NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 27

20 AUGUST 1975

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17 DECEMBER 1975

RALEIGH
1976

CITE THIS VOLUME

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OF
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[1] Deceased 12 December 1975. Succeeded by D. B. Herring, Jr., Fayetteville, 19 December 1975.

[2] Resigned 15 January 1976.

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[1] Appointed 5 January 1976 to succeed Darius B. Herring, Jr.
[2] Appointed 2 February 1976 to succeed Robert K. Leonard who resigned 31 January 1976.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARTIN L. VAN BUREN v. MAX GLASCO AND CAROLINA INTERIOR CONTRACTORS, INC.

No. 7526SC193

(Filed 20 August 1975)

1. **Process § 7; Rules of Civil Procedure § 4— individual defendant — substituted service of process — dwelling house or usual place of abode**

A house in Sanford, N. C. at which a deputy sheriff delivered process to defendant's son qualified as defendant's "dwelling house or usual place of abode" for purposes of substituted service of process within the purview of G.S. 1A-1, Rule 4(j)(1)a where the house was owned by defendant and his wife as tenants by the entirety, his wife and family resided there, and defendant worked in South Carolina but usually visited with his family in the residence in Sanford, N. C. at least two weekends a month, notwithstanding defendant and his wife also owned a house in South Carolina in which defendant resided while working in that state and where his wife and family usually came on those weekends when he was not with them in North Carolina.

2. **Process § 7; Rules of Civil Procedure § 4— individual defendant — substituted service of process — person of suitable age and discretion — 15-year-old boy**

The trial court properly found that defendant's fifteen-year-old son was a "person of suitable age and discretion" with whom to leave process at defendant's dwelling house or usual place of abode within the meaning of G.S. 1A-1, Rule 4(j)(1)a where a deputy sheriff's return of service indicated that copies of the summons and complaint were left with a person of suitable age and discretion, and defendant offered no evidence that his son lacked the intelligence and discretion ordinarily possessed by a boy of his age.

APPEAL by defendant Max Glasco from *Ervin, Judge.* Order entered 19 November 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 May 1975.

This is a civil action in which plaintiff seeks an accounting and to recover damages from the individual and the corporate defendants for breach of a contract relating to services performed in this State. The sole question presented by this appeal is whether the court acquired jurisdiction over the person of the individual defendant, Max Glasco.

This action was commenced on 16 August 1973, when the verified complaint was filed and summons was issued. On 21 August 1973 a deputy sheriff of Lee County delivered copies of the summons and complaint to Joel Glasco, the fifteen-year-old son of the individual defendant, Max Glasco, at the residence at Forest Hills, Route 4, Sanford, North Carolina, in which Joel resided with his mother. On 24 September 1973 entry of default was made against Max Glasco, and on 27 September 1973 a judgment by default and inquiry was signed and filed against him.

On 27 February 1974 Max Glasco moved to set aside the entry of default and judgment by default against him on the ground that the court had not acquired jurisdiction over his person in that summons and complaint were not served upon him as required by G.S. 1A-1, Rule 4(j)(1). In support of this motion, Glasco filed with the court on 10 June 1974 an affidavit in which he in substance stated: He is the president and principal shareholder of the corporate defendant, Carolina Interior Contractors, Inc., which ceased doing business in 1972. He individually has transacted no business with plaintiff but defendant corporation has associated plaintiff as a consultant with it on numerous contracts. The agreement sued upon in this action was between plaintiff and the corporate defendant, and plaintiff has been paid a sum previously agreed upon for his services. Further, in the spring of 1972 affiant went to North Myrtle Beach, South Carolina, where he organized and subsequently incorporated a landscaping business. Since that time he has lived at 213 33rd Avenue in that city in property owned by him and his wife. He and his wife, as tenants by the entirety, also own real estate located at Route 4, Forest Hills, in Sanford, North Carolina, where his wife and children resided on 21 August 1973. When he moved to South Carolina to organize his new business, his wife elected to remain in Sanford until the

couple's youngest child, Joel Glasco, born 18 November 1957, could complete his education in the public schools. Affiant has not lived in North Carolina since spring 1972 and was not physically present in North Carolina on 21 August 1973. Since moving to Myrtle Beach, he has returned to North Carolina on weekends to visit his wife and children and has returned on other occasions to confer with his attorneys and accountants in connection with winding up the affairs of Carolina Interior Contractors, Inc. His weekend visits to his family in North Carolina have not averaged more than two weekends per month, and when appellant has not returned to North Carolina for such visits, his family has usually visited with him in South Carolina.

By order filed 19 November 1974 the trial court denied Glasco's motion to set aside the judgment. Included among the court's findings of fact were the following:

"1. This action was instituted by the filing of summons and complaint on the 16th day of August, 1973.

"2. On the 21st day of August, 1973, a Lee County Deputy Sheriff personally delivered and left with Joel Glasco, the son of defendant Max Glasco at Forest Hills, Route 4, Sanford, North Carolina, copies of the summons and complaint herein.

"3. Said deputy sheriff made his return on the summons indicating that copies of said documents were left with a person of suitable age and discretion who resides in the defendant's dwelling house or usual place of abode.

"4. The birth certificate of Joel Glasco which was placed in evidence by defendant Max Glasco, reflects the said Joel Glasco was born on November 18th, 1957.

"5. Although defendant Max Glasco started a new business in North Myrtle Beach, South Carolina, in the spring of 1972 where he regularly worked during the week, said defendant's wife continued to live together with their youngest child, Joel Glasco, at Forest Hills, Route 4, Sanford, North Carolina. No evidence was offered to the effect that said defendant and his wife considered themselves to be separated. Said defendant continued to return to said residence on weekends and his wife and son regularly visited with him in South Carolina.

* * * * *

"7. Counsel for defendant Max Glasco admitted in open court that defendant Max Glasco actually came into possession of the copy of the summons and complaint left with his said son and that the same had been delivered to said defendant's counsel prior to the expiration of the time for filing answer herein."

The trial court concluded as a matter of law:

"1. That Forest Hills, Route 4, Sanford, North Carolina, was on the 21st day of August, 1973, the usual place of abode of defendant Max Glasco within the meaning of Rule 4(j)(1).

"2. That defendant Max Glasco's son, Joel Glasco, was a person of suitable age and discretion within the meaning of Rule 4(j)(1).

"3. That plaintiff obtained valid service of process upon defendant Max Glasco under the provisions of Rule 4(j)(1) and that there is no basis for setting aside the judgment herein on the ground of insufficiency of service of process.

"4. That defendant Max Glasco had actual notice of the pendency of this action and the nature thereof by his personal receipt of copies of the summons and complaint herein and that he had adequate and ample opportunity to file defensive pleadings herein.

"5. That there is no showing upon which the court could justify setting aside the judgment heretofore entered herein."

The court denied defendant Glasco's motion to set aside the judgment by default and inquiry, and defendant Glasco appealed.

No counsel for plaintiff appellee.

Lowry M. Betts for defendant appellant.

PARKER, Judge.

The right of immediate appeal in this case is given by G.S. 1-277(b). Grounds for personal jurisdiction exist as provided in G.S. 1-75.4, and the determination of this appeal de-

pends upon whether service of process was made in the manner required by G.S. 1A-1, Rule 4(j)(1)a. In pertinent part that Rule provides that service upon a natural person not under disability may be made

> "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein."

Appellant contends, first, that the house at which the deputy sheriff left the copies of the summons and complaint was not his "dwelling house or usual place of abode," and, second, that his fifteen-year-old son was not a "person of suitable age and discretion." We do not agree with either contention.

[1] Although there have been many decisions concerning what is a "defendant's dwelling house or usual place of abode" as that phrase is employed in a rule or statute similar to our Rule 4(j)(1)a, it is difficult to derive a satisfactory all-inclusive definition from the decided cases. *See* Annot., 32 A.L.R. 3d 112 (1970). "The decisions interpreting the term indicate that no hard-and-fast definition can be laid down, but that what is or is not a party's 'dwelling house or usual place of abode' within the meaning of the rule or statute is a question to be determined on the facts of the particular case." 2 Moore's Federal Practice (2d Ed. 1974) ¶ 4.11[2], p. 1039. In the present case appellant's own affidavit establishes that the house in Sanford, N. C., where the deputy sheriff delivered the papers to appellant's son, was owned by appellant and his wife as tenants by the entirety, his wife and family resided there, and appellant himself, although working in South Carolina, regularly returned thereto on a frequently recurring basis. It would appear from the facts stated in his affidavit that the occasions on which appellant was physicially present at his Sanford residence occurred with such frequency and regularity that normally he would be present therein at least twice during any 30-day period in which he might be called upon to file an answer under Rule 12. Under these facts it is our opinion that the Sanford residence qualified as appellant's "dwelling house or usual place of abode" within the meaning of Rule 4(j)(1)a. That appellant and his wife also owned a house in South Carolina, in which he resided while working in that State and where his wife and family usually came on those weekends when he was not with them in North Carolina, does not compel a holding that the North Carolina residence could

not be his "dwelling house or usual place of abode." Indeed, because of his family's continued occupancy of the North Carolina home and because of his regular and frequent return thereto, it would appear that appellant had a closer and more enduring connection with his North Carolina residence than he had with the South Carolina house. Certainly, when all of the circumstances are considered, his relationship and connection with the North Carolina dwelling were such that there was a reasonable probability that substitute service of process at that dwelling would, as it in fact here did, inform him of the proceedings against him in apt time to permit him to assert in timely fashion such defenses as he might have. Moreover, as one authority has pointed out in discussing the cognate Federal Rule, in a highly mobile society such as ours, "it is unrealistic to interpret Rule 4(d)(1) so that the person to be served only has one dwelling house or usual place of abode at which process may be left." 4 Wright and Miller, Federal Practice and Procedure (1969), § 1096, p. 368. However, we are not called upon to decide in this case whether appellant's South Carolina house might simultaneously qualify along with his North Carolina home as his "dwelling house or usual place of abode" for purposes of substituted service of process. We need only decide, as we do, that the North Carolina house so qualified. Although, as above noted, each case necessarily rests upon its own particular facts, our decision here finds support in *Karlsson v. Rabinowitz,* 318 F. 2d 666 (4th Cir. 1963).

[2] We next examine appellant's contention that his fifteen-year-old son was not a "person of suitable age and discretion" for purposes of Rule 4(j)(1)a. In this connection, we note that no exception was taken to the trial court's finding of fact number 3 in which the court found that the deputy sheriff made his return on the summons indicating that copies of the summons and complaint were left with "a person of suitable age and discretion who resides in the defendant's dwelling house or usual place of abode."

> "When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. . . . Upon hearing such motion, the burden of proof is upon the party who seeks to set aside the officer's return

> or the judgment based thereon to establish nonservice as a fact; and, notwithstanding positive evidence of nonservice, *the officer's return* is evidence upon which the court *may* base a finding that service was made as shown by the return." *Harrington v. Rice,* 245 N.C. 640, 642, 97 S.E. 2d 239, 241 (1957).

In the present case the only evidence presented by appellant to show that his son was not a "person of suitable age and discretion" was his son's birth certificate which showed that he was born on 18 November 1957, thus making him fifteen years and nine months old at the time the papers were delivered to him by the deputy sheriff on 21 August 1973. No evidence was presented and no contention is made that appellant's son lacked the intelligence and discretion ordinarily possessed by a boy of his age. Appellant contends, however, that a fifteen-year-old boy is, as a matter of law, not a "person of suitable age and discretion" within Rule 4(j)(1)a. We do not agree. Similar contentions were made and rejected in *Day v. United Securities Corporation,* 272 A. 2d 448 (D.C. Ct. App. 1970); *Holmen v. Miller,* 296 Minn. 99, 206 N.W. 2d 916 (1973); and *Temple v. Norris,* 53 Minn. 286, 55 N.W. 133 (1893). In *Holmen v. Miller, supra,* the Supreme Court of Minnesota was called upon to determine whether a thirteen-year-old daughter was a "person of suitable age and discretion" for purposes of substituted service of process upon her father. In holding the service valid in that case, the court said:

> "It may well be that a 13-year-old, or for that matter a person of any age, is not a person of suitable age and discretion for the purpose of the rule. However, the burden is upon the defendant, after a proper motion to the court, to prove that fact. The sheriff's certificate in this case contained the statement that Jean Miller, contestee's daughter, was a person of suitable age and discretion. We have held that the sheriff's certificate is prima facie evidence of the allegations it contains and that a defendant has the burden of proving otherwise." 296 Minn. at 104, 206 N.W. 2d at 919-20.

The same rule applies in this State. *Harrington v. Rice, supra.* Appellant failed to carry the burden of showing that his son was not a person of suitable age and discretion for purposes of Rule 4(j)(1)a.

The order appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

CONNIE B. WATTS AND MITCHELL W. WATTS v. HELEN R. RIDENHOUR AND CHARLES E. RIDENHOUR

No. 7519SC209

(Filed 20 August 1975)

Frauds, Statute of § 7; Vendor and Purchaser § 3— option to purchase land — insufficient description

An option to purchase land granted plaintiffs by defendants was void for uncertainty since the description of the land which was the subject of the written option agreement was neither certain in itself nor capable of being reduced to certainty by reference to anything referred to in the contract.

APPEAL by plaintiffs from *Long, Judge*. Judgment entered 30 December 1974 in Superior Court, CABARRUS County. Heard in the Court of Appeals 13 May 1975.

Civil action to obtain specific performance of an option to convey real property. On 24 May 1971 plaintiffs as purchasers and defendants as sellers entered into a written contract pursuant to which defendants thereafter conveyed to plaintiffs Plots 1 through 7 inclusive as shown on a map of the "Old Weatherman Farm" in Cabarrus County, a copy of which map was attached to and made a part of the contract by reference. This map shows a large tract of land divided into ten plots. Plots 1 through 7, together with Plots 9 and 10, comprise approximately the western portion of the large tract. The remaining portion of the large tract is irregularly shaped, somewhat resembling a boot, and occupies roughly the eastern half of the large tract. The number "8" appears on the western end of this boot-shaped tract. In the margin of the map there are notations apparently intended to show the area of each of the ten plots. The area shown for No. 8 is five acres; however, if Plot 8 includes the entire boot-shaped tract, it is several times larger than five acres.

As part of their contract defendants granted to plaintiffs an

> "option to purchase additional acreage lying to the rear of Plot No. 8 for the price of $300.00 per acre, this acreage to lie primarily on the southeast side of a line running along the southeastern side of Plots Nos. 4, 5, 6 and 10 and extending on to the rear property line."

Plaintiffs gave defendants timely notice that they were exercising the option and requested defendants to advise them of the total acreage involved. Defendants refused to honor the option, and plaintiffs brought this action.

Both plaintiffs and defendants moved for summary judgment. The court, concluding that "the description contained in the alleged option upon which the plaintiffs seek specific performance is patently ambiguous and is void for uncertainty," granted defendants' motion and dismissed plaintiffs' action. Plaintiffs appealed.

Davis, Koontz & Horton by K. Michael Koontz for plaintiff appellants.

Alexander & Brown by B. S. Brown, Jr. for defendant appellees.

PARKER, Judge.

The only question presented is whether the option agreement contains a description of the land sufficiently definite to meet the requirements of the statute of frauds, G.S. 22-2. We agree with the trial court that it does not.

A contract to sell or convey land, or a memorandum thereof, within the meaning of the statute of frauds, must contain a description of the land, the subject matter of the contract, which is either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers. *Carlton v. Anderson,* 276 N.C. 564, 173 S.E. 2d 783 (1970); *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964); *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593 (1946).

Here, the property subject to the option is described simply as "additional acreage lying to the rear of Plot No. 8 . . . this acreage to lie primarily on the southeast side of a line running along the southeastern side of Plots Nos. 4, 5, 6 and 10 and extending on to the rear property line." To locate property "lying to the rear of Plot No. 8" it is first necessary to locate

Plot No. 8 and to identify its "rear" line. This cannot be done by reference to the map which is made part of the contract or by anything else to which the contract refers. Obviously Plot No. 8 does not include the entire large boot-shaped tract in which the figure "#8" appears, for if that were the case there could be no property left "lying to the rear of Plot No. 8" to which the contract could have reference. If Plot No. 8 contains only five acres to be carved out of the western end of the boot-shaped tract, then, while there could be property left "lying to the rear of Plot No. 8" to which the contract could have reference, in such case we are immediately confronted with the difficulty that there is an infinite variety of ways in which five acres can be carved out of the western end of the boot-shaped tract, and nothing in the contract or in anything to which the contract refers makes it possible to identify any particular way in which the carving is to be done. If it be assumed that the western line of the large boot-shaped tract is also the western line of Plot No. 8, a surveyor may locate that line. Thereafter, nothing else is certain or capable of being made certain by anvthing referred to in the writing. It is simply impossible to locate the other lines of a five-acre tract comprising Plot No. 8 in this case, just as it was impossible to locate the lines of the four-acre tract referred to in *Carlton v. Anderson, supra.*

The reference in the option agreement to the property as "acreage to lie primarily on the southeast side of a line running along the southeastern side of Plots Nos. 4, 5, 6 and 10 and extending on to the rear property line" does not aid the description but merely adds to the uncertainty. The "southeastern side of Plots Nos. 4, 5, 6 and 10" is not a straight line and it is impossible to locate with certainty any exact extension of such a line "to the rear property line." Even if such a line could be located exactly, the acreage involved is described, not as lying on the southeast side of such a line, but only as lying "primarily" on the southeast side thereof.

The description of the land which is the subject of the written option agreement being neither certain in itself nor capable of being reduced to certainty by reference to anything referred to in the contract, the option agreement is void for uncertainty. The judgment appealed from is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. EMMETT ALSTON

No. 7514SC270

(Filed 20 August 1975)

1. **Robbery § 4— conspiracy to commit armed robbery — testimony of co-conspirator — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit armed robbery where the evidence consisted of testimony by a co-conspirator that defendant conceived the plan for the robbery, agreed with his conspirators as to the manner in which it was to be carried out, agreed with them as to the division of expected proceeds, furnished the guns used in the robbery, and arranged for transportation of the conspirators to the scene of the robbery.

2. **Criminal Law § 116— no evidence by defendant — jury instruction proper**

The trial court did not err in instructing the jury concerning defendant's election not to take the witness stand or to present evidence, though defendant made no request for such instruction.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 9 January 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 10 June 1975.

Defendant was indicted for conspiring with Curtis Williams and Alfred Jackson to commit armed robbery. After a first trial and conviction, on appeal defendant was awarded a new trial. *State v. Alston,* 17 N.C. App. 712, 195 S.E. 2d 314 (1973). On retrial the State introduced evidence to show that on 3 September 1971 Williams and Jackson were apprehended by the police while in the act of robbing the McDougald Terrace office of the Durham Housing Authority. There was no evidence that defendant was in the vicinity when the robbery took place. Williams testified that defendant conceived the plan for the robbery, agreed with Williams and Jackson as to the manner in which it was to be carried out, agreed with them as to the division of the expected proceeds, furnished the guns used in the robbery, and arranged for the transportation of Williams and Jackson to the scene of the robbery.

Defendant offered no evidence. The jury found him guilty. From judgment imposing a prison sentence, defendant appealed.

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

Loflin & Loflin by Thomas F. Loflin III for defendant appellant.

PARKER, Judge.

[1] Defendant's motion for nonsuit was properly denied. "It has been held in many cases that the unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution." *State v. Carey,* 285 N.C. 497, 505, 206 S.E. 2d 213, 219 (1974). By cross-examination of the co-conspirator, Williams, defendant's counsel was able to show that Williams's testimony at defendant's second trial differed in certain respects from his testimony at the first trial. It was also shown that Williams had an extensive prior criminal record, that only after he had been in jail about a month on the charge of the armed robbery involved in this case did he tell the officers anything about defendant's involvement in the matter, and that Williams received a probationary sentence for his part in the robbery. Although the showing of these matters brings Williams's credibility into question, that was a question for the jury to resolve. Viewed in the light most favorable to the State, the evidence was clearly sufficient to withstand defendant's motion for nonsuit.

[2] Defendant assigns error to the court's instructing the jury concerning the defendant's election not to take the witness stand or to present evidence, pointing out that no special request for such an instruction was made. "In the absence of a request for an instruction on the point, it was not necessary for the court to refer to the failure of the defendant to offer evidence and, indeed, it would have been better to have made no reference at all to this circumstance." *State v. Baxter,* 285 N.C. 735, 738, 208 S.E. 2d 696, 698 (1974). However, it is not error for the court, even in the absence of a request by the defendant, to instruct the jury on this point, provided it does so correctly and completely so as to make clear to the jury that the defendant has the right to offer or refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. *State v. Baxter, supra.* This was clearly done in the present case when the court, after instructing the jury as to defendant's right not to testify or to offer evidence, said:

> "[A]nd I instruct you, ladies and gentlemen, that you will in nowise hold it to the prejudice of the defendant that he has not testified in this case and that he has not offered witnesses in his defense for in so doing he is simply exer-

cising a right which the law gives him, and this is in nowise to be taken or held to his prejudice in this trial."

Defendant's assignment of error to this portion of the charge is overruled.

During the course of the trial the co-conspirator, Williams, testified that he and the defendant had agreed to commit other robberies, none of which were carried out. Defendant now contends that the court, in charging the jury as to the elements of a criminal conspiracy, so instructed the jury that they might have found defendant guilty if they found he had entered into an agreement with Williams to commit any robbery and that the court failed to instruct the jury that they could find defendant guilty only if they found that he conspired with Williams to commit the particular robbery charged in the bill of indictment. In no reasonable view of the court's charge can defendant's contention be supported. On the contrary, in the mandate portion of the charge the court clearly and expressly limited the jury to a finding of guilt only if they should find defendant guilty of conspiring with Williams to commit the particular armed robbery which was specifically described in the bill of indictment.

We have carefully examined all of defendant's remaining assignments of error and find no prejudicial error.

No error.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM RAY McCALL

No. 7525SC319

(Filed 20 August 1975)

Criminal Law § 155.5— extension of time for docketing appeal — authority of court — failure to docket in apt time

The trial tribunal had no power to extend the time for docketing the record on appeal for any period exceeding 150 days from the date of the judgment appealed from, and an appeal docketed after the 150-day period, though docketed within a purported extension by the trial tribunal, is subject to dismissal.

State v. McCall

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 1 November 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 June 1975.

At a session of Superior Court held in Catawba County in October 1973, defendant was tried before Judge Sammie Chess, Jr. and a jury on indictments in ten criminal cases, each indictment containing two counts charging defendant with feloniously forging and feloniously uttering certain checks. The jury found defendant guilty of both charges in all ten cases. In Case No. 18663 Judge Chess entered judgment on 25 October 1973 sentencing defendant to prison for not less than five nor more than seven years on each count in the indictment, the two sentences to run concurrently. No appeal was taken from the judgment entered in Case No. 18663.

In each of the remaining nine cases, Judge Chess directed that prayer for judgment be continued from term to term for two years or until judgment is imposed at a session of court prior to expiration of two years. Thereafter the State prayed judgment in the nine cases, and on 1 November 1974 defendant was brought before Judge Lacy H. Thornburg, presiding over a session of Superior Court in Catawba County. Judge Thornburg consolidated all counts in the nine cases for purposes of judgment, and entered judgment dated 1 November 1974 sentencing defendant to prison for a term of ten years, with directions that defendant be given credit on this sentence for the time he had spent in prison either awaiting trial or serving the sentence theretofore imposed in Case No. 18663.

From the judgment imposed by Judge Thornburg on 1 November 1974, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr. for the State.

Sigmon, Clark & Mackie by Jeffrey T. Mackie for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 1 November 1974. The record on this appeal was not docketed in this Court until 28 April 1975, which was more than 150 days after the date of the judgment appealed from. There appears in the record an order of the trial tribunal purporting to extend the time for

docketing for a total of 150 days "from December 2, 1974." Under Rule 5 of the Rules of Practice in the Court of Appeals, the trial tribunal, for good cause, may extend the time for docketing the record on appeal for a period not exceeding 60 days after the expiration of the original 90-day period allowed by the Rules, thus allowing a total time for docketing not exceeding 150 days from the date of the judgment appealed from. However, the trial tribunal had no power to extend the time for docketing for any period exceeding 150 days from the date of the judgment appealed from. For failure to docket the record on appeal within the time allowed by the Rules of this Court, this appeal is subject to dismissal. *State v. Adams,* 16 N.C. App. 640, 192 S.E. 2d 648 (1972).

Nevertheless, we have reviewed the record and find no prejudicial error.

Appeal dismissed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. DAVID HARRIS

No. 7514SC308

(Filed 3 September 1975)

1. **Escape § 1— prisoner absent from unit with permission — failure to return — sufficiency of evidence of escape**

Evidence was sufficient to be submitted to the jury in a prosecution for escape where it tended to show that defendant left the correctional center to which he was committed on a Community Volunteer Leave pass, defendant did not return to the unit within the time allowed by the pass, and he was returned to the unit by the county sheriff's department three days later.

2. **Criminal Law § 40— preliminary hearing — denial of free transcript — no error**

Defendant's Fourteenth Amendment constitutional rights to due process of law and to the equal protection of the laws were not infringed by the denial of his motions that a court reporter be provided at State expense to record the proceedings at his preliminary hearing and that he be furnished a free transcript thereof.

3. **Constitutional Law § 31; Criminal Law §§ 98, 126— right to be present at rendition of verdict — waiver**

Defendant waived his right to be present and to have his attorney present at the rendition of the verdict where there was nothing in the

record to indicate that the absence of defendant and his counsel was other than voluntary.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 22 January 1975. Heard in the Court of Appeals 17 June 1975.

Defendant was tried on his plea of not guilty to a bill of indictment which charged that on 11 August 1974, while he was lawfully confined in the North Carolina State Prison System in the lawful custody of the North Carolina Department of Correction, Camp No. 4210 Guess Road, Durham, N. C., serving a sentence for the crime of armed robbery, he feloniously escaped "while on Community Volunteer Leave by wilfully failing to return to the lawful custody of the North Carolina Dept. of Correction, Camp #4210 Guess Road, Durham, N. C." At the trial defendant, represented by counsel, stipulated that on 11 August 1974 he was serving a sentence in the North Carolina Department of Correction for the crime of armed robbery. The State presented the testimony of a sergeant with the North Carolina Department of Correction assigned to the Guess Road Unit who testified that on 11 August 1974 defendant was an inmate at the Guess Road Prison Camp, that he was authorized to be on the Community Volunteer Leave Program, that at about 10:00 a.m. on that day he left the unit on Community Volunteer Leave pass which was to last until 10:00 p.m., that he did not return at 10:00 p.m., and that he was returned to the unit by the Durham County Sheriff's Department three days later.

Defendant did not offer evidence. The jury found him guilty as charged, and from judgment imposed on the verdict, defendant appealed.

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

Loflin & Loflin by Thomas F. Loflin III for defendant appellant.

PARKER, Judge.

[1] Defendant's motion for nonsuit was properly denied. G.S. 148-4 provides in part as follows:

"The Secretary of Correction may extend the limits of the place of confinement of a prisoner, as to whom there

is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to leave the confines of that place unaccompanied by a custodial agent for a prescribed period of time to

* * * * *

"(6) Participate in community-based programs of rehabilitation, including, but not limited to the existing community volunteer and home-leave programs, and other programs determined by the Secretary of Correction to be consistent with the prisoner's rehabilitation and return to society.

"The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to the place of confinement designated by the Secretary of Correction, shall be deemed an escape from the custody of the Secretary of Correction punishable as provided in G.S. 148-45."

The indictment in this case charged, and the State's evidence was sufficient to support a jury finding, that defendant committed an escape within the meaning of G.S. 148-4. The testimony of the State's witness, a sergeant with the North Carolina Department of Correction assigned to the Guess Road Prison Camp in which defendant was confined, that on the day in question defendant "was given permission to leave the unit on a Community Volunteer Leave" was sufficient to support the jury so finding, and it was not necessary, as defendant contends, that the State present evidence to show that the Secretary of Correction, after making a determination that there was reasonable cause to believe that defendant would honor his trust, had personally authorized defendant's release on 11 August 1974 to participate in the community volunteer program and had personally prescribed the precise period of time during which the defendant was permitted to be absent from the Guess Road Prison Unit. *State v. Cooper,* 275 N.C. 283, 167 S.E. 2d 266 (1969), cited by defendant, is not here apposite. There was not here, as there was in that case, a fatal variance between the indictment and the proof.

[2] Prior to return of the indictment as a true bill, a preliminary hearing was held on 26 September 1974 in the district court. On 18 September 1974 defendant, through his court-appointed counsel, filed a written motion with the district court

"that a Court Reporter paid by the State of North Carolina or by the County of Durham be ordered to be present at the preliminary hearing in the said above-styled case on September 26, 1974, to make and provide free of charge to the defendant a verbatim record of the proceedings at such preliminary hearing." By order of the district court dated 18 September 1974 this motion was denied. On 26 September 1974 the preliminary hearing was held in the district court, no court reporter being present, and probable cause was found. The indictment was returned by the grand jury as a true bill at the 7 October 1974 session of superior court, and defendant's trial took place at the 20 January 1975 session of superior court. Upon call of the case for trial, defendant's counsel asked that the court "take corrective action to remand the case back downstairs for a new preliminary hearing for which we might get a transcript at State expense." This motion was denied. Defendant contends his Fourteenth Amendment constitutional right to due process of law and to the equal protection of the laws were infringed by the denial of his motions that a court reporter be provided at State expense to record the proceedings at his preliminary hearing and that he be furnished a free transcript thereof. We do not agree.

"Neither the North Carolina nor the United States Constitution requires a preliminary hearing. A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right." *State v. Foster*, 282 N.C. 189, 196, 192 S.E. 2d 320, 325 (1972). In this State "[i]t is firmly established by a long line of cases that the accused may be tried upon a bill of indictment without a preliminary hearing." *State v. Thornton*, 283 N.C. 513, 517, 196 S.E. 2d 701, 704 (1973); accord, *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Harrington*, 283 N.C. 527, 196 S.E. 2d 742 (1973). Moreover, even in those cases in which a preliminary hearing is held, it has not been the usual practice in this State that a court reporter be present and that the proceedings be recorded. Thus, *Roberts v. LaVallee*, 389 U.S. 40, 19 L.Ed. 2d 41, 88 S.Ct. 194 (1967), cited by defendant, is distinguishable. In that case a New York statute provided that a transcript of the proceedings at a preliminary hearing would be furnished on payment of fees at a specified rate. A majority of the court held that the New York statute, as applied to deny a free transcript to an indigent, violated the equal protection clause of the Federal Constitution. In North Carolina we have no similar statute, and,

as above noted, a court reporter's transcript of the proceedings at a preliminary hearing is not generally available to the accused, indigent or nonindigent. Clearly, there has not been here, as there was in *Roberts v. LaVallee, supra,* a showing that there has been an inequality in treatment by the State based upon the financial situation of the defendant. Furthermore, defendant here has made no showing how the lack of a transcript of the preliminary hearing proceedings could have prejudiced his defense. The case against him was extremely simple, only one witness appearing at his trial and the testimony of that witness being narrated in full in only three and one-half pages of the record on this appeal. We find defendant's assignment of error directed to the denial of his motions for a free transcript of the preliminary hearing proceedings to be without merit and the same is overruled.

Defendant's assignment of error directed to the mandate in the court's instructions to the jury is also overruled. To support this assignment, defendant again cites and relies upon *State v. Cooper, supra.* As hereinabove noted, that case is not applicable to the present prosecution.

[3] Defendant assigns error to the court's action in taking the verdict when neither defendant nor his counsel was present in the courtroom. In this regard the record shows that after the jury retired to the jury room and had completed its deliberation as to the verdict, the jurors indicated by buzzer they were ready to return to the courtroom. Apparently neither the defendant nor his attorney was then in the courtroom, and the court asked if the attorney could be located. Thereafter it was reported to the court that the attorney had been looked for but could not be found on the first or second floor of the courthouse. Upon receiving this information, the court directed that the jury be brought in and proceeded to take the verdict. Defendant and his counsel then returned to the courtroom, and the counsel made a statement to the court on the matter of sentencing. After receiving this statement, the court pronounced judgment, both defendant and his counsel being present.

Although the defendant in a criminal case has the right to be present at the return of the verdict, Annot., 23 A.L.R. 2d 456 (1952), under certain circumstances this right may be waived. For example, "[i]n cases where a defendant is charged with less than a capital crime, this voluntary and unexplained absence from the court after his trial begins constitutes a waiver

of his right to be present." *State v. Stockton,* 13 N.C. App. 287, 291, 185 S.E. 2d 459, 463 (1971); accord, *State v. Billings,* 22 N.C. App. 73, 205 S.E. 2d 577 (1974). There is nothing in the record in the present case to indicate that the absence of defendant and his counsel was other than voluntary. Defendant therefore waived his right to be present and to have his attorney present at the rendition of the verdict.

In defendant's trial and in the judgment entered we find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

ESPIE BLANKENSHIP AND MELO BLANKENSHIP v. PLEZZ PRICE AND WIFE, MRS. PLEZZ PRICE

No. 7522SC280

(Filed 3 September 1975)

1. **Judgments § 21— consent judgment — grounds for setting aside**

A consent judgment, being a contract, cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment.

2. **Cancellation and Rescission of Instruments § 4— unilateral mistake**

In general, a unilateral mistake in the making of an agreement, of which the other party is ignorant and to which he in no way contributes, will not afford grounds for avoidance of the agreement.

3. **Judgments § 21; Boundaries § 15— consent judgment fixing boundary — motion to vacate**

In an action to vacate a consent judgment locating a boundary line as shown on a map prepared by a court-appointed surveyor on the ground that plaintiffs' mistaken belief as to what was represented on the map was induced either by the surveyor's mistake or his intentional fraud in failing to portray on the map their contentions as expressed orally to him at the time of the survey, the evidence supported the court's findings that the surveyor had surveyed the contentions of the plaintiffs and that he did not intentionally defraud plaintiffs where plaintiffs alleged the dividing line was a straight line and the evidence showed the surveyor's line was a straight line between points contended for by plaintiffs.

APPEAL by plaintiffs from *Walker, Judge.* Order entered 22 January 1975 in Superior Court, IREDELL County (case transferred by consent from Alexander County). Heard in the Court of Appeals 10 June 1975.

Action for trespass on real property and to establish the true boundary line between plaintiffs' land and contiguous land of the defendants. On plaintiffs' motion the court appointed a surveyor to survey the contentions of the parties and to prepare a map thereof for the court. This was done, and thereafter all parties and their attorneys signed a consent judgment dated 29 July 1974 in which the court adjudged "by consent that the following is the true boundary line between the plaintiffs and defendants:

> "(a) beginning at a marked poplar being point A as shown on the court map filed in the record said map being prepared by R. B. Kesler, Jr. June 17, 1974, and runs thence North 85° 13′ 58″ west to a point in the East line of the Clyde Bolick property, said point being witnessed by an iron stake in a pine stump, said Bolick property being described in a deed recorded in Deed Book 82, page 31 in the office of the Registered [sic] Deeds of Alexander County."

The consent judgment also directed R. B. Kesler, Jr., the surveyor, to mark the dividing line with yellow paint.

On 7 October 1974 plaintiffs filed a motion pursuant to G.S. 1A-1, Rule 60, to vacate the consent judgment dated 29 July 1974. As grounds for this motion, plaintiffs alleged that after the surveyor painted the boundary line as established in the consent judgment they for the first time realized that the surveyor "did not survey and plat on the Court map the plaintiffs' contentions which the plaintiffs had shown to Robert Kesler on the ground"; that had they been aware of this, they would not have signed the consent judgment; and that the surveyor "either intentionally and with intent to defraud the plaintiffs, or mistakenly failed to survey and plat the actual contentions of the plaintiffs as to the location of the true boundary line."

By agreement of counsel and for the purpose of disposing of the motion, the case was transferred from Alexander County, where the lands of the parties are located and where the action had been instituted, to Iredell County, where a hearing on plaintiffs' motion was held before the judge presiding at the 20

January 1975 Civil Session of Superior Court. After hearing evidence, the judge entered an order dated 22 January 1975 denying the motion, finding that the surveyor had considered and surveyed the contentions of the parties and that he "did not intentionally or otherwise defraud the plaintiffs." From this order denying their motion to vacate the consent judgment, plaintiffs appealed.

John S. Willardson and Joe O. Brewer for plaintiff appellants.

No counsel contra.

PARKER, Judge.

[1] A consent judgment is the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval. *King v. King,* 225 N.C. 639, 35 S.E. 2d 893 (1945). Being a contract, it cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment. 5 Strong, N. C. Index 2d, Judgments, § 21, pp. 41, 42. Here, no question is raised that plaintiffs' consent was not in fact given when they signed the consent judgment nor do plaintiffs contend that they signed the judgment either because of any fraud practiced by defendants or because of any mutual mistake of the parties. Rather, plaintiffs' sole contention is that they signed the consent judgment as result of a unilateral mistake on their part as to what was represented on the map prepared by the court-appointed surveyor and that their mistake was induced either by the surveyor's mistake or by his intentional fraud in failing to portray accurately upon the map their contentions as to the correct location of the boundary line as they had expressed these contentions to him orally at the time he was on the ground making his survey. Plaintiffs do not contend that the surveyor was the agent of the defendants or that defendants were otherwise responsible for the surveyor's actions.

[2] In general, a unilateral mistake in the making of an agreement, of which the other party is ignorant and to which he in no way contributes, will not afford grounds for avoidance of the agreement. 17 Am. Jur. 2d, Contracts, § 146. However, we need not now decide whether plaintiffs have asserted grounds

sufficient to entitle them to be relieved from their contract embodied in the consent judgment in the present case, since in any event we find the trial court's essential findings of fact in the order appealed from to be supported by competent evidence, and plaintiffs have failed to carry their burden of proving even their asserted grounds for relief.

[3] The surveyor was appointed by the court "to survey the contentions of the plaintiffs and the contentions of the defendants in this cause." Plaintiffs' contentions were initially contained in their verified complaint. In the description of their property as contained in their complaint, the southern boundary line of plaintiffs' tract, which is the line which divides their property from that of defendants' which lies to the south thereof, is described as running from a certain poplar "West 180 poles to a dead pine." At the hearing on plaintiffs' motion to set aside the consent judgment, the surveyor testified that the plaintiffs were present while he was on the ground and that they pointed out to him a marked poplar tree which he designated on the map as point A. It is apparent from the record that both plaintiffs and defendants agreed that this marked poplar, designated as point A on the map, correctly marked the eastern terminus of the dividing line between their respective tracts. The surveyor also testified that the plaintiffs pointed out to him on the ground an iron stake in a pine stump, which he designated on the map as point D, as being a corner of their property. The surveyor showed point D on the map as the western terminus of the dividing line. He then showed the dividing line as a straight line running from point A, the marked poplar, to point D, the iron in the pine stump, for a distance of 2948.54 feet. Plaintiffs having alleged in their verified complaint that the dividing line was a straight line and the surveyor having shown the termini at points contended for by plaintiffs, there was ample support for the court's findings that the surveyor "has surveyed the contentions of the plaintiffs" and that he "did not intentionally or otherwise defraud the plaintiffs." That certain trees and other objects which plaintiffs contended orally to the surveyor were on their side of the line were ultimately found to be on defendants' side does not compel a finding that he failed to survey their "contentions." The evidence presented at the hearing on plaintiffs' motion, when considered in the light of the facts alleged in plaintiffs' verified complaint, supports the court's findings and its order denying the motion.

In passing, we note that our Supreme Court has consistently held in cases decided prior to the effective date of our new Rules of Civil Procedure that the proper procedure to attack a consent judgment on the ground of want of consent at the time it was entered is by motion in the cause, *Overton v. Overton,* 259 N.C. 31, 129 S.E. 2d 593 (1963); *Ledford v. Ledford,* 229 N.C. 373, 49 S.E. 2d 794 (1948); *King v. King,* 225 N.C. 639, 35 S.E. 2d 893 (1945), but that the proper procedure to set aside a consent judgment for fraud or mutual mistake is by independent action. *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507 (1964); *King v. King, supra; Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209 (1940); *see, Robinson v. McAdams,* 11 N.C. App. 105, 180 S.E. 2d 399 (1971). The difference in procedure is more than one merely of form, since in an independent action either party by making timely application would be entitled to a jury trial, while a hearing on a motion is before the judge. For this reason we question whether Rule 60 of the Rules of Civil Procedure effects a change in our former practice to the extent of authorizing an attack upon a consent judgment on the grounds of mutual mistake or fraud of the adverse party to be made by motion rather than by independent action. That question we do not decide in the present case, since the attack upon the judgment here was not made on the grounds of mutual mistake or of fraud of the adverse party, but on the grounds of a mistake or fraud of the surveyor appointed by the court itself, thus presenting a question perhaps more appropriately addressed to the court than to a jury. In any event, defendants did not raise any objection to the procedure by motion in the present case, and plaintiffs, who chose that procedure, are hardly in position to complain.

The order appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

W. M. SIMS, AND WIFE CAROL C. SIMS, PLAINTIFFS v. OAKWOOD MOBILE HOMES, INC. AND VIRGINIA HOMES MANUFACTURING CORPORATION, DEFENDANTS AND OAKWOOD MOBILE HOMES, INC., THIRD-PARTY PLAINTIFF v. VIRGINIA HOMES MANUFACTURING CORPORATION, THIRD-PARTY DEFENDANT

No. 7510SC288

(Filed 3 September 1975)

Negligence § 2— construction and installation of mobile home — negligence action

Plaintiffs' evidence was sufficient for the jury in an action against a mobile home manufacturer based on negligence in the construction and installation of a mobile home which the manufacturer undertook to construct in accordance with the plaintiffs' specifications, but plaintiffs' evidence was insufficient for the jury in an action against a mobile home dealer based on negligent construction and installation.

APPEAL by plaintiffs from *Bailey, Judge.* Judgment entered in 73CvS2782 on 15 November 1974, and judgment entered in 73CvS2781 on 22 November 1974. Heard in the Court of Appeals 10 June 1975.

Plaintiffs brought suit against Virginia Homes Manufacturing Corporation (Virginia) for breach of contract and negligence in the construction, delivery and manufacture of a mobile home. Plaintiffs also sued Oakwood Mobile Homes, Inc., (Oakwood) for negligence in the construction, delivery and manufacture of the same mobile home. The actions were consolidated for trial.

Oakwood filed a third-party complaint against Virginia seeking indemnification if Oakwood should be found liable in the primary action. Prior to trial, plaintiffs voluntarily dismissed their contract action against Virginia and proceeded to trial against both defendants for negligence.

Plaintiffs' evidence tends to show the following. W. M. Sims lived in a conventional home in Raleigh but was interested in purchasing a double-wide mobile home. He called on Odell Hamm, the manager at Oakwood, and was told that Oakwood handled a double-wide mobile home called "Norris." However, there were none on the lot and the "Norris" factory had closed for a few months.

Arrangements were made for Hamm and plaintiffs to visit the factory of another mobile home manufacturer—Virginia.

Hamm drove plantiffs to Boydton, Virginia, where they toured the factory and Mr. Sims was introduced to a Mr. Thompson. While there, some concern was expressed by Mr. Sims about the axles, wheels, and hitches on the mobile homes, and he was told that these would be removed when the mobile home was set up. Sims then presented Mr. Hamm a rough drawing of the floor plan which called for a 24′ x 60′ home and a list of extra specifications. He also requested 2″x8″ floor joists instead of the standard 2″x6″ floor joists used in double-wide units. Mr. Hamm took the information to someone in the factory and returned later with a price. Plaintiffs agreed to buy subject to the condition that they not be required to pay until they had sold their home in Raleigh.

Subsequently, plaintiff told Mr. Hamm that they had found a buyer for their home but that they wanted the mobile home to be 55 feet long instead of 60 feet. Mr. Hamm later informed them that the modifications could be made and a 24′x55′ mobile home was ordered at a price of $12,982.00. This price included delivery and installation. Plaintiffs received plans for the foundation from Mr. Hamm and were told that the foundation was not for support but only for appearance purposes. Virginia furnished the foundation plans, but it was plaintiffs' responsibility to construct the foundation.

After completion of the foundation, plaintiffs waited until they received word from Mr. Hamm that the mobile home was in transit to their lot. It arrived in two sections, and, contrary to the instructions of Mr. Sims, workers from Virginia began putting the sections together on the foundation. A metal frame or chassis beneath each section was removed and the sections were placed on the foundation. The two sections were about one-half inch apart, and in order to correct this a truck was used to bump them together. No one from Oakwood was present to supervise installation.

