dismiss this action for failure of plaintiff to join necessary parties defendant and, in the alternative, to bring in the additional parties.

The parties which defendants contend are necessary parties are Public Service Company of North Carolina and Durham and South Carolina Railroad Company. Defendants allege that Public Service is the holder of a 50 foot right-of-way across defendants' properties for an underground gas pipeline. They allege that Durham and South Carolina Railroad is the holder of an easement across defendants' properties for a railroad right-of-way. Assuming defendants' allegations to be correct, we conclude that the controversy between plaintiff and defendants can be fully adjudicated without the presence of these additional parties. The denial of defendants' motion to dismiss and the denial of defendants' motion for additional parties are affirmed.

Defendants argue that the preliminary injunction denied them due process of law because it granted the ultimate relief prayed for in the complaint before a trial on the merits could determine the rights of the parties.

General Statute 40-3 provides that those corporations to which are granted the right of eminent domain under G.S. 40-2 "may at any time enter upon the lands through which they may desire to conduct the . . . works authorized under § 40-2 and lay out the same. . . ." The statute also provides for compensation for damage done to the lands by reason of the entry to lay out the route of the works. General Statute 40-11, et seq., provides the manner for determining damages for the taking of the fee or an easement, if such is later taken. For many years our courts have recognized such a statutory right of entry for the purpose of laying out the route to be condemned. *See State v. Wells,* 142 N.C. 590, 55 S.E. 210 (1906); *Penn v. Coastal Corp.,* 231 N.C. 481, 57 S.E. 2d 817 (1950).

The present action is not an action to condemn a right-of-way across defendants' lands. This is an action to enforce the statutory right of plaintiff under G.S. 40-3 to "enter upon" defendants' lands for the purpose of making a survey of the proposed route. Such a survey clearly is necessary before plaintiff can undertake intelligent negotiations with defendants for a purchase of the route, or, failing in negotiations with defend-

ants, before it can institute condemnation proceedings. General Statute 40-12 requires that a petition for condemnation "must contain a description of the real estate which the corporation seeks to acquire." "It is for the condemnor to determine what land it seeks to condemn *(Morganton v. Hutton & Bourbonnais Company,* 251 N.C. 531, 112 S.E. 2d 111) and to describe it in its petition by reference to uncontroverted monuments." *Light Company v. Creasman,* 262 N.C. 390, 397, 137 S.E. 2d 497 (1964). An entry under G.S. 40-3 for the purpose of laying out the proposed route for an easement does not constitute a taking. *Penn v. Coastal Corp., supra* at 485.

When an entry for the statutory purpose (G.S. 40-3) is resisted in such a way as to make probable a clash between the landowner and the proposing condemnor's representatives, and thereby defeat the investigation and survey assured by the statute, no other remedy is afforded except that of injunctive process. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.,* 186 Ala. 622, 65 So. 287 (1913), *aff'd,* 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916).

[2] Defendants contend that the order granting the preliminary injunction should not be allowed to stand because it grants all relief plaintiff might obtain in a trial on the merits, and thereby has changed the status quo. Although the principle argued by defendants is ordinarily a proper test in weighing the propriety of an interlocutory injunction, it is untenable under the facts presented in this case. In the first place, since plaintiff had the statutory right to enter upon the property to make its preliminary survey, the status quo is a condition of action, not one of rest. *Lewis v. Texas Power & Light Co.,* 276 S.W. 2d 950 (Tex. Ct. Civ. App. 1955) ; 42 Am. Jur. 2d *Injunctions* § 13 (1969). In the second place, the trial judge weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from granting or refusing the preliminary injunction, and found the equities to lie with plaintiff and the public. There appears little doubt that plaintiff has the statutory right to acquire easement rights over defendants' lands, either by voluntary conveyance or by condemnation. Therefore, the injury suffered by the defendants from the survey will be small compared to the injury suffered by the plaintiff and the public if plaintiff is denied its statutory rights to proceed with its preliminary survey. Indeed, plaintiff has posted bond to indemnify defendants for all

physical damage to their property by reason of the preliminary survey.

Defendants are not left to the mercy of plaintiff by the provisions of G.S. 40-3 or by the provisions of the preliminary injunction. In the event of a showing of abuse of its rights by plaintiff or a showing that plaintiff is exceeding its rights, defendants have relief available through the injunctive process.

[3] Defendants argue that G.S. 40-3 is unconstitutional. The entry for the purpose of making a preliminary survey of the route proposed for purchase or condemnation does not amount to a taking of private property. *Penn v. Coastal Corp., supra.* "Statutes authorizing bodies having the power of eminent domain to enter onto land for purposes of conducting preliminary surveys and the like, containing no provision for compensation to the landowner for such use of the land, have been upheld as not violative of constitutional provisions against the taking of private property for public purposes without prior payment of just compensation." Annot., *Eminent Domain: Right to Enter Land for Preliminary Survey or Examination,* 29 A.L.R. 3d 1104, § 4[b] (1970). In our opinion G.S. 40-3 is constitutional on its face and as applied to defendants in this case.

Affirmed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN ALLEN SAWYER

No. 7519SC196

(Filed 6 August 1975)

1. **Jury § 6— examination of jurors — question based on inadequate statement of law**

The trial court in a prosecution for drunken driving did not err in refusing to permit defense counsel to ask prospective jurors whether there was "any member of the panel that would convict the defendant solely upon the results of a breathalyzer test, if the results exceeded .10 percent or more by weight of alcohol in the defendant's blood," since the question was based upon an inadequate statement of the law.

2. **Automobiles § 126; Criminal Law § 64— admissibility of breathalyzer results**

The results of a breathalyzer test were properly admitted in evidence where competent evidence was presented to show that the requirements of G.S. 20-139.1 and G.S. 20-16.2(a) had been satisfied.

3. Automobiles § 126; Criminal Law §§ 50, 64— witness's opinion as to law

The trial court in a prosecution for drunken driving did not err in the exclusion of an officer's testimony that he was required under the law to assist a defendant who requests a blood test since the opinion of the witness as to the law was not competent in evidence.

4. Automobiles § 126; Criminal Law § 64— breathalyzer test — additional private test — officer's failure to authorize analysis

Where a defendant arrested for drunken driving was administered a breathalyzer test by a law officer, defendant was thereafter allowed to contact a physician of his choice, the arresting officer took defendant to the county hospital so that a blood alcohol test could be conducted by the physician, the physician drew a sample of defendant's blood which he gave to defendant's attorney, and the county hospital did not do the required type of analysis, refusal of the arresting officer to sign forms authorizing that the blood sample be sent to N. C. Memorial Hospital in Chapel Hill for analysis did not violate defendant's rights under G.S. 20-139.1(d) and render the breathalyzer results inadmissible since the officer complied with the mandate of the statute by taking defendant to a physician of his choice for the additional test and it was defendant's responsibility to obtain an analysis of the blood sample.

APPEAL by defendant from *Seay, Judge.* Judgment entered 1 November 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 8 May 1975.

Defendant was convicted in district court of operating a motor vehicle on a public highway while under the influence of intoxicating liquor. On appeal to superior court he again pled not guilty and was tried de novo.

The State's evidence showed: At approximately 1:30 a.m., 15 December 1973, N. C. Highway Patrol Sergeant Blackwell stopped an automobile he had observed twice veer across the center line while it was proceeding on a rural paved road near Asheboro. Defendant was the vehicle's driver and sole occupant. Noticing an odor of alcohol on defendant's breath and observing him to stagger and be unsteady on his feet, Blackwell arrested defendant and took him to the Randolph County Jail. A breathalyzer test showed .12 percent by weight of alcohol in defendant's blood.

Defendant testified and denied he was intoxicated but admitted he had been drinking beer. The jury found him guilty as charged and from judgment imposing a suspended sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III for the State.

Ottway Burton and Millicent Gibson for defendant appellant.

PARKER, Judge.

[1] The trial court sustained an objection to the following question asked the panel of prospective jurors by defendant's counsel:

> "Is there any member of the panel that would convict the defendant solely upon the results of a breathalyzer test, if the results exceeded .10 percent or more by weight of alcohol in the defendant's blood?"

There was no error in this ruling.

The voir dire examination of prospective jurors has a double purpose, (1) to ascertain whether grounds for challenge for cause exist and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. However, counsel's examination into the fitness of jurors is subject to the trial judge's close supervision, and the regulation of the manner and extent of counsel's inquiry rests largely in the discretion of the trial court. *State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973). An ambiguous, confusing hypothetical question, or one containing an incorrect or inadequate statement of the law, is improper to submit to prospective jurors. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972). The question which defendant's counsel sought to ask in this case is based on an inadequate statement of the law. In this connection we note that the amendment to G.S. 20-138 made by Chap. 1081 of the 1973 Session Laws did not become effective until 1 January 1975 and is thus not applicable to this case. There has been no abuse of the trial court's discretion in sustaining the district attorney's objection to counsel's question to the prospective jurors, and this assignment of error is overruled.

[2] Before the results of the breathalyzer test were admitted in evidence, Patrolman Byrd, the State's witness who administered the test, testified that at the time the test was administered he possessed a valid and currently effective permit from the State Board of Health for administering a breathalyzer test and that in giving the test he followed the methods, techniques,

and procedures as prescribed by the State Board of Health. He also testified that prior to giving the test he informed defendant both verbally and in writing of his rights as required by G.S. 20-16.2(a). Since competent evidence was admitted to show that the requirements of G.S. 20-139.1 and of G.S. 20-16.2(a) had been satisfied, the results of the test were properly admitted in evidence. *State v. Powell,* 279 N.C. 608, 184 S.E. 2d 243 (1971).

[3, 4] During cross-examination of Sergeant Blackwell, defendant's counsel asked this witness whether "under the law you are required to assist a defendant who requests a blood test, help and aid in getting a blood test and take him to a person to get one." An objection to that question was sustained and counsel again asked in substance the same question, objection to which was again sustained. Had the witness been permitted to answer, he would have testified, "We are required to assist a person, yes, sir." Defendant now assigns error to the exclusion of this testimony. There was no error in the court's rulings sustaining the district attorney's objections. The opinion of the witness as to the law was not competent in evidence. *See* 1 Stansbury's N. C. Evidence (Brandis Rev.) § 130. Defendant's contention on this appeal that by sustaining these objections the trial court improperly suppressed evidence that defendant's statutory rights were violated is not properly presented by this or any other assignment of error. Nevertheless, we have carefully considered defendant's contention and find that defendant was accorded all the rights provided by Chapter 20 of the General Statutes to a person arrested for a violation of G.S. 20-138. Under G.S. 20-139.1(d) the person tested for alcohol content of blood under the direction of a law enforcement officer may have an additional chemical test or tests administered to him by a physician or other qualified person of his own choosing. G.S. 20-139.1(d) further provides that any law enforcement officer having in his charge any person who has submitted to the chemical test under the provisions of G.S. 20-16.2, "shall assist such person in contacting a qualified person as set forth above for the purpose of administering such additional test." The record shows that after the breathalyzer test was administered, defendant was allowed to contact a physician of his choice, Dr. Wilhoit, and that Sergeant Blackwell then took defendant to Randolph County Hospital to meet Dr. Wilhoit for the express purpose of administering a "blood alcohol test" to defendant. Defendant's attorney, who had been called to witness the breathalyzer

test but who arrived at the courthouse too late to do so, was also present at the hospital. Dr. Wilhoit testified that he drew a sample of defendant's blood which he gave to defendant's attorney, that the Randolph County Hospital did not do this type of analysis, and that he "was informed by the nurse and the officer" that the only way he could get the sample sent to North Carolina Memorial Hospital at Chapel Hill was by authorization of the arresting officer. Sergeant Blackwell testified that he "was asked to sign some forms at the hospital," which he did not do because he had not requested that the additional test be taken. Apparently this refusal of the arresting officer to sign the forms at the Randolph County Hospital is the basis of defendant's present contention that his statutory rights were denied him in this case. However, on the record before us we find that defendant suffered no such denial of rights as to affect the validity of his trial and conviction. The arresting officer, when requested to do so, did promptly take him to the doctor chosen by defendant to administer the additional test, thereby complying with the mandate of G.S. 20-139.1(d). The blood sample was drawn by the doctor, and was delivered to defendant's attorney. It was defendant's responsibility to see to obtaining its analysis. That he failed to do so did not render the results of the breathalyzer test incompetent in evidence. G.S. 20-139.1(d) expressly provides that "[t]he failure or inability of the person tested to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law-enforcement officer."

We have carefully examined all of defendant's remaining assignments of error and find no prejudicial error in defendant's trial or in the judgment entered.

No error.

Judges BRITT and VAUGHN concur.

GLORIA V. GEORGE v. WAKE COUNTY OPPORTUNITIES, INC.

No. 7510SC187

(Filed 6 August 1975)

Master and Servant § 10— action for wrongful discharge

Plaintiff's discharge as director of an antipoverty agency was not wrongful where her contract of employment was for an indefinite

period of time and contained no procedural requirements for dismissal; even if the parties contemplated at the time of hiring that dismissal would be governed by established personnel procedures or by procedural safeguards required by the Office of Economic Opportunity, such procedures were followed and defendant's board of directors thereafter properly terminated plaintiff's employment notwithstanding the grievance committee had recommended that she be reinstated.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 11 October 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 29 May 1975.

Plaintiff instituted this action on 16 August 1971 seeking damages in the amount of lost wages from 12 August 1968, the date of defendant's alleged wrongful termination of her employment as Director of the Little River Community Action Center in Zebulon. She also sought restoration to her former position.

In her complaint plaintiff alleged that on 21 September 1967 she entered into a contract of employment with defendant, an antipoverty agency, at an annual salary of $6,000.00. On 26 July 1968 defendant's Executive Director requested plaintiff's resignation as a center director and on 12 August 1968 he ordered her not to return to the center. Plaintiff then initiated grievance proceedings pursuant to the agency's written personnel policies and procedures. These procedures were adopted in compliance with Community Action Memo 23-A, issued by the Office of Economic Opportunity, which reads in part as follows:

> "Employee grievances shall be given prompt and fair attention. Grantee and delegate agencies shall make provision for review of personnel actions by the governing body or a committee appointed by the governing body in any case in which there is a claim of unfair treatment or of dismissal without cause."

Plaintiff further alleges that a Grievance Committee appointed by defendant found in her favor, but on 28 August 1968 defendant's Board of Directors voted to take no action on the committee's report until the Executive Director returned to work. Meanwhile, on 10 September 1968, the Board met and voted to terminate plaintiff's employment. She alleged that the initial request for her resignation was without cause and that she has been denied a hearing of her grievance in accordance with defendant's rules, regulations, procedures and by-laws.

Defendant in its answer admitted that plaintiff was employed and discharged as alleged but denied all other material allegations in the complaint. Defendant alleged that plaintiff's employment was for an indefinite term and was subject to written policies of the corporation including

> "the provisions of Section III 3 (2) *'Dismissal of Center Directors* is at the discretion of the Executive Director and such action will be taken after disciplinary action as outlined in Personnel Policies has been completed.'; and the provisions of Personnel Policies Section V 6 F: 'The Executive Director is authorized to take appropriate action where an employee's work or conduct make it necessary. Suspension from the job or dismissal of an employee is left to the discretion of the Executive Director.' "

Defendant further alleged that on 28 June 1968 plaintiff tendered her resignation, which was accepted subject to her request to appear before the Executive Committee. Plaintiff appeared before the Executive Committee and was granted hearings before the Board of Directors and the Grievance Committee. The action of the Executive Director dismissing plaintiff was approved by both the Executive Committee and the Board. Therefore, defendant alleged, it has fully complied with its established procedures and by-laws.

Both sides moved for summary judgment, stipulating that except for damages there was no material issue of fact to be determined and submitting the fruits of extensive discovery which were contained in the pretrial order. The court announced that it was granting plaintiff's motion, and a hearing was held on the issue of damages.

Plaintiff testified that she had attempted to find other employment but, except for a brief period as a substitute teacher, was unable to do so because of her having been discharged by defendant. The court found that plaintiff was not discharged in accordance with procedural requirements of defendant corporation, was entitled to reinstatement, had made reasonable efforts to mitigate damages, and probably would have continued in her position to this day had she not been discharged. From the judgment awarding plaintiff $43,364.90 and ordering her reinstated, defendant appealed to this Court.

Davis, Davis & Debnam, by F. Leary Davis, Jr., and W. Thurston Debnam, Jr., for plaintiff appellee.

Kimzey, Mackie & Smith, by James M. Kimzey, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in finding that plaintiff's discharge was wrongful and in granting her motion for summary judgment. The voluminous materials offered in support of the motion do not reveal the existence of any genuine issues of material fact. The question then is whether plaintiff was entitled to judgment as a matter of law.

Defendant argues (1) that plaintiff's contract of employment was for an indefinite period and therefore was terminable at will, and (2) that, even if its dismissal procedures are considered to have been made part of the contract, defendant has complied with them. Under either view, defendant argues, judgment for plaintiff was contrary to law and must be reversed. We agree.

It is well settled in North Carolina that a contract of employment for an indefinite period of time is terminable by either party at will. *Scott v. Burlington Mills,* 245 N.C. 100, 95 S.E. 2d 273 (1956); *Howell v. Credit Corp.,* 238 N.C. 442, 78 S.E. 2d 146 (1953). Although alleged by plaintiff, there is nothing in the record to indicate that the dismissal procedure was incorporated into her contract. Without some such provision, defendant had the right to dismiss Mrs. George at any time and for any reason.

Assuming, however, that the parties did contemplate at the time of hiring that dismissal would be governed by established personnel procedures, or that a failure to follow procedural safeguards required by the Office of Economic Opportunity states a cause of action, the record shows that defendant in fact did comply with its written policies and procedures. These provide that "[d]ismissal of Center Directors is at the discretion of the Executive Director and such action will be taken after disciplinary action as outlined in Personnel Policies has been completed." Under Personnel Policies the employee must be given two weeks' notice of appeal as provided under Grievances. Under Grievances the employee may appeal within fifteen days

of dismissal to the Grievance Committee of the Board of Directors.

Plaintiff's exhibits show that on 26 July 1968 she was given notice by defendant's Executive Director that her employment would terminate as of 12 August 1968. By letter dated 9 August 1968 plaintiff requested a grievance hearing, which was held on 26 August 1968. The Grievance Committee recommended that Mrs. George be reinstated for a two-week probationary period during which her relationship with the Executive Director would be reassessed and the Executive Committee would make a final disposition. On 28 August 1968 the Board of Directors decided to postpone action on the Grievance Committee's report. On 10 September 1968 the Board voted to terminate plaintiff's employment.

From the foregoing it is clear that the Executive Director had the authority in his discretion to dismiss plaintiff subject to her right to appeal to the Grievance Committee. Moreover, nothing in the personnel procedures can be construed to require the Board of Directors to accept the Committee's recommendation. While plaintiff may have been entitled to certain procedural safeguards, which she was afforded, she did not have a substantive right to retain her employment.

The record simply does not support the trial court's holding that plaintiff's employment was wrongfully terminated. The judgment in her favor must be

Reversed.

Judges MARTIN and CLARK concur.

CLAUDE WHITAKER v. HERBERT R. EARNHARDT

No. 7519DC160

(Filed 6 August 1975)

1. Appeal and Error § 26— failure to except to findings

In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence and the rulings of the judge in denying defendant's motions to dismiss are ineffectual, and an appeal presents for review only the question whether the findings of fact support the conclusions of law and the entry of the judgment.

2. Animals § 3— escape by cattle — damage to crops

The trial court's findings supported its conclusions that defendant was negligent in allowing his cattle to escape and damage plaintiff's soybean crop and that plaintiff was damaged in the sum of $420 by defendant's negligence.

Judge HEDRICK dissenting.

APPEAL by defendant from *Grant, Judge.* Judgment entered 23 January 1975 in District Court, ROWAN County. Heard in the Court of Appeals 6 May 1975.

Plaintiff brought this action alleging damages to his soybean crop by defendant's cattle, which were negligently allowed to escape from defendant's pasture. The case was tried before the judge without a jury. The trial judge made findings of fact and entered judgment that plaintiff recover the sum of $420.00 and court costs. Defendant appealed.

No appearance by plaintiff.

Robert M. Davis, for defendant.

BROCK, Chief Judge.

Under our Rules of Civil Procedure, G.S. 1A-1, Rule 38, the parties to a civil action may waive trial by jury. In all actions tried upon the facts without a jury, the trial judge shall find the facts specially and state separately his conclusions of law thereon, and direct the entry of an appropriate judgment. G.S. 1A-1, Rule 52. The trial judge's findings of fact have the force and effect of a verdict by a jury upon the issues involved. N. C. Const. art. IV, § 14. The findings of fact by the trial judge are conclusive on appeal if there be evidence to support them. *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351.

[1] Defendant has not taken exception to any finding of fact made by the trial judge. In the absence of proper exceptions to the findings of fact by the trial judge, the appeal presents for review only the question whether the findings of fact support the conclusions of law and the entry of the judgment. 1 Strong, N. C. Index 2d *Appeal and Error* § 26 (1967). In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence, as well as exceptions to rulings of the judge in denying defendant's motions to dismiss, are ineffectual.

Burnsville v. Boone, supra; Salem v. Flowers, 26 N.C. App. 504, 216 S.E. 2d 392.

[2] The fundamental findings of negligence on the part of defendant and damages to plaintiff's crop, to which defendant took no exception, are as follows:

"7. That the fence on the defendant's land was in a poor state of repair and could not stop cattle from crossing the fence and roaming at large.

"8. That the plaintiff told the defendant on numerous occasions that the fence was in poor condition and incapable of containing cattle.

"9. That the defendant did not repair or improve the condition of the fence.

"10. That sometime during the month of August, 1973, the defendant's cattle crossed through the fence on the defendant's land and roamed onto the plaintiff's leasehold.

"11. That while the defendant's cattle were roaming on the plaintiff's leasehold, the said cattle destroyed and rendered unfit for harvest two acres of soybeans."

* * *

"16. That the monetary loss to the plaintiff as a result of the damage to the two acres of soybeans was $420.00."

In our opinion the foregoing unchallenged findings of fact support the trial court's conclusions that defendant was negligent and that plaintiff had been damaged in the sum of $420.00 as a result of defendant's negligence, and support the entry of judgment appealed from.

Affirmed.

Judge MORRIS concurs.

Judge HEDRICK dissenting.

With respect to the damage to plaintiff's soybean crop, the trial judge made the following pertinent findings:

"10. That sometime during the month of August, 1973, the defendant's cattle crossed through the fence on

the defendant's land and roamed onto the plaintiff's leasehold.

11. That while the defendant's cattle were roaming on the plaintiff's leasehold, the said cattle destroyed and rendered unfit for harvest two acres of soybeans.

12. That the plaintiff harvested his soybean crop in November, 1973, and the thirteen remaining acres yielded forty bushels per acre.

13. That as a result of the damage caused by the defendant's cattle, the plaintiff was unable to harvest two acres of soybeans.

14. That the plaintiff's harvest was eighty bushels less than it would have been if the defendant's cattle had not destroyed two acres of soybeans.

15. That on the day the plaintiff harvested his soybeans in November, 1973, the local market price was $5.25 per bushel."

Based on the foregoing findings the trial judge concluded that as a result of defendant's negligence the plaintiff had suffered damage to his soybean crop in the amount of $420.00.

It is often stated that "the measure of damages for destruction of crops is the value of the crop at the time and place of destruction, and . . . the measure for crops injured but not totally destroyed is the diminution in the value of the crop at the time and place of injury." Dobbs, Law of Remedies, § 5.2, p. 325 (1973). However, because growing crops often do not have a market value in the field, the generally accepted method of arriving at the value of the crop at the time of its destruction is "(1) to estimate the probable yield had the crop not been destroyed; (2) calculate the value of that yield in the market; and (3) deduct the value and amount of labor and expense which subsequently to, and but for, the destruction would have been required to mature, care for, and market the crop." 21 Am. Jur. 2d, Crops, § 76, p. 663 (1965) (footnotes omitted). See also, Dobbs, Law of Remedies, supra.

"It is obvious that the true value of a crop must be arrived at from a consideration of numerous facts and factors, among which are the kind of crops which the land will ordinarily yield, the probable yield or value under proper culti-

> vation, the average yield per acre of similar land in the neighborhood cultivated in the same way, and the stage of advancement at which the crop was when injured or destroyed. There must be considered and subtracted from the amount recoverable the expenses which would have been incurred after the injury in producing the crop, such as for cultivating, gathering, threshing, or harvesting the crop. Also to be considered, in this same connection, are expenses in marketing it, including expenses in fitting or preparing it for market, and transporting it to market." 25 C.J.S., Damages, § 85, pp. 936-938 (1966) (footnotes omitted.)

Some courts have even held that the difference between the market value of the probable crop and the expense of maturing, preparing, and marketing the crop is itself the measure of damages and not merely a method of determining the value of the growing crop at the time of its destruction. 21 Am. Jur. 2d, supra; 25 C.J.S., supra.

Defendant's exception to the judgment presents for review the question of whether the findings support the conclusions. In my opinion, the findings and conclusions with respect to the issue of damages demonstrate that the trial judge failed to apply the correct measure of damages in this case. The findings indicate that the two acres of soybeans were damaged sometime during the month of August 1973 and that the thirteen undamaged acres of soybeans were harvested and sold in November 1973. Obviously, the soybeans that were destroyed were not mature. No finding was made with respect to the labor and expense which might have been required to bring the additional two acres of soybeans along to the point that they could have been marketed for $5.25 per bushel. The absence of such essential findings rendered it impossible for the trial court to apply the correct measure of damages. In my opinion, the judgment should be vacated and the cause remanded for a new trial.

STATE OF NORTH CAROLINA, EX REL. FRANK J. YEAGER, DISTRICT ATTORNEY v. JOHN WILLIAM NEAL AND PARKVIEW THEATER, INC.

No. 7421SC1060

(Filed 6 August 1975)

Obscenity — movie — literary and artistic value

The trial court did not err as a matter of law in concluding that a motion picture was not obscene where the court found that the State failed to prove that the film taken as a whole lacks serious literary, artistic, political, educational or scientific value and that the film taken as a whole does have serious literary and artistic value.

Judge MARTIN concurring.

Chief Judge BROCK dissenting.

APPEAL by petitioner from *Exum, Judge.* Judgment entered 3 October 1974 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 March 1975.

This action was started under the provisions of G.S. 14-190.2 to have a motion picture exhibited by respondents declared obscene within the meaning of G.S. 14-190.1.

After hearing the case Judge Exum entered judgment in pertinent part as follows:

"1. The State has failed to satisfy the Court that the film taken as a whole lacks serious literary, artistic, political, scientific or educational value.

2. The Court finds as a fact that the film taken as a whole does have serious literary and artistic value.

3. Since the film taken as a whole does not lack serious literary or artistic value, it is unnecessary to decide whether the sexual scenes in the film are patently offensive or appeal to the prurient interest.

CONCLUSION OF LAW

Based on the foregoing findings of fact, the Court concludes as a matter of law that the film is not obscene within the meaning of that term in North Carolina General Statutes 14-190.1.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Complaint of the District Attorney is hereby dismissed.

This the 3 day of October, 1974.

/s/ J. G. EXUM, JR.
James G. Exum, Jr., Superior Court Judge."

The petitioner appealed.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Michael K. Curtis and George M. Cleland, for defendant appellees.

VAUGHN, Judge.

Petitioner did not take exception to any of the judge's findings of fact or his failure to find additional facts. The validity of the findings by Judge Exum are not, therefore, before this Court.

The only assignments of error brought forward on appeal are Nos. 1 and 10. Both are, in most general terms, directed at the judge's conclusion that, since he had decided the film has serious literary and artistic value, it was unnecessary for him to decide whether the sexual scenes in the film are patently offensive or appeal to the prurient interest.

The applicable parts of the statute are as follows:

"(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity." G.S. 14-190.1(b)(c).

This Court is of the opinion that a court could appraise more fairly any conceivable "serious literary and artistic value" of the film by *first* deciding whether: (1) the wide screen representations and descriptions of actual sexual intercourse, normal and perverted, anal and oral, the exhibition of uncovered genitals in the context of masturbation and other similar sexual activities amounted to a depiction of sexual conduct in a patently offensive way, and (2) whether the average person applying contemporary North Carolina standards relating to the depiction or representation of sexual matters in a public theatre would find that the material taken as a whole appeals to the prurient interest in sex.

In view, however, of the present form of the statute which, in addition to requiring positive findings on the questions of offensive display of sexual conduct patently offensive to the average person, requires an additional negative finding that the material *lacks* serious literary, artistic, political, educational or scientific value, we cannot say that the judge erred as a matter of law. Absent a finding that the material lacks the described values the material cannot be said to be "obscene" within the meaning of our present statute.

Consideration of the only assignments of error brought forward for review requires the conclusion that the judgment must be affirmed.

Affirmed.

Judge MARTIN concurs.

Chief Judge BROCK dissents.

Judge MARTIN concurring:

Due to the unusual posture of the present case on appeal, I must vote to affirm. The district attorney's limited number of exceptions restricts this Court's review and presents only a narrow issue for consideration. Such exceptions do not invoke the full scope of review to which the State is entitled under the statute.

Chief Judge BROCK dissenting:

The construction of the statute by the trial judge and by the majority of the panel of this Court will permit a film to depict in a patently offensive way sexual conduct which appeals to the prurient interest in sex, if the evidence tends to support a finding that the film contains some serious artistic or literary value.

Much of the testimony in this case involved the artistic and expert use of the camera. Anyone viewing the film would agree that the cameramen were expert in clearly and vividly recording the varied and numerous sex acts. However expertly done, the scenes were patently offensive portrayals of sexual conduct. There were two or three brief scenes of beautiful countryside, but they were merely interludes between the sex acts, which were obviously the main theme of the film.

If the statute means what the trial judge and the majority of this panel says it means, it amounts to no prohibition against obscenity. A sex orgy of any kind will be permitted to be depicted so long as the camera is expertly and artistically used, and the orgy is interrupted long enough to have a passage from Keats, Tennyson, Browning, or Shakespeare read, or a picturesque view of the ocean or mountains flashed across the screen. If the legislators intended to permit the public showing of a film of the kind involved in this case, I do not believe it would have bothered to enact a prohibitory statute of any kind.

I think this Court should look at the real issue involved. Are the artistic and literary phases of the film inserted therein merely as a vehicle upon which to portray patently offensive scenes of sexual intercourse, normal and perverted, anal and oral?