Being immediately dissatisfied with the mobile home, plaintiffs made a list of flaws. Workers from Virginia returned and corrected some of them, however, plaintiffs found others, some of which were caused by workers while making the corrections. On different occasions additional work was done on the mobile home, but plaintiffs remained dissatisfied. W. M. Sims testified at length concerning the flaws in his mobile home and its diminished value.

M. W. Cooper, who is in the "mobile home transport and trailer park business," testified that he had never seen a double-wide mobile home with the chassis or metal frame removed from beneath it and that if the frame had remained under the mobile home in question then it would have provided adequate support. Insufficient support, according to Cooper, caused a separation of some of its walls.

John George Raif, a mobile home repairman, testified that he saw numerous defects and attempted to estimate the cost of repairs but didn't know where to begin. Raif looked under the mobile home and did not see a metal frame. He, too, had never seen a mobile home from which the metal frame had been removed.

Clarence P. Jones, who was employed by plaintiffs to construct the foundation, testified that he built the foundation in accordance with the plans. Except in the present instance, he had never built a foundation for a mobile home which had no steel frame.

Plaintiff Carol Sims testifed concerning some of the flaws in the mobile home. According to this witness, plaintiffs ordered a mobile home with 2″x8″ floor joists but no mention was made concerning the steel frame.

At the close of plaintiffs' evidence the trial judge directed verdict in favor of both defendants stating that there was not sufficient evidence of negligence.

Plaintiffs appealed.

Kimzey, Mackie & Smith, by James M. Kimzey and Stephen T. Smith, for plaintiff appellants.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert W. Sumner, for defendant appellee Oakwood Mobile Homes, Inc.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., John N. Fountain, and Kenneth Wooten, Jr., for defendant appellee Virginia Homes Manufacturing Corporation.

MARTIN, Judge.

Instead of proceeding against defendants for breach of contract or warranty, plaintiffs seek to recover in tort alleging that defendants negligently constructed and installed their mobile home.

Negligent performance of a contract may constitute a tort as well as a breach of contract, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done. *Pinnix v. Toomey,* 242 N.C. 358, 87 S.E. 2d 893 (1955). See also *Insurance Co. v. Sprinkler Co.,* 266 N.C. 134, 146 S.E. 2d 53 (1966) and *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132 (1964).

The present case is unusual in that plaintiffs' injuries are confined to the subject matter of the sales contract—i.e. the mobile home. There has been no injury to the person or any property of plaintiffs other than the mobile home which is, according to plaintiffs' evidence, worth much less than what they paid for it. Nor does it appear that the mobile home, as constructed and installed, is capable of causing any harm to persons or other property as is ordinarily found in negligence actions. The manufacturer's liability in tort for mere loss on the bargain has been a troublesome question. Prosser, Handbook of The Law of Torts, § 101, pp. 665-7 (4th ed. 1971). Here, however, the manufacturer (Virginia) assumed responsibility for more than the safety of its product. Virginia undertook to construct the mobile home in accordance with plaintiffs' specifications. In addition, Virginia furnished the foundation plans for the mobile home and undertook to install the home on said foundation.

Viewing the evidence in the light most favorable to plaintiffs, there is sufficient evidence of negligence on the part of Virginia in the construction and installation of the mobile home which would require submission of the issue to the jury.

As for Oakwood, we affirm the directed verdict in its favor. There is no evidence of negligence on its part, nor do we find any relationship between Oakwood and Virginia as would render Oakwood answerable for the negligence of Virginia.

Reversed in part.

Affirmed in part.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. DEXTER LANE ALLMOND

No. 7519SC344

(Filed 3 September 1975)

1. **Homicide § 20— photographs of victim — admissibility for illustration**

The trial court did not err in allowing into evidence five photographs of deceased for the purpose of illustrating the testimony of an expert medical witness as to the cause of death.

2. **Homicide § 19— evidence of victim's character, threats — no evidence of self-defense**

The trial court in a second degree murder prosecution did not err in excluding evidence concerning threats made by the victim against defendant, the specific act of violence by the victim against defendant in pointing a gun at his head, the fact that the victim had a gun hidden outside the building at the time of the shooting, and the reputation of the victim as a vicious man, since such evidence was admissible only upon the presentation of viable evidence of the necessity of self-defense, and defendant presented no such evidence.

3. **Homicide § 31— voluntary manslaughter — thirty years' imprisonment — excessive punishment**

Imposition of a prison sentence of thirty years upon a conviction of voluntary manslaughter was greater than the punishment allowed by statute, and the case is remanded for entry of judgment imposing a sentence within the statutory limit of twenty years.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 6 February 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 27 August 1975.

Defendant was tried upon his plea of not guilty to the charge of murder in the second degree of Dennis Marsh. The State introduced evidence to show that on the night of 21 September 1974 the defendant entered Pinkie's Place in Asheboro carrying a .25 caliber automatic pistol in his right hand. He walked across the dance area and entered the poolroom where Dennis Marsh was playing pool. Defendant pulled the safety back on his pistol and shot Dennis Marsh in the back. Marsh fell to the floor and defendant kept on shooting him. Marsh died of the multiple bullet wounds inflicted by defendant.

Defendant testified and admitted shooting Marsh. He testified that Marsh had previously made threats against his life and at one time had held a gun against his head. Defendant also offered evidence to show that on the night of 21 September 1974, shortly before the fatal shooting, Marsh and defendant were

engaged in conversation outside of Pinkie's Place when defendant saw Marsh reaching to pick up a hidden shotgun, whereupon defendant ran away. On cross-examination, defendant testified: "As to what purpose I went into Pinkie's Grill for, I went in there because I knew if I didn't get him, he was going to get me. I went in there with the idea to shoot Dennis Marsh. After I found out what his idea was, it was either him or me." Defendant also testified on cross-examination that as he walked into the dance area on his way to the poolroom, his sister and another person grabbed him and tried to hold him back, but he broke loose from them so he could "get Dennis Marsh." He admitted that when he shot Marsh, he didn't know if Marsh had a gun, that Marsh did not then try to come toward him but was going toward the door, and that he did not see Marsh with any weapon at that time. Defendant testified that he knew Marsh had a gun out in the bushes. The jury found defendant guilty of voluntary manslaughter. He was sentenced to thirty years in prison. Defendant appealed.

Attorney General Edmisten by Associate Attorney General George J. Oliver for the State.

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

PARKER, Judge.

[1] Defendant first contends the trial judge erred by not limiting the number of photographs of the deceased introduced into evidence by the State. Five photographs were used to illustrate the testimony of an expert medical witness as to the cause of death. We find no error in the trial judge's ruling. Photographs which are relevant and properly authenticated are admissible in evidence for the purpose of illustrating or explaining the testimony of a witness. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). If the photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible. *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971). Here, all of the photographs were relevant, served a useful and proper purpose, and were properly admitted.

[2] Defendant assigns as error the exclusion of evidence concerning threats made by Marsh against defendant, the specific act of violence by Marsh against defendant in pointing a gun at his head, the fact that Marsh had a gun hidden outside at

the time of the shooting, and the reputation of Marsh as a vicious man. It is true that upon a proper showing that the accused in a homicide case may have acted in self-defense, the jury is entitled to hear and evaluate evidence of uncommunicated threats, *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70 (1959); communicated threats, *State v. Rice,* 222 N.C. 634, 24 S.E. 2d 483 (1943); specific acts of violence, *State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48 (1967); and evidence of the general character of the deceased as a violent and dangerous man, *State v. Johnson, supra.* However, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense. "[T]here must be evidence . . . that the party assaulted believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge in the principle of self-defense, and have the jury pass upon the reasonableness of such belief." *State v. Rawley,* 237 N.C. 233, 237, 74 S.E. 2d 620, 623 (1953). Defendant's evidence essentially established that although he had been previously threatened and was perhaps justified in his fear that Marsh might at some time attempt to kill him, he deliberately entered the building for the purpose of shooting Marsh and then proceeded to shoot and kill an unarmed man who was not then immediately attacking him or even in a position to do so. Clearly, at the time of the shooting the deceased was neither actually presenting any threat of imminent harm to the defendant nor did he appear to be doing so. "A defendant, when acting in his proper self-defense, may use such force only as is necessary, or as reasonably appears to him *at the time of the fatal encounter* to be necessary, to save himself from death or great bodily harm." (Emphasis added.) *State v. Fowler,* 250 N.C. 595, 598, 108 S.E. 2d 892, 894 (1959).

Although the excluded evidence was not admissible to show self-defense, some or all of it might have been competent as evidence of passion or heat of blood produced by reasonable provocation, which evidence may reduce a charge of second-degree murder to manslaughter. However, the jury found defendant guilty only of voluntary manslaughter even without the benefit of this excluded evidence. Thus any error in the exclusion of this evidence as it related to the degree of the crime was nonprejudicial.

Defendant also assigns as error the exclusion of testimony concerning the emotional state of defendant's father and the

deceased when they were engaged in conversation on the night of the shooting. Clearly, this testimony was irrelevant to any issue properly in this case and there was no error in the exclusion of this evidence.

[3] We find no error in defendant's trial. We note, however, that the prison sentence of thirty years imposed on defendant was excessive. The statutory punishment for the crime of voluntary manslaughter is imprisonment for not less than four months nor more than twenty years. G.S. 14-18. Accordingly, the judgment is vacated and this case is remanded to the Superior Court in Randolph County for the purpose of entry of judgment imposing a sentence within statutory limits.

Remanded for judgment.

Chief Judge BROCK and Judge ARNOLD concur.

NANCY JOHNSON MONTGOMERY v. DORIS A. WRENN AND ALLEN WRENN

No. 7518SC325

(Filed 3 September 1975)

1. **Appeal and Error § 49— exclusion of testimony — harmless error**

   Plaintiff was not prejudiced by the exclusion of testimony of plaintiff and her medical witness where both plaintiff and the medical witness were permitted to testify as to matters of the same import in their subsequent testimony.

2. **Trial § 51— denial of motion to set aside verdict — no abuse of discretion**

   In an action to recover for injuries allegedly received in a rear-end collision, the trial court did not abuse its discretion in the denial of plaintiff's motion to set aside the verdict for defendant and to grant a new trial where the jury could have found that defendant was not negligent or that plaintiff was not injured by defendant's negligence.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 9 December 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 August 1975.

The action was instituted by plaintiff to recover damages for personal injuries sustained in a rear-end collision on 25

January 1971. Plaintiff contends that defendant, Doris Wrenn, negligently crashed into the rear of plaintiff's car causing traumatic epilepsy and degenerative arthritis in the plaintiff.

Plaintiff testified that the car directly in front of her suddenly stopped, and that she was able to stop short of hitting the car in front of her even though the weather was foggy. Plaintiff then testified that she felt a terrific impact from the rear. On impact, the plaintiff stated that she became "flushed," and could not turn her head. Her car was totally damaged and could not be repaired.

Plaintiff put on six witnesses to testify regarding the extent of her injuries. Dr. Earl W. Schafer, a specialist in the field of orthopedic surgery, stated that he examined the plaintiff two months after the accident. His examination revealed that the plaintiff had good range of motion in the neck with no muscle spasms. X-rays gave no indication of injury. However, Dr. Schafer prescribed a soft cervical collar for the plaintiff.

In August 1974, Dr. Isabel Bittinger examined the plaintiff. Dr. Bittinger, a licensed orthopedic surgeon, testified that her examination revealed degenerative arthritis and that the arthritis could have been caused by the trauma of the accident.

The defendant offered no evidence and the jury returned a verdict for the defendant on the issue, "Was plaintiff injured and damaged by the negligence of the defendant as alleged in the complaint?"

Smith, Carrington, Patterson, Follin, and Curtis, by Michael Curtis, for plaintiff appellant.

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

ARNOLD, Judge.

[1] Plaintiff contends that the trial court committed prejudicial error in excluding competent evidence relating to the extent of plaintiff's injuries. Plaintiff's contention is based on exclusions in her testimony and the testimony of Dr. Bittinger. Defendant argues that the exclusions were proper because the answers were not responsive.

Plaintiff contends error but does not make an attempt to show prejudice or harm. The exclusion of testimony is not prej-

udicial when it appears that the testimony could have no material bearing on the issue or could not alter the rights of the parties or affect the outcome of the case. Both Dr. Bittinger and the plaintiff were permitted to testify as to matters of the same import in their subsequent testimony. Plaintiff did not satisfy the burden of showing prejudicial harm.

[2] Plaintiff next contends that the trial court committed prejudicial and reversible error by denying plaintiff's motion to set aside the verdict and grant a new trial. A motion to set aside the verdict is addressed to the sound discretion of the trial court and denial of the motion is not reviewable in the absence of manifest abuse of discretion. *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872 (1965); *Wilson v. Young,* 14 N.C. App. 631, 188 S.E. 2d 671 (1972).

As in *Johnson v. Johnson,* 23 N.C. App. 449, 209 S.E. 2d 420, *cert. denied* 286 N.C. 335, 211 S.E. 2d 212 (1974), plaintiff's contentions were submitted to the jury on stipulated issues. The jury could have found that the defendant was not negligent or that the plaintiff was not injured by the defendant's negligence. There was evidence present which could have led the jury to disbelieve the plaintiff's primary proponent, Dr. Bittinger. It is well within the province of the jury to so conclude. The trial judge did not abuse his dicretion in denying plaintiff's motion to set aside the verdict and grant a new trial.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT HOGAN

No. 7520SC345

(Filed 3 September 1975)

1. **Criminal Law § 143— probation revocation hearing — probation judgment — necessity for introduction**

The probationary judgment does not have to be formally introduced into evidence at the revocation hearing if the record indicates, as in this case, that the judge has the order before him, and where reference is made in the judgment to specific conditions that defendant allegedly violated.

State v. Hogan

2. Constitutional Law § 36; Criminal Law § 142— three year probation — one year active sentence — no cruel and unusual punishment

Probation for two years and 355 days plus twelve months of active sentence upon revocation of defendant's probation was not cruel and unusual punishment and was within the statutory limits. G.S. 15-200.

APPEAL by defendant from *Chess, Judge.* Judgment entered 27 February 1975 in Superior Court, RICHMOND County. Heard in the Court of Appeals 27 August 1975.

In March 1972 defendant was convicted and received a suspended sentence and probation. At the revocation hearing in February 1975 defendant's probation officer testified as hereafter set out that defendant had violated certain conditions of probation. Defendant stipulated that the allegations contained in the officer's testimony were correct.

One month after being placed on probation defendant, without permission, moved to an unknown address. He was not seen by his probation officer until six weeks before the hearing when he was arrested on another charge. No payment had been made to reimburse the state for defendant's attorney fee or for the cost of the action. The judge revoked the suspended sentence and from judgment imposing an active sentence defendant appealed.

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

Pittman, Pittman and Pittman, by Donald M. Dawkins, for defendant appellant.

ARNOLD, Judge.

We overrule defendant's contention that there was insufficient evidence that he failed to comply with the conditions of probation because the probation judgment was never admitted into evidence. The court made specific findings as to what conditions had been violated, and there was sufficient evidence to support these findings.

[1] The probationary judgment does not have to be formally introduced into evidence at the revocation hearing if the record indicates, as in the case at bar, that the judge has the order before him, and where reference is made in the judgment to specific conditions that defendant allegedly violated. *See State v. Langley,* 3 N.C. App. 189, 192, 164 S.E. 2d 529, 531 (1968).

[2] We cannot agree with defendant's argument that probation for two years and 355 days plus twelve months of active sentence is cruel and unusual punishment. It is obvious from the record that defendant only complied with his probationary sentence for one month, not two years and 355 days. Moreover, the period of probation (three years) and the active sentence are all within statutory limits. G.S. 15-200.

Defendant's assignment that it was error for the court to limit his evidence as to defendant's having rehabilitated himself, is without merit, as are his remaining assignments of error which we have carefully considered.

The findings of Judge Chess support the conclusion that defendant wilfully and without lawful excuse violated the conditions of his probation. The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT HARGROVE

No. 759SC331

(Filed 3 September 1975)

1. **Assault and Battery § 14— felonious assault — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death.

2. **Criminal Law § 163— objections to review of evidence and contentions**

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial court an opportunity for correction or they will be deemed to have been waived.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 7 January 1975 in Superior Court, WARREN County. Heard in the Court of Appeals 26 August 1975.

By indictment proper in form, defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. A shotgun was the weapon al-

legedly used and Thomas Walter Turner was the alleged victim. Defendant pled not guilty, a jury found him guilty as charged, and from judgment imposing prison sentence of 10 years, to be credited with 115 days defendant was confined awaiting trial, he appealed.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Clayton and Ballance, by Theaoseus T. Clayton, for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motions for nonsuit. No useful purpose would be served in relating the testimony here. Suffice it to say, the evidence was more than sufficient to survive the motions, therefore, the assignment is overruled.

[2] By his second assignment of error, defendant contends the trial court erred in its charge to the jury by including in its summation of testimony evidence to which the court had sustained defendant's objection. We find no merit in this assignment. It is a general rule in this jurisdiction that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial court an opportunity for correction, otherwise, the objections are deemed to have been waived and will not be considered on appeal. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973) ; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). Furthermore, we perceive no prejudice to defendant in the inclusion of that testimony. The assignment of error is overruled.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. ROBERT NORRIS TAYLOR

No. 7529SC354

(Filed 3 September 1975)

Automobiles § 129— drunken driving — breathalyzer results — time of intoxication — instructions

In a prosecution for drunken driving, the court's instruction that the jury could infer that defendant was under the influence of an intoxicating beverage if it found a breathalyzer test indicated one-tenth of 1% or more by weight of alcohol in his blood did not allow the jury to determine defendant's guilt or innocence based upon his condition at the time the breathalyzer test was administered rather than at the time he was operating his automobile on the highway where the court's further instructions made it clear that the jury was to determine defendant's condition with respect to intoxication at the time he drove his vehicle on the public highways.

APPEAL by defendant from *Friday, Judge.* Judgment entered 16 January 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 28 August 1975.

Defendant was tried on a warrant charging him with operating a motor vehicle on a public highway while under the influence of intoxicating liquor. He was found guilty in district court and appealed to superior court where he pled not guilty and was found guilty by a jury. From judgment imposing prison sentence, suspended on certain conditions, he appealed to the Court of Appeals.

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

Hamrick and Hamrick, by J. Nat Hamrick, for defendant appellant.

BRITT, Judge.

The sole assignment of error brought forward and argued in defendant's brief relates to the following instruction to the jury:

> "Now, there's evidence in this case which tends to show that a chemical test known as the breathalyzer was given to this defendant. If you should find from the evidence and beyond a reasonable doubt that the chemical test indicated one-tenth of 1% or more by weight of alcohol in his blood,

you may infer from his evidence that the defendant was under the influence of intoxicating beverage, however, you are not compelled to do so. . . . "

Defendant contends the instruction was erroneous in that it enabled the jury to make a determination of defendant's guilt or innocence based upon his condition at the time the breathalyzer test was administered rather than at the time he was operating his automobile on the highway (approximately one hour earlier). We find no merit in the assignment in view of the following instruction given immediately after the challenged instruction:

" . . . It is your duty to consider this evidence together with all other evidence in this case in determining whether the State has proven beyond a reasonable doubt that the defendant was under the influence of intoxicating beverage *at the time he drove his vehicle on the public highways of this State,* if you find beyond a reasonable doubt that he did drive a vehicle on the public highways of this State. . . . " (Emphasis added.)

When the instructions are considered contextually, we think the court made it clear that the jury was to determine defendant's condition with respect to intoxication "at the time he drove his vehicle on the public highways of this State."

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

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES DAVID CARR

No. 759SC330

(Filed 3 September 1975)

Criminal Law § 148— no appeal from nolo contendere

There is no right of appeal upon a plea of *nolo contendere.* G.S. 15-180.2.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 6 January 1975 in Superior Court, WARREN County. Heard in the Court of Appeals 25 August 1975.

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

Clayton & Ballance, by Theaoseus T. Clayton, for defendant appellant.

ARNOLD, Judge.

The record shows the defendant was charged with armed robbery and entered a plea of nolo contendere. There is no right of appeal upon a plea of nolo contendere. G.S. 15-180.2. The appeal is

Dismissed.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. STANTON STRICKLAND, ANNIE RUTH STRICKLAND, DOUG McMILLAN, HATTIE MAE McMILLAN

No. 7516SC367

(Filed 17 September 1975)

1. **Disorderly Conduct § 1— refusal to vacate educational institution building — constitutionality of statute**

G.S. 14-288.4(a)(4)a makes it clear that a violation of the statute occurs when a person intentionally refuses to vacate any building or facility of any public or private educational institution after having been ordered to do so by the chief administrative officer of the institution or his authorized representative, and the statute is not unconstitutionally vague.

2. **Disorderly Conduct § 1; Schools § 1— order to vacate educational institution building — power of official to make**

The validity of G.S. 14-288.4(a)(4)a making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrative officer of the institution or his representative does not depend upon the enactment by the Legislature of detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care.

State v. Strickland

APPEAL by the State from *Godwin, Judge.* Order entered 3 April 1975 in Superior Court, ROBESON County. Heard in the Court of Appeals 2 September 1975.

Defendants were tried in the District Court of Robeson County on warrants charging a violation of G.S. 14-288.4(a)(4), in that said defendants "did unlawfully, wilfully, ~~and feloniously~~ refuse to vacate a building or facility of a public Educational Institution, to wit: the building occupied by the Robeson County Board of Education, a body politic, and used to carry on the administrative business of said Board of Education, in obedience to an order of S. C. Stell, the authorized representative of Young Allen, Supt. of Robeson County Board of Education and Chief Administrative Officer of the aforesaid Robeson County Board of Education." From the imposition of active prison sentences, defendants appealed to the Superior Court.

Upon call of these cases before the Superior Court defendants moved to quash the warrants on the grounds (1) "[t]hat the warrants failed to charge a crime, in that the warrants failed to allege a public disturbance intentionally caused by the defendants," and (2) "[t]hat the statute 14-288.4(a)(4) is unconstitutional in that the language contained therein is vague and overbroad." The motion to quash was allowed by the court upon the finding "that language used by the North Carolina General Assembly in defining a 'public disturbance,' as set forth in General Statute 14-288.1(8) is unconstitutionally vague."

From the order allowing defendants' motion to quash, the State of North Carolina appealed.

Attorney General Edmisten by Associate Attorney Alan S. Hirsch for the State.

Moses & Diehl by Philip A. Diehl for defendant appellees.

PARKER, Judge.

The State assigns as error the trial court's allowance of defendants' motion to quash the warrants upon the grounds that the statute under which they were charged is unconstitutionally vague. We find the statute constitutional and reverse the order allowing the motion to quash.

The statute involved in this case is G.S. 14-288.4, which in pertinent part reads:

"(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

* * * * *

"(4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:

"a. An order of the Chief Administrative officer of the institution, or his authorized representative;

* * * * *

"(b) Any person who willfully engages in disorderly conduct is guilty of a misdemeanor. . . . "

"Public disturbance" is defined in pertinent part in G.S. 14-288.1(8) as: "Any annoying, disturbing, or alarming act or condition exceeding the bonds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access."

[1] Defendants first contend that G.S. 14-288.4(a)(4)a, setting out certain elements of "disorderly conduct," is interdependent with G.S. 14-288.1(8), defining "public disturbance," and that when both provisions are read together, the average citizen is not given adequate notice of the conduct prohibited and therefore the statutes are void for vagueness. Assuming, but without deciding, that the language defining "public disturbance," in G.S. 14-288.1(8) is overbroad and vague, the question is presented whether G.S. 14-288.4(a)(4)a is thereby also rendered unconstitutionally vague. We hold that it is not.

"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 pre-

scribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met." *In re Burrus,* 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969).

The statute, G.S. 14-288.4(a), initially defines "disorderly conduct" in general terms as "a public disturbance" and then sets forth in subsequent subsections specific examples of conduct which is prohibited as disorderly conduct. "It is a rule of construction, that when words of general import are used, and immediately following and relating to the same subject words of a particular or restricted import are found, the latter shall operate to limit and restrict the former." *Nance v. R. R.,* 149 N.C. 366, 371, 63 S.E. 116, 118 (1908); *accord, In re Steelman,* 219 N.C. 306, 13 S.E. 2d 544 (1941). In order to ascertain what actions are violative of the statute as constituting "disorderly conduct," one must look, not to the general definition of "public disturbance," but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself. Such interpretation of this statute follows the admonition contained in the opinion of our Supreme Court in *Milk Commission v. Food Stores,* 270 N.C. 323, 331, 154 S.E. 2d 548, 555 (1967) that "[t]o construe the statute otherwise would raise a serious question as to its constitutionality and it is well settled that a statute will not be construed so as to raise such question if a different construction, which will avoid the question of constitutionality, is reasonable."

Again assuming *arguendo* that the defintion of "public disturbance" as contained in 14-288.1(8) is unconstitutionally vague, it does not necessarily follow that the inclusion of these words in G.S. 14-288.4(a)(4)a, renders the latter statute also unconstitutional. When a statute can be given effect as if the invalid portion had never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone. *Commissioners v. Boring,* 175 N.C. 105, 95 S.E. 43 (1918). That such a deletion of any unconstitutional material in the statutes now before us was intended by the Legislature is made manifest in Sec. 3 of Chap. 668, 1971 Session Laws (enacted when G.S. 14-288.4 was rewritten in 1971) which provides that "[i]f any *word,* clause, sentence, paragraph, section, or other part of this act shall be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect,

impair, or invalidate the remainder thereof." (Emphasis added.) If one totally ignores the words "public disturbance," reference to the succeeding specific subsections in G.S. 14-288.4(a) more than adequately gives notice as to what constitutes the "disorderly conduct" which the statute makes a misdemeanor. Even a casual reading of G.S. 14-288.4(a)(4)a, considered independently of G.S. 14-288.1(8), makes it clear as to exactly what specific disorderly conduct is prohibited by the statute; that is, a violation occurs when a person (1) intentionally refuses to vacate, (2) any building or facility, (3) of any public or private educational institution, (4) after having been ordered to do so by the chief administrative office of the institution or his authorized representative. The warrants in this case clearly and expressly charge that defendants engaged in exactly such conduct.

The above statutory construction is supported by the opinion of our Supreme Court in *State v. Summrell*, 282 N.C. 157, 192 S.E. 2d 569 (1972). In that case, the Court, while ruling certain subsections of G.S. 14-288.4(a) as then enacted to be unconstitutionally vague, specifically upheld other subsections. The subsections which the Court sustained, like the subsection now before us, spelled out specific examples of "disorderly conduct" following the general phrase "public disturbance." Assuming the Supreme Court would find 14-288.1(8) to be unconstitutionally vague, its holding in *State v. Summrell, supra,* could not have been possible had the Court considered the definition in 14-288.1(8) to be an essential part of 14-288.4(a).

[2] Defendants additionally contend that even if the statute, G.S. 14-288.4(a), is not found to be vague and overbroad, it is nevertheless unconstitutional because no restraint is imposed upon the chief administrative officer of an educational institution or his authorized representative when exercising authority to order a person to vacate a building or facility of the institution. We find this contention without merit. The statute, G.S. 14-288.4(a)(4)a, comes into operation only when the order to vacate is given by a responsible school official, the chief administrative officer or his authorized representative. "Schools to be effective and fulfill the purposes for which they are intended must be operated in an orderly manner." *Coggins v. Board of Education,* 223 N.C. 763, 767, 28 S.E. 2d 527, 530 (1944). The legislative branch of the government may delegate "the power to make such rules and regulations as may be deemed necessary

or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions." *Coggins v. Board of Education, supra.* We hold in this case that the validity of G.S. 14-288.4 (a) (4) a does not depend upon the enactment by the Legislature of detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care.

The order allowing defendants' motion to quash is

Reversed.

Chief Judge BROCK and Judge ARNOLD concur.

KENNETH B. WRIGHT, BTH/GAL, NANCY WRIGHT v. WENDELL T. GANN AND CHARLES EDWIN WRIGHT

No. 7517DC353

(Filed 17 September 1975)

1. **Bastards § 10; Parent and Child § 7— illegitimate child — married woman — duty to support**

When a married woman has an illegitimate child, the father of the child, not the woman's husband, has the duty to support the child.

2. **Bastards § 10— action to establish paternity — child born to married woman**

In the statute establishing a civil action to determine the paternity of an illegitimate child, G.S. 49-14, the phrase "out of wedlock" refers to the status of the child and not to the status of the mother; therefore, the statute is applicable to a child born to a married woman as well as to a child born to a single woman.

3. **Bastards § 10; Evidence § 51; Parent and Child § 1— paternity action — married woman — blood grouping tests**

In an action to establish paternity, the results of blood grouping tests were admissible to rebut the presumption of legitimacy of a child born while the mother was married.

4. **Bastards § 10; Parent and Child § 1— paternity — evidence of nonaccess**

Evidence of nonaccess to the wife is admissible to rebut the presumption of legitimacy of children born during marriage if the evidence is from third parties, but the husband and wife may not testify to nonaccess.

5. **Bastards § 10; Parent and Child § 1 —paternity action — divorce based on separation — wife's testimony — harmless error**

In an action to establish the paternity of a child born while the mother was married, the trial court erred in permitting the mother to testify that she obtained a divorce from her husband on the ground of separation because this constituted evidence of nonaccess by the wife; however, such error was harmless beyond a reasonable doubt since plaintiff did not attempt to prove the husband was not the father by proof of nonaccess but by blood tests, defendant's own testimony revealed he had sexual relations with the mother, and the court charged the jury that the judgment in the divorce action could not be viewed as evidence of nonaccess.

6. **Bastards § 10— paternity action — blood tests — instructions**

In an action to establish the paternity of a child born during marriage of the mother, the trial court did not express an opinion in its instructions that blood test evidence conclusively established that the husband of the child's mother could not have been the child's father.

APPEAL by defendant from *Clark, Judge.* Judgment entered 16 January 1975 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 27 August 1975.

Action was instituted by plaintiff through his next friend, and mother, Nancy Wright, under G.S. 49-14, to establish paternity and to obtain support. Plaintiff alleged that the defendant Gann was his father. Defendant denied paternity and alleged that the plaintiff was born while Nancy Wright was married to Charles Edwin Wright and moved that Wright be joined as defendant. His motion was granted.

Dr. H. C. Lennon appeared as a witness for plaintiff and testified that he had administered blood grouping tests to plaintiff, to defendants and to plaintiff's mother Nancy Wright. The blood tests established that defendant Wright could not have been plaintiff's father. The blood tests did not establish that defendant Gann could not be plaintiff's father.

Plaintiff presented additional evidence showing that the mother, Nancy Wright, had been separated from her husband, and that she had sexual relations with the defendant Gann during this period. The defendant admitted having sexual relations with Nancy Wright but denied having sexual relations during the period plaintiff was conceived.

The jury found the defendant Gann to be the plaintiff's father and the court entered judgment holding the defendant Wendell T. Gann liable for child support.

The defendant appealed to this Court.

Gwyn, Gwyn and Morgan, by Allen H. Gwyn, for plaintiff appellee.

Bethea, Robinson, Moore and Sands, by Norwood E. Robinson, and Price, Osborne and Johnson, by D. Floyd Osborne, Jr., for defendant appellant.

ARNOLD, Judge.

Defendant contends that plaintiff's action cannot be maintained under G.S. 49-14 because the statute applies only to children born to single women. He argues that the statute is not applicable because Mrs. Wright was married at the time of conception and birth of the plaintiff, and therefore plaintiff was not born "out of wedlock" within the meaning of the statute.

If the defendant's construction of the statute is adopted, an illegitimate child of a married woman would not be entitled to support because the child would be precluded from asserting his right to support against the father and the law imposes no duty to support the illegitimate child on the husband. This position is untenable.

[1] The father of an illegitimate child has a legal duty to support his child. G.S. 49-2. Where a married woman has an illegitimate child, the father has the duty to support his child and not the woman's husband. *State v. Wade,* 264 N.C. 144, 141 S.E. 2d 34 (1965); *State v. Ray,* 195 N.C. 628, 143 S.E. 216 (1928).

[2] North Carolina does not impose upon a husband the burden of supporting another man's offspring. The legislature, by enacting G.S. 49-14, intended to establish a means of support for illegitimate children. Statutory construction should seek to accomplish that purpose and not frustrate legislative intent. We interpret the phrase "out of wedlock" in the statute as referring to the status of the child and not to the status of the mother.

Other jurisdictions with similar statutes apply their statutes to married women. *See Martin v. Lane,* 57 Misc. 2d 4, 291 N.Y.S. 2d 135 (Duchess County Family Ct. 1968); *B. v. O.,* 50 N.J. 93, 232 A. 2d 401 (1967); *Pursley v. Hisch,* 119 Ind. App. 232, 85 N.E. 2d 270 (1948); *State v. Coliton,* 73 N.D. 582, 17 N.W. 2d 546 (1945).

G.S. 49-14 is applicable to all illegitimate children and therefore does not preclude an illegitimate child of a married woman from instituting suit for support.

[3] Defendant next contends that the trial court erred in allowing the testimony as to the results of the blood test. Defendant's contention is without merit. Children born in wedlock are presumed legitimate; however, the presumption is rebuttable. *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968); *State v. Hickman,* 8 N.C. App. 583, 174 S.E. 2d 609 (1970). Evidence of the results of blood grouping tests are admissible to rebut this presumption. *Wright v. Wright,* 281 N.C. 159, 188 S.E. 2d 317 (1972); G.S. 8-50.1.

Testimony by Nancy Wright that she obtained a divorce from Charles Wright on grounds of separation, and records of that divorce action, were introduced into evidence. Defendant assigns error to the admission of this evidence as being evidence of nonaccess by the wife. He correctly argues that any evidence of nonaccess must come from third parties.

[4] Evidence of nonaccess to the wife is admissible to rebut the presumption of legitimacy of children born during marriage if the evidence is from third parties. The husband and the wife may not testify to nonaccess. *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224 (1941); *State v. Wade, supra; Eubanks v. Eubanks, supra.*

[5] The trial court should not have admitted any part of Mrs. Wright's evidence tending to show nonaccess, but we are unable to see any prejudice to defendant, Gann. The error was harmless beyond a reasonable doubt.

Plaintiff did not attempt to prove Wright was not the father by proof of nonaccess, but rather by the blood tests. Results of the blood tests furnished strong evidence to rebut the presumption of legitimacy of a child born during coverture. Defendant's own testimony established that he was having sexual relations with Mrs. Wright. Moreover, the court specifically charged the jury that the judgment in the divorce action could not be viewed as evidence of nonaccess. We fail to see how the evidence complained of could have affected the outcome of the trial.

[6] Finally, defendant assigns error to the trial judge's instructions to the jury regarding the evidentiary value of the blood test. Defendant argues that the court, in its charge to the jury, expressed the view that the blood test evidence conclusively established that Charles Wright could not have been plaintiff's father. We do not agree.

When the charge to the jury is considered contextually, it is evident that the trial court directed that the blood tests were to be considered with all the other evidence. The trial judge explained the presumption of legitimacy pertaining to all children born in wedlock. He then explained that the presumption was not conclusive and could be rebutted. Finally, the trial judge stated that it was necessary for the jury to find that the blood test proved beyond a reasonable doubt that Charles Wright was not the father of the plaintiff in order to rebut the presumption of legitimacy.

Defendant has additional assignments of error which we have considered and find to be without merit.

We find no prejudicial error in the trial.

No error.

Chief Judge BROCK and Judge PARKER concur.

LEWIS HALSEY v. A. V. CHOATE

No. 7523DC380

(Filed 17 September 1975)

Partnership § 9— dairy partnership — milk base — contribution to partnership property

A "milk base" owned by defendant and used by a dairy partnership was a "contribution" to the partnership property as contemplated by G.S. 59-48(1); therefore, upon dissolution of the partnership, defendant is entitled to be repaid the value of the milk base at the time plaintiff became a partner, each partner is entitled to be paid for the pounds of base each purchased after formation of the partnership, and the value of the remaining milk base should be paid to the partners equally.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 27 January 1975 in District Court, ALLEGHANY County. Heard in the Court of Appeals 3 September 1975.

In this action plaintiff seeks to recover balance allegedly due him following the dissolution of a partnership composed of

him and defendant. Pertinent allegations of the complaint are summarized as follows:

From 25 January 1963 until 5 March 1973, plaintiff and defendant were jointly engaged in the business of operating a dairy farm. Defendant owned the land, buildings, machinery and equipment, together with one-half interest in the dairy herd. Plaintiff performed the work and owned a one-half interest in the herd. All purchases of feed, veterinarian fees and other incidental expenses were paid equally by the parties. At the time of the inception of the joint venture, there was attached to the jointly owned herd a "milk base" established by the North Carolina Milk Commission in accordance with Article 28B of Chapter 106 of the General Statutes. From the inception of the venture in 1963 until its termination in 1973, said milk base was increased through the increased production of milk on the farm operated by plaintiff; the increase in said milk base resulted entirely from plaintiff's efforts.

The parties agreed to sell, and did sell, their interest in the dairy business, including the herd and milk base. On behalf of the parties, defendant collected from the purchaser the value of the milk base but refuses to pay plaintiff for his one-half interest therein.

In his answer defendant admitted that he and plaintiff were jointly engaged in the business of operating a dairy farm and admitted a sale of the business. Defendant further admitted a sale of the milk base but alleged that it belonged entirely to him and that plaintiff was not entitled to any part of the proceeds therefrom.

The parties waived trial by jury. Answers to interrogatories and evidence consisting of exhibits and oral testimony presented at the trial tended to show:

The partnership agreement for the operation of the dairy business was originally entered into on 15 July 1959 between defendant and one Russell Anderson, plaintiff's stepfather. Anderson operated the business until 25 January 1963 when he transferred and assigned all of his interest in and obligations under the agreement to plaintiff. Defendant acquiesced in the transfer and permitted plaintiff to operate the business until it was sold by mutual agreement around 1 March 1973. The milk base which defendant sold in March 1973 was 1345 pounds for which he received $8.00 per pound, a total of $10,760.00.

Following a trial the court entered judgment in which it set forth findings of fact, conclusions of law and an adjudication that plaintiff recover $5,230.00 plus interest and costs.

Defendant appealed.

Edmund I. Adams for plaintiff appellee.

Wade E. Vannoy, Jr., by Jimmy D. Reeves, for defendant appellant.

BRITT, Judge.

In the first of his two assignments of error, defendant contends the court erred in overruling his motion for judgment of involuntary dismissal made at the conclusion of all the evidence pursuant to G.S. 1A-1, Rule 41(b). We find no merit in this assignment and it is overruled.

In his second assignment of error, defendant contends the court erred in concluding as a matter of law that the milk base became a partnership asset, jointly owned by the parties. We think this assignment has merit.

While defendant did not except to any finding of fact, it is well settled that an appeal constitutes an exception to the judgment and presents the question whether the facts found support the judgment. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 222. We think it follows that an exception to a conclusion of law upon which the judgment is predicated presents the question whether the facts found support the conclusion of law.

The conclusion of law which defendant challenges is as follows:

> "That absent any express agreement to the contrary, the milk base became a partnership asset, jointly owned by the partners, and the plaintiff is entitled to recover one-half of the proceeds from sale of said milk base, less the sum of $150.00, which the plaintiff failed to pay as his share of the purchase price for part of said milk base during the period in which the partnership was in operation."

The findings of fact pertaining to said conclusion of law are as follows:

> "That the defendant operated with Mr. Anderson under said contract until the 25th day of January, 1963, at

which time Russell Anderson assigned his rights under the agreement to the plaintiff, and the parties continued to operate the dairy farm under the terms of said agreement until the 5th day of March, 1973, even though the agreement by its terms expired at the end of five years from July 15, 1959. That said agreement is silent as to renewal, and is also silent with respect to ownershsip of a milk base incident to the dairy operation. That a milk base is the amount of milk in numbers of pounds per day of Grade A milk which a dairy farm is permitted to produce and sell to a milk distributor at Grade A prices. That the amount of milk base which a dairy farm is allowed is regulated and determined by the rules and regulations of the North Carolina Milk Commission.

"That during the years in which the plaintiff and defendant were operating their dairy farm, the milk base fluctuated up and down, depending on production. That the defendant had a milk base of about 1,500 to 1,600 pounds in existence in 1959 at the inception of said agreement. That the plaintiff and defendant acquired additional milk base during the period of time in which the plaintiff and defendant operated the dairy farm, and that on one occasion the plaintiff paid one-half of the purchase price for the additional milk base. That on another occasion a purchase of about 100 pounds of milk base was made by the defendant, for which the total purchase price was $600.00, and for which the plaintiff paid $150.00 of the total purchase price.

"That the milk base in of itself had very little, if any, market value in the year 1959 or 1963.

"That on March 5, 1973 the dairy operation was sold, and the plaintiff received his interest in the cattle and equipment. That the defendant received the sum of $10,760.00, which was solely for the purchase price of the milk base, and retained this sum for himself. . . . " G.S. 59-48(1) provides:

"RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS. —The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership

property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. . . . "

While the principle stated in the quoted statute is clear, its application in the instant case is difficult. There can be no doubt that the milk base was a valuable asset at the time the partnership ceased operation. Although the court found that defendant had a milk base of 1500 to 1600 pounds in 1959, and that a milk base had little if any market value in 1959 or 1963, there was evidence tending to show that a milk base had *some* value to a dairy operation at all times pertinent to this action. We think the milk base which defendant owned and was used by the partnership was a "contribution" to the partnership property as contemplated by the quoted statute and that defendant is entitled to proper repayment. This would include any base which defendant purchased and permitted the partnership to use. However, we think 1963 rather than 1959 should be the beginning year.

The problem here is further complicated by the fact that the poundage constituting the milk base fluctuated from year to year. The evidence showed that the base in effect for the year 1962 had diminished to 967 pounds; there was no specific showing as to what it was in 1963 at the time plaintiff became a partner. In spite of findings made by the court that the base had little if any market value in 1959 or 1963, there was a finding that defendant purchased 100 pounds of base for $600 (evidently after plaintiff became a partner) and the amount of the judgment appears to have been determined on a calculation of $8.00 per pound for plaintiff's share of 1345 pounds of milk base.

On the pleadings and contentions presented in this case, we think the court's findings should include: (1) the pounds of milk base belonging to defendant when plaintiff became a partner in January 1963; (2) the pounds of base which each partner purchased on his own account between the time plaintiff became a partner and the date of the sale of the partnership assets; and (3) the pounds of base sold after the partnership ceased operations and the price per pound received. Defendant should be given credit for his base determined in (1) and (2) at the price per pound determined in (3); plaintiff should be paid for his base determined in (2) at the price per pound determined in (3); and the remaining base would belong to the parties

equally and plaintiff should be paid for his one-half interest therein calculated on the price per pound determined in (3).

For the reasons stated, the judgment appealed from is vacated and this cause is remanded for a new trial consistent with this opinion.

New trial.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. CLEVELAND N. LITTLE

No. 7526SC379

(Filed 17 September 1975)

1. **Searches and Seizures § 2— consent to search — standing to contest consent**

A search of a dwelling with the consent of the owner-occupant was constitutionally proper; furthermore, defendant, a visitor in the dwelling, had no standing to contest the consent of the owner-occupant.

2. **Arrest and Bail § 3— warrantless arrest — reasonable grounds**

Officers had reasonable grounds to arrest defendant without a warrant for a felony where the officers observed defendant and another carry two business machines into a house which they believed to be the base of a "fencing" operation, officers searched the house and found the two machines hidden under a blanket in a back bedroom, and defendant denied any knowledge of the machines or their ownership. Former G.S. 15-41(2).

APPEAL by defendant from *Falls, Judge.* Judgment entered 19 December 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 September 1975.

Defendant was tried on a bill of indictment charging him with (1) breaking and entering a building occupied by National Mattress Company and (2) larceny of the following property: three electric calculators, a money box, credit cards, checks, and four rolls and seven sheets of postal stamps. He pleaded not guilty and evidence presented by the State tended to show:

Early on the morning of 29 January 1974, Officers Beveridge and Christmas of the Charlotte Police Department were on stake out near a house on Frazier Street which they believed

to be the base of an operation "fencing" stolen property. Through binoculars they saw defendant arrive in a car driven by Brodie Cannon. Defendant and Cannon entered the house, emerged a few minutes later, returned to the car where they removed two business machines from the trunk and carried them into the house.