The trial judge seems to have felt bound by the testimony of "experts" who believed the film to contain serious artistic

and literary value. I do not feel that the trial or appellate courts are bound by such "expert" testimony with respect to pictures, motion pictures, or printed matter. The courts are not required to be blind and unfeeling. The trial court and the appellate courts can view pictures, motion pictures, or printed matter to determine whether the sexual conduct portrayed therein is patently offensive and whether it contains bona fide, serious literary or artistic value.

No court should undertake to pass upon a question of this nature without an actual court viewing of the material involved so that it can exercise its judgment upon patently offensive sexual conduct and serious artistic or literary value. This panel of the Court has viewed the entire film. It is my understanding that my brethren agree with me that the film depicts in a patently offensive way portrayals of actual sexual intercourse, normal and perverted, anal and oral, and a lewd exhibition of uncovered genitals in the context of masturbation. However, because of the difference in our interpretation of the statute, and because of the failure of the solicitor to make proper exceptions, they feel compelled to affirm.

I vote to reverse.

IN THE MATTER OF J. PRESTON JOHNSON, PROFESSIONAL BONDSMAN

No. 7514SC311

(Filed 6 August 1975)

Arrest and Bail § 11— bondsman — misconduct — jurisdiction of superior court to regulate

While the General Assembly by local act granted local government officials authority to regulate professional bondsmen in Durham County, such grant of authority was not exclusive, and the superior court was not precluded from promulgating rules governing and regulating professional bondsmen offering bonds in that court; therefore, the superior court had jurisdiction to hear a disciplinary proceeding against respondent bondsman for allegedly filing false weekly reports as to the outstanding bonds upon which he was liable contrary to an order entered by a superior court judge requiring bondsmen's reports.

APPEAL by respondent J. Preston Johnson from *Braswell, Judge.* Judgment entered 6 December 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 June 1975.

In re Johnson

On 4 October 1974, J. Preston Johnson was orally prohibited by the presiding judge from signing any bonds or engaging in any bond activity and was ordered to show cause why his authority to act as a bondsman should not be permanently revoked. On 13 November 1974 the court prepared a document entitled "In the Matter of J. Preston Johnson, Professional Bondsman" which was subsequently marked "Order to Show Cause" by the court on 25 November 1974 and which contained, among other things, allegations concerning sixteen bonds signed by respondent. According to this show cause order, the matter was set for hearing and "Respondent was instructed orally in open court that the court would then inquire . . . whether he had violated the Court Order of Judge Edward B. Clark issued on the 11th day of October, 1973, by the failing to file the reports as required and the information as required, with the Office of the Clerk of Superior Court, and whether reports as filed had been made falsely . . . . "

The Clerk of Superior Court testified about the irregularities in respondent's weekly reports. Respondent denied that he had wilfully falsified his weekly reports.

In 1949 the General Assembly passed a local act regulating the bail bonding business in Durham County. With certain modifications enacted in subsequent sessions of the Legislature, this act is still in effect. On 11 October 1973 Judge Clark issued an order in the Superior Court of Durham County, imposing additional restrictions on professional bondsmen in Durham County. This order provides, among other things, that every professional bondsman must file a report each week with the clerk "showing all outstanding bail bonds upon which he is liable." Bondsmen were allowed to write bonds in a total sum of four times their deposit with the clerk.

On 6 December 1974 the court entered judgment that respondent had wilfully or negligently filed inaccurate weekly reports to the clerk. The court enjoined respondent from engaging in the criminal bail bonding business in the General Court of Justice for Durham County for a period of one year. From the judgment entered, respondent appealed.

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

Taylor, Upperman and Johnson, by Herman L. Taylor and Kenneth M. Johnson, for respondent appellant.

MARTIN, Judge.

Respondent contends the court erred in denying his motion to dismiss the proceedings for want of jurisdiction. It is his contention that jurisdiction of the matter in question is conferred by statute in the Durham County Commissioners or the City Council of Durham and that jurisdiction in the Superior Court is derivative so that the County Commissioners and City Council are vested with primary jurisdiction.

If this was a question of the revocation of a license to engage in the bonding business then we think the position of respondent would have merit. *See State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786 (1961). However, the court proceeded to hear the matter as a disciplinary proceeding to determine whether respondent had violated Judge Clark's order in the conduct of his business before the court. While the General Assembly, by local act, granted local government officials authority to regulate professional bondsmen in Durham County, it was not an exclusive grant of authority, and the court was not precluded from promulgating rules governing and regulating professional bondsmen offering bonds in said court. The record discloses that three superior court judges, presiding over the courts of Durham County, found it necessary to enter orders governing the conduct of professional bail bondsmen. Judge Clark entered an order 11 October 1973 entitled, "In the Matter of Professional Bondsmen in Durham County," pertinent parts of which are as follows:

> "It appearing to the Court that previous orders made by this Court relating to the conduct and procedure of professional bondsmen in Durham should be consolidated, modified, and clarified, IT IS THEREFORE ORDERED AND DECREED as follows:
>
> 1. *Reports of Bondsmen.*
>
> Every professional bondsman doing business in Durham County, either licensed or unlicensed, shall on or before the close of business on each Monday file a written report with the Clerk of Superior Court of Durham County showing all outstanding bail bonds upon which he is liable, said report to include the case number, the name of the defendant, the amount of the bond, and shall be complete through midnight on the Saturday preceding the date of the report."

Section 9 of the order, designated "Effective Date," is as follows:

> "This Order shall become effective immediately, and shall remain in full force and effect until amended or abolished by Order of a Judge of Superior Court assigned to Durham County or by the Resident Judge of the Fourteenth Judicial District."

The presiding judge made extensive findings of fact. No exceptions were made to those findings of fact. Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590 (1962). In its order the trial judge concluded as a matter of law that:

> "7. Judge Clark's Order of October 12, 1973 (sic) was and is a lawful order of the Superior Court of Durham County. J. Preston Johnson, who had personal service of copy thereof upon him had a duty to comply with its terms. Thus, for the span of seven weeks, May 24 through July 13, 1974, he knowingly filed weekly reports that did not truly and accurately show the bonds upon which he had personally become obligated as a bondsman. He either wilfully failed to show the sixteen bonds, . . . , as outstanding bail bonds upon which he was liable, or he was grossly and culpably negligent in filing inaccurate weekly reports. His weekly reports for the period in question were false.
>
> 8. As the Clerk of the Superior Court was requiring a security deposit at the time, and as the Clerk of the Superior Court was limiting the professional bondsmen to the writing of bonds not to exceed four times their security deposit, the false reports of the Respondent were an aid to him to keep him from ever exceeding the security deposit limits required of him by the Clerk. With his reports always showing a smaller amount of liability than his true financial picture, it would tend to keep him in the good graces of the Clerk and the several Courts. It would prevent him from having to post additional security with the Clerk."

While it does not appear that respondent obligated himself as surety beyond the limits set by the clerk, nevertheless, his failure to file accurate reports was a clear violation of Judge Clark's order. The order of Judge Clark made reasonable re-

quirements governing and regulating professional bondsmen offering bonds in the General Court of Justice for Durham County. They clearly come within the inherent powers of the court and may be properly supervised by the court.

We have carefully reviewed respondent's remaining assignment of error and find it without merit. Respondent was adequately apprised of the charges against him.

The order appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

JAMES ALBERT COX, PETITIONER v. BOYD C. MILLER, JR., COMMISSIONER, N. C. DEPARTMENT OF MOTOR VEHICLES, RESPONDENT

No. 756SC295

(Filed 6 August 1975)

Automobiles § 2— driver's license — decision of Medical Review Board — judicial review — jurisdiction

A petitioner seeking judicial review of a decision of the North Carolina Driver License Medical Review Board must file such petition in the Superior Court of Wake County pursuant to G.S. 143-309 [now G.S. 150A-45] and may not obtain a hearing under G.S. 20-25 in the superior court of the county in which he resides. G.S. 20-9(g)(4)(f).

APPEAL by respondent from *Martin (Perry), Judge.* Judgment entered 15 February 1975 in Superior Court, BERTIE County. Heard in the Court of Appeals 11 June 1975.

On 27 August 1974, the Department of Motor Vehicles informed petitioner that his driving privileges were being cancelled effective 10 September 1974 upon the recommendation of a medical advisor after an evaluation of his medical records. Petitioner thereupon requested a review before the North Carolina Driver License Medical Review Board, and the cancellation was withdrawn pending a hearing. On 15 October 1974, petitioner appeared, evidence was presented and a record prepared.

In its order of 23 October, the Board found facts concerning petitioner's alcoholism and concluded that he was "suffer-

ing from such physical or mental disability or disease as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, such disease being: alcoholism with a history of driving while intoxicated." The Board ordered that petitioner not be granted driving privileges and sustained the order of the Department of Motor Vehicles withdrawing his license. The Board further ordered that petitioner never be granted driving privileges without the express authority of the Board.

Petitioner then petitioned for a review before the resident superior court judge of the Sixth Judicial District. Respondent filed a motion to dismiss on 11 November 1974 alleging lack of jurisdiction over the subject matter, improper venue and failure to state a claim upon which relief could be granted. The Medical Review Board's order was stayed and a hearing was scheduled in Superior Court, Craven County, on 9 December 1974. After hearing, judgment was entered which overruled respondent's motion to dismiss and decreed that the decision of the Medical Review Board revoking petitioner's driving privileges was null and void. Respondent appealed.

Attorney General Edmisten by Assistant Attorney General William B. Ray for respondent.

Cherry, Cherry, Flythe & Evans by Joseph J. Flythe for petitioner.

CLARK, Judge.

On appeal, respondent contends that judicial review of the action of the Medical Review Board in this case is provided only in Article 33 of Chapter 143 of the General Statutes since G.S. 20-9(g) (4) (f) provides that "[a]ctions of the reviewing board are subject to judicial review as provided under Article 33 of Chapter 143 of the General Statutes." Petitioner, on the other hand, argues that G.S. 20-9(g) (4) (f) merely provides *additional* judicial review to that already provided in G.S. 20-25, wherein a person who has been denied a license or had their license suspended by "the Department" under its discretionary authority may petition for a hearing in the superior court of the county in which he resides.

Petitioner, however, overlooks one crucial point in his argument in that G.S. 20-25 provides for judicial review in a

petitioner's resident county from discretionary suspensions, etc., which are imposed "by the Department." Under G.S. 20-4.2(3), " 'Department' means the Department of Motor Vehicles of North Carolina." However, when a license is denied by the Commissioner because he has found, pursuant to G.S. 20-9(e) the licensee to be so suffering from physical or mental disability or disease as to prevent him from exercising reasonable and ordinary control over the vehicle, that denial may be reviewed by a reviewing board which "shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services." G.S. 20-9(g)(4). Per diem and expenses for these four members are to be paid out of funds allocated for that Commission and not from funds allocated to "the Department." The effect is that the Medical Review Board is not a board functioning under the authority of the Department of Motor Vehicles but is one which serves to provide administrative medical review of denials by the Commissioner of licenses for physical and mental reasons. Even the procedural exercise of this review power is totally independent from the Department since G.S. 20-9(g)(4) in substance provides the licensee with a *de novo* hearing.

Since the licensee sought administrative review by the Medical Review Board, he placed himself under the integrated jurisdictional provision of G.S. 20-9(g)(4)(f) which relegates him to the review provisions of Chapter 143, to wit, G.S. 143-309, which provides, "In order to obtain judicial review of an administrative decision under this Chapter the person seeking review *must* file a petition in the Superior Court of Wake County; . . . " (Emphasis added). It is noted that G.S. 143-309 has been repealed effective July 1, 1975 and now appears substantially as G.S. 150A-45.

The only proper jurisdiction therefore was in the Superior Court of Wake County and respondent's motion to dismiss should have been allowed.

For the foregoing reasons, the judgment below is

Vacated.

Judges MORRIS and VAUGHN concur.

ZAKIE G. BEALL v. LESTER T. BEALL

No. 7518DC279

(Filed 6 August 1975)

1. **Divorce and Alimony § 11— findings of trial court — no prejudice to defendant**

Trial court's findings concerning defendant's income, the number of days per week defendant was away from home, the dates on which defendant kicked his wife out of bed and pulled his daughter's hair, and plaintiff's financial dependency did not prejudice defendant in a divorce and alimony action.

2. **Divorce and Alimony § 11— life burdensome — sufficiency of evidence**

Evidence in an action for divorce and alimony was sufficient to support the trial court's conclusion that plaintiff's condition was intolerable and her life burdensome as a result of defendant's conduct.

3. **Divorce and Alimony §§ 17, 23— alimony and child support — award proper**

Evidence was sufficient to support the trial court's award of child support and alimony.

APPEAL by defendant from *Fowler, Judge.* Judgment entered 13 December 1974 in District Court, GUILFORD County. Heard in the Court of Appeals 10 June 1975.

Plaintiff wife brought an action for divorce from bed and board and alimony against her husband. The case was tried without a jury.

This Court is not interested in recounting the sordid evidence adduced at the hearing. Generally, plaintiff testified that defendant had assaulted her, questioned her femininity, made derogatory remarks about her, and mistreated the parties' four children. Defendant testified that plaintiff had been cold and indifferent to him, had refused to entertain his business customers, and had refused to have sexual relations with him. Both parties offered evidence of their financial condition. The trial court ordered defendant to pay plaintiff $300.00 per month as alimony and $200.00 per month for each of the four children as child support. Defendant was ordered to make all mortgage and tax payments on the family home as they came due, to pay off certain debts of the family within thirty days, and to pay a fee of $500.00 to plaintiff's attorney. Plaintiff was given custody of the children and possession of the family home.

Smith, Carrington, Patterson, Follin & Curtis, by Norman B. Smith, for the plaintiff.

Turner, Rollins & Rollins, by Clyde Rollins, for the defendant.

BROCK, Chief Judge.

Defendant has brought forward thirty-six assignments of error, consolidated into twenty-eight arguments for this appeal. Most of these arguments are without merit and are simply an attempt to reargue the evidence adduced at the hearing, apparently with the hope that this Court will substitute itself for the trial court and will accept defendant's version of the evidence. It is well known that findings of fact are conclusive and binding on appeal if there is any competent evidence to support them. This principle applies with particular force in alimony cases where the testimony of the parties is characteristically in sharp conflict and the credibility of witnesses who appear before the trial judge nearly always determines the outcome. We see no need for an *ad seriatum* discussion of defendant's twenty-eight arguments.

[1] In his second argument defendant contends that the trial court erred in finding that his gross income had ranged from $35,000.00 to $45,000.00 per year, and his net income, from $14,000.00 to $18,000.00. Defendant's own testimony indicates that his gross income has ranged from $30,244.00 to $47,000.00 per year, and his net income, from $13,942.00 to $17,000.00. This finding of fact varies from defendant's testimony, but the difference is so insignificant that it is not prejudicial to defendant.

In his third argument defendant points out that the court erred when it found that defendant "is away from home . . . on the average of 3 days per week." The evidence indicates that defendant is out of town for periods *up to* three days a week; however, we do not deem this prejudicial error.

In his sixth argument defendant asserts that the court erred when it found he kicked plaintiff out of bed on one occasion in 1972. The finding is erroneous, but only as to the date. Again, defendant is not prejudiced. A similar argument is advanced, in defendant's eighth argument, as to a finding that defendant pulled his daughter's hair in 1972. The finding is erroneous only as to the date.