Additional officers were called to the scene and police converged on the house. When they reached the front porch, Officer Beveridge heard fragments of a conversation through the partially open front door including the words "sixty dollars is too much." They pushed the door open, identified themselves as police officers and confronted defendant, Brodie Cannon, Jack Lowry, the owner of the house, and an unidentified young woman all standing in the living room. When questioned about the business machines Officers Beveridge and Christmas had seen defendant and Cannon carrying into the house, Lowry denied knowing anything about any machines and gave officers permission to "look around" his house. A brief search disclosed, under a blanket in a back bedroom, the machines officers had previously seen defendant and Cannon carrying into the house. Defendant and the others were again asked if they knew anything about the machines. When they all denied any knowledge of the machines or their ownership, officers placed them under arrest and transported them and the machines to the Law Enforcement Center.

After arriving at the Law Enforcement Center, the officers learned of the theft of business machines from Charlotte National Mattress Company (Mattress Company). Serial numbers on the machines identified them as items taken from offices of the Mattress Company the night before. Defendant worked for the Mattress Company for a period during 1972. In addition to the business machines, officers learned that several credit cards, postage stamps and a company check were also missing. This information, together with the fact that defendant had a sheet of stamps in his possession when he was arrested, led Officer Beveridge to examine the back seat of the car in which defendant rode to the Law Enforcement Center. In a crevice behind the seat where defendant had been sitting, police recovered a rolled up sheet of stamps, several oil company credit cards bearing the Mattress Company name and a company check. The car had been inspected just prior to picking up defendant and the rear passenger compartment, including the area behind and under

the back seat, was clear; no one else had been in the vehicle since it was used to transport defendant.

Defendant offered no evidence.

A jury found defendant guilty as charged. On the breaking and entering count, the court entered judgment imposing a prison sentence of 10 years with credit to be given for time defendant spent in jail awaiting trial. On the larceny count, the court entered judgment imposing prison sentence of 10 years, to begin at expiration of the other sentence, but suspended for a period of five years on condition defendant violate no law of this State and remain gainfully employed in a lawful occupation.

Defendant appealed.

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

Casey and Daley, P.A., by William G. Jones and Walter H. Bennett, Jr., for the defendant appellant.

BRITT, Judge.

Defendant assigns as error the trial court's failure to suppress evidence derived from a search prior to arrest. We find no merit in this assignment.

[1] The search of the Lowry house was lawful and evidence derived therefrom was properly admitted into evidence. The validity of evidence against a criminal defendant obtained from a search consented to by a third person owner or occupant has been approved by the United States Supreme Court. *Frazier v. Cupp,* 394 U.S. 731, 22 L.Ed. 2d 684, 89 S.Ct. 1420 (1969). This rule was reaffirmed in *Schneckloth v. Bustamonte,* 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). Clearly, a search consented to by the owner or person in control of a residential dwelling is constitutionally proper. *United States v. Matlock,* 415 U.S. 164, 39 L.Ed. 2d 242, 94 S.Ct. 988 (1974). Furthermore, defendant had no interest in the house other than the stolen business machines, therefore, he lacks standing to contest Lowry's consent to a search producing evidence that implicated him. *State v. Fowler,* 172 N.C. 905, 90 S.E. 408 (1906); *State v. Penley,* 284 N.C. 247, 200 S.E. 2d 1 (1973).

[2] We turn next to the validity of defendant's arrest. While not squarely presented in the briefs, the question appears to be presented at least by implication.

Except as authorized by statute any arrest without a warrant is unlawful. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954); *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969). Former G.S. 15-41(2), which was in effect on the day in question, empowered peace officers to arrest without a warrant when they had reasonable ground to believe that a felony had been committed and the suspect would evade arrest if not taken into custody. The basis of this reasonable ground for belief is drawn from the totality of facts and circumstances surrounding the arrest, known to the officers. *State v. Jacobs,* 277 N.C. 151, 176 S.E. 2d 744 (1970). Factors involved in arriving at this determination include " . . . the nature of the felony, the hour of the day or night, the character and reputation of the neighborhood where the arrest was made, the number of suspects and officers available for assistance, and the likely consequence of the officers' failure to act promptly." *State v. Roberts,* 6 N.C. App. 312, 315-16, 170 S.E. 2d 193, 195-96 (1969), *aff'd,* 276 N.C. 98, 171 S.E. 2d 440 (1969); *see,* e.g., *State v. Kennon,* 20 N.C. App. 195, 201 S.E. 2d 80 (1973).

When confronted with the business machines, which just moments before officers had observed him carry into a house which they believed to be the base of a "fencing" operation, defendant denied knowing anything about the machines or their ownership. At this point, facts and circumstances crystalized to form a reasonable ground for officers to believe defendant had committed a felony and would evade arrest if not taken into custody. *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964). By defendant's actions, officers were in possession of sufficient facts " . . . to awaken a suspicion of his being himself the guilty party . . . . " *Neal v. Joyner,* 89 N.C. 287, 291 (1883). Under former G.S. 15-41(2) actual knowledge of an existing felony was not an essential incident of an officer's reasonable grounds of belief. *State v. Allen,* 15 N.C. App. 670, 190 S.E. 2d 714 (1972), *rev'd other grounds,* 282 N.C. 503, 194 S.E. 2d 9 (1972).

While we do not reach the question, we note that it has been held that the fact that an original arrest might have been unlawful does not affect the jurisdiction of the court, is not a ground for quashing the indictment, and does not preclude trial of the accused for the offense. 5 Am. Jur. 2d, Arrest, § 116, p. 796.

We have considered the other assignments of error brought forward and argued in defendant's brief but find them to be without merit. We conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. JIMMY MADDOX

No. 7510SC332

(Filed 17 September 1975)

1. **Constitutional Law § 34— prison inmate — punishment by prison officials — subsequent trial — no double jeopardy**

Defendant, a prison inmate who was punished by prison authorities for assaulting a fellow inmate, was not placed in double jeopardy where he was subsequently tried and convicted by a court of law for the same offense.

2. **Assault and Battery § 14— assault with knife — sufficiency of evidence**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury evidence was sufficient to be submitted to the jury where it tended to show that defendant, a prison inmate, attacked a fellow inmate with a knife, two prison guards observed the attack, defendant thereafter ran up a set of stairs leading into another cell block, defendant threw an object into that cell block, and a prison guard subsequently found a knife two or three feet from the window through which other guards had seen defendant throw an object.

3. **Criminal Law § 42— assault with knife — admissibility of knife**

The trial court in a prosecution for assault did not err in allowing into evidence a knife allegedly used in the commission of the crime where two prison guards testified that the knife offered in evidence was the knife used in the crime or similar to the one used.

4. **Criminal Law § 114— jury instructions — no expression of opinion**

The trial court in an assault prosecution did not express an opinion as to the credibility of the defendant and his witnesses in violation of G.S. 1-180 in that portion of the charge to the jury in which the court stated the contentions of the State.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 7 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 26 August 1975.

State v. Maddox

This is a criminal prosecution wherein the defendant, Jimmy Maddox, an inmate at Central Prison in Raleigh, was charged in a bill of indictment with assaulting Marcellus Murphy, a fellow inmate, with a deadly weapon with intent to kill inflicting serious injury. Defendant entered a plea of not guilty and was found guilty by the jury of assault with a deadly weapon inflicting serious injury. From a judgment that he be imprisoned for ten (10) years, said sentence to commence at the expiration of the sentence then being served, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Sidney S. Eagles, Jr., for the State.

DeBank and Fullwood by Douglas F. DeBank for defendant appellant.

HEDRICK, Judge.

[1] By his first assignment of error defendant contends that his trial in the superior court placed him in double jeopardy in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution. He argues that by virtue of being punished by prison authorities prior to trial for assaulting Marcellus Murphy, he could not subsequently be tried and convicted by a court of law for the same offense. This court has prevously held that "[a]dministrative discipline of an inmate does not constitute multiple punishment within the meaning and intent of the Fifth Amendment . . . . " *State v. Carroll,* 17 N.C. App. 691, 694, 195 S.E. 2d 306, 308 (1973). Accord, *State v. Shoemaker,* 273 N.C. 475, 160 S.E. 2d 281 (1968). Consequently, this assignment of error is without merit.

[2] Next, defendant contends that the trial court erred in failing to grant his timely motions for judgment as of nonsuit. At trial, the State offered evidence tending to show that on 10 April 1974 the defendant was an inmate at Central Prison. At about 12:30 p.m. on that day the defendant, Marcellus Murphy, and two other prisoners were permitted to enter the prison's recreation area. Soon after the defendant and Murphy had entered the area, Wesley Davis, a prison guard, observed the defendant attack Murphy by making a striking motion at him. When the defendant backed away from Murphy, Davis observed "an instrument of a shiny nature in his [the defendant's] left hand." The defendant thereafter ran up a set of stairs leading to the J Block Section of the prison and threw the object in his

hand through a window into J Block. S. D. Alford, another prison guard, testified that he saw the defendant grab Murphy near his chest and make "jabbing motions at him." Alford clearly saw the defendant with a knife in his hand and further testified that the defendant ran up the stairs to J Block and threw the knife through a window into that portion of the prison. Lee Hayes, a prison guard, testified that upon instructions from a superior he went into J Block to look for a weapon and that he found a knife lying on the catwalk approximately two or three feet from the window described by Davis and Alford. Murphy received stab wounds in the chest and abdomen as a result of the incident. When the foregoing evidence is viewed in the light most favorable to the State, we are of the opinion that it is sufficient to require submission of the case to the jury and to support the verdict.

By assignment of error number seven, defendant contends that the trial court erred in allowing a knife (Exhibit 1) to be admitted into evidence. Defendant argues that this exhibit was not properly identified.

[3] It is proper to introduce weapons as evidence where there is evidence tending to show that they were used in the commission of a crime. *State v. Ferguson,* 17 N.C. App. 367, 194 S.E. 2d 217 (1973). In the instant case Wesley Davis, a prison guard, testified that Exhibit 1 was similar to the shiny object which he observed in the defendant's possession. S. D. Alford, another guard, testified that the knife he saw in the defendant's hand was either Exhibit 1 or a "knife identical to it." Furthermore, there was evidence that the knife seen in the defendant's possession during the assault was thrown by the defendant through a window into the J Block Section of the prison and that a guard discovered Exhibit 1 on a "catwalk just inside the window near the top half of the J Block stairs." We hold that there was plenary competent evidence identifying Exhibit 1 as the knife used in the commission of the crime and that it therefore was not error for the trial court to admit it into evidence. *State v. Ferguson, supra; State v. Ashford,* 7 N.C. App. 320, 172 S.E. 2d 83 (1970), cert. denied 276 N.C. 498 (1970); *State v. Culbertson,* 6 N.C. App. 327, 170 S.E. 2d 125 (1969).

[4] Next, defendant contends that the trial court expressed an opinion as to the credibility of the defendant and his witnesses in violation of G.S. 1-180 in that portion of the charge to the jury in which the court stated the contentions of the State. We

do not agree. A review of the portion of the charge objected to reveals that the trial court accurately set forth the contentions of the State on the issue of the credibility of the defendant and his witnesses. The trial court did not assume any fact outside of the record and in no way over-emphasized the State's contentions to the detriment of the defendant. In our opinion the trial court neither intentionally nor unintentionally expressed his opinion as to the credibility of the defendant and his witnesses.

Defendant has additional assignments of error which we have carefully considered and find to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. HAROLD BURRELL

No. 7530SC348

(Filed 17 September 1975)

1. **Criminal Law § 60— lifted fingerprint — chain of custody**

The chain of custody of a fingerprint lifted from the crime scene was sufficiently established to permit testimony by an SBI fingerprint expert based upon an examination of the lifted print where the State presented evidence that the print was lifted by the owner of a property protection company, that it was stored in a locked box in the owner's office, that the owner later delivered it to the sheriff who mailed it to the SBI, and that the fingerprint expert received it in the mail and retained possession of it until trial.

2. **Burglary and Unlawful Breakings § 5; Criminal Law § 60— fingerprint — impression at time of crime — sufficiency of evidence**

In this prosecution for breaking and entering a house with intent to commit larceny, the evidence was sufficient to permit a jury finding that defendant's fingerprint found at the crime scene could have been impressed only at the time of the offense where it tended to show that the print was found on an inside knob of a door used to gain entry to the basement of the house and that all items stolen from the house were taken from the basement area, and where defendant stipulated that he did not know the owner of the house and did not have permission to enter the house on the day of the break-in.

3. **Criminal Law §§ 34, 60— fingerprinting of defendant at jail— admissibility of testimony**

In a prosecution for breaking and entering, the trial court did not err in permitting two deputy sheriffs to testify that they finger-

printed defendant at the county jail 12 days after the crime occurred where the purpose of the testimony was to identify defendant's fingerprint cards used by a fingerprint expert and no mention was made as to whether defendant had been arrested for a separate offense.

APPEAL by defendant from *Wood, Judge.* Judgment entered 27 November 1974 in Superior Court, MACON County. Heard in the Court of Appeals 27 August 1975.

This is a criminal prosecution wherein the defendant, Harold Burrell, was charged in a bill of indictment, proper in form, with the felony of breaking or entering with the intent to commit larceny.

The State offered evidence tending to show that on about 4 February 1974 the home of John Ritchie, located in Queen Mountain Estates in Macon County, was broken into and that a handsaw, a drill, and other tools were taken from a utiltiy room in the basement. During investigation of the break-in, fingerprints were lifted from various items in the house. One latent fingerprint (Exhibit 1), taken from the inside door knob of the basement door, matched the known print of the defendant's left index finger. A pane of glass in the top half of the door had been broken, and the door had been used to gain entry to the basement. The defendant stipulated that he did not know John Ritchie and that Ritichie had not given him permission to enter the house on or about 4 February 1974.

Defendant offered no evidence.

The jury returned a verdict of guilty. From a judgment that defendant be imprisoned for not less than five (5) nor more than seven (7) 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.

Creighton W. Sossomon for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court erred in allowing Stephen Jones of the SBI, an expert in the field of fingerprint identification, to testify that in his opinion the latent fingerprint lifted from the door knob (Exhibit 1) matched the known print of the defendant's left index finger. Based upon

an alleged break in the chain of custody of Exhibit 1 prior to Jones' receipt of it at his office in Raleigh, defendant argues that the State failed to show that Jones' opinion testimony was predicated upon an examination of a fingerprint lifted from the crime scene.

The State offered the foliowing evidence with respect to the chain of custody of Exhibit 1. On 4 February 1974 Fred Stewart, owner of a property protection company, and Carl Zachary, a deputy sheriff of Macon County, went to the home of John Ritchie to investigate the break-in. Stewart lifted the fingerprint (Exhibit 1) from the door knob of the basement door and retained possession of it until 17 February 1974. During this period of time, the fingerprint was stored in a lock box at Stewart's place of business. On 17 February 1974 Stewart delivered Exhibit 1 to George Moses, Sheriff of Macon County. Sheriff Moses placed Exhibit 1 in an envelope addressed to the Latent Evidence Section of the SBI and sealed the envelope. He personally deposited the envelope in the mail on either 17 February 1974 or on the morning of 18 February 1974. Stephen Jones received an envelope containing Exhibit 1 from Sheriff Moses by first class mail at his office in Raleigh on 19 February 1974. Jones retained possession of the fingerprint until trial.

In our opinion, the foregoing evidence reveals a complete chain of custody of Exhibit 1. Consequently, Jones' testimony was based upon examination of a fingerprint lifted from the crime scene and was properly admitted into evidence. This assignment of error is overruled.

[2] Defendant next contends that even if the opinion testimony of Stephen Jones was properly admitted into evidence, the trial court erred in denying his motion for judgment as of nonsuit. Defendant does not argue that the evidence was insufficient to show that a felonious breaking and entering had been committed. Rather, defendant 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 given by a qualified expert that fingerprints found at the scene of a crime correspond with those of an 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, 13, 195 S.E. 2d 581, 583 (1973).

When the evidence in the present case is viewed in light of the foregoing rule, we are of the opinion that the evidence was sufficient to require submission of the case to the jury and to support the verdict. *State v. Reynolds, supra; State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969). There was substantial evidence from which the jury could find that the defendant's fingerprint was found at the crime scene. There was also substantial evidence of circumstances from which the jury could find that the fingerprint could have been impressed only at the time the offense was committed. Defendant's fingerprint (Exhibit 1) was found on the inside door knob of a basement door which had been used to gain entry to the lower portion of the house. All items taken from the house during the break-in on 4 February 1974 were taken from the basement area. There was no evidence that the defendant had ever been lawfully inside of the Ritchie dwelling. In fact, the defendant stipulated that he did not know Ritchie and that Ritchie had neither given him nor anyone else permission to enter the home on or about 4 February 1974. This assignment of error is without merit.

[3] Finally, defendant contends that the trial court erred in permitting two of the State's witnesses, deputy sheriffs of Jackson County, to testify that thev fingerprinted the defendant at the Jackson County jail on 16 February 1974. Defendant argues that this testimony was prejudicial because the "unmistakable inference to be drawn by the jury is that the Defendant was at the Jackson County jail for other than social purposes and that in fact he had been arrested again for other misdeeds." We do not agree.

The deputies testified for the sole purpose of identifying Exhibit 2, the known fingerprint cards of the defendant. These cards were submitted to Stephen Jones of the SBI and were used by Jones in formulating his opinion that Exhibit 1, the latent fingerprint found on the inside of the house, was a print of the defendant's left index finger. No mention was made as to whether the defendant had been arrested for or had been convicted of a separate offense. Reference to the Jackson County jail was only incidental to the deputies' testimony that the defendant was the person whom they fingerprinted.

The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

TALTON JR. GALLIMORE v. FRED C. SINK, SHERIFF, DAVIDSON COUNTY, LEXINGTON, N. C., AND JIMMY VARNER, MANAGER, DAVIDSON COUNTY, LEXINGTON, N. C., AS INDIVIDUALS AND TRAVELERS INDEMNITY COMPANY, ADDITIONAL DEFENDANT

No. 7522DC333

(Filed 17 September 1975)

1. **Rules of Civil Procedure § 8— failure to state claim for relief**

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

2. **Trover and Conversion § 1— conversion defined**

Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.

3. **Trover and Conversion § 2— money and pistol taken from prisoner — transfer to county general fund, SBI — conversion — sufficiency of complaint**

Plaintiff's complaint is sufficient to state a claim for damages for wrongful conversion of silver dollars and a pistol by a sheriff and a county manager where it alleges that plaintiff is the owner of the silver dollars and pistol, that the sheriff seized the silver dollars and pistol when plaintiff was placed in the county jail, that while plaintiff was serving a prison sentence the sheriff and county manager transferred the silver dollars to the county general fund and the sheriff transferred the pistol to the SBI, that the property was not connected with any crime and that plaintiff had demanded and had been refused the return of his property.

4. **Trover and Conversion § 1; Sheriff and Constables § 4— conversion — liability of sheriff**

Sheriffs in this State can be held liable for conversion.

APPEAL by plaintiff from *Hughes, Judge.* Judgment entered 30 November 1974 in District Court, DAVIDSON County. Heard in the Court of Appeals 26 August 1975.

This is a civil action wherein the plaintiff, Talton Jr. Gallimore, seeks to recover damages from the defendants, Fred C. Sink, Sheriff of Davidson County, and Jimmy Varner, County Manager of Davidson County, for the alleged wrongful conversion of 412 U. S. silver dollars and a Colt pistol, and from defendant, Travelers Indemnity Company as surety on the defendants' official bonds.

The allegations of plaintiff's complaint are summarized as follows: On 1 January 1967 the plaintiff was arrested in South

Carolina on charges arising out of illegal activity in North Carolina. At the time of his arrest he had in his possession and was the rightful owner of 412 U. S. silver dollars and a Colt pistol. Subsequently, the plaintiff was returned to North Carolina to the Davidson County jail and the silver dollars and pistol were seized by the defendant Sheriff. In July 1969 while plaintiff was serving a prison sentence in North Carolina, Sheriff Sink turned over the silver dollars to the defendant Varner, who thereafter turned them over to the Davidson County General Fund. Sheriff Sink turned over the pistol to the State Bureau of Investigation.

The plaintiff has repeatedly demanded the return of his property from the defendants Sink and Varner and their subordinates but the defendants have refused to return the property to him. The plaintiff alleges that the transfers of the silver dollars and pistol were contrary to his rightful ownership of the property and, therefore, the transfers constituted a wrongful conversion. Plaintiff seeks $1,298.50 in damages representing the reasonable value of the property.

From an order granting the motion of the defendants to dismiss plaintiff's action for failure to state a claim upon which relief could be granted, plaintiff appealed.

Lambeth, McMillan & Weldon by Charles F. Lambeth, Jr. for plaintiff appellant.

DeLapp, Hedrick and Harp by Robert C. Hedrick for defendant appellees Sink and Varner.

Walser, Brinkley, Walser and McGirt by Walter F. Brinkley for defendant appellee Travelers Indemnity Company.

HEDRICK, Judge.

The one question for resolution on this appeal is whether the allegations of plaintiff's complaint are sufficient to state a claim upon which relief can be granted.

[1] In North Carolina a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law

to support a claim, or in the disclosure of some fact which will necessarily defeat the claim. But a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 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. *Sutton v. Duke,* 277 N.C. 94, 102-103, 176 S.E. 2d 161, 166-67 (1970); *Caldwell v. Deese,* 26 N.C. App. 435, 216 S.E. 2d 452 (1975).

[2] Conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Wall v. Colvard, Inc.,* 268 N.C. 43, 149 S.E. 2d 559 (1966); *McNeill v. Minter,* 12 N.C. App. 144, 182 S.E. 2d 647 (1971). *Accord Peed v. Burleson's, Inc.,* 244 N.C. 437, 94 S.E. 2d 351 (1956). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act." 89 C.J.S., Trover and Conversion § 3, pp. 533-34. "[T]he general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property." 18 Am. Jur. 2d, Conversion, § 1, p. 158. It is clear then that two essential elements are necessary in a complaint for conversion—there must be ownership in the plaintiff and a wrongful conversion by defendant. *Wall v. Colvard, Inc., supra; Vinson v. Knight,* 137 N.C. 408, 49 S.E. 891 (1905).

[3] Assuming the truth of the allegations in his complaint, plaintiff has alleged ownership of the silver dollars and pistol. With respect to whether there was a wrongful conversion, plaintiff alleged that the Sheriff took possession of the property; that the Sheriff and defendant Varner transferred the silver dollars to the County General Fund; and that Sheriff Sink transferred the pistol to the SBI. He also alleged that the property was in no way connected with any crime and that he had demanded the return of his property which demands had been wrongfully refused.

[4] Sheriffs in North Carolina can be held liable for conversion. *See Mica Industries, Inc. v. Penland,* 249 N.C. 602, 107

S.E. 2d 120 (1959). Public officials enjoy no special immunity for unauthorized acts, or acts outside their official duty. *Nelson v. Comer,* 21 N.C. App. 636, 205 S.E. 2d 537 (1974); *Gurganious v. Simpson,* 213 N.C. 613, 197 S.E. 163 (1938); *Avery County v. Braswell,* 215 N.C. 270, 1 S.E. 2d 864 (1939). Whether the acts of the defendants in the case were consistent with their authority as defendants contend is an affirmative defense. The complaint does not disclose such an " . . . unconditional affirmative defense which [would defeat] the claim asserted or [plead] facts which deny the right to any relief on the alleged claim. . . . " *Sutton v. Duke, supra* at 102.

Therefore, construing the allegations of plaintiff's complaint in light of the foregoing principles of substance and procedure, we are of the opinion that plaintiff's complaint is sufficient to state a claim for damages for wrongful conversion of his silver dollars and the pistol.

Judgment appealed from is reversed.

Reversed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. JOSEPH TOMLIN

No. 755SC404

(Filed 17 September 1975)

1. **Homicide § 21— shooting during scuffle — no directed verdict — no error**

In a second degree murder prosecution where the only possible verdicts submitted to the jury were involuntary manslaughter and not guilty, the trial court did not err in denying defendant's motion for a directed verdict where the evidence tended to show that defendant obtained a handgun with the intent to frighten his wife, defendant succeeded in frightening his wife and a scuffle resulted, and the wife grabbed for the gun and was killed.

2. **Criminal Law § 99— comments of trial court — no expression of opinion**

The trial judge's statements made during a controversy regarding the disclosure of statements made to the police by the defendant, though caustic and unnecessary, did not amount to a violation of G.S. 1-180 and cause the jury to doubt defendant's credibility.

3. Criminal Law § 102— murder prosecution — pistol on district attorney's table — no prejudice to defendant

The trial court in a second degree murder prosecution did not err in denying defendant's motion for mistrial made on the grounds that the district attorney displayed a pistol on the table in front of the jury throughout the trial but never introduced the gun into evidence.

4. Homicide § 30— second degree murder withdrawn — involuntary manslaughter submitted to jury — no error

Defendant cannot complain that the trial court erred in withdrawing the offense of second degree murder from consideration by the jury thereby limiting the possible verdicts to involuntary manslaughter and not guilty, since submission of the lesser offense of involuntary manslaughter to the jury inured to the benefit of defendant.

5. Homicide § 27— involuntary manslaughter — failure to define terms — no error

In a second degree murder prosecution where the trial court submitted to the jury possible verdicts of involuntary manslaughter and not guilty, the court did not err in failing to define the terms "reasonable foresight," "gross recklessness or carelessness" and "heedless indifference."

APPEAL by defendant from *Chess, Judge.* Judgment entered 2 April 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 September 1975.

Defendant was charged in a bill of indictment with the first degree murder of Marjorie Jeanette Tomlin, his wife. The State chose to prosecute only upon a charge of murder in the second degree, and defendant pleaded not guilty.

The State's evidence establishes that the defendant came home from work, found the front door locked and became angry with his wife for locking the door. The defendant got his handgun intending to frighten his wife, but Mrs. Tomlin saw the gun and grabbed for it. The gun went off in the scuffle and Mrs. Tomlin was killed.

The defendant moved for a directed verdict of not guilty. The trial judge denied the motion and instructed the jury to return one of two verdicts; guilty of involuntary manslaughter or not guilty. From a verdict of guilty of involuntary manslaughter and judgment imposing a prison sentence, defendant appealed.

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

Burney, Burney, Sperry and Barefoot, by John J. Burney, for defendant appellant.

ARNOLD, Judge.

[1] Defendant alleges that the trial court committed prejudicial error in denying defendant's motion for a directed verdict of not guilty. A motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913 (1955). On a motion for directed verdict of not guilty, the evidence is viewed in a light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Woods, supra.*

Defendant argues that the evidence fails to show that he pointed the gun at the decedent, or that he was careless or reckless with the weapon, and that his motion for directed verdict should have been allowed. We disagree.

State v. Foust, 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963), states, "... with few exceptions, ... every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, or under circumstances not evidencing a heart devoid of social duty, is involuntary manslaughter." *State v. Brooks,* 260 N.C. 186, 188, 132 S.E. 2d 354, 356 (1963), reiterates this standard. "Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide."

The evidence considered in a light most favorable to the State tends to show that defendant obtained a handgun with the intent to frighten his wife. The defendant succeeded in frightening his wife and a scuffle resulted. The wife grabbed for the gun and was killed.

Defendant argues that his actions did not cause the decedent's death but that death was proximately caused by the struggle initiated by the deceased. This argument is untenable. The decedent's death did not result from her conduct but from the defendant's reckless use of the handgun. The trial court properly denied defendant's motion for directed verdict.

[2] Defendant next contends that the trial court violated G.S. 1-180 and caused the jury to doubt defendant's credibility. During a controversy regarding the disclosure of statements made to the police by the defendant, the trial judge stated: "If it is

substantial, something that you didn't already know. Your client would know this better than they would. Who would have the source of information better than your client."

Though the trial judge's remarks appear to have been too caustic and unnecessary, in our opinion it is not reversible error.

"Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, 'and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.'" *State v. Holden,* 280 N.C. 426, 430, 185 S.E. 2d 889, 892 (1971).

The defendant has not shown substantial harm caused by the trial judge's statements.

[3] Defendant further assigns error to the trial court's denial of his motion for mistrial. The defendant based his motion on the grounds that the District Attorney displayed a pistol on the table in front of the jury throughout the trial while never introducing the gun into evidence.

Except for defendant's motion there is nothing in the record indicating that a pistol was on the table or that such pistol was visible to the jury. In any event, since defendant stipulated that deceased died as a result of a gunshot wound, we fail to see prejudice to defendant by the presence of the pistol if it was present. The assignment of error is overruled.

[4] Defendant also contends that the trial court erred by withdrawing the offense of second degree murder from consideration by the jury thereby limiting the possible verdicts to involuntary manslaughter and not guilty. Submission of the lesser offense of involuntary manslaughter to the jury totally inured to the benefit of the defendant. "An error on the side of mercy is not reversible." *State v. Fowler,* 151 N.C. 731, 732, 66 S.E. 567, 567 (1909); *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950).

[5] Defendant's final contention is that the trial judge erred in his charge to the jury. The defendant asserts that the trial judge erred in failing to define the terms "reasonable foresight," "gross recklessness or carelessness" and "heedless indifference."

It is not error for a trial judge to fail to define and explain words of common usage in the absence of special instructions.

State v. Jennings, 276 N.C. 157, 171 S.E. 2d 447 (1970); *State v. Butler*, 21 N.C. App. 679, 205 S.E. 2d 571 (1974). "Gross recklessness or carelessness," "reasonable foresight," and "heedless indifference" are terms used commonly by the general public. The trial judge did not commit error in failing to define these terms.

The defendant's remaining assignments of error have been carefully reviewed and the Court can find no error prejudicial to the defendant.

No error.

Chief Judge BROCK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH CALVIN ANDERSON

No. 7518SC346

(Filed 17 September 1975)

1. **Criminal Law § 26; Narcotics § 5— possession and sale of heroin — no double jeopardy**

The trial of defendant for both possession and sale of the same heroin did not place defendant in double jeopardy.

2. **Criminal Law § 128— answer of witness — motion for mistrial**

In a prosecution for possession and sale of heroin, the trial court did not err in the denial of defendant's motion for mistrial when a State's witness, in response to a question as to why she was working with an undercover agent, stated that she "got real sick of a lot of (her) friends dying."

3. **Narcotics § 3— chain of custody of heroin**

The chain of custody of a powdery substance purchased from defendant by an undercover agent and analyzed and identified as heroin was sufficiently shown to permit the admission of the substance into evidence.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 10 December 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 August 1975.

In a two-count indictment, defendant was charged with (1) possessing heroin and (2) selling and delivering heroin on 26 March 1974. In another two-count indictment, he was charged

with (1) possessing heroin and (2) selling and delivering heroin on 30 March 1974. The cases were consolidated for trial.

Evidence presented by the State is briefly summarized as follows: SBI Undercover Agent W. M. Riggsbee testified that he saw defendant at a Greensboro residence on 26 March 1974 and purchased 13 bags of a white powdery substance represented by defendant to be heroin; that he returned to the residence on 30 March 1974 and purchased 15 bags of a white powdery substance from defendant; and that on each occasion he packaged the bags, mailed them to the State Bureau of Investigation in Raleigh and received them back through the mail. The bags and contents were introduced as exhibits. Teresa Dominick testified that she was working with Riggsbee in March 1974 and that she went with him to defendant's residence on 26 and 30 March 1974. SBI Chemist Jerry M. Dismukes testified that he received one of the mailing envelopes from Riggsbee and delivered it to Dr. Charles H. McDonald, a chemist for the SBI. Dr. McDonald testified that he received each of the envelopes mailed by Riggsbee, that he analyzed the substances in several bags taken at random from each envelope, that he determined the substances to be heroin, and that he mailed the contents back to Riggsbee.

On cross-examinaton Dr. McDonald explained the five tests which he conducted on the substances. He admitted that none of the first four tests could, by itself, specifically identify heroin and stated that the fifth test involved comparison of the substances with a sample of known heroin which he had prepared. He testified that the combination of the five tests yielded a specific answer that the substance was heroin.

Defendant's only evidence consisted of the testimony of Dr. Robert Shapiro, a chemist, who testified that the method by which Dr. McDonald claimed to have produced his known sample of heroin for the fifth test would not yield pure heroin. He opined that Dr. McDonald had not identified the substances as heroin.

A jury found defendant guilty as charged and from judgments entered on the verdicts, defendant appealed.

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

Ellis J. Harrington, Jr., Assistant Public Defender Eighteenth Judicial District, for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends the trial court erred in denying his motions to quash the sale and delivery counts in the bills of indictment as constituting double jeopardy. The assignment is without merit. As conceded by defendant, this question has been answered adversely to his position in several recent opinions of this court and the Supreme Court including *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973), *State v. Thornton,* 283 N.C. 513, 196 S.E. 2d 701 (1973), and *State v. Patterson,* 21 N.C. App. 443, 204 S.E. 2d 709 (1974). We adhere to those opinions and the assignment of error is overruled.

[2] By his second assignment of error, defendant contends the court erred in denying his motion for a mistrial. This assignment relates to an answer given by the witness Teresa Dominick to a question asked by the district attorney. In response to a question as to why she was working with Riggsbee, the witness stated: "Well, I got real sick of a lot of my friends dying." At that point, defense counsel objected, moved to strike and moved for a mistrial. The trial judge declared that he did not hear what the witness said and doubted if the jury heard her answer. Counsel's request to be heard in the absence of the jury was granted, but the motion for a mistrial was denied. When the jury returned to the box, the court gave the following instruction: "Members of the Jury, if you heard any statement that she made in response to the last question that was asked by the District Attorney, just eliminate it from your minds and not consider it in connection with this trial at all."

We find no merit in the assignment. It is well settled that the granting of a motion for a mistrial rests largely in the discretion of the trial judge. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971). We perceive no abuse of discretion here. Furthermore, it will be noted that defendant did not object to the question. The assigment of error is overruled.

[3] By his third assignment of error, defendant contends the court erred in admitting State's exhibits 1 and 5, the powdery substance alleged to have been heroin, arguing that a complete "chain of custody" was not established. No useful purpose would be served in reviewing here the evidence with respect to the chain of custody. Suffice it to say, we have carefully reviewed

the evidence on this point and conclude that it established a complete chain. The assignment of error is overruled.

In his fourth and seventh assignments of error, defendant contends the court erred in "tolerating the district attorney's attempt to shift the burden of proof in the case" and in permitting the district attorney to make improper argument to the jury. We have reviewed the record with respect to these assignments and finding them without merit, they are overruled.

Assignments of error 5, 6, 8, and 9 relate to certain jury instructions which defendant requested but the court did not give and certain instructions which the court did give. We have carefully considered these assignments and find them to be without merit, therefore, they are overruled.

Finally, by his tenth assignment of error, defendant contends the court erred in failing to grant his motion for nonsuit and in signing and entering the judgments as appear of record. We hold that the evidence was sufficient to survive the nonsuit motion and the judgments are fully supported by the verdicts and impose sentences within the limits provided by statute.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STEGALL MILLING COMPANY, INC., J. M. BLEVINS AND SON; YADKIN VALLEY MOTOR COMPANY, INC., AND DR. SALISBURY'S LABORATORIES, INC., PETITIONERS v. E. P. HETTIGER, JR., INDIVIDUALLY; E. P. HETTIGER, JR., SOLE HEIR OF HILDA HETTIGER, DECEASED, AND E. P. HETTIGER, SR., DECEASED; L. W. CURRY; FLAKE B. WEBER, INDIVIDUALLY, AND FLAKE B. WEBER, SOLE HEIR OF LORENE B. WEBER; ALL OTHER KNOWN AND UNKNOWN STOCKHOLDERS, AND UNKNOWN HEIRS AND NEXT OF KIN OF DECEASED STOCKHOLDERS OF HOLLY MOUNTAIN FARMS COMPANY; EXXON CORPORATION, SUCCESSOR TO HUMBLE OIL AND REFINING COMPANY; RUSSELL E. MINTON AND WIFE, MARY VIRGINIA MINTON; EDWIN MINTON AND WIFE, BARBARA MINTON; AND ALL OTHER KNOWN AND UNKNOWN JUDGMENT CREDITORS OF HOLLY MOUNTAIN FARMS COMPANY, RESPONDENTS

No. 7523SC355

(Filed 17 September 1975)

Corporations § 29— appointment of receiver — failure to find land asset of corporation — power of receiver

An order of the trial court appointing a receiver of Holly Mountain Farms Company and empowering and directing the receiver "to take into his possession and control, all and singular, the property, assets, books, papers and records of the said corporation . . . " did not specify that 89 acres claimed by the respondent appellants as their own was an asset of the corporation, and the receiver was therefore not entitled to exercise any control over the land until such time as there was a proper adjudication that the land was an asset of the corporation.

APPEAL by respondents Russell Minton and wife, Mary Virginia Minton, from *Wood, Judge.* Order entered 20 February 1975 in Superior Court, WILKES County. Heard in the Court of Appeals 27 August 1975.

On 14 October 1974, petitioners filed a petition alleging in pertinent part the following: Petitioners and respondent Exxon Corporation are judgment creditors of Holly Mountain Farms Company (Holly Mountain) which was formerly a North Carolina corporation. On 12 November 1963, respondents Russell and Mary Virginia Minton (appellants) executed and delivered to Holly Mountain a deed conveying approximately 89 acres of land in Wilkes County. On the same day, Holly Mountain executed and delivered to a trustee for appellants a deed of trust on said lands securing a note for $8,500.00. The deed and deed of trust were duly recorded. On 15 December 1969, Holly Mountain purported to reconvey said lands to appellants. The corporate charter of Holly Mountain was suspended as of 13 April

1965 by the Secretary of State and has not been reinstated. Holly Mountain has no assets except the tract of land aforesaid. Petitioners asked that a receiver be appointed for the defunct corporation for purpose of selling its property, determining the priority of lien holders and judgment creditors, and disbursing funds received under orders of the court.

On 27 November 1974, appellants filed answer denying material allegations of the petition including the allegation that the 89-acre tract of land is an asset of the corporation.

On 23 January 1975, Wood, Judge, entered an order appointing a temporary receiver "to take legal title" to the 89 acres of land and requiring all parties to the proceeding to appear on 30 January 1975 and show cause, if any they had, why the order for a temporary receiver should not be made permanent. Appellants filed objections and exceptions to the order.

On 20 February 1975, following a hearing, the court entered an order appointing Max F. Ferree receiver of Holly Mountain Farms Company and "he is hereby empowered and directed to take into his possession and control, all and singular, the property, assets, books, papers and records of the said corporation . . . . " The order further restrained all persons, firms and corporations from interfering in any manner with the property and assets of Holly Mountain and with the receiver in the performance of his duties and required that the receiver post bond in amount of $1,000.00.

Appellants appealed.

Franklin Smith for respondent appellants.

William H. McElwee III and W. G. Mitchell for petitioner appellees.

BRITT, Judge.

Appellants contend that the court erred (1) in appointing a receiver and (2) in providing for the receiver "to take legal title" to the 89 acres of land. We will discuss the second contention first.

While appellants filed objections and exceptions to the 23 January 1975 order appointing a temporary receiver, their appeal is from the order entered on 20 February 1975 which completely superseded the former order. It will be noted that the

latter order, unlike the former, did not specify the land as an asset of Holly Mountain but directed the receiver to take into his possession and control "the property, assets, books, papers and records of the said corporation." In view of the pleadings, and particularly the answer filed by appellants denying that the land is an asset of Holly Mountain, we hold that the receiver is not entitled to exercise any control over the land until such time as there is a proper adjudication that the land is an asset of Holly Mountain.

Regarding appellants' contention that the court erred in appointing a receiver, in view of our holding above, we perceive no prejudice to appellants by the appointment. If any assets of Holly Mountain are discovered or determined, it would appear that a receiver would be authorized under G.S. 105-232, G.S. 1-502, or by virtue of the inherent power of the court. *Sinclair v. Railroad,* 228 N.C. 389, 45 S.E. 2d 555 (1947).

As interpreted and clarified by this opinion, the order appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. SONNY LEE TREADWAY

No. 7528SC327

(Filed 17 September 1975)

1. **Forgery § 2— indictment — instrument capable of effecting fraud**

Bill of indictment for forgery sufficiently alleged that the instrument was apparently capable of effecting a fraud where the instrument alleged in the indictment to have been forged was a check drawn on the purported maker's bank account since upon its face it was apparently capable of effecting a fraud if it were forged.

2. **Forgery § 2— forgery and uttering — distinct offenses — instructions as to guilt — harmless error**

In a prosecution for forgery and uttering, the court's instruction that if the jury found defendant not guilty of forgery it would not consider the charge of uttering, while disapproved since the offense of uttering is distinct from that of forgery, was not prejudicial to defendant but placed a heavier burden upon the State than was required.

State v. Treadway

APPEAL by defendant from *Snepp, Judge.* Judgment entered 29 January 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 25 August 1975.

Defendant was charged in a bill of indictment with (1) the felony of forging a check, and (2) the felony of uttering a forged check.

The State's evidence tended to show that a forged check was given for the purchase of a coat; that defendant confessed to the investigating officer that he forged the maker's name to the check; and that he used the check to purchase the coat. Defendant offered no evidence.

The jury found defendant guilty of both counts, and a judgment of imprisonment was entered. Defendant appealed.

Attorney General Edmisten, by T. Lawrence Pollard, Associate Attorney, for the State.

Gray, Kimel & Connolly, by David G. Gray, Jr., for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the count in the bill of indictment which alleges the forgery is fatally defective because it "fails to recite in explicit language that the instrument was apparently capable of effecting a fraud." This argument is wholly without merit.

The instrument alleged to have been forged in this indictment was a check drawn on the account of one Howard M. Gorham in the Northwestern Bank, Asheville, North Carolina. This is the type instrument used in daily transactions for the purchase and sale of merchandise. Upon its face it was apparently capable of effecting a fraud if it were forged. The allegations which are necessary in a bill of indictment charging forgery were clearly stated many years ago as follows: "The false instrument must be such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the Court, *either from the face of the writing itself,* or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. *If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment,* alleging the false and fraudulent intent; but where such

tendency does not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the Court to see in the record, that the indictment charges a complete offense." (Emphasis added.) *State v. Weaver,* 94 N.C. 836, 838 (1886). *See also State v. Moffitt,* 11 N.C. App. 337, 181 S.E. 2d 184 (1971), appeal dismissed, 279 N.C. 396.

[2] Defendant argues that he was prejudiced by the court's instruction to the jury to the effect that if it found defendant not guilty of forgery, it would not consider the charge of uttering. While we do not approve this type of instruction, we conclude that it was not prejudicial to defendant.

"G.S. 14-119 prohibits the forgery of bank notes, checks and other securities. G.S. 14-120 also prohibits the uttering of forged paper or instruments containing a forged endorsement. In this State, by virtue of G.S. 14-120, uttering is an offense distinct from that of forgery which is defined in G.S. 14-119." *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22 (1968). Therefore, the conviction of a charge of forgery is not a prerequisite to a conviction of a charge of uttering. However, the instruction given by the trial judge placed a heavier burden upon the State than it should be required to carry. If the instruction be considered error, it was error prejudicial to the State.

As stated above, we do not approve such an instruction because it is a misstatement of the law. But in deference to the able trial judge, we note that the evidence tended to show that only the defendant committed the forgery and the uttering. If the jury did not find defendant forged the check, there would be no forged check for defendant to utter. We think this peculiar circumstance led to the instruction complained of.

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

No error.

Judges PARKER and ARNOLD concur.

IN THE MATTER OF: DENNIS PAUL MELLOTT

No. 7512DC412

(Filed 17 September 1975)

Criminal Law § 76— statements of minor — test of admissibility

A minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confessison depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.

APPEAL by respondent from *Guy, Judge.* Juvenile adjudication order and juvenile disposition order entered 11 February 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 2 September 1975.

Respondent was charged in a juvenile petition with being a delinquent child in that he shot out the rear glass of a camper truck owned by one Robert Wells.

Deputy Clyde Goins, Cumberland County Sheriff's Department, a witness for the State, testified that he was called, on December 19, 1974, to the home of Mr. Robert Wells in Fayetteville to investigate a complaint about some windows at the Wells' home that had been "shot out." As a result of his investigation, Deputy Goins went to the homes of Dennis Mellott, Anglish Jacobs, and Ronald Jacobs and took them into custody for questioning. After the deputy advised each of the boys of his *Miranda* rights, Anglish Jacobs admitted shooting at the picture window at the Wells' home, and Dennis Mellott stated that he had shot at the camper window of a pickup parked in Mr. Wells' driveway.

Mr. Robert Wells testified that on the evening of December 19, 1974, he heard some glass breaking in his house; that Deputy Goins came to his home later to investigate the matter; and that he did not see Dennis Mellott in the vicinity of his home that evening.

Anglish Jacobs testified that after school got out on the day in question, he, Dennis Mellott, and Ronald Jacobs went hunting; that later, after it began to get dark, Dennis, Ronald, and Anglish went out and crawled to the crest of a sand bank near the home of Robert Wells; that the sand bank was located

approximately fifty yards from the Wells' home; that Anglish had a B.B. gun, and Dennis had a pellet gun; that Anglish shot at the picture window of the Wells' house, and then saw Dennis shoot the pellet gun at the camper window; that he does not remember how many shots were fired or how many shots he heard.

Dennis Paul Mellott testified on his own behalf that he went hunting with Anglish and Ronald Jacobs after school on the day in question; that when it started to get dark, they went back to the Jacobs' house; that Mellott left and went to Randy Oxendine's house where he shot Randy's B.B. gun in his back yard for a while, and then went home.

Respondent was placed on probation for a period of two years in the custody of his mother.

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

John A. Decker, Assistant Public Defender, for the respondent.

BROCK, Chief Judge.

Respondent urges this Court to adopt a rule that would prohibit the use of extrajudicial statements of a juvenile unless made in the presence of a parent or counsel, and after all of them had been advised of the juvenile's *Miranda* rights.

Respondent argues in his brief that he is only twelve years of age. However, the only finding or intimation of respondent's age in the record on appeal is that respondent is less than sixteen years of age. Be that as it may, we adhere to the principles approved in *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140 (1971). "[A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." "The correct test of the admissibility of a confession is whether the confession was, in fact, voluntary under all the circumstances of the case."

The record on appeal in this case contains the following summation: "(At this point the court examined Deputy Goins con-

cerning the procedure that he used in advising each of the three boys of their MIRANDA rights prior to questioning. Deputy Goins testified that all three were fully warned and each advised the deputy that they understood their rights.)" Respondent offered no evidence upon the voluntariness of his confession to Deputy Goins. If respondent felt there was evidence tending to show a lack of voluntariness of his confession, whether such lack of voluntariness stemmed from his age or otherwise, surely he would have included it in the record on appeal for our review. We find no suggestion of circumstances surrounding the interrogation which would tend to render respondent's confession inadmissible.

Respondent's assignment of error to the refusal of the trial judge to dismiss the petition is without merit.

Affirmed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. LARRY DEAN PEARSON

No. 755SC360

(Filed 17 September 1975)

Criminal Law § 155.5— belated extension of time to docket appeal — appeal dismissed

Purported extension of time to docket the record on appeal entered by the trial judge after expiration of the original ninety days was ineffective to extend the time for docketing, and the appeal is dismissed for failure to docket within ninety days from the date of the judgment appealed from.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 23 January 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 September 1975.

Defendant was charged with the felony of being an accessory before the fact of a felonious burning of an uninhabited building in possession of defendant. The indictment alleges that defendant unlawfully and willfully did feloniously and wantonly aid, counsel or procure Richard Joseph Czech to set fire to and burn an uninhabited house located at 25 Carolina Beach Avenue, Carolina Beach, North Carolina, on or about 2 August 1974.

From a verdict of guilty and judgment of imprisonment, defendant gave notice of appeal.

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

John J. Burney, Jr., for the defendant.

BROCK, Chief Judge, PARKER and ARNOLD, Judges.

The judgment appealed from was entered on 23 January 1975. Under the rules applicable to this appeal, the record on appeal was required to be docketed on or before ninety days after entry of the judgment appealed from, unless the time for docketing was extended by proper order of the trial judge. The initial ninety days expired on 23 April 1975. On 7 May 1975, after expiration of the initial ninety days, defendant sought to resurrect his right to appeal by obtaining from the trial judge an extension of time to docket the record on appeal. The order entered after expiration of the initial ninety days was ineffective to extend the time within which to docket the record on appeal.

Appeal dismissed.

STATE OF NORTH CAROLINA v. CHARLES BELTON KEATON

No. 7522SC341

(Filed 17 September 1975)

Burglary and Unlawful Breakings § 5— breaking or entering with intent to commit larceny — sufficiency of evidence

Evidence of defendant's intent to commit larceny was sufficient to withstand his motion for nonsuit on a felony charge of breaking or entering with the intent to commit larceny.

ON *writ of certiorari* to review proceedings before *McConnell, Judge*. Judgment entered 24 October 1974 in Superior Court, IREDELL County. Heard in the Court of Appeals 26 August 1975.

Defendant pled not guilty to charges of (1) breaking or entering with intent to commit larceny, and (2) assault inflicting serious injury.

For the State, Zelma Wilson testified that on June 11, 1974, she awoke about 6 o'clock in the morning to find a black male standing by her bed. He said, "Don't scream." When she attempted to jump from the bed on the opposite side, he jumped on her back. They struggled for about ten minutes. He stepped back and struck her about the face several times, then walked out. She immediately notified the police. She was hospitalized for two weeks for treatment of facial wounds and back sprain. Several weeks later she saw and identified the defendant as the perpetrator.

Officers found that a window screen had been removed.

Bloodhounds led the law officers to a playground near the Chambers' house located about three blocks from Zelma Wilson's home.

Defendant testified that he spent the night at the Chambers' house and remained in bed until he got up about 11 o'clock in the morning. His testimony was corroborated by several members of the household.

The jury found defendant guilty of both offenses as charged; and from concurrent sentences of imprisonment, defendant appealed.

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

Patricia E. King and Charles V. Bell for defendant appellant.

CLARK, Judge.

The only question raised by the assignments of error is whether there was sufficient evidence of defendant's intent to commit larceny to withstand his motion for nonsuit on the felony charge of breaking or entering with the intent to commit larceny.

Where the defendant is charged with breaking or entering or with burglary, the intent to commit the charged felony may be found from the circumstances, usually from the acts of the defendant in the building after the entry. *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345 (1970). However, as in this case, the acts of the defendant after entry often are limited because of apprehension, resistance, or other circumstances which cause an

abandonment of the intended crime; and where a male defendant enters a dwelling occupied by a female, the State has the difficult problem of specifying and proving the intended felony, usually the intent to steal or to commit some sex offense.

In *State v. Tippett, supra,* the indictment charged burglary with the intent to steal *and* with the intent to commit rape; and it was held that the evidence was sufficient to support a finding that at the time of the breaking or entering, the intruder had the intent to commit *one or both* of these felonies within the dwelling.

In *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970), two defendants, charged with burglary with intent to steal, were apprehended by the several occupants immediately after entry, and one of the two male defendants grabbed a female occupant, dragged her out of the house and to the back yard, then fled the scene when a neighbor turned on floodlights. In affirming the conviction the court quoted with approval 13 Am. Jur. 2d, Burglary, § 52, entitled "Intent," as follows: " . . . Numerous cases, however, hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory, in the absence of either intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling at night is theft."

In this case, though the male defendant grabbed the female occupant as she attempted to get out of bed after discovering the defendant in her room, his reason for doing so is not known, and there is no evidence that he said or did anything to indicate an intent to commit rape, or that he said or did anything else tending to negate the intent to steal, which is the usual purpose for unlawful entry.

We hold that the evidence was sufficient for submission to the jury upon the charge of entering with intent to steal, and it was for the jury to determine, under all the circumstances, whether the defendant was guilty of that offense. We find

No error.

Judges MORRIS and VAUGHN concur.

G. B. HARRILL INSURANCE AGENCY, INCORPORATED v. MARY SUE MOORE ROBBINS, INDIVIDUALLY AND MARY SUE MOORE ROBBINS, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH GARLAND ROBBINS, SR.

No. 7529DC422

(Filed 17 September 1975)

APPEAL by defendants from *Gash, Judge.* Judgment entered 17 February 1975 in District Court, RUTHERFORD County. Heard in the Court of Appeals 16 September 1975.

Hamrick, Bowen & Nanney by Louis W. Nanney, Jr. for plaintiff appellee.

Hamrick & Hamrick by J. Nat Hamrick for defendant appellants.

BRITT, PARKER and CLARK, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. RICHARD SMITH

No. 7529SC356

(Filed 17 September 1975)

APPEAL by defendant from *Friday, Judge.* Judgment entered 8 January 1975 in Superior Court, McDOWELL County. Heard in the Court of Appeals 28 August 1975.

BRITT, HEDRICK and MARTIN, Judges.

No error.

LEON SHEARIN v. NATIONAL INDEMNITY COMPANY

No. 757SC224

(Filed 1 October 1975)

Rules of Civil Procedure § 56— summary judgment — party with burden of proof — credibility of witnesses

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. G.S. 1A-1, Rule 56; Article I, § 25 of the N. C. Constitution.

Judge VAUGHN dissenting.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 30 December 1974 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 14 May 1975.

This is a civil action in which plaintiff seeks to recover under an insurance policy issued by defendant in which defendant agreed to pay for accidental damage to plaintiff's Beech Travelair airplane. In his complaint plaintiff alleged that his airplane was damaged on 18 July 1973 when the landing gear was accidentally retracted while the plane was on the runway at an airport at Rocky Mount. Defendant answered and admitted issuing the policy and that it was in effect on the date the plane was damaged. Defendant denied liability under the policy on allegations that at the time of the accident (1) the insured aircraft was not being used for "Pleasure and Business" and (2) it was not being operated by a pilot having the qualifications and experience as required by the policy.

Item 6 of the Policy Declarations provides that the aircraft will be used for "Pleasure and Business" and defines "Pleasure and Business" as "Personal and Pleasure use and use in direct connection with the Insured's business, excluding any operation for which a charge is made." Item 7 of the Policy Declarations provides that "[o]nly the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight:

> "Walter L. Shearin, a private, multi engine rated pilot, or private or commercial multi engine rated pilots with a minimum of 1,000 total logged hours including 200 in multi engine and 10 hours in make and model."

Paragraph 5 of Endorsement No. 1 to the policy is as follows:

> "This policy does not apply to any occurrence or any loss or damage occurring while the aircraft is being operated in flight by a Student Pilot, unless each flight is under the direct supervision and is specifically approved by a properly certificated Flight Instructor certificated by the Federal Aviation Agency, however this exclusion shall not apply to any student pilot following the Issuance of a Private Pilot Certificate."

Plaintiff's answers to written interrogatories submitted to him by defendant disclose the following: When the airplane was damaged, it was not being used in direct connection with plaintiff's business. It was being used with plaintiff's permission by W. Jack Hooks, a certified flight instructor, for the purpose of giving dual instruction to William F. Pridgen, who was a long-time personal friend of the plaintiff. Neither Pridgen nor Hooks paid or promised to give any consideration for their use of the aircraft. Pridgen was rated as a private pilot for single-engine aircraft, and Hooks had a commercial pilot rating in single and multi-engine aircraft.

Based on the pleadings and on plaintiff's answers to the interrogatories, defendant moved for a summary judgment on the ground that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law.

Plaintiff filed a cross-motion for summary judgment, supporting his motion by the pleadings and proceedings theretofore had in the case and by his own affidavit and by affidavits of Hooks and Pridgen. In his affidavit, plaintiff stated that he was the owner of the damaged aircraft which was insured by defendant. Because of his long-standing friendship, he made the airplane available at no charge or cost to Pridgen for Pridgen's use in receiving instruction antecedent to his pilot certification. On 18 July 1973 Pridgen, with plaintiff's permission and authorization, used the airplane under the supervision and instruction of Hooks, a Certificated Flight Instructor, for the purpose of being instructed in the operation and flight of the airplane and to accumulate supervised flying time in the craft.

Hooks stated in his affidavit that he is a Certificated Flight Instructor certified by the Federal Aviation Agency and that

his certification was in effect and valid on 18 July 1973. On 18 July 1973 he had 2,344.85 hours total flying time logged, 710.6 hours of flying time logged in multi-engine airplanes, and 44.7 hours of flying time logged in a Beech Travelair model airplane. On 18 July 1973 he accompanied Pridgen on a flight in plaintiff's airplane for the purpose of instruction and to allow Pridgen to accumulate supervised flying time in the aircraft. The airplane had a dual set of full operational controls, one of which was located at the seat occupied by Pridgen and the other of which was located at the seat occupied by Hooks. At all times during the flight, and specifically at the time of the accident giving rise to this action, Hooks had ready access to the set of controls located at his seat and was engaged in the instruction and direction of Pridgen.

In two affidavits, Pridgen stated that he was certificated as a private pilot, with single engine land rating, but was not rated to fly a dual engine airplane. Because of their mutual friendship, plaintiff made his airplane available to Pridgen for the purpose of Pridgen's receiving instruction therein antecedent to his pilot certification. Pridgen was not rated to fly the aircraft alone, and on 18 July 1973 he requested Hooks, who was a Certificated Flight Instructor, to accompany him on a flight, both to instruct him and to allow him to accumulate supervised flying time in the airplane. This Hooks did, at no charge or cost to Pridgen. On 18 July 1973, after certain procedures had been demonstrated and practiced in the air, Hooks instructed Pridgen to return to the Rocky Mount Downtown Airport for landing practice. After the plane was landed on the runway, Hooks instructed and directed Pridgen to "get his flaps up," whereupon Pridgen inadvertently moved both the flap and gear retraction levers to an "up" position. Before Pridgen's instructor could return the gear retraction lever to a "down" position, the gear was retracted and the airplane collapsed on the runway while in motion, resulting in damage to the plane. The airplane had a dual set of full operational controls, one set of which was located at the seat occupied by Hooks and the other of which was located at Pridgen's seat. Both Pridgen and Hooks had continuous ready access to a set of controls during the entire flight which resulted in the accident.

Defendant did not file any affidavit or other document to contradict the affidavits filed by plaintiff.

The court, finding no genuine issue as to any material fact and concluding as a matter of law that at the time of the accident the plane (1) was being used for "Pleasure and Business" as defined in the policy and (2) was being operated by a pilot who had the qualifications required by the policy, granted plaintiff's motion "for such amount as may be due him as damages," and ordered the cause placed on the civil jury calendar for trial on the sole issue of damages. Defendant appealed.

Biggs, Meadows, Batts & Wineberry by Samuel W. Johnson for plaintiff appellee.

Barden, Stith, McCotter & Stith by F. Blackwell Stith for defendant appellant.

PARKER, Judge.

This appeal presents the question whether under the Constitution and laws of this State a summary judgment may be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. On authority of *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), we conclude that the answer is No.

G.S. 1A-1, Rule 56(a) clearly contemplates the possibility of granting a summary judgment in favor of a "party seeking to recover upon a claim, counterclaim, or crossclaim," and normally such a party has the burden of proof. Subsection (e) of Rule 56 also contains the following:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In the present case defendant did not respond by affidavit or otherwise to plaintiff's motion for summary judgment but rested its defense entirely upon the allegations and denials contained in its answer. Therefore, were we at liberty to give full scope to Rule 56, we would agree with the trial court in the present case that, upon the basis of plaintiff's uncontradicted affidavits, there is here no genuine issue as to any material fact.

We would further agree with the trial court's conclusion of law that, under the facts as disclosed by plaintiff's affidavits and as to which no genuine issue has been shown to exist, plaintiff is entitled to recover under the policy of insurance issued to him by the defendant.

In *Cutts v. Casey, supra,* our Supreme Court held, citing Article I, § 25 of the Constitution of North Carolina, that a trial judge in this State may not direct a verdict under Rule 50 in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. We are unable to see why the principle announced in *Cutts v. Casey* does not apply with at least equal force when the question is presented by a motion for summary judgment under Rule 56.

That both parties in the present case moved for summary judgment does not change the situation. A defendant may contend that if his legal theory of the case be accepted, no genuine issue of fact exists, and at the same time may also legitimately contend that if his opponent's legal theory be adopted, a genuine dispute as to a material fact does exist.

Because we deem *Cutts v. Casey* controlling, the summary judgment in favor of the plaintiff is reversed and this cause is remanded for trial.

Reversed and remanded.

Judge BRITT concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting:

I concur with the majority in the view that, on the undisputed facts in this case, plaintiff is entitled to judgment on the liability issue as a matter of law.

Except for the decision in *Cutts v. Casey,* it would have been my opinion that, if the same evidentiary matters before the judge on this motion for summary judgment had stood uncontradicted as the only evidence before a court on a motion for directed verdict, it would be one of those rare cases where a directed verdict in favor of the party with the burden of proof would have been proper. [It must be noted that the evi-

dence in *Cutts v. Casey* was conflicting and, therefore, it would have been error to direct a verdict in favor of either party.]

In any event, I do not agree that the rule announced in *Cutts v. Casey,* which appears to proscribe a directed verdict in favor of a party with the burden of proof, compels the same decision when that party moves for summary judgment, even where the evidentiary matters on the motions are identical. Although a part of the same struggle, the motions come at different stages of the conflict. The statutes place specific responsibilities on the parties at each encounter and, by his inaction at one, a party may lose the shield that would otherwise be available for the next.

Before the directed verdict question can arise, a party must, of necessity, have theretofore preserved his right to contest an issue at trial. He has done this at the pleading stage of the conflict by, among other things, refuting the allegations of the complaint by answer or other pleadings. If defendant here had ignored the complaint and failed to respond, he could have lost his right to have the jury pass on the issue of liability. The struggle then moved on to the summary judgment arena. Plaintiff supported his attack with affidavits showing that the loss of his aircraft was within the scope of the coverage insured by defendant and, therefore, that there were no issues of fact with respect to liability. Defendant then abandoned the field. It did not attempt to refute these affidavits with either a denial of their truthfulness, an indication that there were other facts which would keep the defense of nonliability alive or any reason why it could not then present facts essential to justify its opposition to the motion. To me, Rule 56 contemplates that this inaction may result in forfeiture of any right to dispute the facts at a later stage of the conflict just as would have resulted from defendant's failure to deny at the pleading stage. In either event defendant must be said to have retreated when the statutes required him to attack in order to keep a factual controversy alive for resolution at trial. Since there was no factual controversy, only a question of law remained. I would affirm the judgment.

MSR ENTERPRISES, INC. v. GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION

No. 7526SC220

(Filed 1 October 1975)

Trover and Conversion § 2— failure to pay repair bill — retention of truck — no conversion by repairer

In an action to recover damages for wrongful detention and conversion of plaintiff's truck, the trial court properly entered summary judgment for defendant where pleadings, depositions and affidavits tended to show that plaintiff delivered its truck to defendant on 22 January 1973 for the purpose of making some repairs, defendant completed the repairs on 23 January 1973, defendant thereafter refused to release the truck to plaintiff since at no time prior to 27 January 1973 did plaintiff pay or offer to pay defendant's bill in cash and the repairs were not covered by warranty, plaintiff did not effectively tender payment by requesting defendant to apply the repair bill against a credit balance which plaintiff asserted it then had against defendant, and by 27 January 1973 the truck was repossessed by GMAC.

APPEAL by plaintiff from *Anglin, Judge.* Judgment entered 19 December 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 May 1975.

Plaintiff brought this civil action against General Motors Corporation (GMC) and against General Motors Acceptance Corporation (GMAC) to recover damages for wrongful detention and conversion of plaintiff's truck. In its complaint, filed 15 February 1973, plaintiff in substance alleged: Plaintiff is engaged in the trucking business. In November 1972 it purchased from GMC a 1973 GMC model truck. On 21 January 1973 plaintiff loaded a cargo of paper in Louisiana to be transported to Cleveland, Ohio. On 22 January 1973 the truck arrived in Charlotte, N. C., on its way to Cleveland. One of the windows in the truck had fallen out and the dash lights were not working. Believing the truck still to be under warranty, plaintiff took it to GMC's place of business in Charlotte for necessary repairs. In 23 January 1973 the repairs were completed and plaintiff went to pick up the truck. GMC refused to release it, stating it had been instructed by GMAC to hold the truck because the December 1972 payment on the truck was past due. Plaintiff informed GMC that prior arrangements had been made made with GMAC for payment of the December 1972 installment, but GMC still refused to release the truck. The repair bill was $46.45. Believing the repairs were covered by warranty,

plaintiff nevertheless tendered payment of the repair bill by asking GMC to apply the bill to a credit balance which plaintiff had with GMC at that time. GMC refused to do this and refused to release the truck. On 30 January 1973 plaintiff obtained a relief tractor and delivered the paper to Cleveland, arriving there on 1 February 1973. The customer refused to accept the late shipment, and by reason thereof plaintiff suffered damages by costs incurred for storage of the paper in Cleveland and for loss of its freight charges for transporting the paper. In addition, because of the delay in delivery of the paper, a profitable hauling contract held by plaintiff was canceled, resulting in lost profits to plaintiff. The repossession of the truck by GMAC and the proposed sale of the truck on 16 February 1973 are illegal and will result in further damages to plaintiff. Plaintiff prayed for recovery of actual damages, consisting of its costs incurred in storing the paper, its lost freight charge, and loss of profits from the canceled contract, in the amount of $750,900.00 and asked for punitive damages in the amount of $500,000.00 from both defendants. Plaintiff also sought an injunction restraining GMAC from selling the truck.

GMAC filed answer containing a counterclaim in which it alleged that when plaintiff purchased the truck from GMC on 9 November 1972 it executed a Purchase Money Security Agreement by which plaintiff promised to pay a total time-deferred balance of $28,503.72 in monthly installments commencing 24 December 1972. GMAC became holder for value of the Security Agreement and thereby obtained a purchase money security interest in the truck. Plaintiff has defaulted under the agreement in that it has made no payments under the terms of the contract. On 27 January 1973 GMAC took possession of the truck in order that it might foreclose its security interest therein. At that time plaintiff owed GMAC $28,503.72. GMAC prayed judgment against plaintiff in that amount plus interest and attorney's fees and asked that it be declared owner of the truck as against plaintiff for the purpose of foreclosing its security interest.

Plaintiff filed to reply to GMAC's counterclaim and on 20 June 1973 default was entered against plaintiff on the counterclaim. Thereafter, counsel of record for plaintiff and for GMAC signed a stipulation dated 31 August 1973 by which it was agreed that GMAC was allowed to proceed immediately with its foreclosure procedure under the terms of its Installments Sales Contract. On 19 December 1974 counsel for plaintiff

and counsel for GMAC joined in a consent judgment in which it was recited that plaintiff moved for a voluntary dismissal with prejudice of its claim against GMAC and GMAC moved for voluntary dismissal with prejudice of its counterclaim against plaintiff. Based thereon the court signed the consent judgment dismissing with prejudice both plaintiff's claim against GMAC and GMAC's counterclaim against plaintiff.

On 24 April 1973 defendant GMC filed answer to plaintiff's complaint in which it admitted it had refused to release the truck to plaintiff after making the repairs, but denied that its detention of the truck was illegal.

After taking the depositions of plantiff's president and vice-president, defendant GMC moved for summary judgment in its favor on the ground that there is no genuine issue as to material facts and that on the undisputed facts plaintiff's action will not lie. The motion was further supported and opposed by a number of affidavits.

The court granted GMC's motion for summary judgment, and plaintiff appealed.

Curtis & Millsaps by Joe T. Millsaps for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman by Edgar Love, III for defendant, General Motors Corporation, appellee.

PARKER, Judge.

The claim and counterclaim as between plaintiff and GMAC having been dismissed with prejudice by consent of those parties, we are concerned on this appeal only with plaintiff's claim against GMC for wrongful detention of its truck. Plaintiff's sole assignment of error is directed to the order allowing GMC's motion for summary judgment as to that claim. We agree with the trial judge that there is no genuine issue as to the material facts relating to the claim against GMC set forth in plaintiff's complaint and that GMC is entitled to summary judgment in its favor as a matter of law.

The pleadings, depositions, and affidavits establish that there is no dispute that plaintiff delivered its truck to GMC on 22 January 1973 for the purpose of making repairs to a window and to the dash lights, that GMC completed these repairs on

23 January 1973, that it thereafter refused to release the truck to the plaintiff, and that by 27 January 1973 the truck was repossessed by GMAC. Therefore, insofar as plaintiff's claim against GMC is involved, we are here concerned only with the lawfulness of GMC's retention of the truck during the period from 23 January to 27 January 1973.

There is no dispute that GMC actually made the repairs which plaintiff requested and plaintiff has never questioned the reasonableness of GMC's bill in the amount of $46.45 for making the requested repairs. Under G.S., Chap. 44A, Article 1, GMC had a lien on the truck in the amount of its reasonable charges for making the repairs and to preserve that lien it was entitled to retain possession of the truck until its bill was legally satisfied. There is no dispute that at no time prior to 27 January 1973 did plaintiff pay or offer to pay GMC's bill in cash. Plaintiff contends that it was nevertheless entitled to have the truck released to it by GMC on either of two grounds: first, that the repairs were covered by warranty given it by GMC so that GMC had no lawful right to demand payment of its repair bill in cash; or, second, that plaintiff effectively tendered payment by requesting GMC to apply the repair bill against a credit balance which plaintiff asserts it then had against GMC. We first consider plaintiff's contention that the repair bill was covered by warranty.

There is no dispute that when GMC sold the truck to plaintiff on 9 November 1972 it issued to plaintiff its written "New Vehicle Warranty" under which it agreed during the warranty period to make certain repairs without charge. The warranty applied for 12 months from the date of delivery "or until the Vehicle had been driven for 12,000 miles, whichever first occurs." It is undisputed that when plaintiff brought its truck to GMC for repairs on 22 January 1973, the odometer showed it had been driven 29,978 miles. Plaintiff did not then and does not now contend that this mileage was incorrect. On the contrary, when GMC called this to plaintiff's attention at the time in pointing out that the written warranty no longer applied, plaintiff made no protest as to that but contended that the truck was covered by a special verbal warranty which had been given plaintiff by GMC's salesman, Harold Hobbs. In this connection, plaintiff's president, O. W. Rodden, testified by deposition that at the time the truck was purchased "they were checking it out . . . and they dropped a wrench down in the console and fire and

smoke came out of it and Mr. Harold Hobbs was aware of this and said, if we had any electrical problems or anything, it would be covered, they would look out for us, it would be covered by warranty." Rodden and plaintiff's vice-president, James E. Morgan, also signed an affidavit in which they stated that immediately prior to delivery of the truck "a GMC worker dropped a wrench into the motor area of the tractor and caused an electrical short or other damage," and that upon protest by plaintiff that it would not accept the tractor in this condition, "Harold Hobbs, acting in the capacity of new Truck Sales Manager, made assurances to these Affiants that should any electrical problem develop, he would 'take care of it' and he encouraged and insisted that MSR accept delivery." Relying upon these assurances of the New Truck Sales Manager, plaintiff did accept delivery of the vehicle.

Accepting as true these statements in the deposition and affidavits of plaintiff's officers, and viewing them in the light most favorable to the plaintiff as the party opposing the motion for summary judgment, they still avail plaintiff nothing. The written Installment Sales Contract signed by plaintiff and GMC when the truck was purchased on 9 November 1972 contained in bold print the agreement that there were no express warranties other than GMC's written new product warranty, and this written warranty in turn contained the clear statements that it was "the only express warranty" applicable to the truck and that GMC "neither assumes nor authorizes anyone to assume for it any other obligation or liability in connection" with the truck. Quite apart from these limitations, even were we to accept that the verbal warranty which plaintiff contends was given it by Hobbs was enforceable against GMC at the time plaintiff's truck was taken to it for repair, plaintiff's contention that it had a right to release of its truck without paying the repair bill must still fail. There is no dispute that part of the repair work was repair to the truck window. This work had no connection whatever with "any electrical problem," which, according to plaintiff's affidavits, was the only matter in which the special verbal warranty allegedly given plaintiff by Hobbs related. The repair bill itself was itemized and discloses that $25.00 out of the $46.45 total was for repair to the window. Therefore, even accepting plaintiff's version of the special warranty, more than half of the repair bill was not covered thereby, and plaintiff would have no right to insist, as it did, that the entire bill be considered as within the warranty. Thus, even

accepting the special warranty allegedly given by Hobbs as being binding on GMC, plaintiff would have had no right to release of its truck.

We now consider plaintiff's second contention, that it had a right to release of its truck because it effectively tendered payment by requesting that GMC apply the repair bill against a credit which plaintiff asserts it then had with GMC. In their affidavit plaintiff's officers assert "that GMC owed MSR $50.00 for a certain Alternator delivered to GMC in the month of December, 1972." A deposition of one of GMC's employees, Kenneth Thornton, indicates that this $50.00 was not owed to plaintiff by GMC but was a personal obligation owed plaintiff by Thornton. Resolving this discrepancy in plaintiff's favor and accepting plaintiff's version of the matter as true, as we must in passing on defendant's motion for summary judgment, plaintiff still may not prevail. As stated by our Supreme Court, "it is well understood that mutual debts do not *per se* extinguish each other, and that in order for one to constitute a payment of another, in whole or in part, there must be an agreement between the creditor and the debtor that the one shall be applied in satisfaction of the other, in whole or *pro tanto*, according to the respective amounts." *Kilpatrick v. Kilpatrick*, 187 N.C. 520, 522, 122 S.E. 377, 378 (1924); *see* 60 Am. Jur. 2d, Payment, § 20, p. 624; 70 C.J.S., Payment, § 32, p. 242. In the present case, the affidavits and depositions of both parties show that GMC never agreed to any offset.

A large part of plaintiff's affidavits and of the depositions of its officers filed as exhibits to the record on appeal in this case deal with plaintiff's contention that in November 1972 it had an agreement with GMC by which GMC agreed to sell plaintiff three new trucks, one of which was the truck involved in this case, and to accept from plaintiff as a down payment thereon four used trucks. Plaintiff contends that GMC "reneged" on this agreement in December 1972. Even if true, these were matters irrelevant to the present litigation.

There being no genuine issue as to any material fact and defendant GMC being entitled to judgment as a matter of law, the order allowing defendant's motion for summary judgment is

Affirmed.

Judges BRITT and VAUGHN concur.

CELIA E. YARBOROUGH v. WILSON F. YARBOROUGH, JR.

No. 7512DC382

(Filed 1 October 1975)

1. **Estoppel § 4— confession of judgment — acceptance of benefits — motion in cause**

Plaintiff was not estopped to bring an alimony action by her acceptance of alimony and other benefits provided for in a confession of judgment without action to which she did not consent or by her filing of a motion in that cause to increase the amount of alimony since defendant has not relied on anything that plaintiff has or has not done to his loss or detriment.

2. **Judgments § 11— confession of judgment — consent of other party**

No person can confess judgment for an amount not agreed to be owing and bind the other party to that confession absent the other party's consent.

3. **Judgments § 12— confession of judgment — absence of consent — no ratification**

Plaintiff did not ratify a confession of judgment entered without her consent by the acceptance of alimony and other benefits provided for therein where the record does not show whether she accepted those benefits under the judgment or whether she was merely enjoying the support she would rightfully be entitled to as a dependent spouse even if there had been no confession of judgment; nor did plaintiff ratify the confession of judgment by filing a motion in the cause to increase the amount of alimony provided for in the confession of judgment since the motion shows that she did not agree to be bound by the confession of judgment.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 14 February 1975 in the District Court, CUMBERLAND County. Heard in the Court of Appeals 3 September 1975.

This is a civil action wherein the plaintiff, Celia E. Yarborough, seeks permanent alimony, alimony pendente lite, and reasonable attorney fees for the prosecution of this action from the defendant, Wilson F. Yarborough, Jr.

The following facts are not controverted: On 27 August 1974 pursuant to G.S. 1A-1, Rule 68.1, Wilson Yarborough, Jr., as prospective defendant, filed in the Office of the Clerk of Superior Court in Cumberland County a "Confession of Judgment without Action" in favor of his wife, Celia Yarborough, the prospective plaintiff, admitting his liability as supporting spouse to her as dependent spouse. That same day the Honor-

able George T. Griffin, Clerk of the Superior Court, entered a judgment containing the following pertinent provisions:

"It is, now, therefore, CONSIDERED, ORDERED, ADJUDGED and DECREED that Celia E. Yarborough (Prospective Plaintiff) be, and she is, awarded permanent alimony against Wilson F. Yarborough, Jr. (Prospective Defendant), in the sum of $600.00 per month, together with other additional benefits and increments, as hereinafter ORDERED and REQUIRED of the said Wilson F. Yarborough, Jr., and the said Wilson F. Yarborough, Jr., be, and he is, ORDERED, DIRECTED and REQUIRED to pay said sum to the Prospective Plaintiff, Celia E. Yarborough, monthly, beginning with a first payment on or before September 1, 1974, and a like payment on the first of each month thereafter so long as the said Celia E. Yarborough shall remain unmarried to a person other than Wilson F. Yarborough, Jr.; that in addition thereto the said Wilson F. Yarborough, Jr., is ORDERED, DIRECTED and REQUIRED to secure to and provide for Celia E. Yarborough the following rights, benefits, emoluments and increments:

(a) Celia E. Yarborough may retain possession of the jointly owned home located 2025 Raeford Road, Fayetteville, North Carolina. That taxes, fire insurance and mortgage payments will be made by Wilson F. Yarborough, Jr. In addition thereto, he will be responsible for the maintenance of the roof, outside walls and air conditioning equipment. If Celia E. Yarborough determines that this house is too large and expensive for her to maintain, then Wilson F. Yarborough, Jr., will consent to the sale of the same with the net proceeds of such sale to be applied to the purchase of a smaller house, which will be jointly owned by the parties and maintained by him to the extent set forth in the first portion of this paragraph.

(b) Title to the 1972 Cadillac automobile presently used by Celia E. Yarborough will be transferred to her or she will be furnished title to another vehicle of her choosing, provided the wholesale costs thereof is not in excess of $3000.00. Maintenance of the automobile, insurance thereon and other operating costs shall be the responsibility of Celia E. Yarborough.

(c) The life insurance policy on the life of Wilson F. Yarborough, Jr., with Protective Life Insurance Com-

pany, the same being Policy No. 202034 and owned by Celia E. Yarborough will remain in full force and effect. The premium thereon in the amount of $488.40 per year will be paid by Wilson F. Yarborough, Jr., provided he is permitted to credit policy dividends against premiums.

(d) Celia E. Yarborough is given furniture, furnishings, and fixtures in the home, other than the personal belongings, personal items and personal effects acknowledged by the parties as belonging to Wilson F. Yarborough, Jr. (Omitted herefrom is the piano, which is the property of the daughter of the parties hereto, it being a gift to her from her paternal grandparents.)

(e) The beach house and lot owned by the parties as an estate by the entireties shall be sold to the highest bidder with the equity therein being divided equally between said parties, either of whom shall be permitted to bid at a sale thereof.

(f) Celia E. Yarborough may retain as her own the four shares of stock in First Union National Bank (now Cameron Financial).

(g) Wilson F. Yarborough, Jr., will retain Celia E. Yarborough on Yarborough Motor Company's group medical insurance so long as the insurance company will permit. That in the event this benefit is no longer available to her, then her alimony payment shall be increased by $35.00 each month. Further, in the event Celia E. Yarborough is confined to hospital or institutional care she will be responsible for the payment of $1000.00 on any costs in excess of insurance available to her at the time and Wilson F. Yarborough, Jr., will be responsible for the payment for her of any additional sums in excess of this $1000.00 amount paid by her.

(h) Wilson F. Yarborough, Jr., will provide for Celia E. Yarborough a membership in Highland Country Club. The payment of all dues incident thereto and the payment of all charges incurred by her shall be, and they are, her responsibility.

PROVISO:

The additional emoluments and benefits, as set forth in subparagraphs (b) and (h) are conditioned upon the

return to Wilson F. Yarborough, Jr. by Celia E. Yarborough of all credit cards held by her, which are in the name of Wilson F. Yarborough, Jr., and the assignment to him by Celia E. Yarborough of twenty-five (25%) percent of the stock of Southland Motor Company, Inc.

That the benefits, including alimony and other benefits and emoluments to and in favor of Celia E. Yarborough, shall cease and terminate upon the death or remarriage of the said Celia E. Yarborough.

That Wilson F. Yarborough, Jr., (Prospective Defendant) is taxed with the costs of this action."

There is nothing in the record to show that either the prospective plaintiff or counsel for her had notice of or participated in this proceeding. However, the record does indicate that a copy of the judgment was served on the plaintiff by the attorney for defendant by mailing a copy of the same, postage prepaid, first class mail, to her at her address. This proceeding was given the file #74CVS4313.

On 29 November 1974 the plaintiff filed a motion in the cause in case #74CVS4313 wherein she claimed that the amount of alimony given in the judgment pursuant to the confession of judgment was inadequate; that she had monthly expenses of $2,150.00; and that the defendant had a net worth of at least $500,000.00 and an income of $50,000.00. She moved for a judgment amending the confession of judgment to provide adequate support and alimony, for permanent support and alimony, for the exclusive use of the family dwelling, and for attorney fees. An answer to the motion in the cause was filed 9 December 1974. The record does not disclose what, if any, disposition was made of this motion.

On 27 September 1974 between the time of the judgment on the confession of judgment case #74CVS4313 and the filing of the motion in the cause on that case, plaintiff filed the present action, case #74CVD4952, wherein she seeks alimony pendente lite, permanent support and alimony, exclusive use of the family dwelling house, and reasonable attorney fees. On 2 December 1974, after the filing of the motion in the cause in the prior case, defendant filed an answer to the complaint in the present case, #74CVD4952. In the answer, among other things, the defendant moved to dismiss the action for the reason that plaintiff "by consent and without prejudice, accepted the sum of

$600.00 per month and has accepted, retained and used the additional benefits and increments . . . " provided for her in the prior confession of judgment.

On 14 February 1975, based on the "stipulations of the parties, admissions of counsel and pleadings as filed in this cause (74CVD4952) and as filed in the action described in defendant's . . . defense as File No. 74CVS4313"; the court made findings of fact which included the following:

> "4. That Celia E. Yarborough, plaintiff herein, has ratified and acquiesced in the Confession of Judgment and formal judgment entered pursuant thereto in the following particulars:
>
> (a) In accepting from the defendant the $600.00 per month as required by said judgment. Provided, however, that by stipulation and plea in the answer of defendant 'Mrs. Yarborough's use of monies deposited to her account under a Confession of Judgment will in no wise and at no time be used to her prejudice'. That the Court in its consideration of this item has not used the same to her prejudice.
>
> (b) That the plaintiff in this cause, Celia E. Yarborough, on November 29, 1974, filed in the action on Confession of Judgment, the same being entitled 'Celia E. Yarborough (Prospective Plaintiff) vs. Wilson F. Yarborough, Jr. (Prospective Defendant),' No. 74 Cvs 4313, a MOTION IN THE CAUSE wherein she moves the Court that the judgment entered on the Confession of Judgment be amended or changed to provide an adequate support for plaintiff in accordance with the provisions of Chapter 50 of the General Statutes of North Carolina; for an order requiring defendant to pay Attorneys' fees; for an order requiring defendant to pay such permanent support and alimony as the Court may deem just and proper; that plaintiff be given exclusive use of the dwelling house located 2025 Raeford Road, Fayetteville, North Carolina; that the complaint (motion) be taken as an affidavit on behalf of plaintiff's claims made in the motion. That forming a part of said motion are alleged monthly expenses on the part of plaintiff totalling $2150.00, all as more particularly set forth in the motion.

(c) That plaintiff has retained exclusive possession of the home located 2025 Raeford Road, Fayetteville, North Carolina; that defendant has paid taxes, fire insurance and mortgage payments thereon; that plaintiff has had the use of the 1972 Cadillac automobile referred to in the judgment; that defendant has continued the life insurance benefits for plaintiff as set forth in subsection (c) of the judgment; that plaintiff has accepted the furniture, furnishings and fixtures in the home located as above set forth and has continued to receive the benefit of medical group insurance provided by defendant."

Based on his findings of fact, the court made the following pertinent conclusion of law:

"That by reason of her ratification and acquiescence in the terms of the Confession of Judgment and her further ratification thereof by motion in the cause, as herein fully set forth, the Court concludes as a matter of law that plaintiff, Celia E. Yarborough, is estopped to proceed in this action; that her motions for alimony pendente lite and Attorneys' fees should be denied and the action dismissed with prejudice."

From an order dismissing plaintiff's claim in case #74CVD4952, plaintiff appealed.

Hatch, Little, Bunn, Jones, Few & Berry by T. D. Bunn and Edgar R. Bain for plaintiff appellant.

Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance for defendant appellee.

HEDRICK, Judge.

[1] We find at the outset that plaintiff is not *estopped* to bring the present action by anything she has done. "Estoppel by misrepresentation, or equitable estoppel . . . grows out of such conduct of a party as absolutely precludes him, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . . " *Boddie v. Bond*, 154 N.C. 359, 365, 70 S.E. 824, 826 (1911). "[A] party who, with knowledge of the facts, accepts the benefits of a transaction, may not thereafter attack the validity of the transaction

to the detriment of other parties who relied thereon. (footnote omitted)" 3 Strong, N. C. Index 2d, Estoppel, § 4, pp. 583-584. See also, *Smith v. Smith,* 265 N.C. 18, 143 S.E. 2d 300 (1965); *White v. Moore,* 11 N.C. App. 534, 181 S.E. 2d 734 (1971). In the present case there is nothing to indicate that the defendant has relied on anything that the plaintiff has or has not done which has in any way acted to his loss or detriment.

In *Ballard v. Hunter,* 12 N.C. App. 613, 184 S.E. 2d 423 (1971), cert. denied 280 N.C. 180, 185 S.E. 2d 704 (1972), Chief Judge Mallard quoting from 2 McIntosh, N. C. Practice and Procedure 2d, § 1684, said:

> "' A *confession of judgment without action* is a consent judgment . . . . * * * The judgment depends upon the consent of the parties, and the court gives effect to it as the agreement of the parties. It would not be valid unless the parties consented, nor could it affect one who was not a party.' (Emphasis added.)"

In 49 C.J.S. Judgments, § 148, p. 275, it is stated:

> "In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto. (footnote omitted)"

Thus, the question for us to determine is whether the plaintiff's conduct after she receives notice of the entry of judgment of confession manifested her intention to consent to it.

[2, 3] It seems obvious that no person can confess judgment for an amount not agreed to be owing and bind the other party to that confession absent his consent. In the present case, the purported confession of judgment imposes upon the plaintiff substantial conditions and purports to make certain a liability that in no way was agreed to be the amount due. We need not discuss at length the finding that plaintiff had ratified the prior judgment by accepting benefits under it. There is nothing in the record to indicate whether she accepted those benefits under the judgment or whether she was merely enjoying the support she would rightfully be entitled to as a dependent spouse even if there had never been a confession of judgment. Plaintiff cannot be said to have ratified the confession of judgment by accepting benefits which she believed she would have been entitled to under any circumstances.

Counsel for the defendant argues and the court below found that plaintiff had ratified the agreement by filing a motion in the cause in the prior action. But, an examination of that motion reveals that she in no way agreed to be bound by the confession of judgment. In fact, the motion clearly shows that she *did not agree* to be bound. Furthermore, the very fact that plaintiff filed the present action just one month after the entry of the judgment by confession demonstrates clearly that she had no intention of consenting to the unilateral action of her husband. The record before us, rather than implying that plaintiff consented to the judgment, demonstrates her repudiation of it.

While we recognize that judgment may be confessed in alimony cases pursuant to G.S. 1A-1, Rule 68.1, and such a procedure may be desirable in many cases to avoid the public airing of domestic problems, we do not perceive that such procedure should be used to deprive a litigant of his or her day in court, or to impress on an unsuspecting party terms and conditions to which the party did not specifically agree. Because the plaintiff in the present case did not expressly or impliedly consent to the judgment confessed in case #74CVS4313, we hold that such judgment is a nullity. The order dismissing plaintiff's claim in case #74CVD4952 is reversed and cause is remanded to the district court for further proceedings.

Reversed and remanded.

Judges BRITT and MARTIN concur.

WOODALL FLYING SERVICE, INC. v. MERELE E. THOMAS

No. 7514SC366

(Filed 1 October 1975)

1. Aviation § 3.5— improper landing — damage to plane — sufficiency of evidence of negligence

In an action to recover damages to an aircraft allegedly crashed due to the negligence of defendant, the trial court erred in granting defendant's motion for directed verdict where the evidence was sufficient to permit but not compel the jury to find that defendant was negligent in approaching and landing the aircraft and that such negligence was a proximate cause of the damage complained of.

2. **Aviation § 2— area beyond runway — failure to maintain — no contributory negligence as matter of law**

In an action to recover damages to an aircraft where the evidence tended to show that defendant touched down on the runway and veered to the right, rolled off the runway then through a mowed area off the runway to an area of uncut grass and rough and bumpy ground where the plane blew a tire and flipped over, the evidence was insufficient to raise an inference of contributory negligence with respect to plaintiff's failure to maintain the area adjacent to the runway beyond the mowed area.