In his thirteenth argument defendant complains that the court erred when it found that plaintiff was substantially dependent upon defendant for financial support. The evidence indicates that plaintiff earned $9,500.00 per year and had expenses of $24,757.34 per year. The evidence clearly supports the court's finding.

[2] By way of his fifteenth argument defendant argues that the trial court erred when it concluded: "Defendant willfully failed to provide plaintiff with necessary subsistence according to her means and condition, so as to render her condition intolerable and her life burdensome." The court found that on two occasions defendant had allowed the family home to run out of heating oil briefly, and on one occasion defendant had delayed in paying a doctor's bill for more than a year. Defendant is correct in arguing that these incidents seem insufficient to establish that plaintiff's life was rendered intolerable and burdensome. However, this error was not prejudicial to defendant because the court also concluded that defendant "offered such indignities to the person of plaintiff as to render her condition intolerable and her life burdensome."

In his seventeenth and eighteenth arguments defendant objects to the court's conclusions that he should be required to pay alimony and attorney's fees and that plaintiff should be given possession of the family home. The court's findings fully support these conclusions; accordingly, we do not find error.

[3] The gist of this appeal is that defendant contends that he will be required to make monthly payments beyond his means. The evidence does not support this contention, but supports the order of the trial judge. The determination of the amount for child support and alimony is within the discretion of the trial court. *Austin v. Austin,* 12 N.C. App. 390, 183 S.E. 2d 428 (1971). No abuse of that discretion has been shown.

We have reviewed defendant's arguments and find that no prejudicial error has been committed. Accordingly, the judgment of the trial court must be upheld.

Affirmed.

Judges PARKER and ARNOLD concur.

THE ERVIN COMPANY, THE ERVIN COMPANY, APARTMENT DIVISION, THE ERVIN COMPANY, d/b/a GEORGETOWN WOODS APARTMENTS AND GEORGETOWN WOODS APARTMENTS, DONNA L. COPELAND, AGENT v. GLADYS L. HUNT

No. 7527DC218

(Filed 6 August 1975)

1. **Courts § 14— action before magistrate — counterclaim — jurisdiction**

In a summary ejectment action instituted before a magistrate, the magistrate correctly refused to hear defendant's counterclaim for damages of $300,000. G.S. 7A-219.

2. **Jury § 1— failure to appear —waiver of jury trial**

Defendant waived her right to a jury trial in a civil action by failing to appear at trial.

3. **Ejectment § 11— summary ejectment — judgment — dismissal of counterclaim**

The trial court properly entered judgment for plaintiff in a summary ejectment action and properly dismissed defendant's counterclaim for damages for failure to state a claim for relief.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 9 December 1974 in District Court, GASTON County. Heard in the Court of Appeals 9 June 1975.

Plaintiffs instituted an action in summary ejectment before a magistrate to move defendant from an apartment owned by plaintiffs alleging that defendant had failed to pay her rent.

Defendant, acting as her own attorney, filed an answer and counterclaimed alleging proper payment of her rent and seeking $300,000 damages for plaintiffs' alleged wilful and deliberate efforts to discredit and harass her.

The judgment of the magistrate dismissed the counterclaim and ordered defendant to vacate the premises. Defendant gave notice of appeal "to the District Court of the General Court of Justice to place this case in the Superior Court Division because of the amount of money being sought in damages stated in the ANSWER and COUNTERCLAIM."

On 9 December 1974 the District Court, sitting without a jury, made detailed findings of fact and conclusions of law thereon and entered judgment dismissing defendant's counterclaim, granting possession of the property to plaintiffs and awarding damages to plaintiffs in the sum of $379.50 for accrued rental for the use and occupation by defendant of the

property from 1 October 1974 to the date of the judgment. From the judgment entered defendant appealed, assigning error.

Garland & Alala, by Terry G. Drum, and Jeffrey M. Guller, for plaintiff appellees.

Gladys L. Hunt, defendant appellant pro se.

MARTIN, Judge.

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 the merits of each of defendant's assignments of error.

Defendant has presented twenty-four questions in her brief. Her "argument" consists of an assertion that she is entitled to a new trial because of (1) the facts contained in her statement of the case, (2) many errors cited in the case, (3) the lack of evidence presented before the courts below, (4) her absence when the judgments were entered below, and (5) the lack of validity of the judgments.

[1-3] It suffices to say that (1) the magistrate correctly refused to hear defendant's counterclaim (G.S. 7A-219), (2) defendant received a trial de novo in the district court (G.S. 7A-228), (3) no motion was made to transfer the case to superior court in accordance with G.S. 7A-258, (4) defendant waived her right to a jury trial by failing to appear at trial *(Sykes v. Belk,* 278 N.C. 106, 179 S.E. 2d 439) and (5) the trial court properly dismissed defendant's counterclaim for failure to state a claim upon which relief could be granted.

We have reviewed the record proper and are of the opinion that the judgment in this case is regular in form, that the facts found by the court support the conclusions of law in the judgment, and that no prejudicial error appears therein.

Affirmed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES CROSBY SPRINGS

No. 7519SC277

(Filed 6 August 1975)

Automobiles § 3— driving while license revoked — instructions — driving on "public highway"

In a prosecution for driving while license was revoked, the trial court erred in failing to require the jury to find beyond a reasonable doubt that defendant operated a vehicle "upon a public highway" while his operator's license was in a state of revocation. G.S. 20-28(a).

APPEAL by defendant from *Crissman, Judge.* Judgment entered 15 January 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 10 June 1975.

Defendant was tried in the District Court of Cabarrus County on his plea of not guilty to a warrant charging him with operating a motor vehicle on a public street in the City of Concord on or about 11 May 1974 while his operator's license was revoked. Having been found guilty as charged, an appeal was taken to the Superior Court for a trial by jury. The jury found defendant guilty of driving while his license was revoked, and from judgment entered thereon defendant appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Williams, Willeford, Boger & Grady, by Samuel F. Davis, Jr., for defendant appellant.

MARTIN, Judge.

Defendant's motions to dismiss were properly denied.

Defendant further contends that in charging the jury the trial judge erred in failing to require the jury to find beyond a reasonable doubt that defendant operated a motor vehicle *upon a public highway* while his operator's license was in a state of revocation. This contention has merit.

In pertinent part, G.S. 20-28(a) provides:

"Any person whose operator's or chauffeur's license has been suspended or revoked other than permanently, as provided in this Chapter, who shall drive any motor vehicle

upon the highways of the State while such license is suspended or revoked shall be guilty of a misdemeanor. . . . "

To constitute a violation of G.S. 20-28(a) there must be (1) operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked. *State v. Cook,* 272 N.C. 728, 158 S.E. 2d 820 (1968). For purposes of Chapter 20, a highway or street is defined as "[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic." G.S. 20-4.01(13).

In order to find defendant guilty of violating G.S. 20-28(a), the jury must be satisfied beyond a reasonable doubt that the alleged offense took place upon a public highway. Failure to so instruct the jury was prejudicial error entitling defendant to a new trial. See, *State v. Harris,* 10 N.C. App. 553, 180 S.E. 2d 29 (1971).

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. GREGORY PERRY COLLINS

No. 759SC207

(Filed 6 August 1975)

Constitutional Law § 33; Criminal Law § 48— implicating statement of accomplice — silence of defendant — no admission

The trial court erred in admitting testimony that a witness who was arrested for the crime with which defendant was charged made an in-custody statement in defendant's presence implicating defendant in the crime and defendant made no denial.

ON writ of *certiorari* to review trial before *Hall, Judge.* Judgment entered 1 October 1974 in Superior Court, Franklin County. Heard in the Court of Appeals 13 May 1975.

Defendant was tried on his plea of not guilty to an indictment charging him with the felonious larceny of $1,200.00 from Jack Collins. At the trial Jack Collins, defendant's cousin, testified that between 9:00 and 10:00 p.m. on 18 November 1973, after he had closed his grocery business and while he was walk-

ing to his car behind the store, he was struck and knocked unconscious. When he came to, someone was going through his pockets. He was again hit, lost consciousness a second time, and when he then regained consciousness, he found that his leg was broken and that between $1,200.00 and $1,300.00 was missing from his pocket. Jack Collins did not see who hit him or took his money.

William Craig Leonard testified that he and defendant planned to "jump" Jack Collins and take his money, that defendant told Leonard to do it because Jack Collins would recognize defendant, that Leonard assaulted Jack Collins, that defendant ran by and grabbed the money, and that and he and the defendant each received about $600.00.

Defendant testified that he had nothing to do with the assault on Jack Collins or larceny of the money and that at the time these offenses were committed he was at home with his wife and infant child. Defendant's father, mother and wife testified in support of his alibi.

The jury found defendant guilty of felonious larceny and judgment was entered imposing a prison sentence. Defendant gave timely notice of appeal, and this Court subsequently granted his petition for writ of certiorari.

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

Aubrey S. Tomlinson, Jr. for defendant appellant.

PARKER, Judge.

From the testimony of Franklin County Sheriff Dement, which is contained in the record, it appears that the State's witness, William Craig Leonard, was first arrested in connection with the offense for which defendant was tried and convicted. While in jail, Leonard gave the Sheriff two statements. In his first statement, Leonard admitted that he alone assaulted Jack Collins and took the money. In this statement Leonard said that on the next morning after committing the offenses, he told defendant what he had done and gave defendant $100.00 not to tell. Based on this first statement by Leonard, the Sheriff arrested defendant and charged him with being an accessory. A few days later while Leonard and defendant were both in jail, Leon-

ard changed his story and gave a second statement to the Sheriff. In this second statement, which was made in defendant's presence, Leonard accused defendant of actively participating in the offenses.

At defendant's trial, the District Attorney during direct examination of Leonard questioned Leonard concerning the statement which Leonard had given the Sheriff in defendant's presence. After Leonard testified in substance to what his statement contained, the record shows the following colloquy occurred:

"Q. Was Greg Collins, the defendant, present when you told Sheriff Dement this?

A. Yes.

Q. How close was he to you?

A. Close as I am to you.

Q. Did he ever deny it?

OBJECTION.

COURT: Overruled.

EXCEPTION NO. 6

A. No sir.

Q. Never denied it?

A. No sir.

EXCEPTION NO. 7"

The obvious purpose of the District Attorney's question to which objection was taken was to raise an implication that defendant, by failing to deny the accusation made against him, was admitting its truth. By remaining silent under the circumstances disclosed in this record defendant was exercising his constitutional right. Our Supreme Court in *State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974) held the admission of similar evidence to be reversible error entitling the defendant in that case to a new trial. On the record before us we cannot say that the erroneously admitted evidence was harmless beyond a reasonable doubt in the present case. Defendant is awarded a

New trial.

Judges BRITT and VAUGHN concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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ANIMALS

§ 3. Injury or Damage Caused by Animals Roaming at Large

Defendant was negligent in allowing his cattle to escape and damage plaintiff's soybean crop. *Whitaker v. Earnhardt,* 736.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Order denying defendants' motion to dismiss an action for injunction pending final determination of plaintiff's petition before the Comr. of Motor Vehicles and transferring the cause to superior court of Wake County where an appeal from the order is pending is interlocutory and not appealable. *Cycles, Inc. v. Honda Motor Co.,* 76.

Summary judgment entered in favor of one of two defendants is interlocutory and not presently appealable. *Siders v. Gibbs,* 333.

§ 9. Moot Question

Appeal from a commitment order to a mental health care facility was not moot though the commitment period had expired. *In re Benton,* 294.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

When plaintiffs appealed from an order denying their motions to set aside a prior judgment, trial court thereafter had no authority to enter summary judgment against plaintiffs. *Howard v. Boyce,* 689.

§ 28. Exceptions to the Findings of Fact

In order to obtain review of exceptions relating to admission of evidence made by the court in a nonjury case, exceptions must be made to the findings of fact. *Salem v. Flowers,* 504. In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence and the rulings of the judge in denying defendant's motions to dismiss are ineffectual. *Whitaker v. Earnhardt,* 736.

§ 62. New Trial and Partial New Trial

In awarding plaintiff a new trial, the Court of Appeals did not intend to grant a partial new trial limited to plaintiff's claim but intended to grant a new trial on all issues, including defendant's counterclaim. *Kaczala v. Richardson,* 268.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

Officer lawfully arrested an automobile passenger for possession of heroin without a warrant based on information received from a confidential informant. *S. v. Alexander,* 21.

Defendant's arrest for disorderly conduct was lawful and she could be convicted for resisting such arrest. *S. v. McLoud,* 297.

§ 5. Method of Making Arrest

Acts of an officer were sufficient to constitute an arrest though the officer did not formally state that defendant was under arrest. *S. v. Ausborn,* 481.

ARREST AND BAIL — Continued

§ 11. Liabilities on Bail Bonds

The superior court had jurisdiction to hear a disciplinary proceeding against a professional bondsman who allegedly violated a rule promulgated by the superior court. *In re Johnson*, 745.

ARSON

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for setting fire to a paint and body shop. *S. v. Caron*, 456.

ASSAULT AND BATTERY

§ 5. Assault With a Deadly Weapon

A defendant convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence. *S. v. Lunsford*, 78.

Defendant tried upon an indictment charging attempted common law robbery could not be convicted of assault with a deadly weapon inflicting serious injury. *S. v. Wilson*, 188.

Act of pointing a gun at two police officers constituted two separate assaults. *S. v. Jones*, 467.

§ 13. Competency of Evidence

Trial court did not err in excluding opinion of an eyewitness that defendant was not the aggressor. *S. v. Brown*, 314.

§ 14. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to support a jury finding that defendant intended to kill his victim. *S. v. Christy*, 57.

§ 15. Instructions

Trial court in a felonious assault case erred in failing to charge on the legal principles of accidental shooting. *S. v. Moore*, 193.

AUTOMOBILES

§ 2. Procedures for Suspension or Revocation of Drivers' Licenses

Petitioner seeking judicial review of a decision of the Driver License Medical Review Board must file such petition in Superior Court of Wake County. *Cox v. Miller*, 749.

§ 3. Driving After Revocation of License

Trial court erred in failing to require the jury to find that defendant operated a vehicle "upon a public highway" while his operator's license was in a state of revocation. *S. v. Springs*, 757.

§ 20. Passing at Intersection

Plaintiff's driver was negligent if he attempted to pass defendant's truck in an unmarked intersection in the City of Rose Hill although plaintiff's driver could have had no way of knowing and did not in fact know that he was in the city limits. *Poultry Co. v. Thomas*, 6.

AUTOMOBILES — Continued

§ 50. Sufficiency of Evidence of Negligence

Directed verdict was proper where plaintiff testified defendant was not negligent in the operation of the vehicle. *Cogdill v. Scates*, 382.

§ 62. Negligence in Striking Pedestrian

Trial court erred in granting summary judgment for defendant in a pedestrian's action to recover for injuries sustained when he was struck by defendant's car while crossing a highway at a point which was not an intersection or crosswalk. *Dendy v. Watkins*, 81.

Trial court properly directed verdict for defendant driver where the evidence tended to show that plaintiff pedestrian jumped into defendant's lane of travel. *Hartsell v. Strickland*, 68.

§ 64. Negligence in Striking Animals

Plaintiff's complaint was sufficient to state a claim against defendant bus driver who struck her dog. *Caldwell v. Deese*, 435.

§ 90. Instructions in Accident Cases

In an action for the wrongful death of a child who was struck by an automobile while riding a bicycle, trial court failed to declare and explain the law arising on the evidence. *Jones v. Bess*, 1.