3. **Aviation § 2— radioed instructions — no contributory negligence as matter of law**

In an action to recover damages to an aircraft allegedly crashed due to the negligence of defendant where the evidence tended to show that plaintiff radioed landing instructions to defendant pilot, evidence was insufficient to establish plaintiff's contributory negligence as a matter of law either in undertaking to give instructions at all or in the instructions that were given.

APPEAL by plaintiff from *Hall, Judge.* Judgment entered 13 December 1974 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 August 1975.

This is a civil action wherein the plaintiff, Woodall Flying Service, Inc., seeks to recover damages to its single engine Cessna 172 aircraft which allegedly crashed due to the negligence of the defendant, Merele E. Thomas, who was piloting the aircraft under a lease agreement with the plaintiff.

The evidence when considered in the light most favorable to the plaintiff tends to show the following: On 11 June 1971, defendant rented a single engine Cessna 172 aircraft from the plaintiff for the purpose of flying to Marion, Ohio, that day on a pleasure trip, and returning to Durham Skypark, the place of rental, on 13 June 1971. He delayed the return flight until 14 June 1971 when he returned nonstop, carrying his mother and father as passengers.

The return flight, the subject of the case, might be broken up into four segments. First, from Marion, Ohio, to Danville, Virginia, he proceeded according to his flight plan but he encountered unexpected winds. Because of the winds and the crossing of the mountains, he ascended to an elevation as high as 9,500 feet. At that elevation he was required to use carburetor heat which used additional fuel. He took no steps to "lean out" the fuel, a process designed for fuel conservation.

The second phase covers the time from which defendant passed over Danville at 1:24 p.m. until the time he sighted Durham Skypark and established radio contact with it at approximately 2:34 p.m. At the time he passed Danville, defendant by his own estimation had enough gas for an additional one hour and fifteen minutes flying time with approximately 19 to 21 minutes flying time remaining to arrive at Durham Skypark. Approximately five minutes out from Danville, defendant experienced problems with his gyro compass, and as he reported to Mr. Truebe, the Federal Aviation investigator, he became disoriented and lost until 2:21 p.m. before he contacted Raleigh-Durham Airport and reported being lost and out of gas. They directed him to Durham Skypark which he sighted at 2:34 p.m., making radio contact soon thereafter. While there is some contradiction in the evidence as to whether defendant stated he was out of gas or low on fuel, the evidence does show that for approximately 52 minutes defendant was apparently lost, but did not attempt to radio for help until his fuel supply was nearly exhausted, although he was within an area to be able to radio for assistance.

The third phase covers the period of time from radio contact with Durham Skypark until a point of time just prior to touching down. Mr. Woodall, owner of plaintiff corporation, testified as to the proper procedure for making the approach and landing at the airport in a Cessna 172. Basically it involved a downwind leg, parallel to the runway but about 4000 feet out from the center of the runway. It should be made at an altitude of 800 feet, at 90 miles per hour, and 10 degrees of wing flaps should be extended about midway down the leg. At the end of the downwind leg, the pilot should turn 90 degrees toward the runway at a distance about 1000 feet beyond the end of the runway. This begins the base leg and should be made at approximately 500 feet altitude, 80 miles per hour and with flaps extended to 20 degrees. At the end of the leg, the pilot should again turn 90 degrees to be facing up the runway. The beginning approach should be 70 miles per hour with 40 degrees flaps extended. Speed should be reduced as elevation decreases and the plane should be landed in the first 25 percent of the runway.

When defendant Thomas sighted the airport, he reported that he was above the airport and out of gas. Mr. Matia, an employee of plaintiff, maintained radio contact with defendant by means of another radio in an airplane on the field. Mr. Woodall,

who testified as to what occurred, stood about 10 feet away. Woodall's testimony was to the effect that on the downwind leg defendant was only 2500 feet out rather than 4000 feet, and that he was going 100 miles per hour instead of 90, and that he was 200 feet too high. Additionally, no flaps were extended until near the end of the leg when he was told to extend some flaps by Mr. Matia. On the base leg, defendant was again too close—only 500 feet out instead of 1000. He was also going too fast by 10 miles per hour and did not extend flaps to 20 degrees until again directed to do so somewhere near the end of the leg or beginning of the landing leg. On the last leg, defendant was still 10 miles per hour too fast and did not have enough flaps extended. He was told from the ground to execute a series of "S" turns to slow the plane. He responded, but only executed shallow turns where the witness said deep turns were necessary. Defendant then began drifting off the landing path. He was told from the gound to realign himself with the runway which he attempted to do. At the end of this phase, he was nearing landing in the last quarter of the runway.

The fourth phase is the actual touchdown. When the defendant landed, there was evidence that he was going 50 miles per hour when the optimum speed was 45 miles per hour. There was evidence that he landed the plane at too flat an attitude causing the plane to bounce approximately 10 feet up, and that he landed at an angle not having completely realigned himself with the runway. When the plane touched down again it veered to the right, rolling off the runway at about 10 miles per hour. The immediate area surrounding the runway was maintained only a few feet beyond the lights ringing the runway. The plane apparently rolled through the mowed area off the runway to an area of uncut grass and rough and bumpy ground. The nose wheel of the plane hit a hole, blowing the tire and flipping the plane over. After it flipped, it slid about one foot, then came to rest. Defendant had touched down at a point about 750 feet from the end of the runway; there was testimony that the plane could be landed safely in 500 feet; and, the distance from the point where the plane first touched down to where it stopped was approximately 300 feet.

The defendant was familiar with the airport, being a member of a flying club there, and was familiar with the Cessna 172, having trained for his pilot's license in a similar model.

At the close of the plaintiff's evidence, the court allowed a motion for a directed verdict. From the judgment and from certain evidentiary rulings by the court, the plaintiff appealed.

Powe, Porter, Alphin & Whichard, P.A. by James G. Billings for plaintiff appellant.

Vann & Vann by Arthur Vann for defendant appellee.

HEDRICK, Judge.

From the judgment entered, it appears that the court found no evidence of actionable negligence on the part of the defendant and, in addition, found that the plaintiff's own negligence was the cause of the accident.

"The hiring or rental of aircraft constitutes a bailment contract . . . . " 2A C.J.S., Aeronautics and Aerospace, § 100. "While one who rents or hires an airplane from another is not, as bailee, an insurer thereof, he must exercise towards the aircraft the ordinary degree of care required by a reasonable person in the light of all the circumstances present at the time. He is bound to exercise elementary principles of safe flying . . . . (footnotes omitted)" 2A C.J.S., *id.*, § 105, p. 243; *accord, Jackson v. Stancil,* 253 N.C. 291, 116 S.E. 2d 817 (1960). "[*R*]*es ipsa loquitur* does not apply, 'it being common knowledge that aeroplanes do fall without fault of the pilot.' Furthermore, there must be a causal connection between the negligence complained of and the injury inflicted. *Smith v. Whitley,* 223 N.C. 534, 27 S.E. 2d 442." *Jackson v. Stancil, supra* at 297.

[1] Plaintiff introduced evidence as to the customary and proper procedure for approaching and landing at Durham Skypark in a Cessna 172. Plaintiff also introduced evidence to the effect that defendant's approach and landing did not conform to the procedure outlined by the plaintiff's witness. Defendant was too high, not far enough out, traveling too fast, and had out insufficient flaps. In addition the defendant's "S" turns were shallow when the customary procedure would call for deep banking "S" turns to slow the plane. Instead of remaining aligned with the runway, defendant drifted off the landing path. He then landed at an angle, at a speed above the optimum for a Cessna 172, and at too flat an attitude when the customary procedure would be to pull the nose up.

While evidence of custom or general practice or optimum procedure is not conclusive on the necessary standard of care, deviation from such standards is evidence of negligence to be used by the jury in determining what the ordinary degree of care required of a reasonable person would be in the same circumstances. *See generally* 65A C.J.S., Negligence, § 232. When the evidence is considered in the light most favorable to the plaintiff, it will permit but not compel the jury to find that the defendant was negligent in approaching the Durham Skypark and landing the aircraft and that such negligence was a proximate cause of the damage complained of.

With respect to the negligence of the plaintiff, " . . . a directed verdict for the defendant . . . on the ground of contributory negligence should be granted when, and only when, the evidence, taken in the light most favorable to plaintiff, establishes the contributory negligence . . . so clearly that no other reasonable inference or conclusion may be drawn therefrom. Discrepancies and contradictions in the evidence, even though such occur in the evidence offered on behalf of plaintiff, are to be resolved by the jury, not by the court. *Stathopoulos v. Shook,* 251 N.C. 33, 36, 110 S.E. 2d 452, 455 (1959) and cases cited therein." *Bowen v. Constructors Equipment Rental Co.,* 283 N.C. 395, 405, 196 S.E. 2d 789, 797 (1973).

[2] Defendant contends that the failure of the plaintiff to maintain the airport grounds adjacent to the runway but beyond the narrow mowed area outside the lights constituted contributory negligence as a matter of law. We do not agree. While there is evidence in the record from which the jury could find that plaintiff allowed the area off the runway to remain rough with high grass and holes, there is nothing in the record before us to raise an inference that the plaintiff violated any duty owed to the defendant with respect to its maintenance of that area. Hence, under the circumstances here presented, we are of the opinion that the evidence is not sufficient to raise an inference of contributory negligence with respect to maintenance of the area adjacent to the runway lights.

[3] Defendant also contends that the radioed instructions were a direct interference with the safe landing of the aircraft. While there is some evidence from which the jury could find that the plaintiff was negligent, under the circumstances here presented, in undertaking to give any instructions to the defendant regarding the landing of the aircraft and in the instructions that were

given, and that such negligence was a proximate cause of the damage to the aircraft, we are of the opinion that the evidence raises an issue for the jury but does not establish the plaintiff's contributory negligence as a matter of law.

For the reasons stated, the judgment directing a verdict for defendant must be reversed and the cause remanded for a new trial.

From the disposition of the plaintiff's exceptions to the granting of the directed verdict, we find it unnecessary to discuss plaintiff's exceptions to the evidentiary rulings since they are unlikely to occur at a new trial.

Reversed.

Judges BRITT and MARTIN concur.

NELLIE M. SMITH STRANGE v. JEAN BARRIER SINK

No. 7519SC343

(Filed 1 October 1975)

1. **Trusts § 13— resulting trust**

A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein and the beneficial interest is not otherwise effectively disposed of.

2. **Trusts § 19— entirety property — agreement to reconvey to one spouse — resulting trust**

Where plaintiff and her husband conveyed entirety property to defendant, who agreed orally to convey the property to plaintiff upon her request after a planned divorce of plaintiff and her husband was granted, defendant was the trustee of a resulting trust in the property in favor of plaintiff, and plaintiff is entitled to have legal title transferred to her.

3. **Trial § 36— instructions — use of "as in this case" — no expression of of opinion**

In an action to establish a resulting trust, the trial court's instruction that "as in this case" a resulting trust arises under certain conditions did not constitute an expression of opinion on the evidence when considered with the court's other instructions to the effect that plaintiff alleged and sought to establish a resulting trust and that plain-

tiff had the burden of satisfying the jury by clear, strong and convincing evidence of all the material, factual allegations in her complaint.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 21 February 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 26 August 1975.

The plaintiff alleged and offered evidence tending to show the following facts:

1. In 1954 plaintiff and her husband, E. E. Smith, agreed upon a separation, which was to be followed by divorce, and they employed an attorney who prepared, and they executed, a written separation agreement providing for a division of personal and real property, including provision for payment by plaintiff to her husband of the sum of $1,000.00 and his granting to her of their home realty which they owned as tenants by the entirety.

2. To effect the division and transfer of the entirety property to plaintiff, they entered into an oral agreement with defendant and her husband, Lindsey R. Sink, who was the brother of the plaintiff, that they would convey their entirety property to defendant and her husband, who would convey the said property to plaintiff upon her request after the planned divorce was granted.

3. Pursuant to such agreement, plaintiff and her husband executed and recorded the deed for the entirety property to defendant and her husband.

4. Neither defendant nor her husband paid any consideration for the said realty.

5. Plaintiff retained possession and has remained in possession continuously and has paid the property taxes, insurance, and various bills for repair and upkeep of the home.

6. Plaintiff, after divorce in 1956, made numerous requests of defendant, both before and after defendant's divorce from plaintiff's brother, to convey the subject realty to her, but defendant made various excuses and avoided doing so.

7. In 1974, after his divorce from defendant in 1973, Lindsey R. Sink, conveyed his one-half undivided interest in the subject property to plaintiff, and defendant has refused to con-

vey her legal title to the one-half undivided interest which she holds as trustee for plaintiff under a resulting trust.

Plaintiff concludes that defendant has legal title to a one-half undivided interest in the subject property as trustee for plaintiff under a resulting trust, and prays that legal title be transferred to her.

In her answer defendant denied any agreement to convey the subject property to plaintiff, admitted that plaintiff had been permitted to reside on the property and testified that there was no oral agreement to convey the property upon plaintiff's request, and that the first request for her to sign a deed to the property was made by her husband, plaintiff's brother, in 1972 after she separated from him.

The trial court submitted to the jury this issue: Is the defendant trustee of a resulting trust, in favor of plaintiff, of a one-half undivided interest of the real property described in the Complaint?

The jury answered the issue in the affirmative, and from judgment declaring the plaintiff owner of the subject realty, defendant appeals.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour for plaintiff appellee.

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

CLARK, Judge.

Defendant contends that this case falls within the Gaylord rule that "a parol trust in favor of a grantor may not be engrafted on a warranty deed in the absence of fraud, mistake or undue influence." This prescription in *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028 (1909) has been approved and applied in many subsequent cases.

On the other hand, plaintiff contends that she was the beneficial owner under a resulting trust which arose by operation of law and that legal title held by defendant as trustees should be transferred to plaintiff.

The principal function of a deed is to evidence the transfer of a particular interest in land, and a parol trust in favor of the

grantor would change the nature of a deed absolute, would violate the parol evidence rule, and may not be shown. 2 Stansbury, N. C. Evidence 2d, § 255 (Brandis rev. 1973). However, a parol trust in favor of a third person, is generally not within either the parol evidence rule or statute of frauds. *Wells v. Dickens,* 274 N.C. 203, 162 S.E. 2d 552 (1968); *Hoffman v. Mozeley,* 247 N.C. 121, 100 S.E. 2d 243 (1957); *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642 (1943); *Britt v. Allen,* 21 N.C. App. 497, 204 S.E. 2d 903 (1974).

[1] A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein and the beneficial interest is not otherwise effectively disposed of. Resulting trusts are established by equity for the purpose of carrying out the presumed intention of the parties. In addition to general definitions, resulting trusts are frequently defined by specific circumstances which have been found to give rise to them. One such situation rests upon the general rule that in the absence of circumstances indicating a contrary intent, where the purchase price is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase. *Creech v. Creech, supra; Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548 (1961).

The resulting trust is created by operation of law and arises from the character of the transaction and not necessarily from a declaration of intention. Thus, the fact that the payor of the purchase money has previously obtained the consent of the other person to the placing of the title in his name does not prevent the creation of a resulting trust; he simply consents to an obligation imposed by the law. *Randle v. Grady,* 224 N.C. 651, 32 S.E. 2d 20 (1944).

[2] In this case the plaintiff and her husband were tenants by the entirety. Having agreed to separate and to divorce, they executed a separation agreement, which included a provision that plaintiff become the owner of the entirety property, the homeplace, and that her husband receive certain personal property including the payment of $1,000.00 by plaintiff. Neither owned a separate estate or interest in the entirety property. They joined as grantors in the deed to defendant and her hus-

band on the advice of counsel for the obvious purpose of effecting, by means of the proposed deed to the plaintiff, the transfer of the entirety property to her as agreed. Under these circumstances, the well-established Gaylord rule, that a parol trust in favor of a grantor cannot be engrafted onto a warranty deed absolute on its face, has no application to this case because it ignores the well-established nature of tenancy by the entirety, which was recognized as early as the Fourteenth Century and by the Supreme Court of North Carolina as early as 1837. *Motley v. Whitemore,* 19 N.C. 537 (1837); *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466 (1956).

Tenancy by the entirety is *sui generis,* and arises from the singularity of relationship between husband and wife. As between them there is but one owner and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole and every part and parcel thereof. *Johnson v. Leavitt,* 188 N.C. 682, 125 S.E. 490 (1924). It is on the doctrine of Unity of Person that estates by the entireties, with right of survivorship, rest; the husband and wife, though twain, are regarded as one; neither has a separate estate or interest. *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486 (1917); *Moore v. Trust Co.,* 178 N.C. 118, 100 S.E. 269 (1919); *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484 (1931).

We find that the grantor was the entirety entity which conveyed the entirety property to trustees, defendant and her husband, for the benefit of a third party, the plaintiff, and that, therefore, this case comes within the traditional resulting trust situation where the consideration is paid by one but title is taken in the name of another, who by law holds title in trust for the payor.

[3] Though on appeal the defendant emphasizes her claim that as a matter of law the trial court erred in not directing a verdict, she also seeks a new trial for error in the jury instructions. After defining resulting trust the court concluded as follows:

> "Also, as in this case, ladies and gentlemen, a resulting trust arises when a person conveys property to another with intention at the time of the conveyance or before the conveyance that that person will reconvey the property after special conditions have been met."

The defendant contends that the words "as in this case" constitute an expression of opinion and invades the province of the jury. This contention has obvious merit when considered alone, but considering the charge as a whole, we find instructions, which preceded the alleged error, that plaintiff *alleges* a resulting trust and seeks to establish a resulting trust. Following the alleged error, the court, in its final mandate, places the proper burden on the plaintiff to satisfy the jury by clear, strong and convincing evidence of all the material, factual allegations in her complaint. Considering the charge as a whole, we find *lapsus linguae* on the part of the trial judge, who in applying the law to the evidence obviously intended to inform the jury only that the case involved a resulting trust, and that the jury clearly understood from the charge that the plaintiff had the burden of proving the trust. Therefore, the error was not prejudicial and does not warrant a new trial.

In his brief, counsel for defendant candidly concedes that, "there are certain equities in favor of plaintiff." The testimony of the plaintiff relative to the trust agreement was supported by the testimony of the defendant's former husband and by the written separation agreement. Admittedly, plaintiff was in continuous possession of the subject property. Clearly this with other evidence was sufficient to deny defendant's motion for directed verdict and to support the jury verdict.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. MAUDIE MAE CLAY

No. 7515SC438

(Filed 1 October 1975)

1. **Assault and Battery § 13— felonious assault — serious injury — hearsay — harmless error**

In a prosecution for felonious assault, the erroneous admission of the victim's testimony as to what the doctor told him about why a cast could not be put on his injured arm and how the doctor told him to carry his arm in a sling was not prejudicial to defendant where evidence previously admitted without objection was sufficient to show a serious injury.

2. Assault and Battery § 13— felonious assault — showing wound to jury

The victim of a felonious assault was properly permitted to display to the jury the bullet wound on his neck.

3. Criminal Law § 169— exclusion of testimony — absence of answer in record

No prejudice was shown in the exclusion of testimony where the record failed to show what the answer of the witness would have been had he been permitted to answer the question asked.

4. Criminal Law § 161— assignment of error — more than one question of law

An assignment of error which attempts to present more than one question of law is broadside and ineffective.

5. Criminal Law § 119— requested instructions not given verbatim

The trial court did not err in failing to give requested instructions where the instructions were implicit in the charge, although not with the elaboration requested.

APPEAL by defendant from *Walker, Judge.* Judgments entered 12 March 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 September 1975.

Defendant was charged in two bills of indictment: (1) with assault upon William Andrew Murdock with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death; and (2) with assault upon Otherell Tinnin with a deadly weapon with intent to kill, inflicting serious injuries not resulting in death. The cases were consolidated for trial.

The State's evidence tends to show the following: During the evening of 30 September 1974, Murdock and Tinnin went to defendant's house to purchase beer. When they arrived, they were admitted by one Bud Gattis, who sold them two beers each, for which Murdock paid $2.00. Defendant's kitchen contained two refrigerators. One refrigerator contained food, and the other refrigerator had the shelves removed and was filled with beer. Defendant was in her bedroom. Defendant came into the room where Murdock, Tinnin and Gattis were located. She said, "I told you about going in my damn refrigerator." She shot Murdock in the stomach, and when he fell to the floor, she shot him in the neck. Defendant then shot Tinnin in the arm, and Tinnin ran out the door.

Defendant's evidence tends to show the following: Defendant was in bed because she was sick. Bud Gattis was a neighbor and friend who was there to look after her while she was sick.

Between nine and ten o'clock, defendant was awakened by her dog barking. She went into the kitchen and saw Murdock taking beer from her refrigerator and putting it in his pocket. She testified as follows:

> "My kitchen floor is covered in carpet. I have a rule about this Kelvinator, and that is I don't allow anybody in the kitchen or my Kelvinator. I do now allow anybody in my kitchen because I have carpet on the floor and people walking in there mess it up. This rule applies to everybody, including Bud Gattis. Mr. Murdock and Mr. Tinnin knew about this rule. Mr. Murdock took two beers out of my Kelvinator. I asked him what he was doing in my Kelvinator. He threatened me. He went back out on the porch where I had the washing machine. He said that he would knock the goddamned hell out of me, that I was telling a goddamned lie. I ordered him to leave. Three times I said for them to get out of my house. He did not leave. When I ordered him to leave he said he would do what he wanted to. This threat by Mr. Murdock made me scared. I was afraid he might hurt me. After I ordered him to leave he cursed me. He called me a black son-of-a-bitch. After this happened is when I shot him. I saw Mr. Tinnin after I shot Mr. Murdock. I shot him because he jumped up and hit at me. I ordered him to leave. When I ordered him to leave he looked at me like something wild. He did not leave when I ordered him to leave. I was scared of this conduct by Mr. Tinnin. I didn't have anybody but myself. Mr. Tinnin hit at me, and when he did that is when it went off. That was when he was shot in the arm."

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury in both cases. Defendant was sentenced to consecutive terms of twelve months' imprisonment. She appealed.

Attorney General Edmisten, by Assistant Attorney General Charles R. Hassell, Jr., for the State.

Long, Ridge & Long, by Daniel H. Monroe, Jr., for the defendant.

BROCK, Chief Judge.

Defendant's assignments of error Nos. I, II, and III object to the trial court's ruling on defendant's objections to testi-

mony. These assignments of error are feckless and merit no discussion.

[1] Defendant's assignment of error No. IV objects to the admission of hearsay testimony. Prosecution witness Murdock was permitted to state that defense witness Gattis told him defendant was in the bedroom. If this was error, it was clearly harmless because all of defendant's evidence is to the effect that she was sick and was in bed when Murdock and Tinnin arrived. Prosecution witness Tinnin was permitted to state what the doctor told him about why they could not put a cast on his injured arm and how the doctor told him to carry his arm in a sling. Conceding that the admission of this testimony was error, it was not prejudicial. The witness had already testified that defendant shot his arm, that the bone and muscle in his arm were shattered, and that he was sent to a specialist. The evidence previously admitted, without objection, was clearly sufficient to show a serious injury. The challenged testimony added nothing to the seriousness already shown. Assignment of error No. IV is overruled.

[2] Defendant's assignment of error No. V objects to the court's allowing prosecution witness Murdock to display to the jury the bullet wound on his neck. Clearly this was permissible, and this assignment of error is overruled.

[3] By her assignment of error No. VII, defendant contends it was error for the trial judge to sustain the State's objection to defense cross-examination of the prosecution witness Murdock. The question asked was: "You deny you shot a man in 1972?" Perhaps the trial judge felt that the form of the question was argumentative, and it appears that it was. The witness had just admitted convictions of several offenses. He had not denied anything. Had counsel phrased his question in a non-argumentative manner, it perhaps would not have brought forth an objection. In any event, the record does not disclose what the answer would have been had the witness been permitted to answer. Therefore, no prejudice is shown. Assignment of error No. VII is overruled.

Defendant's assignments of error Nos. VIII, IX, and X object to the trial court's ruling on admission and exclusion of testimony. These assignments of error are feckless and merit no discussion.

Defendant's assignments of error Nos. XI and XII contend that the trial court committed error in denial of her motions for nonsuit. The evidence taken in the light most favorable to the State is sufficient to support the verdicts of guilty. These assignments of error are overruled.

[4] Defendant's assignment of error No. XIII groups eleven exceptions to the instructions given by the trial judge to the jury. Each of these exceptions presents a different question of law and procedure, and they are therefore improperly grouped under one assignment of error. *Nye v. Development Co.*, 10 N.C. App. 676, 179 S.E. 2d 795 (1971). An assignment of error which attempts to present more than one question of law is broadside and ineffective. *State v. Clark*, 22 N.C. App. 81, 206 S.E. 2d 252 (1974). Assignment of error No. XIII is overruled.

[5] Assignments of error Nos. XIV and XV argue that the trial judge committed error in failing to give requested instructions. "Even if a defendant is entitled to requested instructions, the court is not required to give them verbatim. It is sufficient if they are given in substance." *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968). The requested instructions were implicit in the charge, although not with the elaboration requested. These assignments of error are overruled.

Defendant's remaining assignments of error are without merit and are overruled.

No error.

Judges VAUGHN and MARTIN concur.

ALICE LUCILLE CRAVEN BRITT, OSSIE GERMAN BRITT AND IDA LEOLA CRAVEN BRISTOW v. GARLAND W. ALLEN

No. 7519SC362

(Filed 1 October 1975)

1. Vendor and Purchaser § 1— agreement to purchase land — insufficiency — statute of frauds

Defendant's alleged promise to purchase a quantity of land from plaintiffs is unenforceable because (1) the quantity was never agreed upon, (2) the location of the lines was never agreed upon, (3) the

purchase price was never agreed upon, and (4) the alleged agreement was in violation of the statute of frauds because it was not in writing.

2. **Trusts § 13— parol trust — failure of promisor to acquire land**

Defendant's alleged promise to acquire plaintiffs' land at a foreclosure sale and reconvey some or all of the property to plaintiffs did not give rise to a parol trust where defendant never acquired the property.

3. **Contracts § 4— agreement to purchase at foreclosure sale — absence of consideration**

Defendant's alleged promise to purchase all of plaintiffs' land at a foreclosure sale upon plaintiffs' agreement to give defendant a portion of the property so purchased was unsupported by consideration and unenforceable since plaintiffs' promise to give property they no longer own does not constitute a valuable consideration.

APPEAL by plaintiffs from *Long, Judge.* Judgment entered 30 December 1974 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 27 August 1975.

In this action plaintiffs seek to recover damages upon defendant's breach of his alleged promise to purchase a quantity of land from plaintiffs. In the alternative plaintiffs seek to recover damages upon defendant's breach of his alleged promise to purchase land at the foreclosure sale of plaintiffs' land and gratuitiously to convey part of the land to plaintiffs.

The jury awarded damages to plaintiffs. The trial judge set the verdict aside and ordered a new trial. Plaintiffs appealed.

Ottway Burton and Millicent Gibson, for plaintiffs.

Moser and Moser, by Thad T. Moser, for defendant.

BROCK, Chief Judge.

The plaintiffs' evidence, taken in the light most favorable to plaintiffs, tends to show the following: Plaintiffs executed a deed of trust dated July 20, 1961, to Archie L. Smith, trustee for People's Savings and Loan Association, to secure the payment of their note in the sum of $3,000.00. The deed of trust conveyed approximately 33½ acres of land, including plaintiffs' homeplace. Between 1961 and October 1966 plaintiffs reduced the indebtedness to People's Savings and Loan to approximately $2,200.00. Also, during this period, plaintiffs executed a second lien deed of trust to secure an indebtedness which in October 1966 amounted to approximately $500.00.

In October 1966 plaintiffs received notice of default in payment of the note to People's Savings and Loan and notice that the property would be sold by the trustee to satisfy the balance of the indebtedness. Upon receipt of these notices, plaintiff Mrs. Britt asked defendant for a loan of $3,000.00 to pay off the notes secured by the two deeds of trust. Defendant declined to make a loan but offered to purchase from plaintiffs some of the land for a sum sufficient to pay the outstanding indebtednesses. The quantity of land and the price were never agreed upon, and plaintiffs did not sign a deed to defendant for any quantity of the land.

The foreclosure sale was advertised for 25 November 1966. Plaintiff Mrs. Britt went to see defendant several times in attempts to obtain money to pay the two notes. She testified: "Every time I would go over there he would assure me that I didn't have anything to worry about. He would see that I didn't lose my home. I trusted him. He claimed that he couldn't get a surveyor down there to survey it out, that it was rough and bad. I kept waiting on him to, waiting until the sale on the 25th of November, and he said he would put a bid in on it to keep me from losing it." After the trustee's sale on 25 November 1966, defendant placed an upset bid, and a resale was advertised for 27 December 1966. Plaintiff Mrs. Britt went back to see defendant several times between 25 November 1966 and 27 December 1966. She testified: "I asked when he was going to get it straightened out. He said just as quick as he could get it surveyed out." The following occurred on her direct examination:

> "Q. Now, you have spoken about him surveying it out, what was it that he agreed to do and you agreed to do, be specific?
>
> "A. He said he would take enough land, buy enough land to clear it up. Then he would sell it back to us with a six percent interest, if we wanted it back.
>
> "Q. How much was enough land?
>
> "A. He never did specify any amount, but I asked if it would be eight or ten acres. He said, 'Maybe not that.' "

On 27 December 1966, the day of the resale, plaintiff Mrs. Britt went to see defendant to discover whether he had obtained the survey and what he was going to do. She testified: "He said, 'I can't get the damn surveyor down here.' That's the words he

used. I said, 'Well, today is the day of the last sale or resale.' I said, 'I stayed out of work to come down here and try to get it straightened out before it's sold,' and that was about 9:00 o'clock that morning. It was to be sold at 11:00. He said, 'Why did you stay out of work? Why don't you trust me? I told you I would take care of it.' I said, 'Well, I want to get it straightened out.' He said, 'If anybody else puts in on it, I will either go or call my lawyer to put a bid over them. You trust me. I will see that you don't lose your place." The next thing plaintiffs heard about the foreclosure was on 16 January 1967 when three men, who identified themselves as the purchasers of the property, came to plaintiffs' home to look over the property. Plaintiffs continued to live on the premises until they were evicted by the purchasers in May 1968.

The jury returned a verdict awarding damages to plaintiffs. The trial judge set the verdict aside and ordered a new trial.

[1] Defendant's alleged promises to purchase a quantity of land from plaintiffs is clearly unenforceable for four reasons: (1) the quantity of land was never agreed upon, (2) the location of the lines was never agreed upon, (3) the purchase price was never agreed upon, and (4) the alleged agreement was in violation of the statute of frauds because it was not in writing.

This case was reviewed on appeal by this Court in 21 N.C. App. 497, 204 S.E. 2d 903. In that decision we set aside the directed verdict entered for the defendant. The opinion of this Court was based on the theory that defendant's promise to purchase the 33½ acre tract for Mrs. Britt at the foreclosure sale constituted a parol trust and on the theory that a valid consideration existed to support defendant's promise to bid. Unfortunately, the opinion erroneously presupposed that defendant Allen had bid in the property and acquired title for his exclusive benefit. Had Allen acquired title to the property, Mrs. Britt would be permitted to show a parol trust by clear and convincing evidence. The parol trust device is used to prevent a party from retaining property unfairly after purchasing it as the agent for another party. *Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872.

[2] Defendant Allen's alleged promise to acquire plaintiffs' land at the foreclosure sale and reconvey some or all of the property to them does not give rise to a parol trust because Allen never acquired the property. Legal title to the property never

vested in Allen; as a result, he never became a trustee on behalf of Mrs. Britt.

[3] Aside from the specter of the statute of frauds, when this transaction is stripped of the parol trust theory, Allen's alleged promise to purchase plaintiffs' land at the foreclosure sale cannot be enforced by the plaintiffs because of the absence of a valid consideration. The sale of property upon foreclosure results in transfer of title to the highest bidder. Mrs. Britt testified that she agreed to give Allen some of the property if he would bid in *all* the property for her at the foreclosure sale. Obviously, the plaintiffs' promise to give property which they would no longer own does not constitute a valid consideration, nor is such a promise capable of inducing another party to purchase the entire tract at a foreclosure sale and convey a portion to the plaintiff.

The opinion of this Court in the former appeal, reported at 21 N.C. App. 497, 204 S.E. 2d 903, was based upon an erroneous interpretation of the evidence. The opinion applied sound principles of law to a state of facts not supported by the evidence. We therefore hold that the opinion in the former appeal, reported at 21 N.C. App. 497, 204 S.E. 2d 903, is not authoritative.

During the trial which resulted in this appeal, defendant timely made his motions for a directed verdict for the defendant. But for the former opinion of this Court in this case, it seems obvious that the trial judge would have directed a verdict for defendant upon this trial. Faced with our opinion, the trial judge let the case go to the jury and then set aside the verdict when it was returned for plaintiffs.

Plaintiffs have now had two opportunities to present their evidence, and, in our opinion, they have failed to present evidence sufficient to support a verdict in their favor. In our view justice will be served if we now reverse the order for a new trial, affirm the order setting aside the verdict, and remand this case for entry of a judgment directing a verdict for the defendant in accordance with defendant's motion made at the close of all the evidence. It is so ordered.

Reversed in part. Affirmed in part. Remanded for entry of judgment.

Judges PARKER and ARNOLD concur.

IMMANUEL BAPTIST TABERNACLE CHURCH OF THE APOSTOLIC FAITH v. SOUTHERN EMMANUEL TABERNACLE CHURCH, APOSTOLIC FAITH

No. 7519SC328

(Filed 1 October 1975)

1. **Appeal and Error § 57— findings of fact — conclusiveness on appeal**

The trial court's findings of fact are conclusive if supported by any competent evidence even though there is evidence to the contrary that would support different findings.

2. **Religious Societies and Corporations § 3— congregation as governing body — deed made by trustees — unauthorized conveyance**

The trial court's finding that the affairs of the plaintiff church were conducted by the congregation was tantamount to a finding that the congregation was plaintiff's governing body; therefore, the trial court's conclusions of law that plaintiff was a congregational church in respect to its property, that a meeting of the congregation would be necessary to authorize a conveyance of the church property, and that the trustees of plaintiff did not have authority to execute a deed to defendant were proper in the absence of a finding that the congregation had empowered a subordinate group to convey its real property.

3. **Appeal and Error § 28— finding of fact — failure to note exception — no consideration on appeal**

While there was some evidence tending to show that plaintiff ratified the action of its trustees in executing a deed to defendant, defendant made no request that the court find facts relating to ratification and noted no exception to the failure of the court to find such facts; therefore, the question of ratification was not presented on appeal.

4. **Appeal and Error § 26— assignment of error to signing of judgment**

An assignment of error to the signing of the judgment presents the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 31 January 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 26 August 1975.

In this civil action, instituted 7 November 1973, plaintiff asks the court to set aside a deed which purports to convey to defendant a parcel of land in Rowan County. Material allegations of the complaint are summarized as follows:

Plaintiff is a religious society of Rowan County, North Carolina, and defendant is a Florida corporation with principal

place of business in that state. On 27 November 1942, the subject property was conveyed to J. H. Smith, J. C. Mills and Mame White as trustees for plaintiff. On 31 July 1946, said trustees executed and delivered to defendant a purported deed for said property which deed was recorded in Rowan County Registry. The 1946 deed was executed by said trustees without consideration, and without any authority from plaintiff's congregation; and said congregation has never directed, approved, ratified, or confirmed the conveyance of said property.

Defendant filed answer denying that the conveyance was made without consideration or authority. Jury trial was waived and following a trial, the court entered judgment finding facts summarized in pertinent part as follows:

Sometime prior to July 1946, (defendant's) Bishop Mills and now Bishop Cutler approached the congregation of plaintiff church with respect to affiliating with defendant. Prior to July 1946, several members of plaintiff's congregation met in Statesville with Bishop Mills and others at which time plaintiff's trustees and those present decided to convey the subject property to defendant. Pursuant thereto said deed was executed by Trustees Smith, Mills and White but the question of conveying the land to defendant was never presented to, or approved by, plaintiff's congregation. From time to time thereafter, Bishop Cutler assured certain members of plaintiff that the purpose of the deed was not to take the property from plaintiff or its congregation. No money was paid by defendant for said deed and since 1946 plaintiff has made various improvements to its church property. Defendant has not contributed any sum for the betterment of plaintiff's property or its programs. On occasions since 1946, certain of plaintiff's members talked with defendant's bishop at which times he assured them the property still belonged to plaintiff and that it would get title to the property. The affairs of plaintiff are conducted by the congregation; plaintiff is a congregational church with respect to its property and in order to convey property a proper meeting of the congregation would be necessary to vote on the question and approve same before a deed could be made. The trustees held legal title to the property for the use and benefit of plaintiff's congregation.

The court concluded that in 1946 Trustees Smith, Mills and White did not have authority from plaintiff's congregation to execute the deed dated 31 July 1946, therefore, said deed is void and of no effect. The court adjudged that the deed to defendant

is void and that plaintiff is the legal owner of the subject property.

Defendant appealed.

Woodson, Hudson, Busby & Sayers, by Max Busby, for plaintiff appellee.

Burke, Donaldson & Holshouser, by John L. Holshouser, Jr., for defendant appellant.

BRITT, Judge.

[1] By its first assignment of error, defendant contends the court erred in making certain findings of fact. We find no merit in the assignment. It is well settled that the court's findings of fact are conclusive if supported by any competent evidence even though there is evidence to the contrary that would support different findings. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223. A summation of the testimony here would serve no useful purpose; it suffices to say that we have reviewed the evidence and conclude that it supports the findings of fact.

[2] By its second assignment of error, defendant contends the court erred in its conclusions of law and particularly in concluding that plaintiff is a congregational church in respect to its property, that a meeting of the congregation would be necessary to authorize a conveyance of the church property, and that the trustees did not have authority to execute the deed to defendant. We find the assignment without merit.

G.S. 61-4 provides in pertinent part: "The trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances, ... "

The threshold question confronting the trial court in the instant case was who constituted the governing body of plaintiff church. See *Atkins v. Walker,* 284 N.C. 306, 319, 200 S.E. 2d 641 (1973). On sufficient evidence, the court found that "the affairs of the plaintiff church are conducted by the congregation." We think this was tantamount to a finding that the congregation was plaintiff's governing body; therefore, the court's conclusions of law were proper in the absence of a finding that the congregation had empowered a subordinate group to convey its real property.

[3] Defendant argues, *inter alia*, that plaintiff ratified the action of its trustees in executing the 1946 deed. While there was some evidence tending to show ratification, defendant made no request that the court find facts relating to ratification and noted no exception to the failure of the court to find such facts. That being true, the question of ratification is not presented on appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 28, p. 159.

[4] By its third assignment of error, defendant contends the court erred in signing the judgment. This assignment presents the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and whether the judgment is regular in form. *Ibid*, § 26, pp. 152-53. We hold that no error of law appears on the face of the record, the facts found or admitted support the judgment, and the judgment is regular in form.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. RICKY MURRAY

No. 7515SC501

(Filed 1 October 1975)

1. **Criminal Law § 88— cross-examination — conclusiveness of answer — motive in testifying**

In this prosecution for breaking and entering, defendant was not bound by the answer of a State's witness on cross-examination that no promises had been made to him concerning his testimony and that he had not stated to a defense witness that prison authorities had told him that he would serve the entire maximum portion of his sentence if he did not testify against defendant, and the trial court erred in the exclusion of testimony by the defense witness that the State's witness had made such a statement to him, since answers on cross-examination tending to show motive and interest of the witness in testifying against defendant are not conclusive.

2. **Burglary and Unlawful Breakings § 5; Criminal Law § 10— accessory before fact to break-in**

Defendant could be guilty at most of being an accessory before the fact to a felonious breaking and entering where the evidence

tended to show that defendant drove two others to a grill, advised them how to break in through a panel in the back door, and left them there, and that defendant was to return later and pick them up, and there was no evidence that defendant was present or was situated where he could give advice, aid or encouragement to the perpetrators of the break-in.

APPEAL by defendant from *Walker (Ralph A.), Judge.* Judgment entered 20 March 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 25 September 1975.

Defendant was tried on his plea of not guilty to an indictment charging him with felonious breaking and entering. The State's evidence showed that at approximately 12:40 a.m. on 7 January 1974 a Burlington Police Officer, observing that a section of the door at the rear of the Queen Ann Grill had been removed, entered the building and apprehended therein Michael Allison and Ronald Stewart. Allison testified for the State that earlier in the evening he, Stewart, one Michael Moize, and defendant had been together, that defendant drove them to the Queen Ann Grill and advised them how to break in through a panel in the back door, that he and Stewart got out of the vehicle, that defendant was to return later and pick them up, that he and Stewart broke into the Grill and gathered anything of value, and that they had been in the Grill about 45 minutes when the officer arrested them. The owner of the Grill testified that he had not given defendant or anyone else permission to enter the Grill.

Stewart, presented as a witness for the defense, testified that he, Moize, and Allison were involved in the break-in but that defendant did not have anything to do with it, that he had borrowed defendant's car for the purpose of going to buy some beer, and that Moize drove the car to the Grill. Defendant presented evidence that he was at home when the break-in of the Grill occurred.

The jury found defendant guilty and from judgment on the verdict imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Claudette Hardaway for the State.

John P. Paisley, Jr. for defendant appellant.

PARKER, Judge.

[1] The State's witness, Allison, testified that he had received a one-day to four-year sentence for his part in the break-in at the Queen Ann Grill. On cross-examination he denied that any promises had been made to him concerning his testimony and specifically denied that while in the courtroom on the morning of defendant's trial he stated to defendant's witness, Ronald Stewart, that he had been told that he would serve the entire four years if he did not testify in this case. When presenting evidence for the defense, defendant's counsel asked Stewart to tell the jury what Allison had stated to him on the morning of the trial. Upon objection being made by the district attorney, the court sent the jury out and conducted a voir dire hearing. At this hearing Stewart testified in the absence of the jury that Allison stated to him on the morning of defendant's trial that the officials at Umstead Youth Center where Allison was incarcerated had told him "that if he did not testify for the State that they would see to it that he did pull the maximum for his sentence." At the voir dire hearing Allison denied that he had made any such statement to Stewart and denied that any official of the Department of Correction had threatened him or said that he would have to pull four years if he didn't testify for the State. At the conclusion of the voir dire examination the court found as a fact that Allison was incarcerated as a committed youthful offender, that he was under review for conditional release, that his release was in no way connected with his giving testimony in this cause, and concluded that Allison's testimony was given without threat or promise having been made by officials of the State of North Carolina.

In taking from the jury's consideration Stewart's testimony as to what Allison had stated to him on the morning of the trial, the court committed error.

> "It is a general rule of evidence in North Carolina 'that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of

the witness toward the cause or parties.' " *State v. Long,* 280 N.C. 633, 639, 187 S.E. 2d 47, 50 (1972).

Here, the question put to Allison on cross-examination was clearly as to a matter tending to show his motive and interest in testifying against the defendant. Therefore, defendant was not bound by Allison's answer but was entitled to prove the matter by other witnesses. 1 Stansbury's N. C. Evidence (Brandis Revision) § 48, p. 137. The State's entire case depended solely upon Allison's testimony. No other evidence connected defendant in any way with the crime charged. Allison's credibility was thus the paramount matter for the jury to determine, and when the court excluded Stewart's testimony from the jury's consideration as noted above, defendant suffered prejudicial error for which he is entitled to a new trial.

[2] Apart from the foregoing, there is no evidence in the record which would support a finding that at the time the break-in was committed, defendant was present or was situated where he could give Allison and Stewart any advice, aid, or encouragement. Since there was no evidence that defendant was either actually or constructively present when the offense was committed, he could be guilty at most of being an accessory before the fact. Upon remand of this case, defendant may be tried under the original bill of indictment for the offense of being an accessory before the fact to the felonious breaking and entering described in the indictment. *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972). In this connection, however, we note that the original bill of indictment describes the premises entered as "a building occupied by Gilbert Pore trading as Queen Ann Grill used as a restaurant located at 203 Queen Ann Street, Burlington, North Carolina," while the evidence indicates that the building entered was one occupied by Gilbert Pore trading as Queen Ann Grill located at 803 Queen Ann Street. Although we do not consider the discrepancy in the number of the street address to constitute a fatal variance in view of the other language identifying the premises, it may be that the district attorney, should he so elect, may decide to prepare a new bill of indictment charging defendant with being an accessory before the fact to the felonious breaking and entering by Allison and Stewart of the building occupied by Pore trading as the Queen

Ann Grill, designating the building by the correct street number address.

New trial.

Judges BRITT and CLARK concur.