Trial court properly instructed the jury that plaintiff's driver was negligent if he attempted to pass defendant's truck in an unmarked intersection in a city although the evidence showed plaintiff's driver could not know he was in the city limits. *Poultry Co. v. Thomas*, 6.

§ 113. Sufficiency of Evidence of Manslaughter

State's evidence in an involuntary manslaughter prosecution was sufficient to show a causal connection between the automobile accident in question and decedent's death. *S. v. Marr*, 286.

§ 126. Competency and Relevancy of Evidence of Driving Under the Influence

Trial court in a drunken driving case properly excluded officer's testimony that he was required by law to assist a defendant who requests a blood test. *S. v. Sawyer*, 728.

Where the arresting officer took defendant to a county hospital so that a blood alcohol test could be conducted by a physician of his choice after a breathalyzer test had been administered to defendant, refusal of the arresting officer to sign forms authorizing that the blood sample be sent to N. C. Memorial Hospital for analysis did not violate defendant's statutory rights and render the breathalyzer test inadmissible. *Ibid.*

§ 131. Failing to Stop After Accident

There was no fatal variance where the warrant charged defendant with failing to stop at the scene of an accident and to give certain identifying information and the evidence showed that defendant struck a parked and unattended vehicle. *S. v. Norris*, 259.

Trial court erred in permitting jury to find defendant guilty of leaving scene of accident if they found defendant was involved in accident with car driven by person not named in warrant. *S. v. Joyner*, 447.

AUTOMOBILES — Continued

§ 134. Unlawful Taking

The phrase "or has reason to believe" included in G.S. 20-106 prohibiting possession of a stolen vehicle is not unconstitutional. *S. v. Rook*, 33.

Evidence was sufficient to establish either knowledge or belief on the part of defendant that the vehicle he was driving was stolen. *Ibid.*

BOUNDARIES

§ 10. Sufficiency of Description and Admissibility of Evidence Aliunde

Deed conveying a "tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres" contains only a latently ambiguous description which may be aided by parol evidence. *Overton v. Boyce*, 680.

§ 15. Judgment

Processioning proceeding is remanded for inclusion of a surveyor's map with the judgment. *Simpson v. Lee*, 712.

BROKERS AND FACTORS

§ 6. Right to Commissions

Real estate agents were not entitled to recover their lost commission from defaulting buyers of a house. *Tuggle v. Haines*, 365.

BURGLARY AND UNLAWFUL BREAKINGS

§ 4. Competency of Evidence

Evidence that defendant's thumbprint was found on a broken vending machine lock in a launderette was sufficient for the jury in a breaking and entering case although defendant showed the machine and lock were located in a vending area frequented by customers and others who socialize around the machines. *S. v. Miller*, 440.

COMPROMISE AND SETTLEMENT

§ 3. Practice and Procedure

Plaintiffs were not prejudiced by admission of testimony of a settlement offered by defendant. *Williams v. Power Co.*, 392.

CONSPIRACY

§ 2. Action for Civil Conspiracy

Plaintiff failed to state a claim for relief on the ground of civil conspiracy where the complaint discloses the act defendants committed was a lawful one. *Smith v. Ford Motor Co.*, 181.

§ 6. Sufficiency of Evidence

State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of conspiracy to break or enter a service station with intent to commit larceny. *S. v. Locklear*, 26.

CONSPIRACY — Continued

Evidence was sufficient for the jury in a prosecution for conspiracy to commit murder; *S. v. Dellinger*, 426; for conspiracy to commit robbery with a firearm, *S. v. Hamrick*, 518.

§ 7. Instructions

Trial court erred in giving jury instructions which assumed that a conspiracy had been entered. *S. v. Gibson*, 306.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades

Act prohibiting sale of beer and wine in the community of Atlantic is an unconstitutional local act regulating a trade. *Nelson v. Board of Alcoholic Control*, 303.

§ 20. Equal Protection

The statutory scheme for town-initiated annexation by towns of less than 5000 population is constitutional. *Rexham Corp. v. Pineville*, 349.

§ 30. Due Process in Trial

Defendant was not denied his right to a speedy trial where 18 months elapsed between the offense and the trial. *S. v. Alexander*, 21.

Defendant was not denied due process by delay between alleged narcotics offenses on 9 May 1974 and his indictment and arrest on 30 September 1974, though defendant contended the delay resulted in loss of memory of events of the day in question. *S. v. Hackett*, 239.

Defendant was not denied due process by an eight-month preindictment delay for narcotics offenses. *S. v. Helms*, 601.

§ 31. Time to Prepare Defense

Defendant was denied the opportunity to prepare and present his defense to a charge of corporate malfeasance where defendant had been awaiting trial on indictment for embezzlement for two years and an indictment was returned charging defendant with corporate malfeasance and trial of that charge was held the same day. *S. v. Chapman*, 66.

§ 32. Right to Counsel

Defendant was not denied his right to the effective assistance of counsel by the trial court's statement out of the jury's presence that "if the jury finds this man guilty, I'm going to put him in prison." *S. v. Norris*, 259.

Defendant was sufficiently advised of his right to counsel and waived that right. *S. v. Joyner*, 447.

§ 33. Self-incrimination

Admission of testimony of two officers concerning accusations made by defendant's companion and defendant's silence was prejudicial error. *S. v. Absher*, 309.

Trial court erred in admitting testimony that a witness made a statement implicating defendant in the crime charged and defendant made no denial. *S. v. Collins*, 758.

Evidence as to defendant's silence when questioned by authorities was not prejudicial where the court immediately withdrew the evidence and gave a curative instruction. *S. v. Baker*, 605.

CONSTITUTIONAL LAW — Continued

§ 34. Double Jeopardy

Defendant was not subjected to double jeopardy where she was charged with multiple statutory offenses arising from one act of prostitution. *S. v. Demott*, 14.

Where the court on appeal dismissed an armed robbery charge against defendant for insufficiency of evidence, defendant will not be subjected to double jeopardy when he is tried on a lesser included offense upon retrial. *S. v. Alston*, 418.

CONTEMPT OF COURT

§ 6. Hearing on Order to Show Cause; Findings and Judgment

Evidence supported the trial court's finding that defendant was able to pay $3,570.55 needed to comply with a child support order and that he was in contempt for failure to make such payment. *Fitch v. Fitch*, 570.

§ 8. Appeal and Review

A contempt order which provided that defendant could purge itself by complying with an earlier court order to answer plaintiff's interrogatories was not final and was not appealable. *Willis v. Power Co.*, 598.

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

A paper writing containing the statement "This letter is to serve as a memorandum agreement until proper complete documents can be drawn up to consummate this transaction" is not unenforceable as a contract as a matter of law. *Bank v. Wallens*, 580.

§ 10. Contracts Limiting Liability for Negligence

A contract provision limiting a telephone company's liability for errors in an advertisement in the Yellow Pages to the cost of the advertisement will not be enforced as a matter of public policy. *Gas House, Inc. v. Telephone Co.*, 672.

§ 14. Contracts for Benefit of Third Persons

Trial court properly denied defendant's motion to dismiss where the evidence tended to show plaintiff was a third party beneficiary of the contract between defendants. *Finance Corp. v. Mitchell*, 264.

§ 16. Conditions Precedent

Execution of new notes to defendant by third parties was a condition precedent to defendant's obligation to reissue checks to plaintiff in payment for feed advanced by plaintiff to the third parties. *Cargill, Inc. v. Credit Assoc., Inc.*, 720.

§ 30. Forfeitures and Penalties Under Terms of Instrument

Summary judgment was improperly entered for defendant in an action to recover a sum withheld by defendant as liquidated damages where plaintiff presented evidence that it did not complete work by the date called for because the site was not made available to it at the time specified in the contract. *Dickerson, Inc. v. Board of Transportation*, 319.

CONTRACTS — Continued

§ 32. Action for Wrongful Interference

Plaintiff failed to state a claim against Ford Motor Company for wrongful interference with a contract in which plaintiff was employed as president and general manager of a Ford dealership. *Smith v. Ford Motor Co.*, 181.

COSTS

§ 3. Taxing of Costs in Discretion of Court

Trial court in a personal injury action had authority under G.S. 6-21.1 to award attorney fees for services rendered in a prior trial, an appeal to the Court of Appeals and retrial, but the court erred in failing to make findings of fact to support the award. *Hill v. Jones*, 168.

COURTS

§ 7. Appeal from Inferior Court to Superior Court

Only superior court has jurisdiction to hear the State's appeal from a district court order quashing a warrant for loitering on the ground the city ordinance allegedly violated was unconstitutional. *S. v. Greene*, 342.

§ 14. Jurisdiction of Inferior Courts

Magistrate correctly refused to hear defendant's counterclaim for damages of $300,000. *Ervin Co. v. Hunt*, 755.

§ 21. What Law Governs Between Laws of This and Other States

Validity and construction of a separation agreement are to be determined by law of the state where executed. *Cole v. Earon*, 502.

CRIME AGAINST NATURE

§ 1. Elements of the Offense

Conviction of defendant for crime against nature and assault with intent to commit rape where the charges grew out of one event did not twice put defendant in jeopardy for one crime. *S. v. Webb*, 526.

§ 2. Prosecutions

The crime against nature statute, G.S. 14-177, is not unconstitutionally vague. *S. v. Webb*, 526.

CRIMINAL LAW

§ 5. Mental Capacity in General

Instruction given by the court at the jury's request as to the procedure for psychiatric treatment and restraint in the event of a verdict of not guilty by reason of insanity was inaccurate and could have influenced the jury's verdict. *S. v. Sellers*, 51.

§ 9. Principals in First or Second Degree

Defendant could not be convicted as a principal of the crimes of breaking and entering, larceny and attempted safecracking where defendant was at his home when the crimes were committed, but defend-

CRIMINAL LAW — Continued

ant could be convicted as an accessory before the fact of the crimes of breaking and entering and larceny. *S. v. Buie,* 151.

§ 15. Venue

Trial court's instruction on continuing offenses which were committed in two counties was proper. *S. v. Joyner,* 447.

§ 22. Arraignment and Pleas

Absence of defendant's arraignment and plea in the transcript of the trial proceedings did not establish that arraignment and plea did not occur. *S. v. Baldwin,* 359.

Trial court did not err in denying defendant's motion in arrest of judgment made on the ground that he had not been properly arraigned though the record does not show that a formal plea was entered. *S. v. Harris,* 371.

§ 26. Plea of Former Jeopardy

Defendant was not subjected to double jeopardy where she was charged with multiple statutory offenses arising from one act of prostitution. *S. v. Demott,* 14.

Defendant was not subjected to double jeopardy when she was convicted of distribution of heroin and cocaine and possession of the same heroin and cocaine. *S. v. Perry,* 185.

A defendant who was convicted of an armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence. *S. v. Lunsford,* 78.

Where the court on appeal dismissed an armed robbery charge against defendant for insufficiency of evidence, defendant will not be subjected to double jeopardy when he is tried on a lesser included offense upon retrial. *S. v. Alston,* 418.

§ 29. Suggestion of Mental Incapacity to Plead

Trial court did not err in denying motion of defense counsel that the case be dismissed on the ground that defendant was not competent to stand trial. *S. v. Baldwin,* 359.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Though evidence tended to show that defendant may have been guilty of independent crimes, such evidence was admissible since it tended to prove the disputed fact as to defendant's intent. *S. v. Breeze,* 48.

Error in admission of testimony tending to show defendant at a given time was in jail was cured when the trial court instructed the jury not to consider the testimony. *S. v. Miller,* 190.

Trial court erred in permitting a witness to testify that defendant broke into her house and committed sexual offenses 10 days before the alleged burglary. *S. v. Whitney,* 460.

In an armed robbery case, evidence that defendants committed another robbery using the same automobile was admissible for purposes of identification. *S. v. Harvey,* 716.

CRIMINAL LAW — Continued

§ 40. Evidence and Record at Former Trial or Proceeding

Defendant was not entitled to free transcripts of two trials of one who was accused in a separate indictment of participating in the same robbery for which defendant was being tried. *S. v. Harris*, 371.

§ 43. Photographs

Trial court's error in admitting a photograph of defendant which indicated to the jury that defendant was in police custody two months prior to the commission of the offense for which he was being tried was harmless. *S. v. Segarra*, 399.

Trial court in a second degree murder prosecution did not err in allowing into evidence a photograph of deceased. *S. v. Baker*, 605.

§ 46. Flight of Defendant as Implied Admission

Trial court did not err in admitting evidence that defendant escaped from jail while awaiting trial and instructing the jury on flight. *S. v. Miller*, 190.

§ 48. Silence of Defendant as Implied Admission

Admission of testimony of two officers concerning accusations made by defendant's companion and defendant's silence was prejudicial error. *S. v. Absher*, 309.

Officer's testimony concerning a statement made in defendant's presence that defendant had been caught as a "peeping Tom" was hearsay and not competent as an implied admission by silence. *S. v. Whitney*, 460.

Trial court erred in admitting testimony that a witness made a statement implicating defendant in the crime charged and defendant made no denial. *S. v. Collins*, 758.

Evidence as to defendant's silence when questioned by authorities was not prejudicial where the court immediately withdrew the evidence and gave a curative instruction. *S. v. Baker*, 605.

§ 50. Opinion Testimony

Witness's testimony, "We made plans to rob my father," did not invade the province of the jury. *S. v. Hamrick*, 518.

§ 60. Evidence in Regard to Fingerprints

Evidence that defendant's thumbprint was found on a broken vending machine lock in a launderette was sufficient for the jury in a breaking and entering case although defendant showed the machine and lock were located in a vending area frequented by customers and others who socialize around the machines. *S. v. Miller*, 440.

§ 64. Evidence as to Intoxication

Where the arresting officer took defendant to a county hospital so that a blood alcohol test could be conducted by a physician of defendant's choice after a breathalyzer test had been administered to defendant, refusal of the arresting officer to sign forms authorizing that the blood sample be sent to N. C. Memorial Hospital for analysis did not violate defendant's statutory rights and render the breathalyzer results inadmissible. *S. v. Sawyer*, 728.

CRIMINAL LAW — Continued

§ 66. Evidence of Identity by Sight

Witness's in-court identification of defendant was based on his observations at the crime scene. *S. v. Ervin*, 328; *S. v. Widemon*, 245.

Trial court properly asked questions on voir dire regarding an armed robbery victim's identification of defendant. *S. v. Segarra*, 399.

Robbery victim's in-court identification of defendant was not tainted by pretrial photographic or lineup identifications. *S. v. Hunter*, 489.

Burglary victim's in-court identification of defendant was of independent origin and not tainted by exhibition of the defendant to the victim while sitting alone in a police car. *S. v. Whitney*, 460.

§ 75. Test of Voluntariness of Confession and Admissibility

Trial court did not err in allowing testimony of an officer concerning statements made by defendant without benefit of Miranda warnings. *S. v. Christy*, 57.

A volunteered statement made by defendant prior to being given Miranda warnings was admissible. *S. v. Sorrell*, 325.

Defendant who was given Miranda warnings freely and understandingly waived his Fifth Amendment rights. *S. v. Smith*, 283.

§ 79. Declarations of Codefendant

Trial court did not err in allowing into evidence an extra-judicial statement of a codefendant. *S. v. Dellinger*, 426.

§ 80. Records

Trial court did not err in denying defendant's request for subpoenas to the telephone company for certain records. *S. v. Neely*, 707.

§ 82. Privileged Communications

Trial court properly sustained State's objection to cross-examination of a coconspirator involving communications with his attorney. *S. v. Hamrick*, 518.

§ 84. Evidence Obtained by Unlawful Means

Defendant was without standing to question the validity of a warrantless search of the house where he was arrested since defendant was a trespasser therein. *S. v. Widemon*, 245.

§ 86. Credibility of Defendant and Parties Interested

Cross-examination as to specific acts of misconduct was proper. *S. v. Neely*, 707.

§ 87. Direct Examination of Witnesses

Trial court properly allowed police chief to refresh his memory by referring to transcript of an interrogation of defendant and solicitor to use transcript to cross-examine defendant. *S. v. Cogdell*, 522.

§ 88. Cross-examination

Trial court did not unduly limit cross-examination of robbery victim in sustaining the State's objection to a question as to whether the weapon used in the robbery could have been a blank pistol. *S. v. Smith*, 511.

CRIMINAL LAW — Continued

§ 89. Credibility of Witnesses and Impeachment

Testimony that the victim told the witness immediately after being shot that the defendant had shot him was competent to corroborate the victim's testimony. *S. v. Christy*, 57.

District attorney properly asked a defense witness whether he had ever used or possessed controlled substances. *S. v. Cogdell*, 522.

§ 91. Continuance

Trial court did not err in denying defendant's motion for continuance where defendant's attorney was absent from the State for several days and returned on the day of the trial. *S. v. Harris*, 371.

The trial court did not err in denying defendant's motion for a one-week recess to obtain the presence of a witness who lived out of the State. *S. v. Davis*, 696.

§ 92. Consolidation

Trial court did not err in consolidating for trial charges against five defendants which arose out of the same conspiracy. *S. v. Locklear*, 26.

Charges of armed robbery and conspiracy to commit armed robbery were properly consolidated for trial. *S. v. Johnson*, 516.

§ 96. Withdrawal of Evidence

Reference to defendant as a prison escapee was rendered harmless by withdrawal of the evidence by the judge. *S. v. Widemon*, 245.

Defendant was not prejudiced by a witness's reference to a prior offense committed by him where the trial court immediately instructed the jury not to consider it. *S. v. Wolfe*, 464.

§ 97. Introduction of Additional Evidence

Trial court did not abuse its discretion in refusing to permit defendant to recall witnesses who had already testified and to call numerous other witnesses who were not in court. *S. v. Miller*, 190.

Trial court did not err in allowing the State to recall two witnesses after it had rested its case. *S. v. Davis*, 696.

§ 99. Conduct of the Court and Expression of Opinion on the Evidence During Trial

Defendant was not denied the right to a fair trial by the trial court's remarks before the jury and in the absence of the jury regarding defendant's motion for nonsuit. *S. v. Norris*, 259.

Defendant was not denied his right to the effective assistance of counsel by the trial court's statement out of the jury's presence that "if the jury finds this man guilty, I'm going to put him in prison." *Ibid.*

Comments by trial court to defendant while he was on the witness stand did not constitute an expression of opinion. *S. v. Battle*, 478.

§ 102. Argument of Solicitor

Defendant was not prejudiced by the solicitor's jury argument concerning defendant's prior convictions. *S. v. Simon*, 71.

Solicitor's jury argument in an armed robbery case that defendant was "selling grass, preying upon the weakness of his fellow human beings" was not improper. *S. v. Hunter*, 489.

CRIMINAL LAW — Continued

§ 111. Form and Sufficiency of Instructions

Instruction given by the court at the jury's request as to the procedure for psychiatric treatment and restraint in the event of a verdict of not guilty by reason of insanity was inaccurate and could have influenced the jury's verdict. *S. v. Sellers,* 51.

§ 113. Application of Law to Evidence in Instructions

Trial court erred in instructing the jury that it should return a verdict of guilty if it found beyond a reasonable doubt that defendants "or some of them" agreed with another or with one other of their number to damage property by explosives. *S. v. Gibson,* 306.

Trial court in a breaking and entering case did not err in failing to instruct on aiding and abetting. *S. v. Gantt,* 554.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court's instruction on a getaway car in an armed robbery was proper. *S. v. Pettice,* 272; *S. v. Goodman,* 276.

Defendant was not prejudiced by trial court's reference in the jury instructions to defendant's alias. *S. v. Harvey,* 716.

§ 116. Charge on Failure of Defendant to Testify

Trial court erred in instructing the jury that defendants elected, as they had a right to do, not to offer evidence without further instructing the jury that failure to offer evidence should not be considered against defendants. *S. v. Scott,* 145.

§ 117. Charge on Character Evidence and Credibility of Witness

Trial court's instructions on the jury's duty to scrutinize the testimony of defendant were proper. *S. v. Millsaps,* 41.

Trial court did not err in failing to instruct the jury on an interested witness where defendant made no request therefor. *S. v. Baldwin,* 359.

Trial court did not err in failing to instruct the jury to scrutinize the testimony of an informer absent a request for such an instruction. *S. v. Helms,* 601.

§ 118. Charge on Contentions of the Parties

Where trial court did not state the contentions of the State but used the word "contends" in referring to the evidence for the purpose of explaining the law applicable thereto, the court did not err in failing to state the contentions of defendant. *S. v. Vail,* 73.

In a prosecution for armed robbery of a Scottish Inn, the court's inaccurate statement that "he didn't deny going to the Scottish Inn or being there" was not prejudicial error. *S. v. Millsaps,* 41.

§ 119. Requests for Instructions

Trial court was not required to instruct on alibi where request therefor was oral and was not made until the court had completed its charge. *S. v. Ervin,* 228.

§ 121. Instructions on Defense of Entrapment

Trial court's instructions on entrapment which substantially followed the N. C. Pattern Jury Instructions were proper. *S. v. Gantt,* 554.

CRIMINAL LAW — Continued

§ 122. Additional Instructions After Initial Retirement of Jury

Trial court in a homicide case did not coerce a verdict when the court on two occasions instructed the jury to deliberate further, and did not err in failing to instruct that no juror should surrender his convictions in order to agree on a verdict. *S. v. Barnes*, 37.

Trial court did not err in failing to recharge the jury on entrapment after the jury returned and asked whether they should vote on one verdict altogether or the three charges separately. *S. v. Gantt*, 554.

§ 124. Sufficiency and Effect of Verdict

Where defendant was tried on two charges and the jury verdict referred to only one charge, the verdict amounted to an acquittal on the other charge. *S. v. Teachey*, 338.

§ 126. Acceptance of Verdict

Trial court did not err in accepting a verdict that the jurors "find the Defendant guilty of voluntary manslaughter and request mercy." *S. v. Barnes*, 37.

§ 134. Form and Requisites of Sentence in General

Trial court erred in sentencing defendant as a "regular youthful offender" without finding that defendant would not benefit from sentencing as a "committed youthful offender." *S. v. Jones*, 63.

§ 138. Severity of Sentence and Determination Thereof

Sentence is vacated where the record discloses that severity of sentence was based on trial judge's dissatisfaction with the length of time committed offenders remain in prison and his mistaken assumption that prisoners would automatically be released on parole at the expiration of one-fourth of their sentences. *S. v. Snowden*, 45.

§ 139. Sentence to Maximum and Minimum Terms

Sentence imposed by the trial court was improper where it failed to sentence defendant to a minimum term. *S. v. Neely*, 707.

§ 145.1. Probation

Trial court did not err in failing to arraign defendant in a proceeding to revoke his probation. *S. v. Harris*, 254.

Defendant received sufficient notice of his probation revocation proceeding under G.S. 15-200.1. *Ibid.*

§ 146. Appellate Jurisdiction in Criminal Cases

Only superior court has jurisdiction to hear the State's appeal from a district court order quashing a warrant for loitering on the ground the city ordinance allegedly violated was unconstitutional. *S. v. Greene*, 342.

§ 154. Case on Appeal

In the absence of a complete stenographic transcript, the burden was upon defendant to set forth in the case on appeal the errors he contended were committed at trial. *S. v. Neely*, 707.

CRIMINAL LAW — Continued

§ 155.5. Docketing of Record in Court of Appeals

Appeal is subject to dismissal for failure to docket the record within time allowed in order granting certiorari. *S. v. Powell*, 344.

Failure to docket appeal was not extended by order extending the time for serving case on appeal. *S. v. Stokes*, 527.

Appeal is dismissed where record on appeal was filed more than 90 days after judgment was entered. *S. v. McGaha*, 528.

§ 161. Necessity For and Requisites of Exceptions

Exceptions to the signing and entry of judgment present the face of the record for review. *S. v. Robinson*, 620.

§ 172. Whether Error is Cured by Verdict

Trial court's failure to instruct on the heat of passion in a second degree murder case was cured by the verdict of guilty of voluntary manslaughter. *S. v. Smith*, 283.

DAMAGES

§ 7. Liquidated Damages

Summary judgment was improperly entered for defendant in an action to recover a sum withheld by defendant as liquidated damages where plaintiff presented evidence that it did not complete work by the date called for because the site was not made available to it at the time specified in the contract. *Dickerson, Inc. v. Board of Transportation*, 319.

§ 11. Punitive Damages

Plaintiffs were not entitled to punitive damages for fraudulent representations by a real estate agent in the sale of a house. *Tuggle v. Haines*, 365.

DEATH

§ 9. Distribution of Recovery

A parent who abandoned his child is precluded by statute from participating in proceeds from settlement for wrongful death of the child. *Williford v. Williford*, 61.

DEEDS

§ 13. Remainders

A deed conveying land to testatrix "and her children after her" created a vested remainder in the children. *Houck v. Stephens*, 608.

DESCENT AND DISTRIBUTION

§ 6. Wrongful Act Causing Death as Precluding Inheritance

A minor who was adjudged a delinquent child after he shot his parents was not a slayer as defined by G.S. 31A-3(3)a and therefore barred from inheriting from his parents but he was barred under common law. *Lofton v. Lofton*, 203.

DISORDERLY CONDUCT

§ 1. Nature and Elements of the Offense

Defendant's arrest for disorderly conduct was lawful. *S. v. McLoud,* 297.

DIVORCE AND ALIMONY

§ 4. Condonation

Trial court did not err in failing to instruct the jury on condonation where there was no evidence that plaintiff condoned defendant's abandonment. *Earles v. Earles,* 559.

§ 8. Abandonment

There was sufficient evidence to go to the jury on the issue of abandonment in this action for divorce from bed and board. *Earles v. Earles,* 559.

§ 11. Indignities to the Person

Evidence was sufficient to support trial court's findings and conclusions that plaintiff's condition was intolerable and her life burdensome as a result of defendant's conduct. *Beall v. Beall,* 752.

§ 13. Separation for Statutory Period

Disposition on procedural grounds of an earlier action by defendant for support did not constitute a judicial separation. *Kirby v. Kirby,* 322.

§ 14. Adultery

Testimony by plaintiff in a divorce action regarding defendant's statement that he loved another woman and would continue to see her was not rendered incompetent by G.S. 8-56 and G.S. 50-10. *Earles v. Earles,* 559.

§ 16. Alimony Without Divorce

Findings required for award of alimony without divorce. *Townson v. Townson,* 75.

Defendant's obligation under a consent judgment to pay plaintiff alimony ceased as a matter of law when the plaintiff remarried. *Martin v. Martin,* 506.

Trial court in an action for alimony erred in directing defendant to pay plaintiff cash and transfer to her certain real property. *Taylor v. Taylor,* 592.

§ 17. Alimony Upon Divorce from Bed and Board

Issue of whether plaintiff was the dependent spouse should be determined by the trial court and not by the jury. *Earles v. Earles,* 559.

§ 18. Alimony Pendente Lite

Finding that defendant has a present monthly income of $658.52 will not support an award of alimony pendente lite of $938 per month. *Robinson v. Robinson,* 178.

Trial court's award of attorney fees in an action for alimony was proper. *Taylor v. Taylor,* 592.

DIVORCE AND ALIMONY—Continued

§ 21. Enforcing Payment

Evidence supported the trial court's finding that defendant was able to pay $3,570.55 needed to comply with a child support order and that he was in contempt for failure to make such payment. *Fitch v. Fitch,* 570.

§ 22. Jurisdiction and Procedure in Custody Action

District court of one county did not have the right to assume custody jurisdiction of two minor children upon its finding they were "neglected" children to the exclusion of the district court in another county which had previously acquired custody jurisdiction in a divorce proceeding. *In re Greer,* 106.

§ 23. Support of Children of the Marriage

Under the law of New York, wife's violation of visitation provisions in a separation agreement precluded her from maintaining an action against the husband to recover unpaid child support payments provided for in the agreement. *Cole v. Earon,* 502.

§ 24. Custody of Children of the Marriage

Evidence was sufficient to support trial court's conclusions that there had been a change in circumstances following remarriage of the mother to warrant a change of custody of the minor child of the parties. *Paschall v. Paschall,* 491.

DURESS

In an action to recover on a promissory note, evidence was sufficient to withstand plaintiff's motion for summary judgment where it tended to show that defendant signed the promissory note as a result of economic duress. *Austin v. Wilder,* 229.

EJECTMENT

§ 11. Verdict and Judgment

Trial court properly entered judgment for plaintiff in a summary ejectment action and properly dismissed defendant's counterclaim. *Ervin Co., v. Hunt,* 755.

EMINENT DOMAIN

§ 2. Acts Constituting a Taking

Entry upon lands to make a preliminary survey of the route proposed for a power line does not amount to a taking of private property, and G.S. 40-3 providing for such entry is constitutional. *Power Co. v. Herndon,* 724.

§ 6. Evidence of Value

Trial court in an eminent domain action erred in exclusion of a map depicting floodway zones for the land in question. *City of Durham v. Development Corp.,* 210.

EMINENT DOMAIN — Continued

§ 7. Proceedings to Take Land and Assess Compensation

Defendant in an eminent domain proceeding did not waive its right to contest the date of service of process on it by filing a petition for disbursement of funds deposited by plaintiff with the court. *City of Durham v. Development Corp.*, 210.

EQUITY

§ 2. Laches

Petitioners did not lose their right to set aside a 1945 consent judgment involving the property in question by laches. *Howard v. Boyce*, 686.

EVIDENCE

§ 12. Communications Between Husband and Wife

Letters written by defendant to plaintiff and defendant's oral statements that he loved another woman and would continue to see her were not inadmissible as privileged confidential communications between husband and wife, and G.S. 8-56 and G.S. 50-10 did not render plaintiff's testimony concerning the statements inadmissible. *Earles v. Earles*, 559.

§ 29. Accounts, Ledgers and Private Writings

Report purportedly compiling costs incurred because of overrun of undercut excavation was not admissible under the business records exception to the hearsay rule. *Lowder, Inc. v. Highway Comm.*, 622.

§ 41. Nonexpert Opinion Evidence as Invasion of Province of Jury

Testimony that silt which damaged plaintiffs' property came from the right-of-way cut made by defendant power company on property above that owned by plaintiffs was properly excluded by the court as invading the province of the jury. *Williams v. Power Co.*, 392.

FIRES

§ 3. Negligence in Causing Fires

Where evidence tended to show that defendants negligently used a flammable glue, failure to show the exact source of the fire was not fatal to plaintiffs' claim. *Jenkins v. Helgren*, 653.

Trial court did not err in refusing to permit evidence of a change in the warning label on a flammable glue can subsequent to the fire or evidence as to the availability of a nonflammable glue. *Ibid.*

FRAUD

§ 9. Pleadings

Plaintiff's allegations were insufficient to state a claim for relief to set aside a foreclosure sale based on fraud. *Britt v. Britt*, 132.