CHARLES M. WYATT v. JUDY P. WYATT

No. 7525DC369

(Filed 1 October 1975)

1. **Divorce and Alimony § 23— child support — separation agreement — modification by court**

Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable; however, no agreement between husband and wife will serve to deprive the courts of their authority to protect the interests and provide for the welfare of infants.

2. **Divorce and Alimony § 23— child support — separation agreement — modification by court**

The trial court erred in holding that the parties to a separation agreement were bound by the amount of child support provided for in the agreement where the court found as a fact that the child is substantially in need of maintenance and support from her father and that the father has the present ability to support the child.

APPEAL by defendant from *Tate, Judge.* Judgment entered 14 February 1975 in District Court, BURKE County. Heard in the Court of Appeals 28 August 1975.

Plaintiff and defendant entered into a separation agreement on 18 May 1973. According to this agreement the plaintiff would pay $65.00 each month for the support of his daughter, Judith Mellissa Wyatt, and her medical expenses. The defendant agreed to pay the dental expenses of her child.

On 24 September 1973 plaintiff obtained an absolute divorce from his wife Judy P. Wyatt. The judgment entered in that action did not refer to the separation agreement nor did it provide for the support of the minor child. It did, however, place

the custody of the child with the defendant Judy P. Wyatt, with visitation privileges to plaintiff.

On 17 January 1975 defendant filed a motion in the divorce action asking the court to amend its order of 24 September 1973 by entering an order of support of the child in the amount of $100.00 per month and in addition thereto all medical and dental expenses incurred by the minor child.

At the hearing upon defendant's motion, both parties presented evidence. In summary, the court made findings of fact and drew therefrom conclusions of law as follows: Plaintiff has a gross income of $538.00 per month and a net take home pay of $340.00. As a part-time student he is receiving V.A. educational benefits of $180.00 per month. He has received pay raises of ten to twelve percent since the separation agreement was executed.

Plaintiff has remarried and his wife is employed and contributes to the family household expenses. The monthly expenses of plaintiff's present family amount to $382.55 together with educational expenses of $35.00 per semester.

Defendant has a gross income of $590.00 and a net take home pay of $316.00 after certain deductions including a car payment of $70.00. Defendant's monthly needs amount to between $175.25 and $185.25.

The monthly needs of Judith Mellissa Wyatt amount to between $190.25 and $200.25 excluding medical and dental expenses.

Judith Mellissa Wyatt is a dependent child of plaintiff, is substantially in need of maintenance and support from her father, and the plaintiff-father has the present ability to support his daughter. The mother is supplying the needs of the child over and above the monthly payment of $65.00 contributed by the father.

At the time of the execution of the separation agreement the defendant and the child were residing with defendant's mother. The defendant was incurring no expense for rent, electricity and water, heat and telephone, since all of these were being provided free of charge by defendant's mother. The child was not then enrolled in public schools and therefore required no transportation expense to and from school and did not require expenditures for school lunches. These expenses totaling approxi-

mately $120.00 per month were not in existence when the separation agreement was executed and these items constitute change of circumstances relating to the needs of the child. The court further found and concluded the following:

> The Deed of Separation does not state the specific basis for arriving at the $65.00 per month, and therefore this Court cannot make findings as to the specific items contemplated by the parties in executing the agreement, but nevertheless concludes that the six change of circumstances items of rent, electricity and water, heat, telephone, public school lunches, and transportation to and from school, nevertheless are of a nature which reasonably should have been contemplated by the parties at the time of the agreement, and that as a matter of law they do not constitute 'material change of circumstances' as the Court understands that phrase.
>
> Based upon the foregoing the Court concludes as a matter of law where parties to a separation agreement agree upon the amount for the support and maintenance of their minor child there is presumption in the absence of evidence to the contrary that the amount mutually agreed upon is just and reasonable, and that the parties have voluntarily bound themselves by a separation agreement and the Court is not warranted in ordering an increase in the absence of a finding of a material change in conditions or of the need for such increase.

From an order finding that there had been no material change in conditions or of the need for such increase and a refusal to grant the requested increase, defendant appeals.

John H. McMurray, for plaintiff appellee.

Byrd, Byrd, Ervin and Blanton, P.A., by Joe K. Byrd, for defendant appellant.

MARTIN, Judge.

[1] Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487 (1963). However, no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as

statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court. The ultimate object is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967). The welfare of the child is the "polar star" in the matters of custody and maintenance.

[2] The trial court erred in holding that the parties were bound by the separation agreement since it had found as a fact that the child is substantially in need of maintenance and support from her father and that her father has the present ability to support his daughter.

The case is remanded for further proceedings in accordance with this decision.

Remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. IRVIN H. RESPASS, JR.

No. 752SC335

(Filed 1 October 1975)

1. **Burglary and Unlawful Breakings § 6— jury instructions — indictment different — no prejudice to defendant**

Where a bill of indictment charged defendant with breaking or entering a "building," the trial court's instruction to the jury that to convict defendant of felonious breaking or entering the State had to prove beyond a reasonable doubt that defendant broke into or entered both a house and a shed was not prejudicial to defendant.

2. **Larceny § 9— variance in indictment and instructions — no prejudicial error**

Where a bill of indictment alleged that defendant committed felonious larceny of property of a value of more than $200 but where the court instructed the jury that they should find defendant guilty of felonious larceny if they concluded that the larceny occurred as the result of a breaking into or entering of a building, the variance was not fatal since both the indictment and the instructions included the lesser offense of misdemeanor larceny, the jury must necessarily have

found that all the elements of misdemeanor larceny were satisfied, and the verdict therefore should have been considered as a finding of guilty of misdemeanor larceny.

3. **Larceny § 8— ownership of buildings — instruction no expression of opinion**

The trial court's statement that the buildings in question were owned by a specified person while instructing the jury on a breaking and entering charge did not amount to an expression of opinion on a charge of larceny of property from the buildings when the statement is considered contextually.

4. **Criminal Law § 114— jury instructions — no expression of opinion**

Trial court's failure to instruct the jury that the court's particular choice of testimony in reviewing the evidence in no way should be taken as an expression of opinion by the court as to the strength or relevancy of the evidence did not amount to an expression of opinion by the trial court.

5. **Criminal Law § 6— intoxication of defendant — no instruction required**

Where the evidence tended to show that defendant was able to shoot a hog and shoat, field dress the shoat and carry it away and put it in his father's freezer, carry away goods from the farm, and operate a tractor with skill sufficient to retrieve his car from a muddy field in which it had become stuck, the trial court was not required to instruct the jury *sua sponte* on the effect of defendant's intoxication as negating the specific intent required in a felonious breaking or entering, since such instruction was required only if there was evidence that defendant was so overcome by an intoxicant that he had lost the capacity to think and plan.

6. **Criminal Law § 126— polling jury — misunderstanding by juror — unanimity of verdict**

Defendant was not denied his right to an unanimous verdict where the jury was polled and one juror hestitated to affirm her vote because she did not understand the clerk's question as to whether she still assented thereto.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 15 January 1975 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 26 August 1975.

Defendant was indicted for felonious breaking or entering and felonious larceny of property valued in excess of $200. Upon plea of not guilty as to each charge the jury returned a verdict of guilty as to each charge. From judgment sentencing him to five to seven years on each offense, the sentences to run consecutively, defendant appealed.

The State's evidence tended to show that the defendant, who had been drinking, broke into and entered a farm equipment

shed and an abandoned farmhouse. In addition to taking various farm goods and tools, the defendant shot and killed a sow and a shoat. Defendant put the shoat in the station wagon he was driving and carried it to his father's house and put it in the freezer. Other items taken were put in the station wagon and some of the items were later removed and placed in a corn field.

Attorney General Edmisten, by Associate Attorneys Jerry J. Rutledge and Robert Gruber, for the State.

Samuel G. Grimes for defendant appellant.

MORRIS, Judge.

Defendant brings forward ten assignments of error. After grouping defendant's major contentions by subject matter, we find that defendant presents for this Court's disposition alleged problems of (1) variance; (2) prejudicial opinions rendered by the court in violation of G.S. 1-180; (3) erroneous jury instructions regarding intoxication, burden of proof and larceny; and (4) a constitutionally invalid verdict because of an allegedly incompetent juror's purported disaffirmance of her verdict.

[1] The defendant first asserts that the charges to the jury regarding both the breaking or entering and felonious larceny exceed and vary from the averments in the respective bills of indictment. Defendant points out that in the first bill of indictment he was charged with breaking or entering a "building." In instructing the jury, the trial court stated that the defendant should be found guilty of felonious breaking or entering if they should find beyond a reasonable doubt that defendant broke a window of a "house" and entered therein "AND" broke a lock on a door to a "shed" and entered therein. Defendant contends that this charge is improper because the jury was left with the impression that they could find defendant guilty as charged even though they might have had some reasonable doubt as to whether defendant broke and entered the farmer's shed. We disagree. This instruction, if erroneous, operates in defendant's favor. To convict the defendant of felonious breaking or entering the State had to prove beyond a reasonable doubt that defendant broke into or entered *both* the house *and* the shed. While the general rule is that "a charge which goes beyond the averments of the indictment is prejudicial," 3 Strong, N. C. Index 2d, Criminal Law, § 113, if prejudice could have resulted from the variance, it could only result to the State and not the defendant. In this instance, the defendant has no reason to complain.

[2] The defendant also contends there is fatal variance between the larceny indictment and the charge to the jury. The second bill of indictment alleged that defendant committed felonious larceny of property of a value of more than $200. The court, however, instructed the jury that they should find defendant guilty of felonious larceny if they concluded that the larceny occurred as the result of a breaking into or entering of a building. The variance, however, is not fatal. G.S. 15-170 provides that "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . . " Here, both the indictment and the instructions included the lesser offense of misdemeanor larceny. The jury must necessarily have found that all the elements of misdemeanor larceny were satisfied. Therefore, the verdict should be considered as a finding of guilty of misdemeanor larceny. See *State v. Benfield,* 278 N.C. 199, 179 S.E. 2d 388 (1971). The Supreme Court has stated that " . . . the misdemeanor of larceny is a less degree of the felony of larceny within the meaning of G.S. 15-170." *State v. Cooper,* 256 N.C. 372, 380, 124 S.E. 2d 91 (1962).

[3] Defendant next argues that the court rendered prejudicial opinions in violation of G.S. 1-180. The court stated that the buildings in question were owned by one Raymond Bennett while instructing the jury as to the breaking or entering charge. Defendant cites this as prejudicial error because the matter of ownership was a fact in issue as to the larceny charge. This had the effect, the defendant contends, of directing the jury as to an element that the State must prove beyond a reasonable doubt. To sustain this assignment of error would require our examining this portion of the charge isolated from its context. When examining a court's instructions upon appellate review, we must construe the entire charge contextually and "isolated portions will not be held prejudicial when the charge as [a] whole is correct. . . . If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. . . . 'It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. . . . ' " *State v. Lee,* 277 N.C. 205, 214, 176 S.E. 2d 765 (1970). This assignment of error is overruled.

[4] Defendant also asserts prejudicial error in the court's failure to instruct the panel that the court's particular choice of testimony in reviewing the evidence in no way should be taken as an expression of opinion by the court as to the strength or relevancy of the evidence. In the court's failure to so instruct, defendant finds an expression of opinion by the court and contends that the judge's statement that the jury should ultimately "rely on its own recollection" is not sufficient to overcome this failure. Defendant cites no authority for his position but argues that the court's failure becomes particularly important in this case because the court failed to give an instruction on the effect of intoxication. The court's admonishing the jury to rely on its own recollection of the evidence is sufficient.

[5] The defendant next attacks the court's instructions as prejudicial because of its failure to instruct the jury *sua sponte* on the effect of defendant's intoxication as negating the specific intent required in a felonious breaking or entering. It is true that intoxication is an affirmative defense and does not require a special plea.

> "However, to avail the defendant and require the court to explain and apply the law in respect thereto, there must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *State v. Cureton,* 218 N.C. 491, 495, 11 S.E. 2d 469 (1940).

The evidence in the case before us tended to show that defendant, though intoxicated, was far from that drunken point where he "lost the capacity to think and plan." Though no great skill or manual dexterity was required, the defendant was able to shoot a hog and shoat, field-dress the shoat and carry it and put it in his father's freezer, carry away goods from the farm, and in fact operate a tractor with skill sufficient to retrieve his car from a muddy field in which it had become stuck. He may have been intoxicated to the point that his actions were foolhardy, but he was not so overcome by the excessive consumption of alcohol that he had lost the capacity to think and plan. In short, the evidence was not sufficient to require an instruction, *sua sponte.*

The defendant also maintains that the court failed properly to instruct the jury as to the State's burden of proof as to each and every element of each offense, and failed to define the lar-

ceny element of felonious breaking or entering. A contextual reading of the charge, however, indicates that the court did adequately define "larceny" and properly placed the burden of proof upon the State.

[6] Finally, defendant assigns as error the court's refusal to grant defendant a mistrial, judgment notwithstanding the verdict, or new trial in light of Juror Puckett's alleged refusal to affirm her vote. After rendering its verdict, the jury was polled and the following occurred when Juror Puckett was questioned:

"CLERK: Do you find the defendant Irvin H. Respass, Jr. guilty of felonious breaking or entering and guilty of felonious larceny?

JUROR PUCKETT: Yes.

CLERK: Is that your verdict and do you still assent thereto?

JUROR PUCKETT: Do I still . . . .

COURT: Do you understand the question?

JUROR PUCKETT: Yes, she said do I find him guilty.

COURT: She said, do you still assent thereto.

JUROR PUCKETT: What do you mean by that?

COURT: She means do you still agree that is your verdict?

JUROR PUCKETT: Well, I can't agree on it.

COURT: Well, answer the question. Ask her the question again. Please listen and try to understand it. If you don't understand it, we will explain it to you.

CLERK: Do you find the defendant Irvin H. Respass, Jr. guilty of felonious breaking or entering and guilty of felonious larceny?

COURT: Answer that question.

JUROR PUCKETT: Oh, yes, ma'am.

CLERK: Is that your verdict and do you still assent thereto?

COURT: That means do you still agree that is your verdict?

JUROR PUCKETT: Oh, no ma'am. For that, I don't stay up here all the time.

COURT: No, do you understand what she means when she says, 'Do you still assent thereto?' You have said you find him guilty of breaking or entering, felonious breaking or entering and felonious larceny . . . .

JUROR PUCKETT: Oh, yes, sir.

COURT: She has asked additionally, 'Is that your verdict and do you still assent thereto?' Do you still say that?

JUROR PUCKETT: I still say that.

COURT: All right."

It is apparent from the record that Juror Puckett was not disaffirming her vote. She was merely unaware of the meaning of the word "assent" and found the court's question confusing. Indeed, the court clerk finally asked her: "*Do* you find the defendant . . . guilty?" (Emphasis supplied.) When asked that question, framed in the present tense, Juror Puckett clearly indicated that she still found the defendant guilty as charged. Whatever difficulty and confusion Juror Puckett had went to her inability to understand the meaning of the word "assent" and not to her verdict. Defendant's constitutional right to a unanimous verdict was not abridged. Moreover, the record does not indicate that Juror Puckett was an incompetent juror in this case.

As to No. 74CR1369—Breaking or entering—no error.

As to No. 74CR1368—Larceny—remanded for resentencing.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. KEVIN EUGENE WELLS

No. 7519SC352

(Filed 1 October 1975)

1. **Narcotics § 4— constructive possession defined**

Constructive possession is that which exists without actual personal dominion over the material, but with an intent and capability to maintain control and dominion over it.

2. **Narcotics § 4.5— failure to instruct on constructive possession — no error**

In a prosecution for possession of MDA, the trial court did not err in failing to define and explain constructive possession since his general definition of possession was so broad in scope as to pertain in common to actual and constructive possession.

3. **Narcotics § 4— possession of MDA — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for possession of MDA where it tended to show that defendant rented and occupied an apartment in which MDA was found, though defendant was not present in the apartment at the time the MDA was found.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 27 February 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 28 August 1975.

The defendant pled not guilty to the charge of illegal possession of 3,4-methylenedioxy amphetamine, a Schedule I drug. On 11 August 1974, officers of the Salisbury Police Department obtained a search warrant to conduct a search of the upstairs apartment at 223 Wiley Avenue in Salisbury. The warrant was based on information from a reliable informant that he had recently seen marijuana in the apartment, and from a law officer that he went in the apartment on the same day and the odor of marijuana was present therein.

The State's evidence tended to show that the search warrant was executed at 9:30 p.m. and the controlled substance, commonly called MDA, was found in a bedroom of the two-bedroom apartment. No one was present in the apartment at the time the search was conducted. The defendant had rented and paid the rent on the apartment for the months of July and August, 1974. The defendant and his two brothers had been seen in the apartment on several occasions prior to the search, but there was no evidence that the defendant was seen there for

three days preceding the search. Three unidentified males were seen in the apartment within an hour before the search.

The search also revealed a letter from Duke Power Company addressed to *Cavin* (emphasis added) Wells which was postmarked 26 July 1974, and contained the utility listing of the apartment. A small bundle of plastic containing a white powdery substance was found by officers within a foot of the Duke Power letter. Male clothing was present in the same bedroom.

The defendant did not offer evidence.

The jury found defendant guilty as charged; and from a sentence to confinement as a committed youthful offender, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Conrad O. Pearson for the State.

Carlton, Rhodes & Thurston by Gary C. Rhodes for defendant appellant.

CLARK, Judge.

The validity of the search warrant and the search pursuant thereto were not questioned on appeal.

[1] The defendant assigns as error the failure of the trial court to define and explain constructive possession. Constructive possession is that which exists without actual personal dominion over the material, but with an intent and capability to maintain control and dominion over it. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972). Cases dealing with constructive possession were collected in *State v. Allen,* 279 N.C. 406, 410, 183 S.E. 2d 680, 683 (1971), wherein Justice Branch for the Court quoted the following language from *People v. Galloway,* 28 Ill. 2d 355, 192 N.E. 2d 370. "Where narcotics are found on premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt." See also, *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972).

[2] The trial judge, in his instructions to the jury, did not define and explain constructive possession but did define possession as follows: " . . . that a person possesses a controlled sub-

stance when he has either by himself or together with others both the power and intent to control the disposition or the use of that substance." This definition of possession from N. C. Pattern Jury Instructions is brief and general, but we find it so broad in scope as to pertain in common to actual and constructive possession. The trial court properly could have added a definition of constructive possession and the inference that arises from the control of the premises; the failure to do so was not error.

[3] The defendant also contends that the trial court erred in overruling his motion for judgment of nonsuit. The State may overcome this motion by evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Harvey, supra,* and *State v. Allen, supra.*

In this case it is our opinion that the evidence of the defendant's lease of the apartment, his occupation of the same, together with all the other evidence, was sufficient to justify the jury in concluding that the defendant, either alone or jointly with others, was in control of the apartment and in possession of the MDA found therein. The trial judge correctly overruled defendant's motion for judgment of nonsuit.

We have examined the entire record and find

No error.

Judges MORRIS and VAUGHN concur.

JANIE M. CLARK v. ABRAHAM BODYCOMBE

No. 7515SC278

(Filed 1 October 1975)

Automobiles §§ 62, 83— striking pedestrian — absence of negligence — contributory negligence

In an action to recover damages for personal injuries sustained by plaintiff when she was struck by defendant's automobile, plaintiff's evidence was insufficient to show negligence by defendant and established her own contributory negligence as a matter of law where it tended to show that plaintiff was walking westerly on the right-hand side of the street, the weather was misty and hazy, defendant

was driving on the street in a westerly direction, plaintiff stepped into the street to go around an automobile parked in a driveway and was struck by defendant's automobile, defendant's headlights and windshield wipers were on, defendant has had two cataract operations and his peripheral vision is limited, and 73 feet of medium skidmarks were found in the westbound lane of the street leading to defendant's car and veering to the right.

Judge CLARK dissenting.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 12 November 1974 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 June 1975.

Plaintiff instituted this action seeking to recover damages for personal injuries sustained when she was struck by an automobile driven by defendant. The accident occurred on 14 December 1972 at approximately 5:15 p.m. on West Rosemary Street in Chapel Hill.

In her complaint plaintiff alleged that defendant was negligent in operating his automobile at an excessive speed under existing conditions and in failing to keep a proper lookout. Defendant denied negligence and alleged that plaintiff was contributorily negligent in failing to keep a proper lookout for her own safety and in failing to yield the right-of-way while crossing the street at a place not an intersection.

The cause came on for hearing and both parties testified, defendant as an adverse witness for plaintiff. At the close of all the evidence the court granted defendant's motion for directed verdict. From judgment dismissing the action, plaintiff appealed to this Court.

Joseph I. Moore and James R. Farlow, by James R. Farlow, for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

ARNOLD, Judge.

The sole question presented by this appeal is whether the evidence was sufficient to submit the case to the jury. Plaintiff is entitled to have her evidence taken in the light most favorable to her, giving her the benefit of every reasonable inference to be drawn therefrom and resolving contradictions in her favor, and to have considered only so much of defendant's evidence

as is favorable to her. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969); *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499 (1963).

From the evidence, viewed in this manner, the jury could have found the following facts:

Plaintiff, then a sixty-two year old woman, was walking westerly on the right-hand side of Rosemary Street between Columbia Street and Pritchard Avenue. The weather was misty and hazy. Plaintiff was wearing a light blue and grey coat. She came to a driveway where an automobile blocked her path. Seeing no vehicles approaching, she stepped no more than a foot into the street and walked around the car. She had almost reached the other side of the driveway when she was hit. That was all she remembered. She was found lying in the street about two feet from the curb.

Defendant testified that he was proceeding west on Rosemary Street following a line of traffic at a speed of twenty to twenty-five miles per hour. His automobile headlights and windshield wipers were on. He has had two cataract operations, and, although he wears glasses which correct his vision to twenty-forty, his peripheral vision is limited. At the time of the accident his vision was further impaired by the lights of oncoming traffic. He saw a shadow to his left and struck a person on the left side of his car. Some 73 feet of medium skidmarks were found in the westbound lane of Rosemary Street, leading to defendant's car and veering to the right.

From the foregoing facts, we are of the opinion that plaintiff has failed to make out a case of negligence on the part of defendant and moreover has established her own contributory negligence as a matter of law.

At the time of the accident, plaintiff was under a duty to yield the right-of-way and to walk on the left side facing approaching traffic. Defendant had the right-of-way subject to a duty to exercise reasonable care and avoid colliding with plaintiff. G.S. 20-174(a), (d) and (e). Plaintiff also had a duty to exercise reasonable care for her own safety. *Jenkins v. Thomas,* 260 N.C. 768, 133 S.E. 2d 694 (1963); *Rosser v. Smith, supra; Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589 (1955). There is no evidence that defendant's automobile was traveling at excessive speed. While evidence of skidmarks suggests that defendant became aware of plaintiff's presence sooner than he

indicated in his testimony, there is no evidence that plaintiff was unaware of the approaching automobile or was unable to remove herself from its path. *Garmon v. Thomas, supra. See Jenkins v. Thomas, supra. See also Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246 (1945).

Plaintiff had the burden of showing both negligence and proximate cause. *See Tysinger v. Dairy Products, supra.* The evidence in this case does not show actionable negligence on the part of defendant. His motion for directed verdict was properly granted. The order of the trial court is

Affirmed.

Judge MARTIN concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

While the evidence is correctly stated in the majority opinion, it further appears that the defendant was 81 years of age and had limited peripheral vision. The evidence relating to the circumstances of the impact is conflicting. According to defendant's version, plaintiff ran across the street from his left and was struck by the left front of his car near the center of the street. According to plaintiff's version, she walked "no more than three inches from the curb" behind the car parked in the driveway and was almost across the driveway when struck.

We attach some significance to the facts that the westbound lane of the street was more than 13 feet wide; that the 1968 Ford was about six feet wide; and that the tire marks extending behind the car for 78 feet veered to the right from near the street center to the right side, the car stopping not more than two feet from the curb.

Considering the evidence in the light most favorable to the plaintiff, it is my opinion that the evidence was sufficient to take the case to the jury on the issue of defendant's negligence and that it does not establish her contributory negligence as a matter of law. I feel that the directed verdict was improvidently granted.

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 7526SC462

(Filed 1 October 1975)

1. **Searches and Seizures § 4— warrant to search premises — search of vehicle proper**

The trial court in a prosecution for possession of heroin did not err in allowing testimony with respect to a box and its contents found in the trunk of defendant's automobile which was parked in defendant's driveway, since a search warrant authorized a search of the premises of defendant.

2. **Criminal Law § 88— cross-examination — scope discretionary**

The scope of cross-examination is largely in the discretion of the trial court, and that discretion was not abused where the trial court allowed the prosecuting attorney to ask defendant who was charged with possession of heroin questions concerning the use of milk sugar in "cutting" heroin.

3. **Criminal Law § 169— testimony elicited by defendant — subsequent similar testimony proper**

Where defendant first introduced evidence as to the activity of IRS, he could not thereafter complain of questions concerning IRS put to him by the prosecuting attorney.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 20 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 September 1975.

Defendant was charged in a bill of indictment with possession of heroin and pleaded not guilty. Evidence pertinent to this appeal tended to show:

On 28 June 1973, J. H. Bruton of the Charlotte Police Department obtained a search warrant to search defendant's premises at 608 Georgetown Drive, Charlotte, N. C., for controlled substances. Accompanied by other officers, Mr. Bruton went to defendant's premises and in a search of defendant's home found a quantity of heroin and other evidence of narcotics. The officers also searched defendant's automobile which was parked in his driveway at 608 Georgetown Drive. In the trunk of the car they found a box which contained residue of a vegetable type material.

A jury found defendant guilty as charged, and from judgment imposing prison sentence of five years, to begin at expiration of certain sentences then being served, he appealed.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Olive, Downer, Williams & Price, by Paul J. Williams, for defendant appellant.

BRITT, Judge.

[1] First, defendant contends the court erred in admitting testimony with respect to the box and its contents found in the trunk of defendant's automobile. He argues that a search of the vehicle was not authorized by the search warrant. We find the contention without merit. In *State v. Reid,* 286 N.C. 323, 210 S.E. 2d 422 (1974), in a case involving illegal possession of intoxicating liquor, the court held that evidence seized from defendant's car, which was parked on his service station lot, was properly admitted where the officers searched the premise under a valid warrant which described them with particularity but did not specifically refer to the vehicle parked thereon. We think the same rule would apply to this case in which the search was for controlled substances.

Next, defendant contends the court erred "in allowing the Assistant District Attorney to ask irrelevant and prejudicial questions of the defendant." This contention also is without merit.

[2] In the first question challenged by this contention, the prosecuting attorney asked defendant if milk sugar was not used to "cut" heroin and defendant replied that he did not know that. Defendant was then asked if he had ever heard of milk sugar being used to "cut" heroin. Counsel's objection to the question was overruled but the record reveals no answer. It is settled that the scope of cross-examination is largely in the discretion of the trial court, *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50 (1970), and, in view of the testimony, we perceive no abuse of that discretion here.

[3] In the remaining questions challenged here, defendant was asked if Internal Revenue Service (I.R.S.) had not " . . . placed a levy on your possessions . . . " in the amount of $11,000. Defendant's objection to the question was overruled and defendant answered that " . . . [t]hey came out there and talked to me about it." He was then asked, "And the reason they did that was because they had enough evidence to prove you were a drug

dealer and enough money to levy on your possession (sic) in that amount, didn't they?" Defense counsel objected, defendant answered in the negative after which counsel moved for a mistrial. The court sustained the objection, denied the motion for mistrial, and instructed the jury not to consider " . . . at any point in your deliberations the Solicitor's statement as contained in that question. . . . "

The record reveals that on cross-examination of Officer Bruton, defendant elicited testimony showing that on the night of defendant's arrest Bruton searched defendant and took $1990 from him; that the money was not returned to defendant because I.R.S. took it from officers of the Charlotte Police Department. Thus it appears that defendant injected activity of I.R.S. into the evidence. It has been held many times that the admission of evidence over objection where evidence of similar import has been previously introduced without objection ordinarily is not prejudicial error. *State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). It is also established that where the court properly withdraws incompetent evidence from the consideration of the jury and instructs the jury not to consider it, any error in its admission is cured in all but exceptional circumstances. 2 Strong, N. C. Index 2d, Criminal Law, § 96, p. 630. While the stated rules do not directly apply to the question presented here, we think they are sufficiently close in point to support our conclusion that no prejudicial error was committed.

Finally, defendant contends the court erred in certain of its instructions to the jury. We have carefully reviewed the jury charge, with particular reference to the portions which defendant contends were erroneous, and conclude that the charge was free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

DORIS LOVELACE BOONE, MARY ATKINS LOVELACE AND JOE DAVID LOVELACE v. MARY BOONE

No. 7517DC419

(Filed 1 October 1975)

Appeal and Error § 7— son found in contempt — mother not aggrieved party — appeal dismissed

Defendant had no standing to appeal from an order finding her son in contempt of court as a result of his testimony in a child custody action between defendant and the children's mother and maternal grandparents, since defendant was not the party aggrieved. G.S. 1-271.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 28 February 1975 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 16 September 1975.

This is an action by plaintiffs to obtain custody of three minor children from defendant, their paternal grandmother; plaintiffs are the mother and maternal grandparents of the children. There have been two previous appeals in this cause; see opinions reported in 23 N.C. App. 680, 210 S.E. 2d 122 (1974), and 24 N.C. App. 135, 210 S.E. 2d 121 (1974).

The record discloses: At all times during the pendency of this action, the father of the children, Clyde Thomas Boone (Clyde), has been a prisoner in the North Carolina correctional system. In May 1974, Judge Harris entered an order granting plaintiffs custody of the children pending further orders of the court. Defendant appealed and thereafter disappeared with the children. The appeal was dismissed. On motion of plaintiffs, the cause came on for hearing at the 24 February 1975 Session of the Court to determine the whereabouts of the children. Clyde was called as a witness by plaintiffs and testified, among other things, that he did not know where defendant is, that he does not want to know where she is for fear that he would have to reveal her whereabouts, and that he does not inquire of his brother, who lives in California, as to where she is. He further testified that in May 1974, he told defendant to take the children and leave for the reason that he did not want his children raised by his wife's mother and sister.

Following the hearing, the court entered an order finding facts and concluding, *inter alia,* that Clyde has intentionally attempted to thwart and obstruct the orders of the court, and is

in willful and intentional contempt of the court for which he should be personally attached until such time as he shall have purged himself upon a showing of reasonable efforts to determine the whereabouts of defendant and children and to cause the children to be returned to the custody of plaintiffs.

Within ten days after the order was entered, defendant, through her counsel, gave notice of appeal.

Gwyn, Gwyn & Morgan, by Julius J. Gwyn, for plaintiff appellees.

Benjamin R. Wrenn, P.A., for defendant appellant.

BRITT, Judge.

By her three assignments of error, defendant contends the court erred (1) in declaring Clyde in contempt of court, (2) in concluding that the court had jurisdiction to declare Clyde in contempt, and (3) in ordering a copy of the order forwarded to the Department of Correction and the Parole Commission if Clyde failed to purge himself of contempt within 30 days of the order.

We do not reach the questions raised by the assignments of error for the reason that defendant has no standing to raise the questions. It is well settled in this jurisdiction that only the party aggrieved may appeal to the appellate court. G.S. 1-271; *Coburn v. Roanoke Land and Timber Corporation,* 260 N.C. 173, 132 S.E. 2d 340 (1963); *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219 (1944); *Duke Power Company v. Board of Adjustment,* 20 N.C. App. 730, 202 S.E. 2d 607 (1974); *cert. denied,* 285 N.C. 235, 204 S.E. 2d 22 (1974). Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed. *Gaskins v. Fertilizer Company,* 260 N.C. 191, 132 S.E. 2d 345 (1963).

For the reasons stated, the appeal is

Dismissed.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. VERNON LEE SILVERS

No. 7525SC370

(Filed 1 October 1975)

1. **Criminal Law § 66— identification of defendant — failure to hold voir dire — no error**

The trial court did not err in failing to conduct a *voir dire* before allowing an SBI agent to identify defendant as the person who sold him marijuana where defendant offered no objection to the agent's testimony and requested no *voir dire*.

2. **Narcotics § 4— possession of marijuana — identification of defendant — sufficiency of evidence**

Evidence in a prosecution for possession of marijuana was sufficient to be submitted to the jury where it tended to show that defendant sold marijuana to an SBI agent who had ample opportunity to observe defendant at the time of the sale.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 18 December 1974 in Superior Court, CATAWBA County. Heard in the Court of Appeals 29 August 1975.

Defendant was charged in a bill of indictment with the felonious sale and delivery of the controlled substance marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act. The jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of five years, the last of three of which were suspended, defendant appealed.

The State's evidence tended to show that on 17 August 1973, an agent of the State Bureau of Investigation bought one ounce of marijuana from the defendant for the sum of twenty dollars at the "Someplace Else Club" in Hickory.

The defendant's evidence tended to show that on the date in question he was in Greenville, North Carolina and not at a club in Hickory. He sold no marijuana to the agent or anyone else and had never seen the agent until after his arrest.

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

Williams, Pannell, Matthews & Lovekin, by Stephen L. Lovekin, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's contention that the trial judge should have, without request, conducted a voir dire before allowing the agent to identify defendant is without merit. Defendant offered no objection to the agent's testimony that he saw and talked with defendant for the purpose of buying drugs and that he recognized the defendant on trial as being the same man with whom he talked and who sold him an ounce of marijuana for twenty dollars on 17 August 1973.

Defendant did interpose one objection when the agent was about to tell what some unidentified person had told the agent about the possibility of buying marijuana from someone at the club. The objection may have been well taken as an objection to hearsay but does not relate to the agent's identification of defendant at trial. Both before and after the objection to which we have referred, the agent, without objection from defendant, identified defendant as being the man from whom he bought the marijuana.

[2] Defendant's primary argument, however, seems to be not that the agent's testimony was inadmissible but that his identification of defendant is incredible and, since that identification is the only evidence to connect defendant with the crime, his motion for nonsuit should have been granted.

We do not agree with defendant's argument that State's evidence disclosing that the agent did not know defendant before the purchase, did not see him again for about six months thereafter, could not describe the clothing defendant was wearing and that the lights in the club were dim, makes his identification so inherently unreliable as to require that the agent's credibility be removed from consideration by the jury.

The agent first talked with defendant at the bar in the club. About 15 minutes later he saw defendant standing at a pinball machine and asked defendant to sell him some marijuana. They discussed the amount and the price. When the agreement was concluded, defendant pulled a plastic bag part of the way out of his pocket, and, as requested, the agent pulled it the rest of the way out and handed defendant a twenty-dollar bill. He was standing right beside defendant and was able to see clearly his face and features. The agent remained in the club and saw defendant leave about 30 minutes later. The agent followed de-

fendant outside where the lights were much brighter and saw him get in a Buick Opel automobile. About 15 minutes later he saw defendant return to the club in the same automobile. After defendant's return the agent remained in the club about 30 minutes. The lights were brighter at some places in the club than they were at others. This evidence tends to show that the agent had a reasonable opportunity to observe defendant sufficiently to permit subsequent identification. The probative force of the evidence was for the jury.

After careful consideration of the record we conclude that there was no prejudicial error in defendant's trial.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. HOWARD PEARSON

No. 7525SC351

(Filed 1 October 1975)

1. **Assault and Battery § 15— jury instructions — recapitulation of evidence — no error**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in his charge to the jury by recapitulating some of the testimony of a neurosurgeon who examined the victim of the assault.

2. **Assault and Battery § 15— failure to define serious injury — no error**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to define serious injury.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 23 January 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 28 August 1975.

The defendant was tried upon a bill of indictment charging him with assault with a deadly weapon with intent to kill, inflicting serious injury. The jury found him guilty of assault with a deadly weapon inflicting serious injury, whereupon he was sentenced to a term of not less than six years nor more than ten years.

The evidence for the State tended to show the following. On 5 August 1974, Billy Norville, while working at his job, received a telephone call from Betty Pearson, wife of defendant. Mrs. Pearson requested that Norville come to her house. On his arrival he pulled in the driveway adjacent to the house, and Norville and Mrs. Pearson began talking. Mrs. Pearson was standing in the doorway of her house and Norville was still seated in his car. Norville felt a bullet hit his arm. He looked up and saw defendant shooting at him with a .22 caliber rifle. Defendant fired about eight times, and several of the bullets hit Norville, leaving him partially paralyzed. In Norville's pocket was found a .25 caliber pistol and on the back seat of his car was a 12-gauge shotgun and a bag of shells. Norville did not attempt to use either weapon. Defendant retrieved the shotgun, and fired it into the ground near where Norville was lying. Norville asked defendant to call an ambulance but he refused.

Officer Frank Browning of the Burke County Sheriff's Department was called to the residence of the defendant to investigate the shooting. In the course of this investigation Officer Browning advised the defendant of his constitutional rights in detail. Thereafter, defendant made a statement, which was later typed and signed, admitting that he shot Norville with a .22 caliber rifle. This statement was introduced into evidence without objection from defendant.

As a result of these injuries, Norville was hospitalized for 53 days, 4 of which were spent in the intensive care unit. He has been unable to work since the shooting and is not presently able to walk as he could before the shooting.

The evidence for the defendant tends to show the following. Norville had been courting defendant's wife and had tried to get her to leave defendant. He came to defendant's house after being warned to stay off the premises and to leave Mrs. Norville alone. Defendant was coming from the basement of his home and heard his wife and Norville talking. Defendant took his rifle from the head of the stairway and went out the door where he observed Norville reach over in the back seat of his car in the direction of a shotgun. Defendant fired about four rounds from the rifle at Norville.

Defendant also offered evidence tending to show that he is a man of good character and reputation in the community in which he resides.

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

James A. Simpson, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's assignment of error to a portion of the charge wherein the judge recapitulates some of the testimony of a neurosurgeon who examined Norville is without merit. Defendant does not argue that the judge misstated the testimony and, indeed, the record would clearly refute that contention.

Defendant appears to argue that the testimony was irrelevant and that the judge, by the act of recapitulating it, expressed the opinion that it had probative value. In the first place, the testimony was received without objection and secondly, the testimony is obviously relevant to aid the jury in determining the degree of Norville's injuries. The weight to be given that testimony, along with all the other evidence, is for the jury.

[2] In the only other assignment of error, defendant contends the judge erred in that he did not define "serious injury." Defendant made no request for a special instruction and did not submit a proposed definition to the judge. Moreover, the Supreme Court has said that further definition of the term "serious injury" is " . . . neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case." *State v. Jones*, 258 N.C. 89, 91, 128 S.E. 2d 1.

We find no error in defendant's trial.

No error.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. CHARLES HEYWARD GRIGGS

No. 7519SC481

(Filed 1 October 1975)

1. Automobiles § 127— drunken driving — sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for drunken driving where it tended to show that a highway patrolman

discovered defendant asleep on the front seat of a car parked partly on a public highway, defendant admitted to the patrolman that he had driven his car to that location and that after stopping the car he did not have anything to drink, defendant had the odor of alcohol on his breath, his eyes were bloodshot and watery, he was weaving and staggering, and he did not perform coordination tests satisfactorily, and defendant admitted at trial that he was drunk when arrested.

2. **Automobiles § 129— drunken driving — instructions — offense "upon a highway"**

In a prosecution for drunken driving, the trial court erred in failing to require the jury to find beyond a reasonable doubt that the offense was committed "upon a highway."

APPEAL by defendant from *Crissman, Judge.* Judgment entered 15 January 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 24 September 1975.

Defendant was charged in a warrant with operating a motor vehicle on 18 December 1974 on a public highway in Cabarrus County while under the influence of intoxicating liquor. After conviction in the District Court, he appealed to the Superior Court where he was tried de novo on his plea of not guilty.

The State's evidence showed: About 10:00 p.m. on 18 December 1974 Highway Patrol Officer Edwards found defendant lying down asleep on the front seat of a 1964 Chevrolet which was parked on Rural Paved Road 1594 with its two right side wheels on the shoulder of the road and the rest of the vehicle on the pavement. The motor was not running but the headlights were on high beam. No one else was in the vehicle. The patrolman had passed this location approximately twenty minutes earlier, and the car was not there at that time. When the patrolman returned, he found the car with defendant in it. The patrolman awakened the defendant, who then opened the door and got out. There was a strong odor of alcohol on his breath, he was weaving and leaning back against the car, and his eyes were bloodshot and watery. The patrolman placed defendant under arrest for public intoxication and read to him his constitutional rights under the Miranda decision. Defendant replied that he understood each of his rights and that he didn't need a lawyer. In response to questions from the patrolman, defendant stated that the vehicle belonged to him, that he was by himself, and that he was the driver. He told the officer that he stopped the car on the road because he was sleepy and that he did not have anything to drink after he stopped the car. When taken to jail, defendant

was wobbling and staggering and did not perform coordination tests satisfactorily. He refused to take a breathalyzer test.

The patrolman testified that Rural Paved Road 1594 is a public highway.

Defendant testified at his trial in Superior Court and admitted he was drunk but denied he was driving. He testified that his brother was with him.

The jury found defendant guilty, and from judgment imposing a six-month prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney David S. Crump for the State.

Williams, Willeford, Boger & Grady by Samuel F. Davis, Jr. for defendant appellant.

PARKER, Judge.

[1] There was ample evidence to warrant submitting the case to the jury. Not only was there strong circumstantial evidence that defendant drove his car upon the highway at a time when he was under the influence of intoxicating liquor, *see State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411 (1961), but there was here evidence that when arrested defendant admitted to the patrolman that he had driven his car to the location where it was found parked partly on the paved portion of the highway and that after stopping the car he did not have anything to drink. In his testimony at trial defendant admitted that when arrested he was drunk. There was no error in submitting the case to the jury.

[2] However, for error in the charge there must be a new trial. The three elements of the offense with which defendant was charged are: (1) driving or operating a vehicle, (2) upon a highway (or public vehicular area) within this State, (3) while under the influence of intoxicating liquor. G.S. 20-138(a); *State v. Kellum,* 273 N.C. 348, 160 S.E. 2d 76 (1968); *State v. Haddock, supra.* In charging the jury, the trial judge failed to require the jury to find beyond a reasonable doubt that the offense in this case was committed *upon a highway.* Failure to so instruct the jury was prejudicial error entitling defendant to

a new trial. *See State v. Springs,* 26 N.C. App. 757, 217 S.E. 2d 200 (1975).

New trial.

Judges BRITT and CLARK concur.

CHARLES R. GARDNER AND WIFE, AGATHA L. GARDNER v. EDWARD SALEM, ALSO KNOWN AS EDDIE SALEM, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF MAGGIE JOSEPH SALEM, AND GEORGE SALEM

No. 7526SC357

(Filed 1 October 1975)

Appeal and Error § 57— findings of fact unsupported by record — judgment improper

Where both plaintiffs and defendants prepared proposed judgments which contained different findings of fact and presented them to the judge with a request to be heard further, but the court without further consultation entered the judgment prepared and proposed by defendants, the record did not support the findings of fact from which the trial court drew its conclusions of law and entered judgment for for defendants.

APPEAL by plaintiffs from *Falls, Judge.* Judgment entered 5 February 1975 in the Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 August 1975.

This is a civil action wherein the plaintiffs, Charles R. Gardner, and wife, Agatha L. Gardner, seek to recover damages for the diminution in value of their property and for the deprivation of the full use and enjoyment of their property allegedly caused by the violation of restrictive covenants by the defendants, Edward Salem, individually and as Executor of the Estate of Maggie Joseph Salem, and George Salem; said covenants allegedly running with the land of defendants' property adjoining that of the plaintiffs. Plaintiffs also seek an injunction restraining future violations of said covenants by defendants.

The record discloses that immediately prior to trial counsel for both parties conferred with the Judge in chambers. The Judge, after listening to the contentions of the plaintiffs and statement of counsel as to the evidence that the plaintiffs would

introduce, informed the parties that he would grant a dismissal at trial at the close of plaintiffs' case. Thereupon, counsel for both parties agreed to stipulate to the testimony of the witnesses for the plaintiffs, and the Judge requested defendants to prepare a proposed judgment for the case. Defendants prepared a proposed judgment and presented it to the plaintiffs. Plaintiffs objected to paragraph 4 of the findings of fact of the proposed judgment and to paragraph 1 of the conclusions of law and prepared instead alternative proposals for the objectional paragraphs. Both proposed judgments were presented to the Judge with a request by the parties to be heard further in the matter when it was convenient for the Judge. But, thereafter, without any further consultation by either party and without any agreement by the parties to the proposed findings of fact contained in the alternative proposals of plaintiffs and defendants, the Judge entered the judgment proposed and prepared by the defendants. Plaintiffs excepted to the judgment and appealed.