§ 12. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for the jury in an action for fraudulent representations by real estate agents concerning assumption of home loan and credit life insurance. *Tuggle v. Haines*, 365.

FRAUD — Continued

§ 13. Damages

Plaintiffs were not entitled to punitive damages for fraudulent representations by a real estate agent in the sale of a house. *Tuggle v. Haines*, 365.

FRAUDS, STATUTE OF

§ 2. Sufficiency of Writing

Deed conveying a "tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres" contains only a latently ambiguous description which may be aided by parol evidence. *Overton v. Boyce*, 680.

GUARANTY

Failure of a bank to collect accounts receivable held by it as collateral for a loan to a corporation did not constitute a defense to the bank's action against guarantors of payment of the loan. *Trust Co. v. Elzey*, 29.

HIGHWAYS AND CARTWAYS

§ 9. Actions Against Highway Commission

Substantial overrun in undercut excavation caused by unexpected and excessive wetness was a changed condition which entitled a highway construction contractor to an equitable adjustment in the contract price. *Lowder, Inc. v. Highway Comm.*, 622.

HOMICIDE

§ 17. Evidence of Threats

Time of defendant's threat to kill his wife was sufficiently established to permit the admission of evidence of the threat. *S. v. Thompson*, 171.

§ 19. Evidence Competent on Question of Self Defense

Where defendant offered evidence as to deceased's character as a violent and dangerous man, trial court erred in allowing the State to ask witnesses about deceased's general reputation in the community. *S. v. King*, 86.

Trial court in a murder prosecution did not err in excluding testimony of a public officer concerning specific incidents of violence involving deceased. *S. v. Arnold*, 484.

Trial court in a murder case did not err in excluding evidence that deceased was a violent and dangerous man. *S. v. Anderson*, 422.

§ 20. Photographs

Trial court in a murder prosecution did not err in allowing into evidence three photographs of the deceased's body. *S. v. Skinner*, 10.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury in a prosecution for second degree murder of defendant's wife. *S. v. Thompson*, 171.

State's evidence was sufficient for the jury in a prosecution for first degree murder of the femme defendant's husband. *S. v. Scott*, 145.

HOMICIDE — Continued

Evidence did not establish as a matter of law that defendant acted in self-defense in shooting the victim as the victim was picking up a shotgun. *S. v. Hutchison,* 290.

Evidence was sufficient to warrant a jury finding defendant was engaged in attempted armed robbery when the fatal shots were fired. *S. v. Widemon,* 245.

Evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter where it tended to show death by shooting. *S. v. Newcomb,* 595.

Evidence was sufficient to be submitted to the jury in a prosecution for murder though the State introduced exculpatory statements of defendant. *S. v. Hankerson,* 575.

§ 24. Instruction on Presumptions

Trial court properly instructed jury on presumptions from intentional killing with deadly weapon in prosecution of defendant for killing of his wife's paramour. *S. v. Smith,* 283.

§ 28. Instructions on Defenses

Trial court's instruction on the defense of accident was proper. *S. v Skinner,* 10.

Trial court in a homicide case erred in failing to instruct the jury that defendant could stand his ground and shoot his assailant in self-defense if he had reasonable belief he was about to be killed or suffer great bodily injury. *S. v. Ward,* 159.

Trial court in a homicide case erred in instructing the jury that the burden was on defendant to show that he was not the aggressor where there was no evidence in the record that defendant was the aggressor. *Ibid.*

Trial court did not err in giving the jury instruction which limited defendant's right to stand his ground on his own premises only to the case when a murderous assault was being made upon him. *S. v. Hutchison,* 290.

Trial court properly permitted the jury to determine whether defendant used excessive force in repelling decedent's attack upon him. *Ibid.*

Trial court in a murder case did not err in refusing to instruct the jury on defense of family and others in one's presence. *S. v. Anderson,* 422.

Failure of the trial court to include not guilty by reaason of self-defense as a possible verdict was cured where the court included such a charge in its additional jury instructions. *S. v. Hankerson,* 575.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Trial court in a homicide case did not err in failing to submit to the jury an issue of involuntary manslaughter. *S. v. Carter,* 84.

§ 31. Verdict

Trial court did not err in accepting the verdict of the jury finding defendant guilty of "manslaughter." *S. v. Skinner,* 10.

HUSBAND AND WIFE

§ 10. Requisites and Validity of Separation Agreement

Validity and construction of a separation agreement are to be determined by law of the state where executed. *Cole v. Earon*, 502.

§ 11. Construction and Operation of Separation Agreements

Under law of New York, wife's violation of visitation provisions in a separation agreement precluded her from maintaining an action against the husband to recover unpaid child support payments provided for in the agreement. *Cole v. Earon*, 502.

Trial court was without authority to modify "alimony" provisions in a separation agreement of the parties. *Bailey v. Bailey*, 444.

§ 12. Revocation and Rescission of Separation Agreement

Trial court erred in granting plaintiff's motion for directed verdict in an action to recover alimony allegedly due under a separation agreement where evidence was sufficient to support defendant's allegation of plaintiff's remarriage. *Shankle v. Shankle*, 565.

INDICTMENT AND WARRANT

§ 5. Findings and Return of Grand Jury

Indictment was not rendered invalid because of the absence of the letter "X" or some other mark in the endorsement on the indictment stating "this bill found ..... A True Bill." *S. v. Marr*, 286.

§ 12. Amendment

A warrant charging that defendant drove "after his license was suspended" was properly amended to read "while his license was suspended." *S. v. Bohannon*, 486.

Trial court properly permitted the State to amend an indictment charging possession of marijuana with intent to sell and sale of marijuana by changing the date of the offenses. *S. v. Helms*, 601.

§ 13. Bill of Particulars

Trial court properly denied defendant's motion for a bill of particulars. *S. v. Anderson*, 422.

§ 14. Grounds for Motion to Quash

Court properly denied motion to quash warrant for resisting arrest on ground arrest was unlawful. *S. v. McLoud*, 297.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

Plaintiff may not object for the first time on appeal to the trial court's private interview of a child in a custody proceeding. *Stevens v. Stevens*, 509.

INJUNCTIONS

§ 1. Nature and Grounds

Trial court properly granted a preliminary injunction restraining defendants from refusing to allow plaintiff's agent to conduct a survey

INJUNCTIONS — Continued

over defendants' property to determine the amount of land needed for a right-of-way for power lines. *Power Co. v. Herndon,* 724.

INSANE PERSONS

§ 1. Commitment of Insane Person to Hospital

Admission of the affidavit of a nontestifying psychiatrist abridged respondent's right to cross-examine the witness. *In re Benton,* 294.

Evidence was insufficient to support finding that respondent was imminently dangerous to herself. *Ibid.*

§ 2. Inquisition of Lunacy

For failure to give notice to respondent of a hearing on her competency, adjudication of lunacy is reversed. *In re Robinson,* 341.

INSURANCE

§ 5. Public Policy in Regard to Insurance Contract

Insurance agency will not be allowed to plead illegality of its agreement with insured to waive short rate premium that would have been due by reason of cancellation by the insured upon insured's agreement to delay cancellation of its insurance until the agency could resubmit a bid for such coverage. *Insurance Agency v. Leasing Corp.,* 138.

§ 35. Right to Proceeds where Beneficiary Causes Death of Insured

A minor who was adjudged a delinquent child after he shot his parents was not a slayer as defined by G.S. 31A-3(3)a and therefore barred from receiving proceeds of a life insurance policy on the lives of his parents, but he was barred under common law. *Lofton v. Lofton,* 203.

§ 63. Aviation Insurance

Evidence was sufficient to support jury finding that a legally effective binder for aircraft insurance was in existence on the date the aircraft crashed. *Norris v. Insurance Co.,* 91.

The jury could find there was a meeting of the minds of the parties before an airplane crash that the amount of admitted liability coverage for the airplane was to be $100,000 per seat. *Ibid.*

Evidence was sufficient to support a jury finding that an airplane was being temporarily used as a substitute aircraft within the meaning of an aircraft liability policy at the time it crashed. *Ibid.*

§ 117. Construction of Fire Policy

"Friendly" and "hostile" fires defined. *Bowes v. Insurance Co.,* 234.

§ 136. Actions on Fire Policies

Trial court erred in limiting its definition of hostile fire to the concept of "uncontrollability" but should have broadened its definition to include a fire that has become excessive even though it remains spatially confined to its intended place. *Bowes v. Insurance Co.,* 234.

§ 137. Time Limitations on Fire Policies

In an action on a fire policy, plaintiffs' amendment of their complaint more than a year after the loss to allege the correct policy number related

INSURANCE — Continued

back to the time of filing of the original complaint within the one-year limitation. *Andrews v. Insurance Co.*, 163.

§ 147. Aviation Insurance

Defendant insurer did not waive its right to cancel an airplane insurance policy for failure of insured to pay a premium installment in apt time by its reinstatement of the policy on other occasions when insured made late premium payments, and insurer had the right to require insured to pay the full unpaid balance of the premium in order to keep the policy in effect. *Klein v. Insurance Co.*, 452.

INTOXICATING LIQUOR

§ 1. Validity and Construction of Control Statutes

Act prohibiting sale of beer and wine in the community of Atlantic is an unconstitutional local act regulating a trade. *Nelson v. Board of Alcoholic Control*, 303.

JUDGMENTS

§ 2. Time and Place of Rendition

Fact that court's written order may differ from the decision announced in open court does not constitute error since the judgment is not rendered until entry of the written order. *Fitch v. Fitch*, 570.

§ 37. Matters Concluded in General

Denial of defendant's petition for support under the Uniform Reciprocal Enforcement of Support Act was not a bar to a subsequent action for alimony by defendant. *Kirby v. Kirby*, 322.

JURY

§ 1. Right to Trial by Jury

Defendant waived her right to a jury trial in a civil action by failing to appear at trial. *Ervin Co. v. Hunt*, 755.

§ 6. Examination of Jurors

Trial court in a drunken driving case properly refused to permit defense counsel to ask prospective jurors whether they would convict defendant solely upon results of a breathalyzer test. *S. v. Sawyer*, 728.

§ 7. Challenges

Trial court in a common law robbery case did not err in refusing to allow defendant more than six peremptory challenges. *S. v. Miller*, 190.

Trial court properly excused jurors who stated that their feelings about undercover investigations would prejudice their decision as to the guilt or innocence of defendant. *S. v. Battle*, 478.

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

Taking of a victim from an expressway ramp to a nearby apartment constituted a sufficient carrying away to support a conviction for kidnapping. *S. v. Gordon*, 312.

KIDNAPPING — Continued

Evidence was sufficient to be submitted to the jury in a kidnapping case. *S. v. Laney*, 513.

LANDLORD AND TENANT

§ 19. Rents, and Actions Therefor

A tenant is not entitled to recover rents paid on the theory the rented dwelling was maintained by the landlord in violation of the city housing code and was unfit for human habitation. *Knuckles v. Spaugh*, 340.

LARCENY

§ 5. Presumptions and Burden of Proof

Interval of 18 days between theft of wire and defendant's possession of the wire did not render the doctrine of possession of recently stolen goods inapplicable. *S. v. Fink*, 430.

§ 6. Competency and Relevancy of Evidence

Owner's testimony as to the price her husband paid for a ring nine years before was irrelevant in determining its market value at the time of the theft. *S. v. Shaw*, 154.

§ 7. Sufficiency of Evidence and Nonsuit

Wire found in defendants' possession was sufficiently identified to support an inference that it was wire stolen from a mobile home supply warehouse. *S. v. Fink*, 430.

LIBEL AND SLANDER

§ 12. Limitation of Actions

Plaintiff's claims for relief based on libel or slander were barred by the statute of limitations where she did not allege any slanderous statement made within one year before she filed her original complaint or her proposed amended complaint, nor did plaintiff's claim for relief based on slander in her proposed amended complaint relate back to the date of filing her original complaint. *Price v. Penney Co.*, 249.

LIMITATION OF ACTIONS

§ 12. Institution of Action and Amendment

In an action on a fire policy, plaintiffs' amendment of their complaint more than a year after the loss to allege the correct policy number related back to the time of filing of the original complaint within the one-year limitation. *Andrews v. Insurance Co.*, 163.

MARRIAGE

§ 2. Validity and Attack

Evidence as to plaintiff's reputation as a married woman was admissible in plaintiff's action against her former husband for alimony. *Shankle v. Shankle*, 565.

MASTER AND SERVANT

§ 10. Duration of Employment

A pre-incorporation agreement did not employ plaintiff for a definite term and did not give plaintiff the right to acquire control of the corporation after 60 months. *Smith v. Ford Motor Co.*, 181.

Plaintiff's discharge as director of an antipoverty agency was not wrongful. *George v. Opportunities, Inc.*, 732.

MORTGAGES AND DEEDS OF TRUST

§ 26. Notice and Advertisement of Sale

Foreclosure sale was not invalid because notice of publication filed in the office of the clerk of court was unsigned. *Britt v. Britt*, 132.

Notice of foreclosure sale posted at the courthouse door and in a newspaper is sufficient to meet due process requirements. *Ibid.*

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

The statutory scheme for town-initiated annexation by towns of less than 5000 population is constitutional. *Rexham Corp. v. Pineville*, 349.

Where an annexation ordinance was remanded for amendment of the boundaries to conform to the statute, a second public hearing was not required. *Ibid.*

A municipality may use a street as a reference in setting boundary lines in an area to be annexed. *Ibid.*

A municipality could properly split tracts by an annexation boundary where the boundaries followed topographic features. *Ibid.*

§ 30. Zoning Ordinances

Zoning ordinance prohibiting mobile homes in a certain area was violated even though the wheels and tongue of the mobile home had been removed and a foundation erected. *City of Asheboro v. Auman*, 87.

NAMES

There is no common law or statutory requirement in this State that a married woman use her husband's name. *In re Mohlman*, 220.

The General Assembly has provided that a person may change his name for good cause shown and for good and sufficient reasons, and the burden is upon the petitioner to make such a showing. *Ibid.*

Four married women who sought, without dissolving their marriages, to resume use of their maiden names failed to show good and sufficient reasons for granting their petitions. *Ibid.*

NARCOTICS

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for possession of heroin. *S. v. Wolfe*, 464.

Evidence of defendant's possession of marijuana was sufficient to be submitted to the jury where marijuana was found in a car driven by defendant. *S. v. Fleming*, 499.

NARCOTICS — Continued

§ 5. Verdict and Punishment

Defendant was not subjected to double jeopardy when she was convicted of distribution of heroin and cocaine and possession of the same heroin and cocaine. *S. v. Perry,* 185.

NEGLIGENCE

§ 18. Contributory Negligence of Minors

A child under seven years of age is incapable of contributory negligence as a matter of law. *Mitchell v. K.W.D.S., Inc.,* 409.

§ 27. Competency and Relevancy of Evidence

Trial court did not err in refusing to permit evidence of a change in the warning label on a flammable glue can subsequent to the fire or evidence as to the availability of a nonflammable glue. *Jenkins v. Helgren,* 653.

§ 29. Sufficiency of Evidence of Negligence

Plaintiff's evidence was sufficient for the jury on issue of defendant's employee's negligence in closing drive-in window drawer on plaintiff's hand. *Spencer v. Trust Co.,* 88.

§ 52. Definition of Invitee

A minor who accompanied her grandmother to a public bowling alley was an implied invitee on the premises. *Mitchell v. K.W.D.S., Inc.,* 409.

§ 53. Duties and Liabilities to Invitees

Presence of a parent somewhere on the premises does not absolve the proprietor of liability for injuries to a child caused by the proprietor's failure to maintain the premises in a reasonably safe condition. *Mitchell v. K.W.D.S., Inc.,* 409.

§ 57. Sufficiency of Evidence in Action by Invitee

Trial court erred in granting defendant's motion for summary judgment where there was a jury question of defendant's negligence in maintaining a plate glass window in its public bowling alley. *Mitchell v. K.W.D.S., Inc.,* 409.

OBSCENITY

Trial court did not err as a matter of law in concluding that a motion picture was not obscene. *Yeager v. Neal,* 741.

PARTNERSHIP

§ 9. Dissolution of Partnership and Accounting

Where a partnership dissolution agreement was silent as to liability for accounts payable if they exceeded accounts receivable, each partner was required to contribute toward the excess accounts payable according to his share of the profits. *Supply Co. v. Styron,* 55.

PLEADINGS

§ 11. Counterclaim

Trial court properly allowed defendant's motion at pretrial conference to treat her answer as a counterclaim. *Thompson v. Thompson,* 496.

PRINCIPAL AND AGENT

§ 9. Liability of Principal for Torts of Agent

Oil company was not liable for injuries sustained by minor plaintiff when she was bitten by a dog owned and used by a service station operator as a watchdog for a separate business on adjacent property. *Huffman v. Oil Corp.,* 376.

PROCESS

§ 3. Time of Service

Defendant in an eminent domain proceeding did not waive its right to contest the date of service of process on it by filing a petition for disbursement of funds deposited by plaintiff with the court. *City of Durham v. Development Corp.,* 210.

§ 12. Service on Domestic Corporation

Process was not properly served on a corporation where the corporation was using the residence of its president as a temporary place of business and a deputy sheriff delivered process at that address to an unknown person who answered the doorbell. *City of Durham v. Development Corp.,* 210.

PROSTITUTION

§ 1. Nature and Elements of the Offense

Statutes defining prostitution and providing that prostitution and various acts abetting prostitution are unlawful are constitutional. *S. v. Demott,* 14.

§ 2. Prosecutions

Though the Legislature fragmented the offense of offering the body for sexual hire into multiple substantive offenses, the purpose was not to provide a separate punishment for each violation. *S. v. Demott,* 14.

RAILROADS

§ 3. Extent of Easement for Right of Way and Use of Facilities

Lease of a railroad right-of-way to a private corporation did not constitute an illegitimate private use of the right-of-way. *Allen v. Martin Marietta Corp.,* 700.

RAPE

§ 17. Assault With Intent to Commit Rape

Conviction of defendant for crime against nature and assault with intent to commit rape where the charges grew out of one event did not twice put defendant in jeopardy for one crime. *S. v. Webb,* 526.

RAPE — Continued

§ 18. Prosecutions for Assault With Intent to Commit Rape

Evidence was sufficient to be submitted to the jury in a prosecution for assault with intent to commit rape. *S. v. Laney*, 513.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was insufficient to support verdict that defendant received stolen watch and diamond ring having a value in excess of $200. *S. v. Shaw*, 154.

Evidence was sufficient to be submitted to the jury in a prosecution for receiving a stolen TV. *S. v. Hobbs*, 588.

§ 6. Instructions

In a prosecution for feloniously receiving stolen goods, trial court's instruction as to knowledge was erroneous. *S. v. Hobbs*, 588.

§ 7. Verdict and Judgment

Where evidence was insufficient to support a jury finding that the value of stolen property exceeded $200, jury verdict finding defendant guilty must be treated as a verdict of guilty of misdemeanor receiving. *S. v. Shaw*, 154.

REFERENCE

§ 7. Report of Referee and Exceptions Thereto

Plaintiff waived any right to object to the failure of the referee to conduct hearings and file his report within the time directed by the court by participating in hearings after that time had passed. *Simpson v. Lee*, 712.

ROBBERY

§ 3. Competency of Evidence

Trial court did not unduly limit cross-examination of robbery victim in sustaining the State's objection to a question as to whether the weapon used in the robbery could have been a blank pistol. *S. v. Smith*, 511.

§ 4. Sufficiency of Evidence and Nonsuit

Evidence that defendant served as a lookout was sufficient to be submitted to the jury in an armed robbery case. *S. v. Smith*, 317.

Evidence was sufficient to be submitted to the jury in a prosecution for common law robbery. *S. v. Ashe*, 524.

There was sufficient evidence of an actual firearm for an armed robbery case to be submitted to the jury. *S. v. Smith*, 511.

Where the court on appeal dismissed an armed robbery charge against defendant for insufficiency of evidence, defendant will not be subjected to double jeopardy when he is tried on a lesser included offense upon retrial. *S. v. Alston*, 418.

Evidence was sufficient for jury in prosecution for armed robbery of a beer truck driver, *S. v. Pettice*, 272; *S. v. Goodman*, 276; of a store proprietor, *S. v. Medley*, 331; of a pedestrian, *S. v. Dunn*, 275; *S. v. Davis*,

ROBBERY — Continued

696; of a theatre employee, *S. v. Johnson*, 516; of the night manager of a motel. *S. v. Dark*, 610.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Defendant tried upon an indictment charging attempted common law robbery could not be convicted of assault with a deadly weapon inflicting serious injury. *S. v. Wilson*, 188.

Trial court did not err in failing to submit lesser included offenses in an armed robbery case. *S. v. Segarra*, 399.

§ 6. Verdict and Judgment

A defendant convicted of armed robbery and assault with a deadly weapon is entitled to an arrest of judgment on the assault conviction when both offenses arose out of the same occurrence. *S. v. Lunsford*, 78.

RULES OF CIVIL PROCEDURE

§ 4. Process

Process was not properly served on a corporation where the corporation was using the residence of its president as a temporary place of business and a deputy sheriff delivered process at that address to an unknown person who answered the doorbell. *City of Durham v. Development Corp.*, 210.

§ 7. Form of Motions

Plaintiff was not prejudiced by defendant's failure to state the number of any rule in his motion. *City of Durham v. Development Corp.*, 210.

§ 9. Pleading Special Matters

Plaintiff's allegations were insufficient to state a claim for relief to set aside a foreclosure sale based on fraud. *Britt v. Britt*, 132.

§ 13. Counterclaim

Trial court properly allowed defendant's motion at pretrial conference to treat her answer as a counterclaim. *Thompson v. Thompson*, 496.

§ 15. Amended and Supplemental Pleadings

In an action on a fire policy, plaintiffs' amendment of their complaint more than a year after the loss to allege the correct policy number related back to the time of filing of the original complaint within the one-year limitation. *Andrews v. Insurance Co.*, 163.

Plaintiff's claim for relief based on slander in her proposed amended complaint did not relate back to the date of filing her original complaint. *Price v. Penney Co.*, 249.

Failure of defendants to object to testimony on the ground that the pleadings did not conform to the evidence rendered the pleadings amended. *Finance Corp. v. Mitchell*, 264.

§ 19. Necessary Joinder of Parties

Holders of easements over defendant's land were not necessary parties in a proceeding for a preliminary injunction. *Power Co. v. Herndon*, 724.

§ 30. Depositions; Protective Orders

A customer list was not a trade secret subject to a protective order under Rule 30. *Manufacturing Co. v. Manufacturing Co.*, 414.

RULES OF CIVIL PROCEDURE — Continued

§ 33. Interrogatories to Parties

Defendant waived right to object to interrogatories by failure to object or answer within time. *Manufacturing Co. v. Manufacturing Co.*, 414.

§ 51. Instructions to Jury

Trial court expressed an opinion in instructing the jury that there was "some discrepancy" in testimony of defendant and the passengers in her car. *Henderson v. Matthews*, 280.

§ 52. Findings by the Court

Trial court in a nonjury trial erred in dismissing plaintiff's claim without making findings of fact determinative of the issues raised at the trial. *Lowe's v. Thompson*, 198.

§ 54. Judgment

Judgment dismissing plaintiff's claim and retaining jurisdiction for the purpose of adjudicating defendants' counterclaim is interlocutory and not presently appealable. *Rorie v. Blackwelder*, 195.

Summary judgment entered in favor of one of two defendants is interlocutory and not presently appealable. *Siders v. Gibbs*, 333.

Trial court's judgment dismissing plaintiff's claim against defendant was not a final judgment and was not appealable. *Christopher v. Bruce-Terminix Co.*, 520.

§ 56. Summary Judgment

If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. *Insurance Agency v. Leasing Corp.*, 138.

Trial court properly entered partial summary judgment on a claim for rent for one truck leased to defendant but erred in entering partial summary judgment on a claim for rent for a second truck where defendant filed a counterclaim which raised a genuine issue of material fact. *Rentals, Inc. v. Rentals, Inc.*, 175.

Trial court erred in hearing motions for summary judgment without giving nonmovant 10 days notice prior to such hearing. *In re Will of Edgerton*, 471.

Trial court need not make findings of fact in passing on a motion for summary judgment. *Klein v. Insurance Co.*, 452.

§ 59. New Trial; Amendment of Judgment

Trial court did not err in setting aside a judgment and ordering a new trial. *Finance Corp. v. Mitchell*, 264.

Where the jury disregarded the trial court's instructions with regard to damages, it was error for the court to eliminate an item of damages awarded by the jury. *Circuits Co. v. Communications, Inc.*, 536.

SCHOOLS

§ 5. Budget and Expenditures

Board of county commissioners has right to consider budget request submitted by board of education on a line by line basis regardless of

SCHOOLS—Continued

whether additional tax levy is necessary. *Board of Education v. Board of Commissioners*, 114.

Superior court erred in failing to find whether disputed amount of a salary supplement for the superintendent of schools was a necessary item in the maintenance of the schools. *Ibid.*

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

An officer lawfully searched an automobile passenger as an incident of the passenger's lawful arrest without a warrant for possession of heroin. *S. v. Alexander*, 21.

Defendant was without standing to question the validity of a warrantless search of the house where he was arrested since defendant was a trespasser therein. *S. v. Widemon*, 245.

An officer did not need a warrant to seize contraband which was in plain view in defendant's car. *S. v. Wolfe*, 464.

§ 2. Consent to Search Without Necessary Warrant

Defendant's consent to search his vehicle was not coerced because officers told him they would get a warrant if he did not consent. *S. v. Davis*, 696.

§ 3. Requisites and Validity of Search Warrant

Evidence was sufficient to support issuance of a warrant to search for marijuana. *S. v. Sorrell*, 325.

Trial court properly found that defendant was the party named in a search warrant though he was designated as a Junior rather than as a III. *Ibid.*

A warrant to search defendant's premises for drugs was issued by a neutral magistrate and it was not necessary that the affidavit supporting the warrant contain within itself all the evidence presented to the magistrate. *S. v. Woods*, 584.

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

Utilities Commission order which prohibits the attachment to telephone directories of any binders or covers not furnished by the telephone company is valid. *Utilities Comm. v. Merchandising Corp.*, 617.

§ 4. Liability for Negligence

A contract provision limiting a telephone company's liability for errors in an advertisement in the Yellow Pages to the cost of the advertisement will not be enforced as a matter of public policy. *Gas House, Inc. v. Telephone Co.*, 672.

TRESPASS

§ 8. Damages in General

Findings of the "total market value" of destroyed crops and timber were insufficient to support an award of damages for destruction of the crops and wrongful cutting of the timber. *Simpson v. Lee*, 712.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence and Nonsuit

There was a missing link in plaintiff's chain of title where a 1900 deed devised land to trustees and plaintiff offered no evidence of conveyances or other action taken by the trustees under the trust deed. *Land Co. v. White,* 548.

TRIAL

§ 36. Expression of Opinion on Evidence in Instructions

Trial court expressed an opinion in instructing the jury that there was "some discrepancy" in testimony of defendant and the passengers in her car. *Henderson v. Matthews,* 280.

§ 58. Findings and Judgment of the Court

Trial court in a nonjury trial erred in dismissing plaintiff's claim without making findings of fact determinative of the issues raised at the trial. *Lowe's v. Thompson,* 198.

TROVER AND CONVERSION

§ 2. Procedure and Damages

Trial court's findings support its judgment for plaintiff in an action to recover for the conversion of property plaintiff had placed in premises leased from defendants. *Waltons v. Lloyd,* 200.

UNIFORM COMMERCIAL CODE

§ 20. Breach of Contract

Trial court's instruction on measure of damages for breach of a contract was proper. *Circuits Co. v. Communications, Inc.,* 536.

§ 74. Secured Transactions: Rights of Third Persons; Priorities

Proceeds from sale of a mobile home in which plaintiff had a security interest remained identifiable proceeds so as to be subject to plaintiff's security interest after they were deposited in defendant's regular checking account. *Bank v. Mobile Homes Sales,* 690.

UNJUST ENRICHMENT

A hotel owner was not liable under the theory of unjust enrichment for plumbing materials and services furnished to the lessee. *Siskron v. Temel-Peck Enterprises,* 387.

UTILITIES COMMISSION

§ 6. Hearings and Orders; Rates

The Commission was not required to include contributed plant in a water utility's fair value rate base or to allow depreciation on contributed plant as an operating expense. *Utilities Comm. v. Utilities, Inc.,* 404.

Utilities Commission did not err in failing to order a refund of revenues previously collected by a power company under bond although approved changes in rates will result in lower rates for some users than

UTILITIES COMMISSION — Continued

were applied during the pendency of the application. *Utilities Comm. v. Edmisten,* 613.

The fuel adjustment clause used by Duke Power Company qualified as a valid part of a rate schedule within the meaning of G.S. Ch. 62. *Utilities Comm. v. Edmisten,* 662.

Procedure followed by the Utilities Commission in the adjustment of electric rate schedules was proper. *Ibid.*

Utilities Commission order which prohibits the attachment to telephone directories of any binders or covers not furnished by the telephone company is valid. *Utilities Comm. v. Merchandising Corp.,* 617.

VENUE

§ 1. Nature of Venue; Waiver

Defendants did not waive the defense of improper venue by failure to pursue motion until plaintiff filed its motion for sanctions. *Swift and Co. v. Dan-Cleve Corp.,* 494.

§ 7. Motion to Remove as Matter of Right

Motion for change of venue to the proper county was not required to be verified or supported by affidavits. *Swift and Co. v. Dan-Cleve Corp.,* 494.

WATERS AND WATERCOURSES

§ 3. Natural Streams

Trial court properly denied plaintiffs' motions for directed verdict in an action for damages for siltification of ponds and a lake allegedly caused by work by a power company on nearby lands. *Williams v. Power Co.,* 392.

WEAPONS AND FIREARMS

Jury instruction in a prosecution for discharging a firearm into an occupied building was prejudicial where it equated wilful and wanton conduct with knowledge of occupancy of the building. *S. v. Furr,* 335.

Evidence of motive was admissible in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Locklear,* 300.

WITNESSES

§ 1. Competency of Witness

Trial court properly determined that a witness was competent to testify. *S. v. Pettice,* 272.

§ 6. Evidence Competent to Impeach Witness

Evidence of an inconsistent statement made by the male plaintiff in a former trial was relevant for the purpose of impeaching the male plaintiff. *Williams v. Power Co.,* 392.

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