Hugh J. Beard, Jr., for plaintiff appellants.

Gene H. Kendall for defendant appellees.

HEDRICK, Judge.

Plaintiffs' exception to the critical findings of fact raises the question of the sufficiency of the evidence or the stipulations in the record to support such findings.

The record before us demonstrates that the court heard no evidence and that the parties made no stipulations as to the facts. Thus, the record does not support the critical findings of fact from which the trial court drew its conclusions of law and entered judgment for the defendants. Because the record fails to support the judgment, the judgment must be vacated and the cause remanded to the Superior Court for further proceedings.

Vacated and remanded.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. LARRY LEVON HUGHES

No. 7521SC442

(Filed 1 October 1975)

1. **Narcotics § 4— possession of marijuana — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for possession of marijuana where it tended to show that officers stopped defendant to check his driver's license, frisked him, and discovered marijuana on his person.

2. **Arrest and Bail § 3; Searches and Seizures § 1— warrantless arrest — search incident thereto — legality**

Officers' arrest of defendant for operating a motor vehicle on a public highway without an operator's license was legal; hence, the search of defendant's person as an incident to the arrest was legal.

APPEAL by defendant from *Albright, Judge.* Judgment entered 20 March 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 September 1975.

In a warrant proper in form, defendant was charged with possession of marijuana. He was convicted in district court and appealed to superior court where he pled not guilty but was found guilty by a jury. From judgment imposing six months' prison sentence, to begin at expiration of another sentence being served, he appealed.

Attorney General Edmisten, by Assistant Attorney General Conrad O. Pearson, for the State.

Badgett, Calaway, Phillips & Davis, by Richard G. Badgett, for defendant appellant.

BRITT, Judge.

By his first and third assignments of error, defendant contends the court erred in denying his motions to dismiss interposed at the close of the State's evidence and renewed at the close of all the evidence. By his second assignment of error, defendant contends the court erred in denying his motion to dismiss on the ground that he was illegally searched. We find no merit in the assignments.

The evidence tended to show: On 21 November 1974, defendant was an inmate at a prison camp in or near Winston-Salem. On that date, while on routine patrol, Winston-Salem police offi-

cers, who knew defendant, saw him driving an automobile in the city. They followed him for several blocks after which he stopped at an apartment house complex. The officers drove up near defendant and asked to see his operator's license. When he failed to display his license, one of the officers told him he was under arrest. The officers proceeded to "frisk" defendant and detected a hard object in his coat pocket. Thinking the object might be a weapon, the officer then ran his hand into defendant's pocket and retrieved a pipe containing residue of marijuana and a plastic bag containing marijuana. He was then advised that he was under arrest for violation of the Controlled Substances Act. Testifying in his own behalf, defendant denied any knowledge of the pipe and marijuana being in his pocket. On cross-examination he admitted that earlier in 1974 he had been convicted twice for possession of marijuana, once for possession of cocaine, and several times for resisting arrest and assault on a police officer.

[1, 2] Clearly, the evidence was sufficient to survive the motions to dismiss. It is also clear that defendant's arrest for operating a motor vehicle on a public highway without an operator's license was legal, hence the search of his person as an incident to the arrest was legal. *State v. Streeter,* 283 N.C. 203, 195 S.E. 2d 502 (1973); *State v. Jackson,* 11 N.C. App. 682, 182 S.E. 2d 271 (1971), aff'd, 280 N.C. 122, 185 S.E. 2d 202 (1971).

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM HENRY HINTON

No. 7526SC408

(Filed 1 October 1975)

Criminal Law § 119— request for instructions — instructions given in substance — no error

While the court did not give instructions on reasonable doubt and presumption of innocence as lengthy as those requested by defendant, the court did give the requested instructions in substance.

APPEAL by defendant from *Chess, Judge.* Judgment entered 19 March 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 September 1975.

By indictment proper in form, defendant was charged with (1) breaking and entering the residence of J. H. Barbour, and (2) larceny of a television set, shotgun and camera pursuant to the breaking and entering. He pled not guilty.

Evidence against defendant included a written statement which he gave to police in which he admitted participation in the offenses charged. Following a voir dire hearing, the court found that the statement was given voluntarily.

The jury returned a verdict of guilty and from judgment imposing prison sentences, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Conrad O. Pearson, for the State.

Roger H. Bruny for defendant appellant.

BRITT, Judge.

Defendant's sole assignment of error is that the court erred in refusing to give jury instructions on reasonable doubt and presumption of innocence as requested by defendant in writing. We find no merit in the assignment.

The rule with respect to the question presented appears to be properly stated in 3 Strong, N. C. Index 2d, Criminal Law, § 119, p. 30, as follows:

> "Where a prayer for special instructions is aptly tendered, and the instructions requested are correct in law and are based upon the evidence adduced, it is error for the court to fail to give the instruction requested, in substance at least. But the court is not required to give such instructoins verbatim, it being sufficient if the court gives the requested instructions in substance."

In the case at hand, while the court did not give instructions on reasonable doubt and presumption of innocence as lengthy as those requested by defendant, we hold that the court gave the requested instructions "in substance" and the jury was properly charged on the legal principles involved.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. CARL WORTHINGTON

No. 7522SC415

(Filed 1 October 1975)

1. **Infants § 10— youthful offender — definition**

A youthful offender is a person under the age of 21 at the time of conviction. G.S. 148-49.2.

2. **Criminal Law § 134— youthful offender — finding required prior to sentencing**

Before sentencing a youthful offender under any other applicable penalty provision, the judge must expressly state that he finds the defendant will not derive benefit from commitment as a "committed youthful offender"; such finding need not be accompanied by supporting reasons and is not a subject for appellate review.

ON *certiorari* to review trial before *Seay, Judge.* Judgment entered 10 February 1975 in Superior Court, IREDELL County. Heard in the Court of Appeals 15 September 1975.

Defendant entered pleas of guilty to four charges of felonious breaking or entering and three charges of felonious larceny. The cases were consolidated and a judgment imposing a prison sentence of ten years was entered. Defendant was then 16 years old.

Attorney General Edmisten, by Assistant Attorney General Robert P. Gruber and Associate Attorney Jerry J. Rutledge, for the State.

Jay F. Frank, for defendant appellant.

VAUGHN, Judge.

[1] A youthful offender is a person under the age of 21 at the time of conviction. G.S. 148-49.2.

When sentencing a youthful offender the court may commit him to the custody of the Secretary of Correction as a "committed youthful offender." G.S. 148-49.4.

> "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." G.S. 148-49.4. (Emphasis added.)

In the case before us, the record discloses the following.

"Court-appointed counsel for the defendant asked the presiding Judge to commit the defendant as a committed youthful offender, which request the Court denied without further comment."

[2] It might be argued, therefore, that the court did consider the sentencing option, rejected it and thereby made an implied "no benefit" finding. We hold, however, that the plain meaning of the statute requires that, before sentencing a youthful offender under any other applicable penalty provision, the judge must expressly state that he finds the defendant will not derive benefit from commitment as a "committed youthful offender." That finding need not be accompanied by supporting reasons, *State v. Mitchell,* 24 N.C. App. 484, 211 S.E. 2d 645, and is not a subject for appellate review. Within the limits provided by law, the sentence to be imposed remains within the sole discretion of the trial court.

The judgment is vacated and the case is remanded to the end that the Superior Court conduct further proceedings, consistent with this opinion, and resentence the defendant.

Vacated and remanded.

Chief Judge BROCK and Judge MARTIN concur.

CHARLES A. NEWTON, DOING BUSINESS AS NEWTON'S HOME FURNISHINGS v. THE STANDARD FIRE INSURANCE COMPANY

No. 7527SC392

(Filed 1 October 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— two claims — dismissal of one — appeal premature

In an action to recover under an insurance policy and to recover punitive damages for refusal of defendant to pay the loss allegedly covered by the policy, plaintiff's appeal from the trial court's allowance of defendant's motion to dismiss plaintiff's claim as to punitive damages was premature, since the trial court's order adjudicated only one of plaintiff's two claims and the court made no determination to the effect that there was no just reason for delay. G.S. 1A-1, Rule 54(b).

Newton v. Insurance Co.

APPEAL by plaintiff from *Kirby, Judge.* Order entered 1 May 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 4 September 1975.

This is a civil action to recover $5,500 under an insurance policy issued by defendant to plaintiff and to recover punitive damages of $50,000 for refusal of defendant to pay his loss covered by the policy.

Defendant moved pursuant to G.S. 1A-1, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss plaintiff's claim as to punitive damages, and pursuant to G.S. 1A-1, Rule 12(f) to strike the allegations of the complaint relating to punitive damages.

The court allowed the motions and plaintiff appealed.

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

Hollowell, Stott and Hollowell, by L. B. Hollowell, Jr., for defendant appellee.

MARTIN, Judge.

In his pleadings appellant seeks recovery for two claims, one for actual damages and the other for punitive damages. The court ordered the dismissal of the claim for punitive damages.

Although neither party has raised the question concerning the matter, we note that the order from which the plaintiff purports to appeal adjudicates only one of the two claims and the trial court made no determination to the effect that there is no just reason for delay.

"Under the North Carolina Rule, the trial court is granted the discretionary power to enter a final judgment as to one or more but fewer than all of the claims . . . , 'only if there is no just reason for delay *and it is so determined in the judgment.*' (Emphasis added.) By making the express determination in the judgment that there is 'no just reason for delay,' the trial judge in effect certifies that the judgment is a final judgment and subject to immediate appeal." *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

In the absence of such an express determination in the order, G.S. 1A-1, Rule 54(b) makes "any order or other form of de-

cision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties," interlocutory and not final. *Leasing, Inc. v. Dan-Cleve Corporation,* 25 N.C. App. 18, 212 S.E. 2d 41 (1975); *Raynor v. Mutual of Omaha,* 24 N.C. App. 573, 211 S.E. 2d 458 (1975); *Arnold v. Howard, supra.*

For the reasons stated, the appeal is premature.

Appeal dismissed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. EARL DOUGLAS STOKES

No. 7518SC386

(Filed 1 October 1975)

ON *writ of certiorari* to review judgment entered by *Rousseau, Judge,* on 21 October 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 September 1975.

Defendant was tried upon a bill of indictment charging him with the felony of armed robbery. He pleaded not guilty to the charge. The jury found defendant guilty and from judgment imposing a prison sentence defendant appealed.

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

Z. H. Howerton, Jr., for defendant appellant.

MARTIN, Judge.

Defendant presents the record for review for possible errors. We have carefully reviewed the record and find that defendant had a fair trial which was free of prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. WAYNE EARL WATKINS

No. 7518SC420

(Filed 1 October 1975)

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 17 December 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 September 1975.

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

Z. H. Howerton, Jr., for the defendant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. TYRONE H. MOORE

No. 7512SC413

(Filed 1 October 1975)

APPEAL by defendant from *Bailey, Judge.* Judgment entered 5 March 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 September 1975.

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

Assistant Public Defender Mary Ann Talley, for the defendant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. EMMA CANTY TISDALE

No. 755SC376

(Filed 1 October 1975)

APPEAL by defendant from *Tillery, Judge.* Judgment entered 22 October 1974 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 29 August 1975.

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

Mathias P. Hunoval, for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. LEONARD McDOWELL WINGATE

No. 7526SC530

(Filed 1 October 1975)

APPEAL by defendant from *Falls, Judge.* Judgment entered 15 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1975.

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

Fred McPhail, Jr., for defendant appellant.

MORRIS, HEDRICK and ARNOLD, Judges.

No error.

Rodgerson v. Davis

HAYWOOD RODGERSON, JR. AND WIFE, JACKIE RODGERSON; ELBERT R. WOOLARD AND WIFE, LYNN WOOLARD; JIMMY SPAIN AND WIFE, COLLEEN SPAIN; SAM WOOLARD AND WIFE, BOBBIE WOOLARD; WILLIAM E. WOOLARD; OTTIS B. WOOLARD; HAROLD E. WOOLARD; MOYE T. LATHAM; ALVA W. DOUGLAS; JOSEPH D. MILLS; VERNA A. WOOLARD; DOROTHY R. WOOLARD; MONNIA S. WOOLARD v. ROBERT L. DAVIS AND WIFE, HELEN P. DAVIS; WILLIAM THOMAS WOOLARD AND WIFE, ELIZABETH P. WOOLARD; HAROLD ALTON LANE AND WIFE, LOUISE S. LANE; HAROLD ALTON LANE, JR. AND WIFE, BETTY S. LANE; WILLIAM F. LITCHFIELD AND WIFE, PATTY G. LITCHFIELD; ROBERT G. MASON AND WIFE, GEORGIA A. MASON

No. 752DC387

(Filed 15 October 1975)

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

In ruling on a motion for summary judgment, the trial judge does not make findings of fact, which are decisions upon conflicting evidence, but he may properly list the uncontroverted material facts which are the basis of his conclusions of law and judgment.

2. **Deeds § 20— restrictive covenants — agreement by non-owner of land — incorporation in deeds**

Although an agreement relating to restrictive covenants for a subdivision was made and recorded by a corporation which never acquired any interest in the subdivision, the restrictive covenants were valid and binding on the owners of lots in the subdivision where the deeds to all lot owners incorporated by reference the restrictions imposed by the recorded agreement.

3. **Deeds § 20— restrictive covenant — single unit family residence — construction of duplexes**

Restrictive covenant prohibiting the construction of "more than one single unit family residence" on lots in a subdivision precludes the construction of duplexes in the subdivision.

4. **Deeds § 20— set-back restrictions — waiver**

Both plaintiffs and defendants have violated a subdivision restrictive covenant requiring the construction of buildings "not less than 40 or more than 60 feet from the front property line" where plaintiffs' residences are located more than 60 feet from the front property line and structures of defendants are located less than 40 feet from the front property line; therefore, both plaintiffs and defendants have waived the set-back restriction, and the trial court properly refused to interfere to prevent its violation.

APPEAL by defendants, Robert L. Davis and wife, Helen P. Davis, and plaintiffs from *Ward, Judge.* Judgment entered 18

March 1975, in District Court, BEAUFORT County. Heard in the Court of Appeals 3 September 1975.

Both plaintiffs and defendants made motions for summary judgment which were supported by affidavits and by the testimony of several witnesses at the hearing on the motions. The following uncontradicted facts were established:

1. Prior to 13 March 1965, the Woolard heirs owned a tract of land, containing about 28 acres in Beaufort County. By instrument of that date, duly recorded, they granted to four of the Woolards the power of attorney to subdivide the tract and sell it in whole or in part.

2. By an "Option and Agreement" recorded 12 September 1967 in Book 618, Page 71, the attorneys-in-fact granted to Edward Copeland and Robert Whitley an option to purchase the tract and to subdivide the same, subject to the conditions that the subdivision map be submitted to the Woolards for approval before recording and that "appropriate" restrictions be imposed, including a restriction that "only one building, a one-family residence, shall be constructed on any lot."

3. Through an instrument entitled "Declaration of Building Restrictions, Terms, Covenants, and Agreements" recorded 31 October 1967, a corporation named Copeland and Whitley, Incorporated, declared that certain restrictive covenants were to be applicable to all lots in Swan Acres Subdivision, referred to the aforesaid option agreement, and recited that a survey map entitled "Swan Acres" had been made and would be recorded.

4. Apparently, Copeland and Whitley formed Copeland and Whitley, Incorporated, for the development of "Swan Acres," but they never transferred any rights under the purchase option to the corporation, and neither did they nor the corporation ever become the record owners of the subdivision tract or any part thereof.

5. The restriction agreement referred to in paragraph 3 above contained in pertinent part the following:

> "1. That grantee or grantees shall not build, construct, or cause to be built or constructed on any lot more than one *single unit family residence*. . . .
>
> 2. That said residence shall be constructed not less than forty or more than sixty feet from the front property

line and not less than fifteen feet from the side property lines; (a) that said property shall not be used in whole or in part for commercial purposes; . . . "

6. On 3 November 1966, a map entitled "Map of 'Swan Acres' Development" was duly recorded. The only identifying information on the map is the title, the survey date of 18 September 1967, and the surveyor's name.

7. By instrument recorded on 22 October 1969, Edward Copeland and Robert Whitley released and surrendered all rights and interests in the subdivision to the Woolard heirs.

8. The Woolard heirs, through their attorneys-in-fact, made their first deed for a lot in "Swan Acres" on 24 March 1969, and the deed recited that the lot was "subject to all the terms, restrictions and covenants as are fully set forth in that certain instrument of record . . . in Book 618, Page 71, and by this reference . . . are made a part of this conveyance."

9. Thereafter deeds for lots in "Swan Acres" were made to the plaintiffs herein and others, and all of these deeds contained a provision, similar to that quoted above, subjecting the property conveyed to the restrictions contained in the agreement recorded in Book 618, Page 71. The deed to the defendants, dated 31 July 1972, and duly recorded, for eight lots contained a similar provision. In December 1972, the defendants conveyed three of the eight lots and this deed contained the same reference to the recorded restriction agreement.

10. On their lots in "Swan Acres" three of the plaintiffs constructed dwellings, which were located more than 60 feet from the front property lines.

11. In February 1973, the defendants began construction of two duplex buildings on two of their lots. One was located 17 feet from the front line and the other 15 feet from the front line. By March 1973, when construction was halted, they had expended $16,000 for one duplex and $4,000 on the other.

On 27 March 1973, the plaintiffs Haywood Rodgerson, Elbert Woolard, Sam Woolard, and Jimmy Ray Spain and their wives brought this action against the defendants seeking an injunction to restrain them from further construction of the duplexes and for removal of the same for that the defendants violated both the set-back and single unit restriction. A tempo-

rary order restraining construction and later a preliminary injunction were entered by the District Court.

The defendants answered and denied the validity of the restriction agreement, denied that they were violating the covenants therein, and counterclaimed for an injunction requiring that the plaintiffs comply with the restriction that houses must be built within 60 feet of the front property line. Upon motion of the defendants, the other property owners of "Swan Acres" were made parties to the action.

After the hearing on plaintiffs' and defendants' motions for summary judgment, the District Court entered judgment finding facts substantially as set out above, concluding that the restriction agreement made by Copeland and Whitley, Incorporated, and recorded in Book 618, Page 71, was accepted and adopted by the developer-owners, and since it was incorporated by reference in every deed for lots in "Swan Acres" the grantee-owners accepted the restriction provision. The court then concluded as follows:

> "9. The remedy of mandatory injunction should be confined to those cases where irreparable damage is apparent and where all parties seeking such relief are guilty of no laches or negligent acts of omission or commission, and to mandatorily require the plaintiffs Elbert R. Woolard, et ux, Sam T. Woolard, et ux, and Jimmy Spain, et ux, to conform their residences to the set-back requirements set forth in the aforementioned restrictive covenants would result in undue hardship upon said plaintiffs and an inequity for that: (a) the defendants Davis are in violation of said covenants in several particulars as aforesaid; (b) the set-back violations of said plaintiffs do not materially affect the character of or plan for the 'Swan Acres' subdivision; (c) the residents of the aforementioned original plaintiffs are complete and have been in use for a substantial period of time.
>
> 10. That the remedy of mandatory injunction or to prohibit Defendants Davis from making any use whatsoever of the said incompleted structures commenced by them, would result in undue hardship upon said defendants an inequity, for that: (a) the original plaintiffs Elbert R. Woolard, et ux, Jimmy Spain, et ux, and Sam Woolard, et ux, have violated the provisions of said re-

strictive covenants as set out above; (b) none of the additional party plaintiffs objected to any violations of the defendants or the original plaintiffs prior to having been made parties to this action; (c) said structures are a considerable distance from the property owned by the original plaintiffs; (d) this remedy should be confined to those cases where irreparable damage is apparent and where all parties seeking such relief are guilty of no laches or negligent acts of omission or commission.

11. That the Restrictive Covenants recorded in Book 618, page 71, Beaufort County Registry, are valid and binding upon all lots located within said subdivision except as modified by this Judgment, and may be enforced as therein provided.

UPON THE FOREGOING Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED AND DECREED

That the defendants Robert L. Davis and wife, Helen P. Davis, their agents, representatives, employees and assigns, be and they are hereby enjoined and restrained from further construction, completion, or work toward the completion of any duplex or multi-family dwelling unit or units upon any lots owned by them in 'Swan Acres' Subdivision, provided that said defendants may, if they so elect, convert the existing structures upon Lots Nos. 22 and 23, 'Swan Acres' Subdivision, into single-family residences, provided same may be completed without any violation of said Restrictive Covenants excepting sideline and set-back requirements; and it is further ORDERED that the defendants' cross-action and counterclaim be, and the same is hereby dismissed; and it is further ORDERED that Sam T. Woolard, et al, as principals, and Western Surety Company, as Surety, be, and they are hereby discharged from any and all liability upon the undertaking executed by them on April 5, 1973, in this cause; and the costs are taxed against the defendants.

This third day of February, 1975.

/s/ HALLETT S. WARD
Judge Presiding"

The plaintiffs excepted to Conclusion of Law No. 9 above and the defendants excepted to Conclusion of Law No. 10 above, and both parties appealed from the judgment.

Carter and Archie by W. B. Carter, Jr., for plaintiff appellants and appellees.

Ward, Tucker, Ward & Smith, P.A., by C. H. Pope, Jr., for defendant appellants and appellees, Robert L. Davis and wife, Helen P. Davis.

CLARK, Judge.

[1] This is an exceptional case in that with incompatible claims both plaintiffs and defendants move for summary judgment, and yet there is no genuine issue of material fact which would make summary judgment inappropriate under G.S. 1A-1, Rule 56. None of the parties excepts to the conclusion of law in the judgment appealed from that "as between the plaintiffs and the defendants there is no genuine issue as to any material fact." Though each of the parties, plaintiff and defendant, excepted to a so-called finding of fact in the judgment, examination reveals that the finding excepted to by the defendants was a conclusion of law rather than fact, and the finding of fact excepted to by plaintiffs was immaterial; therefore disposition of the case by summary judgment was appropriate. It is noted that in ruling on a motion for summary judgment the trial judge does not make *findings of fact,* which are decisions upon conflicting evidence, but he may properly list the uncontraverted material facts which are the basis of his conclusions of law and judgment. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972).

[2] The defendants contend that the restriction agreement recorded in Book 618, Page 71, and incorporated by reference in each of the deeds to the grantees of lots in "Swan Acres" was invalid, because it was made and recorded by Copeland and Whitley, Incorporated, when the corporation owned no interest in the subdivision. This contention lacks merit because the important requirement is that the restrictions have a contractual basis for the imposition of the obligation on the grantor and grantee to observe them. This requirement is satisfied by contract implied from the acceptance of the deed containing the restrictions or properly incorporating the restrictions therein by reference. 26 C.J.S., Deeds, § 162(1), p. 1084. In this case the deeds to all lot owners incorporated by

reference the restrictions imposed by the agreement recorded in Book 618, Page 71. The defendants Davis, who question the validity of the restrictions, accepted their deed for seven lots with the restrictions incorporated therein, and they later conveyed three of these lots by deed with the restrictions incorporated therein.

[3] Further, the defendants Davis take the position that even if the restrictive covenants are valid, the construction of duplexes in "Swan Acres" is not prohibited by the restriction which prohibits the construction of "more than one single unit family residence." To support this contention they rely on *Scott v. Board of Missions,* 252 N.C. 443, 114 S.E. 2d 774 (1960), and *Construction Company v. Cobb,* 195 N.C. 690, 140 S.E. 552 (1928). In *Cobb* the court upheld a ruling that the restriction, " 'shall be used for residential purposes only . . . and there shall not at any time be more than one residence or dwelling-house on said lot . . . ' " did not prohibit erection of an apartment house. In *Scott* the restriction stated, "There shall not be constructed on said lot more than one (1) dwelling house, . . . " It was held that there was no restriction limiting the use of the property for residential purposes only and that the construction of the church was not prohibited. In the case at bar a reasonable construction of the restrictive covenants is that they were intended to prohibit multi-family residences and to preserve the single family residential character of the subdivision. "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, . . . " *Long v. Branham,* 271 N.C. 264, 268, 156 S.E. 2d 235, 238 (1967).

[4] The other assignments of error relate to the "not less than 40 or more than 60 feet from the front property line" restriction. Three of the five buildings in "Swan Acres," all owned by plaintiffs, are located more than 60 feet from the front property line. The two duplexes of the defendants Davis are located less than 40 feet from the front property line. Clearly, the defendants Davis and three of the plaintiffs have violated the set-back restrictions, and the other parties, plaintiff and defendant, have acquiesced in these violations.

Where restrictions have been imposed according to a general plan, one of the grantees of lots subject thereto, who has himself violated such restrictions, will not be allowed in equity to complain against similar violations by other grantees. 26

C.J.S., Deeds, § 169, p. 1163. We find that all of the parties, both plaintiff and defendant, have waived or abandoned by their conduct the set-back restriction, and that the District Court properly refused to interfere to prevent its violation. A balancing of the equities does not justify enforcement by requiring the movement of any of the buildings in the subdivision. The judgment of the District Court is

Affirmed.

Judges MORRIS and VAUGHN concur.

LESTER W. TRIPP AND BETTY B. TRIPP v. DAVID FLAHERTY, SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES, AND ANNIE LAURIE BURTON, DIRECTOR OF ALAMANCE COUNTY DEPARTMENT OF SOCIAL SERVICES

No. 7515SC263

(Filed 15 October 1975)

1. **Rules of Civil Procedure § 56— summary judgment — genuine issue of fact — recital in judgment**

There is no requirement in G.S. 1A-1, Rule 56 that a summary judgment, to be valid, must contain an express determination that there is no genuine issue as to any material fact.

2. **Constitutional Law § 13— rest home — regulation prohibiting sleeping in attic — constitutionality — insufficient evidence for summary judgment**

In an action seeking a writ of mandamus commanding defendants to issue plaintiffs a license to operate a rest home, or in the alternative, seeking the court to declare the statute giving defendants the power to withhold licenses void as violative of the N. C. Constitution, evidence before the trial court was not sufficient to show that defendants were entitled to summary judgment as a matter of law where such evidence tended to show that licensing standards adopted by the Social Services Commission required that the attic of a home housing 2-5 persons not be used for storage or sleeping, plaintiffs' three daughters slept in the attic of their home, and there was no evidence that use of an attic of a one-story house for storage or as sleeping quarters for others than aged or infirm persons increases the hazard or in any way appreciably affects the safety of occupants of the ground floor.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 7 November 1974 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 29 May 1975.

Plaintiffs own and manage a family care home known as "Tripp's Rest Home" and have been doing so for approximately eight years. The rest home has been operating without the requisite license provided for by G.S. 108-77.

Defendants informed plaintiffs that if the rest home were not closed and the patients relocated, they would commence criminal proceedings against them. Plaintiffs, alleging they have complied with all valid requirements for a license, instituted this action seeking a writ of mandamus commanding the defendants to issue them a license to operate a rest home or, in the alternative, that the court declare the statute giving defendants the power to withhold licenses to be void as violative of the North Carolina Constitution.

Defendants filed answers denying that plaintiffs have complied with all valid requirements for license. Thereafter, defendant Flaherty, Secretary of the Department of Human Resources, filed a motion for summary judgment. The court allowed the motion and dismissed the plaintiffs' action with prejudice. From this judgment plaintiffs appealed.

Harris & McEntire by W. S. Harris, Jr., for plaintiff appellants.

Attorney General Edmisten by Assistant Attorney General William Woodward Webb for defendant appellee, David Flaherty, Secretary of the Department of Human Resources.

Donnell S. Kelley for defendant appellee, Annie Laurie Burton, Director of Alamance County Department of Social Services.

PARKER, Judge.

[1] Appellant's first contention is that the judgment appealed from is fatally defective because it does not contain an express determination that there is no genuine issue as to any material fact. Summary judgment under G.S. 1A-1, Rule 56 may be rendered only "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." However, there is no requirement in Rule 56 that the summary judgment, to be valid, must contain "the ritual statement that there is no genuine issue as to any material fact."

Fromberg, Inc. v. Gross Manufacturing Company, 328 F. 2d 803, 806 (9th Cir. 1964). Rendering the judgment in itself clearly implies such a determination. Articulation of that determination in the judgment, though desirable, is not essential. Validity of the judgment does not depend upon the form in which the determination is made, whether express or implied, but upon the correctness of the determination. Accordingly, we move to the real questions presented by this appeal, which are (1) whether the record shows that there is no genuine issue as to any material fact and (2) whether defendants are entitled to judgment as a matter of law.

G.S. 143B-137 makes it the duty of the Department of Human Resources "to provide the necessary management, development of policy, and establishment and enforcement of standards for the provision of services in the fields of general and mental health and rehabilitation with the basic goal being to assist all citizens . . . to achieve and maintain an adequate level of health, social and economic well-being, and dignity." G.S. 143B-153 provides for the creation of the Social Services Commission of the Department of Human Resources and vests the Commission "with the power and duty to adopt rules and regulations to be followed in the conduct of the State's social service programs." More particularly, G.S. 143B-153(3)b provides that "[t]he Social Services Commission shall have the power and duty to establish and adopt standards . . . [f]or the inspection and licensing of all boarding homes, rest homes, and convalescent homes for aged or infirm persons as provided by G.S. 108-77." Insofar as pertinent to this appeal, G.S. 108-77 provides as follows:

> "§ 108-77. *Licensing of homes for the aged and infirm.* —(a) The Department of Human Resources shall inspect and license, under the rules and regulations adopted by the Social Services Commission, all boarding homes, rest homes, and convalescent homes for persons who are aged or are mentally or physically infirm, except those exempted under subsection (c) below. [The exceptions listed under subsection (c) are not pertinent to this appeal.] Licenses issued under the authority of this section shall be valid for one year from the date of issuance unless revoked for cause earlier by the Secretary of Human Resources.

"(b) Any individual or corporation that shall operate a facility subject to license under this section without such license shall be guilty of a misdemeanor."

Acting pursuant to its statutory authority and duty to adopt rules and regulations and to establish standards for licensing of boarding homes, rest homes, and convalescent homes for aged or infirm persons, the Social Services Commission (then the State Board of Social Services) adopted under date 1 January 1971 "Minimum and Desired Standards and Regulations" for "Family Care Homes" having a capacity to care for from two to five persons. The Standards adopted relate to such matters as management of the home, the personnel to be employed therein, the type of services to be rendered, and the physical construction of the home itself. Section III C of the Standards deals with the location, construction, and physical facilities of the home. Included are requirements that the home may be "[o]nly one story in height" (Sec. III C.2.b.) and that the attic "[c]annot be used for storage or sleeping." (Sec. III C.2.e.). It is this last requirement which gives rise to the present litigation.

Defendant Flaherty's motion for summary judgment states that the reason for the denial of a license to plaintiffs was their failure to comply with Section III C.2.b. and e. of the Standards. Nothing in the record indicates that plaintiffs have failed to comply in any other respect. The affidavit of the plaintiff, Betty B. Tripp, filed in opposition to defendants' motion for summary judgment, states that she operates the home in her residence, that she was contacted by a representative of the Department of Social Services and advised that she must secure a license, that she was informed "that she and her home met all of the minimum standards except the regulation which prohibited the use of the attic for storage or sleeping and that it would be necessary for her to find other sleeping accommodations for her three daughters and to seal off the attic before her home could be licensed as a family care facility for 2-5 persons." In her affidavit Mrs. Tripp details the reasons she could not comply and still remain in business, and she states that on a subsequent application for a license "it was determined that she met all standards except that she still had her three daughters sleeping in the attic." Defendants presented nothing to challenge these allegations. Thus, the record discloses there is no genuine issue that plaintiffs are in compli-

ance with all standards provided for the licensing of a family care home except the requirement that the attic of their home "[c]annot be used for storage or sleeping." There is no suggestion that the attic is being used for storage, but by plaintiffs' own admission it is being used, not as a sleeping place for any aged or infirm person, but to provide sleeping quarters for plaintiffs' three daughters. The question presented by this appeal is thus narrowed to whether, on the foregoing facts as to which there is no genuine issue, defendants were entitled as a matter of law to summary judgment dismissing plaintiffs' action. The answer to this question in turn depends upon the validity of the requirements in Section III C.2.b. and e. of the licensing standards.

In the statutes relating to the licensing of homes for the aged and infirm the General Assembly has declared the public policy to be effectuated, established the legal framework within which that policy is to be accomplished, and fixed adequate standards for guidance of the administrative agency involved. Decisions of our Supreme Court establish the principle that although the General Assembly may not delegate its authority to make laws, it may delegate to an administrative agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend, provided the General Assembly has itself declared the policy to be effectuated, has established the broad framework of law within which that policy is to be accomplished, and has fixed adequate standards for guidance of the administrative agency. *See Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E. 2d 517 (1973); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953). Accordingly, we find no unconstitutional delegation of legislative power involved in the present case. That is not to say, however, that all of the licensing standards established by the Social Services Commission are valid. Clearly, the Commission lacks power to establish a standard which, if adopted by the Legislature, would be unconstitutional. This is what plaintiffs contend has occurred in the present case.

[2] Plaintiffs recognize that the State in exercise of its police power may properly impose minimum standards on family care homes in order to protect the health and safety of the aged or infirm persons residing therein. Their contention is that the regulation which prohibits use of the attic of their home as sleeping quarters for their children bears no reasonable relationship to the public good sought to be attained. In this con-

nection plaintiffs point particularly to the precautions they have taken, as disclosed in their affidavits filed in opposition to the motion for summary judgment, to safeguard their home against fire. The question involved, however, is not whether plaintiffs' home is or is not in fact safe for first floor occupancy by elderly or infirm residents despite the fact that it does not meet minimum standards for licensing because of the violation of the prohibition of use of the attic for storage or sleeping. Rather, the question is whether that prohibition, as applied to family care homes in general, bears a reasonable relationship to the legitimate State objective of promoting the safety and welfare of the aged or infirm. For a decision of this question we find the present record inadequate. Nothing in the material filed in support of or in opposition to the motion for summary judgment furnishes any basis for deciding that use of an attic of a one-story house for storage or as sleeping quarters for others than aged or infirm persons increase the hazard or in any way appreciably affects the safety of occupants of the ground floor. It may be that such use of the attic does affect the fire hazard to the entire structure and thereby increases the hazard to the first floor occupants, but nothing in the present record supports such a conclusion. We hold that summary disposition of the question presented was not appropriate on the record as presently constituted and that the material before the court was not sufficient to show that defendants were entitled to summary judgment as a matter of law.

Upon a further hearing before the trial court, the parties may present evidence to assist the court in determining whether the licensing standards here involved do, or do not, reasonably relate to the legitimate public purpose of promoting the health and safety of the aged or infirm.

We note that after this appeal was argued in this Court, the General Assembly enacted Chapter 729 of the 1975 Session Laws which amended G.S. 108-77. However, we express no opinion as to the effect of that amendment upon the ultimate disposition of the present case.

For the reasons above noted, the summary judgment appealed from is reversed and this cause is remanded to the trial court for further proceedings.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

J. T. TAYLOR, JR. PETITIONER v. R. G. JOHNSTON AND WIFE, MARGARET K. JOHNSTON; WILLIAM P. MAYO AND WIFE, ANNA BALL MAYO; ROSA HENRIES PRICE, WIDOW; NOAH W. GASKILL AND WIFE, HATTIE I. GASKILL LAND, WIDOW; JOHNNY GASKILL AND WIFE, VELVA GASKILL; VERA GASKILL RICE AND HUSBAND, ROOSEVELT RICE; CHARLOTTE GASKILL HOBBS, WIDOW; MARY GASKILL KITTINGER AND HUSBAND, A. R. KITTINGER; ANNIE L. GASKILL MOORE AND HUSBAND, HUBERT L. MOORE; EVA GASKILL CLEMMONS AND HUSBAND, LEONARD TERRY CLEMMONS; POLLY M. WILLIAMSON, WIDOW; LUTHER GASKILL AND WIFE, LUCY GASKILL; EDDIE GASKILL AND WIFE, EVA GASKILL; MARCUS GASKILL AND WIFE, LINA GASKILL; CHARITY DOWTY AND HUSBAND, TOLLIE DOWTY; EVELYN SPAIN AND HUSBAND, ROYCE SPAIN; THELMA HARRIS, WIDOW; ALVITA HOPKINS, WIDOW; MINNIE MAYO AND HUSBAND, GRANT MAYO; BLANCHE GOODWIN LUPTON AND HUSBAND, MANNING LUPTON; FURNEY GOODWIN AND WIFE, ANNIE GOODWIN; VIOLET GOODWIN IRELAND, WIDOW; EVA GOODWIN RIGGS AND HUSBAND, SETH RIGGS; ELMO GOODWIN AND WIFE, HELEN GOODWIN; MAGGIE GOODWIN DANIELS AND HUSBAND, OSCAR DANIELS; MARION GOODWIN AND WIFE, FRANCES GOODWIN; BERNICE ALCOCK LATHAM, WIDOW; WEYERHAEUSER COMPANY; GENTRY POTTER WILLIAMS AND HUSBAND, MANLEY WILLIAMS; ORIEN C. POTTER AND WIFE, WAYNE RAYE POTTER; BERNARD B. HOLLOWELL, TRUSTEE; THURMAN M. POTTER AND WIFE, EMMA V. POTTER; J. DENARD CARAWAN AND WIFE, ELMA CARAWAN; H. M. CARPENTER AND WIFE, MARY S. CARPENTER; R. H. MORRISON, JR., AND WIFE, GLADYS S. MORRISON; THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; BRUCE B. CAMERON AND WIFE, LOUISE W. CAMERON; MARIE J. LEARY, EXECUTRIX OF THE WILL OF SYLVESTER J. LEARY, DECEASED; FIRST-CITIZENS BANK & TRUST COMPANY, TRUSTEE FOR BRUCE B. CAMERON III; ERVIN L. SADLER AND WIFE, RENA SADLER; EFFIE J. SADLER, WIDOW; WATEMAN SADLER; CARL F. ALCOCK AND WIFE, BIRMA L. ALCOCK; WILLIAM B. RODMAN, JR., CAMMIE R. ROBINSON, WIDOW; HANNAH R. CURTIS AND HUSBAND, GEORGE R. CURTIS; OLZIE C. RODMAN, WIDOW; JOHN C. RODMAN AND WIFE, ELIZABETH M. RODMAN; OLZIE C. RODMAN II, UNMARRIED; ARCHIE C. RODMAN AND WIFE, MEREDITH M. RODMAN; OWEN G. RODMAN AND WIFE, ELIZABETH W. RODMAN; CLARK RODMAN AND WIFE, MAVIS L. RODMAN; CAMILLUS H. RODMAN AND WIFE, HELEN M. RODMAN; W. BLOUNT RODMAN AND WIFE, MARTHA O. RODMAN; W. C. RODMAN AND WIFE, EFFIE T. RODMAN; OWEN H. GUION, JR., AND WIFE, ELIZABETH H. GUION; LIDA R. GUION, UNMARRIED; JULIA GUION MITCHELL AND HUSBAND, JOHN W. MITCHELL; THEODORA R. CHERRY AND HUSBAND, RICHARD F. CHERRY; CHARLOTTE R. ANDREW AND HUSBAND, J. H. B. ANDREW; NATHANIEL

F. RODMAN, JR., TRUSTEE FOR THE ESTATE OF N. F. RODMAN, DECEASED; AND ELIZABETH K. GUION, WIDOW

No. 753SC378

(Filed 15 October 1975)

1. **Ejectment § 7; Trespass to Try Title § 2— Marketable Title Act — applicability — nonpossessory interests**

The Real Property Marketable Title Act, G.S. Ch. 47B, applies only against nonpossessory interests and does not apply to a claim against a party in present, actual and open possession of property. G.S. 47B-3(3).

2. **State § 2— title to land — State as party — burden of proof**

In suits for land in which the State or a State agency is a party, the burden of proof is on the party seeking to prove title against the State. G.S. 146-79.

3. **Partition §§ 5, 12— 1835 decree of division — ineffectiveness to pass title**

A report of division of the lands of an intestate which ordered the heirs of the intestate to execute deeds to each other for the respective lands allotted to them, and which was confirmed by the court in 1835, did not transfer title from the intestate's heirs to persons allotted property by the decree since in 1835 an equitable decree did not serve to transfer title to the subject matter; therefore, there was a missing link in petitioner's chain of title where petitioner introduced the report of division allotting the land in question but introduced no evidence to show that deeds were ever exchanged by the intestate's heirs.

4. **Execution § 13; Trespass to Try Title § 4— sheriff's deed — failure to show judgment and execution**

There was a missing link in plaintiff's chain of title where plaintiff introduced a sheriff's deed but failed to establish the existence of the judgment and execution giving the sheriff authority to convey the property.

APPEAL by petitioner from *Tillery, Judge.* Judgment entered 16 December 1974 in Superior Court, PAMLICO County. Heard in the Court of Appeals 2 September 1975.

Petitioner, alleging to be the owner in fee simple, instituted proceedings pursuant to G.S. Chapter 43 to register title to lands located in Pamlico County. The North Carolina State Wildlife Resources Commission answered and asserted title to that portion of the lands located north of Mouse Harbor Canal.

An examiner of title, appointed pursuant to G.S. 43-11, ruled in favor of petitioner. The Wildlife Commission appealed, and the issue of title was tried without a jury in Superior Court.

Petitioner presented evidence, both testimony and documents, in an effort to establish a chain of title from himself running back to a 1798 land grant from the State. Respondent Wildlife Commission offered evidence by testimony and documents in an effort to establish title by adverse possession for seven years under color of title.

The trial court held that the petitioner failed to prove record title to the property north of Mouse Harbor Canal, and that fee simple title had vested in the Wildlife Commission by adverse possession. Petitioner excepted and appealed.

Henderson, Baxter & Davidson, by David S. Henderson, and Taylor and Marquardt, by Nelson W. Taylor, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for defendant appellees.

ARNOLD, Judge.

Petitioner attempts to prove title by a connected chain of title to a grant from the state. Though the petition was filed prior to its enactment, petitioner now argues that Chapter 47B, Real Property Marketable Title Act, is applicable.

[1] From the trial court's findings and conclusion, which are fully supported by the evidence, it is evident that the Wildlife Commission was in possession during this proceeding. The Marketable Title Act does not apply because petitioner is asserting claim against a party in present, actual and open possession of the property. G.S. 47B-3(3). The Marketable Title Act applies only against nonpossessory interests.

To prove his claim of record title in fee simple the petitioner undertook to show a connected chain of title by offering the following documents:

(1) Grant No. 602 to John Gray Blount, dated 22 December 1798, recorded in Book 99, page 234, Beaufort County Registry.

(2) "Will of John Gray Blount" (Note: this is a Report of Division and not a will), recorded in the Office of the Clerk of Court, Beaufort County.

(3) Sheriff's deed to William B. Rodman, dated 18 February 1848, recorded in Book 24, page 331, Beaufort County Registry.

(4) Quitclaim deed from William B. Rodman, Jr., et al, to John T. Taylor (petitioner) dated 29 December 1967, recorded in Book 148, page 536, Pamlico County Registry.

[2] In suits for land in which the State or a State agency is a party the burden of proof is on the party seeking to prove title against the State. G.S. 146-79 provides, "In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or in the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself."

Wildlife Commission contends that there are several missing links in petitioner's purported chain of title. We agree with respondent that petitioner's asserted chain is severed in at least two instances.

[3] What was labeled "Will of John Gray Blount" was in fact a report of division of the lands of John Gray Blount who died intestate. Grant No. 602 was allotted to Thomas Blount in the report of division. The decree entered by the court ordered the heirs, who were parties to that proceeding, to execute to each other deeds for the respective lands allotted to them. No evidence was introduced to show that any deeds were ever exchanged.

The report of division was confirmed by the court in 1835, and it was not recorded until 1888. The law in effect at the time of confirmation, and not the date of recordation, will control. It is argued by the petitioner that the decree entered by the court in 1835 vested title in Thomas Blount. We disagree.

Early common law courts made equitable decrees applicable in personam against the parties, and never in rem upon the subject matter of a judicial controversy. Pomeroy, Equitable Jurisdiction §§ 135, 1317. An equitable decree was not of itself a legal title, nor did it serve to transfer title to the subject matter. *Proctor v. Ferebee*, 1 Ired. Eq. 143, 36 Am. Dec. 34 (1840) [36 N.C. 143], McIntosh, North Carolina Practice and Procedure § 1736.

Statutes have long since destroyed this doctrine. G.S. 1-227, N. C. Rev. Code c. 32 § 24 (1850), G.S. 1A-1, Rule 70. Nevertheless the doctrine was in effect during 1835 at the time the decree labeled "Will of John Gray Blount" was entered.

The North Carolina Supreme Court in *Proctor v. Ferebee, supra,* applied the doctrine to an equitable decree ordering the sale of lands. The administrator of testator's estate filed a bill in the Court of Equity praying for a sale of the lands belonging to the testator not specifically devised. The court decreed a sale of the land even though testator's heir, Mrs. Elizabeth Ferebee, was not a party to the action.

Defendant Ferebee argued that the court's decree did not affect Mrs. Ferebee's title because she was not a party to the action. The court expressly declined to question the operation of the decree on the interest of Mrs. Ferebee on the ground that she was not a party to suit. The court stated:

" . . . if she had been a party, the decree could not have affected her legal title, for the reason that a decree in equity does not profess and cannot per se divest a title at law, but only obliges a person who has the title and who is mentioned in the decree to convey as therein directed." *Proctor v. Ferebee, supra,* at 146.

[4] The 1835 division did not transfer title from the heirs of John Gray Blount to Thomas H. Blount, therefore the asserted chain of title alleged by the petitioner was broken. At most the report of division left Thomas Blount with an undivided interest which did not aid petitioner. Moreover, petitioner's chain is severed by the 1848 Sheriff's deed which he relied upon to establish his chain of title.

The record discloses no evidence as to the establishment of any judgment or execution thereon except for certain recitals in the deed itself, introduced as one of petitioner's exhibits.

The Sheriff's deed is a vital link in petitioner's chain, and its validity depends upon a live execution in the hands of the sheriff. *Board of Education v. Gallop,* 227 N.C. 599, 44 S.E. 2d 44 (1947); *see Sledge v. Miller,* 249 N.C. 447 at 453, 106 S.E. 2d 868 (1959).

"It is a well established rule that the recitals in a deed executed pursuant to a judicial decree, or by a sheriff upon an execution sale, are evidence of the facts recited, but they are

only secondary evidence, and before being admitted for that purpose the loss or destruction of the original record must be clearly proven." *Thompson v. Lumber Co.*, 168 N.C. 226, 228, 84 S.E. 289 (1915); also, *Walston v. Applewhite*, 237 N.C. 419, 424, 75 S.E. 2d 138 (1953).

The burden was on petitioner to establish the existence of the judgment and the execution in order to show that the sheriff in fact had authority to convey the property. Petitioner failed to carry this burden of proof.

If there is one severed link in the purported chain of title then no benefit can accrue from the earlier conveyances and there is a failure to prove record title. *State v. Brooks*, 279 N.C. 45, 53, 181 S.E. 2d 553 (1971); *Sledge v. Miller, supra.*

Petitioner failed to show a good and valid title in himself. We need not consider whether title vested in respondent Wildlife Commission by adverse possession under color of title. As a matter of law title "shall be taken and deemed to be" in the Wildlife Commission by virtue of G.S. 146-79. *State v. Brooks, supra.*

The result reached by the trial court is correct, and the judgment is

Affirmed.

Chief Judge BROCK and Judge PARKER concur.

BOILING SPRING LAKES DIVISION OF REEVES TELECOM CORPORATION v. COASTAL SERVICES CORPORATION, NORMAN PERRY, T/D/B/A NORMAN PERRY CONSTRUCTION COMPANY, AND LLOYD R. WILLIAMS

No. 7513DC364

(Filed 15 October 1975)

1. Deeds § 19— construction of restrictive covenants

Restrictive covenants are strictly construed against limitations upon the beneficial use of property, but such construction must be reasonable and not applied in such a way as to defeat the plain and obvious purposes of the restriction, and the surrounding circumstances existing at the time of the creation of the restriction are considered in determining the intention.

2. Deeds § 20— restrictive covenants — approval of house plans

A restrictive covenant requiring the approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith.

3. Deeds § 20— restrictive covenant — approval of house plans by developer — unreasonable disapproval

In an action to enforce a restrictive covenant requiring building plans for homes in a subdivision to be submitted to and approved by the subdivision developer, the developer's disapproval of defendant's plans for construction of a house containing 768 square feet on the ground floor and 469 square feet on the second floor because the town planning board recommended that a minimum of 1000 square feet be required on the ground floor of houses in the subdivision is *held* unreasonable, and the covenant will not be enforced against defendant, where advertising for the subdivision lots was directed to low income groups, purchasers were given the impression they could erect small homes on the lots, and there had been a policy to require that houses have a minimum size of 800 square feet, but some deviations had been allowed for the construction of smaller homes, and there was no evidence that the policy applied only to the ground floor.

APPEAL by plaintiff from *Walton, Judge.* Judgment entered 2 January 1975 in District Court, BRUNSWICK County. Heard in the Court of Appeals 28 August 1975.

The plaintiff seeks to restrain permanently the defendants from erecting a dwelling on the lots of the defendant Williams after plaintiff had refused to approve the house plans, contending that it had authority to do so under an applicable restrictive covenant.

In 1960 plaintiff corporation purchased 14,000 acres of land in Brunswick County, located several miles inland and west of Southport. The tract was wooded with several natural lakes. A creek served as a water source for three large man-made lakes, the largest being Boiling Spring Lakes containing 250 acres and having a shore line of ten miles. Plans were made for development of the tract as a recreational and retirement community. Part of the area was subdivided into almost 10,000 lots on about 100 miles of streets and roads. A golf course, club house and motel were constructed.

Lot sales began in 1962 with a massive advertising campaign using various media in the United States and several foreign countries. The advertising was directed primarily to the lower income groups. Initially lots were sold for $350.00 or two for $650.00, with a down payment of $5.00 and the balance

payable at the rate of $5.00 monthly. Generally, the lots were sold under contract. Delivery of the deed was made after all payments were received under the terms of the contract, usually eight to ten years after the initial down payment. Now about 300 families live in the development. Boiling Spring Lakes became an incorporated municipality several years ago.

An instrument entitled "Public Declaration of Covenants, Restrictions and Conditions," dated 27 January 1963, was filed for registration in 1963 in the office of the Register of Deeds of Brunswick County; and an instrument of the same title, dated 23 August 1971, was recorded, which extended the operative time of the covenants. Both instruments contained substantially similar provisions. Neither contained a provision for the minimum size of dwellings, but both contained the provision that "no building or other structure shall be erected or altered on any lot until the building plans shall have been approved in writing by the developer group." This provision was also included in the "Covenants and Restrictions" portion of the sales contract between plaintiff and the buyers, and the deeds delivered upon final payment incorporated by reference the "Covenants and Restrictions" provisions of the sales contract.

The testimony of Arthur M. Greene, witness for the defendants, tended to show that he worked for plaintiff at the project from 1962 to 21 May 1974, most of the time as general manager, and thereafter until October 1974, as consultant; that he had set a minimum building size policy of 800 square feet of enclosed area, exclusive of porches; and he permitted some minor variations. Though the plaintiff was not engaged in house construction, to induce home building on the project Mr. Greene designed and built a model home in 1966, which was designated "The Hideaway." This model home had an enclosed area of 845.8 square feet with a porch of 103.2 square feet. A brochure picturing the house was mailed to all lot owners to give them some idea of the type and size house they could build on their lots. Mr. Greene testified that he did not try to increase or upgrade the size standards of the houses, because plaintiff had represented that small homes would be acceptable, and many lots had been sold to those who expected to build there years later upon retirement.

The two lots now owned by the defendant Williams were sold by plaintiff in 1963 under a sales contract. After paying the purchase price in installments, the purchaser assigned his

interest to the defendant Williams. The deed for the lots was made by plaintiff to said defendant on 29 August 1974. He then employed defendants Coastal Services Corporation and Norman Perry to prepare the house plan and submit it for approval to the plaintiff and the building inspector for the Town of Boiling Spring Lakes. The plan submitted was for a two-story dwelling containing 768 square feet on the ground floor and 469 square feet on the upper floor. The town granted a building permit, but the plaintiff, through its general manager, George Bayer, refused to approve the house plan for the stated reason that the Planning Board of the Town of Boiling Spring Lakes recommended to the manager that zoning standards in the area be changed to require a minimum of 1,000 square feet of enclosed area on the ground floor.

It appeared from the record that George Bayer had replaced Arthur M. Greene as plaintiff's general manager in June 1974. Soon after assuming his new duties, Bayer consulted with the Planning Board of the Town of Boiling Spring Lakes. At that time the Planning Board was not acting in an official capacity; it had adopted no zoning ordinances, but had made some study and determined that the town should be divided into three residential zones and that in Zone R-2 (in which defendant Williams' lots were located) a minimum size of 1,000 square feet of livable heated space on the ground floor was desirable. The Board recommended to plaintiff's manager that plaintiff adopt that as a standard in the approval of plans for new construction in this zone. In a letter to defendant Williams dated 20 November 1974, Mr. Bayer notified him that plaintiff would not approve his house plan and added: "This office is being guided by the recommendations of the local Planning Board."

In November 1974, the defendants began construction. Plaintiff began this action to restrain such construction. All parties stipulated that Judge Walton hear the case without a jury and render final judgment. From the judgment denying relief sought by plaintiff and dismissing the action, plaintiff appealed.

Frink, Foy & Gainey by Henry G. Foy for appellant.

Ledgett, Gall & Edwards, P.A., by G. Thomas Gall for appellees.

CLARK, Judge.

The courts hold that restrictive covenants imposed by the original owners or a common vendor of a tract of land in pursuance of a general plan for the development and improvement of the property, are valid and enforceable, provided they are not contrary to law or public policy. Webster, "Real Estate Law in North Carolina," § 344 (1971); 7 Thompson, Real Property, § 3164 (1962).

[1] In North Carolina restrictive covenants are strictly construed against limitations upon the beneficial use of property, but such construction must be reasonable and not applied in such a way as to defeat the plain and obvious purposes of a restriction. In applying the strict but reasonable test of construction, " 'the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the intention.' " *Long v. Branham,* 271 N.C. 264, 268, 156 S.E. 2d 235, 239 (1967).

Sub judice, for the first time in this Court, we have a restrictive covenant which requires building p'ans to be submitted to and approved by the grantor. Generally, the courts of other states, with the possible exception of Ohio, agree that this restrictive covenant is valid and enforceable, even though the covenant does not in itself impose standards of approval, when applicable to all of the lots in a residential subdivision as part of a uniform plan of development, or when used in connection with some other stated restriction within which approval may operate. See, Annot., 40 A.L.R. 3d 864 (1971).

The exercise of the authority to approve the house plans cannot be arbitrary. There must be some standards. Where these standards are not within the restrictive covenant itself, they must be in other covenants stated or designated, or they must be otherwise clearly established in connection with some general plan or scheme of development. *Vaughan v. Fuller,* 278 Ala. 25, 175 So. 2d 103 (1963); *Rhue v. Cheyenne Homes, Inc.,* 168 Colo. 6, 449 P. 2d 361 (1969); *Levin v. Mountain Farms, Inc.,* 22 Conn. Supp. 14, 158 A. 2d 493 (1959); *Kirkley v. Seipelt,* 212 Md. 127, 128 A. 2d 430 (1957); *Carroll County Dev. Corp. v. Buckworth,* 234 Md. 547, 200 A. 2d 145 (1964); *Parsons v. Duryea,* 261 Mass. 314, 158 N.E. 761 (1927); *West Bloomfield Co. v. Haddock,* 326 Mich. 601, 40 N.W. 2d 738 (1950); *Syrian Antiochian Orthodox Archdiocese v. Palisaides*

Associates, 110 N.J. Super. 34, 264 A. 2d 257 (1970) ; *Plymouth Woods Corp. v. Maxwell,* 407 Pa. 539, 181 A. 2d 321 (1962).

[2] And it is the general rule that a restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith. Annot., 40 A.L.R. 3d, supra, at 879.

[3] In applying the test of reasonableness and good faith to the case before us, we must consider the general plan or scheme of development which was established initially and subsequently up to the time that the plans of the defendant Williams submitted his house plans to the plaintiff for approval as required by the restrictive covenant. It is clear that all advertising was directed to the low income groups, and that the purchasers were given the impression that they could erect small homes. Though there was a policy to require that the houses have a minimum size of 800 square feet, some deviations were allowed for the construction of smaller homes, and there was no evidence that the policy applied only to the ground floor. We conclude that under these circumstances the disapproval of the plans for dwelling of the defendant was not reasonable.

The judgment is

Affirmed.

Judges MORRIS and VAUGHN concur.

LARRY G. MOZINGO AND WIFE, KATHLEEN A. MOZINGO; AND RIVERDRIVE APARTMENTS, INC. v. NORTH CAROLINA NATIONAL BANK

No. 753SC305

(Filed 15 October 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— adjudication of fewer than all claims — premature appeal

Attempted appeal from an order dismissing fewer than all of plaintiffs' claims is premature where the trial court did not find that there is no just reason for delay.

APPEAL by plaintiffs from *Alvis, Judge.* Judgment entered 14 February 1975 in Superior Court, PITT County. Heard in the Court of Appeals 25 August 1975.

Plaintiffs, Mr. and Mrs. Mozingo, filed a complaint against defendant for breach of contract. This claim was dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure by order of the trial court, and the plaintiffs were given the opportunity to amend their complaint. In the amended complaint, plaintiffs assert three causes of action.

In their first cause of action, plaintiffs undertake to allege a contract and a breach thereof. In their second cause of action, plaintiffs undertake to allege fraud and damages therefor. In their third cause of action, plaintiffs undertake to allege another contract and a breach thereof. The trial judge allowed defendant's Rule 12(b)(6) motion to dismiss the first and second causes of action. The third cause of action is pending for trial.

From the dismissal of the first and second causes of action, plaintiffs appealed.

Joseph F. Bowen, Jr., attorney for plaintiffs-appellants.

Everett & Cheatham, by James T. Cheatham, attorneys for defendant-appellee.

BROCK, Chief Judge.

General Statute 1A-1, Rule 54(b) requires dismissal of this appeal because it is an attempted appeal from an order as to fewer than all the claims, and the trial court did not find that there is no just reason for delay. In such a situation, the order is subject to revision by the trial court at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. *Newton v. Fire Ins. Co.*, 27 N.C. App. 163, 218 S.E. 2d 231 (1975); *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975), *cert. denied* 288 N.C. 241; *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Appeal dismissed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. HOWARD WHITE

No. 7527SC371

(Filed 15 October 1975)

Receiving Stolen Goods § 6— instructions — assumption goods were stolen

In a prosecution for receiving stolen property, the trial court erred in giving the jury instructions which assumed that the goods allegedly received by defendant had been stolen.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 22 January 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 29 August 1975.

Defendant pled guilty to six felony charges of receiving stolen goods in cases 74CR18315, 18316, 18994, 18996, 18993, and 18992. He pled not guilty to three felony charges of receiving stolen goods in cases 74CR18995, 18991, and 18990.

The jury found defendant guilty as charged. The trial court consolidated for judgments the cases 74CR18990, 18315, and 18316, and imposed a sentence of ten years in the State's Prison. Cases Nos. 74CR18995, 18991, 18994, 18992, 18996, and 18993 were consolidated for judgment, and the trial court imposed a sentence of five years in the State's Prison, this sentence to run at the expiration of the ten-year sentence.

From these judgments, defendant appeals.

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

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

CLARK, Judge.

It is noted that one of the contested charges (74CR18990) was consolidated with two guilty plea charges for judgment, in which the sentence of ten years' imprisonment was imposed; and that two of the contested charges (74CR18991 and 18995) were consolidated with four guilty plea charges for judgment, in which the consecutive sentence of five years' imprisonment was imposed. Therefore, the charges to which defendant entered pleas of guilty support both of the judgments of the trial court.

The three contested charges were consolidated for trial. We find no merit in defendant's exception to the order of consolidation. Nor do we find error in the overruling of defendant's motion to dismiss.

In the final mandate to the jury on each of the three charges of receiving stolen goods, the trial judge instructed as follows: ". . . I instruct you that if you should find from the evidence beyond a reasonable doubt that . . . the defendant, Howard White, with a dishonest purpose, that is to say, with the purpose of permanently depriving the lawful owners of the use of his property which the defendant, Howard White, knew was stolen following a breaking or entering, it would be your duty to return a verdict of guilty of feloniously receiving stolen goods."

It further appears that the trial judge, where referring to each of the three charges in the indictments instructed the jury in part as follows: (1) "that is the case wherein Mr. Roy Hullett's property was stolen as alleged"; (2) "that is, the case in which Mr. Thompson's property was stolen"; and (3) "that is to say the case in which Mr. Henry Jumper's property was taken."

One of the elements of the offense of "receiving stolen property" is that the property was stolen by someone other than the defendant. The court in its instructions to the jury should not assume that any fact has been established even though the evidence in regard thereto is uncontradicted, since the credibility of the evidence remains a question for the jury. 7 Strong, N. C. Index 2d, Trial, § 36, p. 342.

For errors in the charge we order in cases Nos. 74CR18995, 18991, and 18990.

New trials.

Judges MORRIS and VAUGHN concur.

KEITH D. CLINE AND PATRICIA P. CLINE v. B. F. SEAGLE t/a B. F. SEAGLE REALTY CO.

No. 7525DC395

(Filed 15 October 1975)

Pleadings § 38; Vendor and Purchaser § 1— offer to purchase realty — ability to obtain loan — unfilled blanks in contract — judgment on pleadings

In an action to recover a deposit made toward the purchase of a house, judgment on the pleadings was inappropriate, notwithstanding attorneys for both parties consented to judgment on the pleadings, where the pleadings raised issues of fact as to whether clauses in the form contract signed by plaintiffs which conditioned the contract on the ability of the buyer to obtain financing constituted a part of the contract since they contained unfilled blank spaces.

APPEAL by defendant from *Beach, Judge.* Judgment entered 19 February 1975, District Court, CATAWBA County. Heard in the Court of Appeals 4 September 1975.

On 27 June 1973, plaintiffs and defendant entered a written "Offer to Purchase," a standard real estate form for purchase of a house. Plaintiffs paid $500 to the defendant who acted as their escrow agent as well as their real estate agent. Several clauses of the form contract contained blank spaces which were left unfilled. Plaintiffs allege that the clauses in question conditioned the contract on their being able to secure financing for the purchase. Defendant answers that because the blanks were unfilled the clauses were not a part of the contract. The disputed clauses are set out below:

> "This offer is conditioned upon Buyer being able to secure a loan in the principal amount of $_____ for a term of _____ years, at an interest rate not to exceed _____% per annum using the above described property as security. Buyer agrees to use his best efforts to secure such loan and to pay the usual cost in connection therewith provided; however, that in the event Buyer is unable to obtain a loan commitment as herein described on or before _____, 19____, this agreement shall be null and void.
>
> * * *

Other conditions:

* * *

In the event this offer is not accepted or if Buyer is unable to secure a loan as hereinabove described or if the Seller(s) is not able to convey a good and marketable title, any deposit made as a part of the purchase price is to be returned to Buyer and this offer and contract shall thereafter be null and void."

Attorneys for both parties consented to judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The trial judge ordered defendant to return $500 to the plaintiffs, finding that the clauses were a part of the contract and interpreting them in favor of the plaintiffs. Defendant appeals from this judgment.

Carroll W. Weathers, Jr., for plaintiff appellees.

Butner, Rudisill & Brackett by J. Steven Brackett for defendant appellant.

CLARK, Judge.

The dispositive question presented on appeal is whether the trial court erred in granting judgment on the pleadings for the plaintiffs. We hold that it did.

In *Jones v. Warren,* 274 N.C. 166, 170, 161 S.E. 2d 467, 470 (1968), the court said, "The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. [Citations omitted.]" We think at least one issue arises on the pleadings: Did the parties intend that the contract be conditioned on plaintiffs' obtaining financing for the purchase? The pleadings raise a major question as to what the minds of the parties contemplated would embody their contract. Interpretation of contract language cannot begin until it is determined what terms and clauses constitute the contract. The pleadings raise contradicting assertions as to what terms comprised this contract. Because the pleadings raised this material question, judgment on the pleadings became inappropriate in spite of the consent by the attorneys.

Form contracts present problems because frequently they contain terms that are not pertinent to the agreement at hand.

Often these undesired terms are marked out to indicate that they are not to be included as a part of the agreement.

Where a blank in a contract is not filled and not marked out, whether it is rejected as surplusages or omissions are supplied, depends upon the intention of the parties. This intention may be inferred from the contract if it appears with certainty; if not, the intention must be determined from evidence of the transaction and its details. 17 Am. Jur. 2d, Contracts, § 261 (1964).

Whether the terms in question in this case were intended to be included or excluded does not appear with certainty from the contract or from the pleadings. Therefore, evidence will be required to determine what the intentions of the parties were in light of their actions and representations leading up to the consummation of this agreement.

What other issues, if any, arise on the pleadings we leave for later determination by the trial court.

Reversed.

Judges BRITT and PARKER concur.

THOMAS WARREN HALL v. GENERAL MOTORS CORPORATION AND DAN THOMAS PONTIAC, INC.

No. 7519SC482

(Filed 15 October 1975)

Courts § 9; Costs § 3— compensation for commissioner and court reporter — order by clerk and superior court

Although a motion concerning compensation for a commissioner appointed by the court to take depositions and for the court reporter had been filed and notice had been given that the motion would be heard on the same date as defendants' motion for impoundment of a carburetor, the judge's order makes it clear that he ruled only on the motion for impoundment of the carburetor, and the clerk, and the superior court on appeal, thereafter had authority to enter an order awarding a commissioner's fee and compensation for the court reporter and taxing half of said amounts as part of the costs to be paid by plaintiff.

Hall v. General Motors Corp.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 7 March 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 24 September 1975.

This is a civil action instituted to recover for property damage and personal injuries allegedly sustained by plaintiff when his Pontiac automobile wrecked as the result of a defective cam and throttle. The action was commenced on 22 December 1972 and proceedings pertinent to this appeal are summarized as follows:

After complaint and answers were filed, discovery proceedings followed. On 9 April 1974, plaintiff, through his counsel, filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a)(1). On 23 April 1974, defendants filed motion setting forth that the case was scheduled for trial on 9 April 1974; that when the case was called for trial plaintiff filed a notice of dismissal; that on 11 May 1973, a commissioner was appointed by the court for purpose of taking depositions; that depositions were taken but no order providing for compensation for the commissioner and the court reporter had been entered; defendants asked that a fee be set for the commissioner and that one-half of the fee and one-half of the reporter's charges be taxed as a part of the costs against plaintiff.

On 2 May 1974, defendants filed a motion asking for an order impounding the carburetor assembly on the automobile in question to the end that said assembly would be available in the trial of any subsequent action that plaintiff might institute. Defendants served notices on plaintiff's counsel that they would ask for a hearing on both motions on 6 May 1974 at 10:00 a.m., or as soon thereafter as counsel could be heard.

On 7 May 1974, an order (dated 6 May 1974) was entered by Judge Crissman providing as follows:

> "This cause coming on to be heard on defendants' written motion heretofore filed and oral motion to impound the carburetor on the Pontiac automobile and after argument of counsel for defendants and argument of counsel for plaintiff, the Court is of the opinion that both motions should be denied.
>
> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendants' motions and both of them are hereby denied."

On 7 May 1974, defendants filed another motion concerning taxing of costs for the commissioner's fee and reporter's charges and served notice on plaintiff's counsel that a hearing on that motion would be held before the clerk of the superior court on 20 May 1974 at 4:00 p.m. On 24 May 1974, the clerk entered an order making certain findings, awarding the commissioner a fee of $200, adjudging the reporter's charges to be $302, and ordering that half of said amounts be taxed as a part of the costs against plaintiff. Plaintiff appealed from the clerk's order.

On 10 March 1975, following a hearing, Judge Rousseau entered an order making findings of fact, awarding the commissioner a fee of $200, adjudging the reporter's charges to be $302, and ordering that half of said amounts be taxed as a part of the costs against plaintiff.

Plaintiff appealed to the Court of Appeals.

Ottway Burton and Millicent Gibson for plaintiff appellant.

Miller, Beck, O'Briant & Glass, by Adam W. Beck, for defendant appellee Dan Thomas Pontiac, Inc.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant appellee General Motors Corporation.

BRITT, Judge.

Plaintiff contends that Judge Crissman's order filed 7 May 1974 denied defendant's motion that a fee for the commissioner and the reporter's charges for taking depositions be taxed as a part of the costs against plaintiff, therefore, the clerk's order and Judge Rousseau's order thereafter entered are void. We find no merit in the contention.

Although a motion by defendants concerning the commissioner's fee and reporter's charges had been filed, and notice given that the motion would be heard before Judge Crissman on 6 May 1974, defendants' motion concerning impoundment of the carburetor assembly had also been filed and notice given that that motion would be heard before Judge Crissman on 6 May 1974. Judge Crissman's order is clear that he was ruling only on the written and oral motions to impound the carburetor. That being true, it was not improper for the clerk and Judge Rousseau to pass upon the question presented by the other motion.

The order appealed from is

Affirmed.

Judges PARKER and CLARK concur.

JUDY SHUMATE JENKINS v. CLARENCE RICHARD JENKINS

No. 7524DC525

(Filed 15 October 1975)

1. **Rules of Civil Procedure § 6— notice of hearing not timely — absence of prejudice**

Defendant failed to show that he was prejudiced by the failure of plaintiff to give him five days' notice, excluding Saturday and Sunday, of a hearing for alimony *pendente lite* and child custody as required by G.S. 1A-1, Rule 6(d).

2. **Trial § 3— motion for continuance — district court — attorney in trial in superior court**

The trial court did not abuse its discretion in the denial of a motion for continuance of a hearing for alimony *pendente lite* and child custody in the district court made on the ground that plaintiff's regular attorney was engaged in a trial in the superior court.

3. **Divorce and Alimony §§ 4, 16— alimony and child custody action while living with spouse — no condonation**

A wife could maintain an action against her husband for alimony based on indignities and for child custody while still living in the same house with him since plaintiff did not condone the continuing indignities by remaining in the same house with defendant for a short time.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 15 April 1975 in Special Session of District Court, WATAUGA County. Heard in the Court of Appeals 19 September 1975.

This was an action for divorce from bed and board, custody of minor children, alimony and child support. Plaintiff alleged indignities and misconduct on behalf of her husband which rendered her life intolerable and burdensome. The action was instituted while plaintiff still resided in the marital home, but the evidence tended to show that immediately upon service of process the defendant locked plaintiff out of the home.

Defendant did not appear at the hearing. A member of the defendant's attorney's law firm was present and moved for a continuance on the grounds that the defendant's regular attorney was engaged in a Superior Court trial. The motion was denied.

The court heard the evidence in the absence of the defendant, after defendant was called by telephone and failed to appear, and entered the order upon which the defendant appealed.

Eggers and Eggers, by Stacy C. Eggers III, for plaintiff appellee.

Wilson, Palmer and Simmons, by W. C. Palmer, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that he was not given adequate notice to which he was entitled under G.S. 1A-1, Rule 6(a) and (d). Plaintiff responds that defendant was given six days' notice where the statute merely required five days' notice. G.S. 1A-1, Rule 6(d).

Where the time period is less than seven days, intermediate Saturdays and Sundays shall be excluded. G.S. 1A-1, Rule 6(a). Plaintiff committed error in computing the time. However, defendant does not have an absolute right to the notice requirement of Rule 6. Notice may be waived. Also, a new trial will not be granted for a mere technical error. It is incumbent on defendant to show he was prejudiced. See *Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E. 2d 177 (1971). Defendant has not argued any prejudicial harm and we can find none.

[2] Defendant further argues that the court erred in denying his motion for a continuance. It is a well established rule in North Carolina that the granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. *Johnson v. Johnson,* 14 N.C. App. 40, 187 S.E. 2d 420 (1972); *Austin v. Austin,* 12 N.C. App. 286, 183 S.E. 2d 420 (1971).

Defendant asserts that because his attorney was engaged in a trial in Superior Court that his motion for continuance should have been allowed, citing Rules of Practice for Superior and District Courts, Rule #3 (North Carolina General Statutes Volume 4A, Appendix I) as his authority. "Attorneys, under the

guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time." *Austin v. Austin, supra,* at 297. The court did not abuse its discretion in denying defendant's motion for continuance.

[3] Defendant's final argument is that a wife cannot maintain an action against her husband for alimony and custody while living in the same house with him. We disagree. If defendant's contention is correct it would mean that living under the same roof, without any evidence of sexual relations, would be condonation as a matter of law.

Plaintiff alleged that she and her minor children had no other place to go. We cannot agree with defendant that plaintiff condoned the continuing indignities complained of merely because she remained in the same house with defendant for a short period of time. For a discussion of condonation see Lee, North Carolina Family Law, Vol. 1, § 87.

After reviewing defendant's arguments we find no prejudicial error.

Affirmed.

Judges MORRIS and HEDRICK concur.

S. B. FRINK AND DAVIS C. HERRING v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 7513SC336

(Filed 15 October 1975)

1. **Injunctions § 2— inadequate remedy at law**

Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law which is as practical and efficient as is the equitable remedy.

2. **Eminent Domain § 2; Highways and Cartways § 5— abutting landowner — right of access — easement**

The owner of land abutting a public road has a special right of easement in the road for access purposes which cannot be damaged or taken from him without due compensation.

3. Injunctions § 11— injunction against Board of Transportation — adequate remedy at law

Plaintiffs failed to show substantial or irreparable harm which would entitle them to an injunction prohibiting the State Board of Transportation from removing the remaining portion of an old causeway which is plaintiffs' only means of vehicular ingress to and egress from their property since plaintiffs may resort to their legal remedy under G.S. 136-111 to recover just compensation for the taking of their property rights.

APPEAL by defendant from *Clark, Judge.* Judgment entered 14 April 1975, in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 26 August 1975.

Plaintiffs brought suit against defendant for the purpose of recovering a judgment against the defendant in an amount representing just compensation for plaintiffs' property which plaintiffs allege was taken by defendant, and for the purpose of temporarily and permanently enjoining the defendant from excavating or removing that portion of old N. C. Highway No. 133 described in the complaint, or in any manner interfering with plaintiffs' use thereof. On 8 March 1975, Judge Clark entered a temporary restraining order restraining defendant from excavating and removing the said portion of old N. C. Highway No. 133.

The evidence, in pertinent part, tends to show that the plaintiffs claim title to a certain tract of land described in the complaint subject to an easement existing in favor of the North Carolina Transportation Advisory Commission and its successors or grantees. Plaintiffs and defendant disagree as to the nature and extent of this easement which was obtained by defendant from plaintiffs' predecessor in title. Across the property claimed by the plaintiffs has been constructed a high level bridge which replaces the old causeway and bridge. The defendant is attempting to remove the remaining portion of the old causeway where N. C. Highway No. 133 is located pursuant to a permit obtained by defendant from the U. S. Coast Guard which provides that in order to construct a new bridge roadway, defendant must remove the old N. C. Highway No. 133 causeway. The only means of vehicular ingress and egress to the property claimed by plaintiffs is from this old causeway right-of-way.

From the evidence, the court concluded that the plaintiffs proved prima facie title to the property they claim and over

which defendant has constructed a new bridge roadway; that the removal of the old causeway would deprive plaintiffs of their only means of vehicular ingress and egress to their property and would cause irreparable injury, loss, and damage to plaintiffs; that the plaintiffs have no adequate remedy at law, and plaintiffs' motion for a preliminary injunction should be granted to preserve the status quo pending trial upon the merits.

From an order based on the foregoing which restrained and enjoined the defendant from excavating and removing said portion of N. C. Highway No. 133 and from interfering with plaintiffs' use thereof pending trial upon the merits, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Eugene A. Smith, for the State.

Frink, Foy & Gainey, by Henry G. Foy, for defendant appellant.

MARTIN, Judge.

[1] "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *Durham v. Public Service Co.*, 257 N.C. 546, 126 S.E. 2d 315 (1962). However, equity will exercise its preventive powers by restraining the irremedial injury or threatened injury to or destruction of property rights. *Clinton v. Ross*, 226 N.C. 682, 40 S.E. 2d 593 (1946). An injury is irreparable, within the law of injunctions, where it is of a "peculiar nature, so that compensation in money cannot atone for it." *Gause v. Perkins*, 56 N.C. 177 (1857).

[2] It is generally recognized that the owner of land abutting a highway has a right beyond that which is enjoyed by the general public. This right is a special right of easement in the public road for access purposes, and is a property right which cannot be damaged or taken from him without due compensation. *Abdalla v. Highway Comm.*, 261 N.C. 114, 134 S.E. 2d 81 (1964). G.S. 136-111 provides that any person whose land or compensable interest therein has been appropriated by the Highway Commission (now Board of Transportation) without the filing of a complaint and declaration of taking may within twenty-four (24) months of date of said taking bring an action in the superior court to recover damages for the taking. *Ledford v. Highway Comm.*, 279 N.C. 188, 181 S.E. 2d 466 (1971).

[3] In the case at bar, plaintiffs have not made a sufficient showing of substantial or irreparable harm which would warrant equitable relief. They are not claiming that the right of defendant to condemn or take is at issue, nor claiming a taking which is unnecessary or excessive, nor claiming an attempt to take property not subject to condemnation, nor claiming an unauthorized use of public property or a substantial departure from legislative limitations or directions. Rather, plaintiffs are asking for equitable relief in the form of an injunction against an agency of the State to prevent the removal of the remaining portion of the old causeway which is plaintiffs' only means of vehicular ingress and egress to their property.

In the act establishing the State Highway Commission (Now Board of Transportation), the General Assembly has expressly granted to it the power of eminent domain. G.S. 136-18, *State Hwy. Comm'n. v. Matthis,* 2 N.C. App. 233, 163 S.E. 2d 35 (1968).

> "The power of eminent domain, that is the right to take private property for public use, is inherent in sovereignty. Our Constitution, Art. I, Sec. 17, requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking. The taking must, of course, be for a public purpose, but the sovereign determines the nature and extent of the property required for that purpose." *Morganton v. Hutton & Bourbonnais Co.,* 251 N.C. 531, 112 S.E. 2d 111 (1960).

Thus, the Board of Transportation has the statutory authority to determine the nature and extent of the property required for its purposes. If the Board must remove the old causeway pursuant to a permit obtained by defendant from the U. S. Coast Guard, plaintiffs may resort to their legal remedy under G.S. 136-111 to recover just compensation for the taking of their land. There is no sufficient showing that substantial or irreparable harm is being suffered or threatened which would warrant equitable relief since a fair and reasonable redress may be obtained in a court of law.

For the reasons stated, the order granting the preliminary injunction is

Reversed.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. BENNY LITTLE, JR.

No. 7521SC349

(Filed 15 October 1975)

1. **Criminal Law § 34— evidence of defendant's guilt of another offense — relevancy test of admissibility**

Relevancy is the true test for determining whether evidence of an offense other than the one charged is to be excluded or not; that is, there must be a causal relation or logical and natural connection between the two acts, or they must form parts of but one transaction.

2. **Criminal Law § 34— evidence of defendant's guilt of subsequent offense — prejudicial error**

In a prosecution of defendant for possession of heroin on 6 June 1974, evidence of defendant's possession of heroin in January 1975 was relevant only to show the disposition of the accused to commit an offense of the nature of the one charged, and admission of such evidence requires that defendant be tried anew.

APPEAL by defendant from *Walker, Judge.* Judgment entered 5 February 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 August 1975.

Defendant was tried upon a bill of indictment charging him with possession of heroin.

The State's evidence tends to show the following facts:

On 6 June 1974 the police obtained a search warrant to search the apartment at 419-C Highland Avenue in Winston-Salem for marijuana. An informant had notified the police that defendant lived in that apartment. As the officers approached the apartment, a black man saw them from the rear of the apartment and yelled, "Bust, bust, bust" in a loud tone. Due to this warning, the police entered the apartment without knocking, informed the occupants that they were police officers with a search warrant, and proceeded to search the apartment for marijuana. Defendant was not in the apartment when the officers entered, but appeared several minutes later. In the apartment, the officers found a "cooker," a plastic bag of marijuana, needles and syringes, a marijuana pipe, and two tin foil packages containing heroin. Subsequent to the search, a warrant was issued for the defendant's arrest for the possession of heroin. Seven months later, a search warrant for heroin was issued for the same apartment. The defendant was in the apartment when the search was made. The State was allowed to intro-

duce evidence of heroin found pursuant to this search warrant at the trial of defendant for possession of the heroin found on 6 June 1974.

The jury found the defendant guilty as charged, and from judgment entered thereon, defendant appealed.

Attorney General Edmisten, by Associate Attorney William Woodward Webb, for the State.

William G. Pfefferkorn and Beirne Minor Harding, for defendant appellant.

MARTIN, Judge.

Though defendant presents several assignments of error, the only one warranting express consideration is the assignment of error based on the admission of evidence of an offense which occurred more than seven months after the date of the offense with which defendant is charged in the case at bar.

"It is the general rule that in a prosecution for a particular crime, evidence in chief which shows that defendant has committed other distinct, independent offenses is not admissible. *State v. Myers,* 240 N.C. 462, 82 S.E. 2d 213; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. This rule is subject to many exceptions. *State v. McClain, supra,* and *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232." *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820 (1971).

In 1 Stansbury, N. C. Evidence, § 91 (Brandis Rev. 1973), at 289, we find the following:

> ". . . It is submitted, however, that the rule is in fact a single one which, when accurately stated, is subject to no exceptions: evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime."

In *State v. McClain, supra,* the North Carolina Supreme Court noted with approval the criterion laid down by the South Carolina Supreme Court for determining whether evidence of

an offense other than the one charged is to be excluded under the general rule or admitted under one of the exceptions:

> "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. 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. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."

[1] Relevancy is the true test for determining whether evidence of an offense other than the one charged is to be excluded or not. There must be a causal relation or logical and natural connection between the two acts, or they must form parts of but one transaction. *State v. Beam,* 184 N.C. 730, 115 S.E. 176 (1922).

[2] In applying the "logical relevancy" test to the case at bar, it appears that evidence from a search made seven months after the offense for which defendant was on trial was merely evidence of an offense of the same nature as the crime charged. Evidence of an offense of the "same nature" is not sufficient to come within one of the exceptions to the rule. There must be a logical relevancy to the particular excepted purpose(s) for which it is sought to be introduced. Evidence of possession of heroin in January 1975, nothing else appearing, does not tend to establish the mental state or guilty knowledge of the defendant in June 1974, nor does it tend to prove a common scheme or plan or a series of crimes so as to connect the accused with the commission of the act with which he is charged. Rather, its only relevancy is to show the disposition of the

accused to commit an offense of the nature of the one charged. Its admission requires that the cause be tried anew.

New trial.

Judges BRITT and HEDRICK concur.

DANIEL ALEXANDER MANESS, JR., ADMINISTRATOR OF THE ESTATE OF LARRY EDWARD MANESS v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7519SC361

(Filed 15 October 1975)

1. **Trial § 54— compromising and inconsistent verdict — new trial**

Jury verdict finding defendant negligent and the minor plaintiff not contributorily negligent and awarding the minor plaintiff nothing but plaintiff father $3274.67 for sums expended for medical treatment and care furnished his son was inconsistent and a compromise.

2. **Trial § 8— separate trials ordered — order not binding on hearing judge**

Since consolidation of claims cannot be thrust upon a presiding judge by edict of another judge, then, correspondingly, one judge should not have to follow the decision of another judge ordering separate trials on the separate claims of the two plaintiffs presented jointly in the earlier action.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 17 December 1974 in Superior Court, RANDOLPH County.

This litigation arose out of a one-vehicle collision with a utility pole in June 1966. Larry Edward Maness was a passenger in the vehicle owned by defendant Clyde Columbus Bullins and operated by defendant Ronald Clyde Bullins. Larry Maness, through his next friend, instituted suit to recover damages for alleged severe facial injuries received in the accident. Daniel Alexander Maness, Jr., instituted an action to recover sums expended by him for medical treatment and care furnished his minor son.

Defendants denied negligence and pled the contributory negligence of Larry Maness as a bar to any recovery.

At the close of all the evidence, the court asked the jury to consider four specific issues and the verdict rendered included the following:

"1. Were Larry Edward Maness and Daniel Alexander Maness, Jr., injured and damaged by the negligence of the defendant, Ronald Clyde Bullins, as alleged in the Complaint?

ANSWER: Yes.

2. Did Larry Edward Maness contribute to his own injuries by his own negligence, as alleged in the Answers?

ANSWER: No.

3. What amount of damages, if any, is D. A. Maness, Jr., Administrator of the Estate of Larry Edward Maness, deceased, entitled to recover of the defendants?

ANSWER: None.

4. What amount of damages is the plaintiff, Daniel Alexander Maness, Jr., entitled to recover of the defendants?

ANSWER: $3,274.67."

The trial court, finding the verdict inconsistent, set it aside and ordered separate trials on the separate claims of the two plaintiffs. From the judgment and order entered, plaintiffs appealed.

Ottway Burton and Millicent Gibson for plaintiff appellants.

Coltrane and Gavin, by W. E. Gavin, for defendant appellees.

MORRIS, Judge.

The cases have now been tried four times. After the first trial, upon plaintiffs' appeal, a new trial was awarded. *Maness v. Bullins,* 11 N.C. App. 567, 181 S.E. 2d 750 (1971). At the second trial, the jury again found defendant driver negligent and plaintiff contributorily negligent. Plaintiff appealed and was awarded a new trial for prejudicial error in the charge of the court. *Maness v. Bullins,* 15 N.C. App. 473, 190 S.E. 2d 233 (1972). Upon the third trial, the jury answered the negligence issue in plaintiff's favor, awarded the minor plaintiff

$3,000, but the father nothing. Both plaintiff father and defendants appealed, and a new trial was again ordered. *Maness v. Bullins,* 19 N.C. App. 386, 198 S.E. 2d 752 (1973), cert. denied 284 N.C. 254 (1973), and *Maness v. Bullins,* 19 N.C. App. 388, 198 S.E. 2d 753 (1973), cert. denied 284 N.C. 254 (1973). In *Maness v. Bullins,* 19 N.C. App. 386, at 387, Judge Brock expressed the hope "that the fourth trial will terminate this litigation and let the courts move on to less time worn controversies." We have before us the fourth appeal, and we find that again history must repeat itself. Still a fifth trial must be had.

[1] Plaintiff appellants first contend that the verdict rendered by the jury was neither inconsistent nor a compromise. We disagree. In an analogous case, a minor plaintiff, purportedly injured by defendant's negligence, alleged $25,000 damages. The minor plaintiff's father also sued to recover medical expenses incurred in the amount of $1,970. The jury's verdict found the defendant negligent and the minor plaintiff free of contributory negligence. The jury, however, awarded no damages to the minor plaintiff, and yet, awarded the plaintiff's father $1,970 for the medical expenses incurred. The Court held:

> "Under the circumstances here presented, there is ground for a strong suspicion that the jury awarded no damages to the minor plaintiff as a result of a compromise on the first and second issues involving the question of liability. For that reason we think the error in assessing damages tainted the entire verdict . . . . " *Robertson v. Stanley,* 285 N.C. 561, 569; 206 S.E. 2d 190 (1974). Also see 7 Strong, N. C. Index, 2d, Trial, § 54.

The Court, amplifying this position, further noted:

> "Under such circumstances, with the evidence of pain and suffering clear, convincing and uncontradicted, it is quite apparent that the verdict is not only inconsistent but also that it *was not rendered in accordance with the law.* Such verdict indicates that the jury arbitrarily ignored plaintiff's proof of pain and suffering. If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such case. . . . 'When it is apparent that a jury by its verdict holds the defendant responsible for a

whole loaf of bread, it may not then neglectfully, indifferently, or capriciously cut off a portion of that loaf as it hands it to the plaintiff.' " *Id.*, at 566-567; quoting *inter alia, Todd v. Bercini,* 371 Pa. 605, 92 A. 2d 538 (1952).

[2] Plaintiff next contends that the trial court cannot, when granting a new trial, go further and order separate trials on the two claims presented by the plaintiffs in the instant case. We agree. "One Superior Court judge may not . . . restrain another judge from proceeding in a cause of which he has jurisdiction." 2 Strong, N. C. Index 2d, Courts, § 9. The rules regarding separation of claims, moreover, are considered a " . . . necessary corollary to the rules permitting practically unlimited claim joinder. . . . " 1 McIntosh, N. C. Practice and Procedure, Separate Trial, § 1341 (Phillips Supp. 1970). In light of the interdependent nature of the rules regarding joinder and separation of trials and claims, we find our earlier decision in *Pickard v. Burlington Belt Corporation,* 2 N.C. App. 97, 103, 162 S.E. 2d 601 (1965), dispositive of the matter at issue in the case at bar. There we noted that:

> "Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion by the judge who will preside during the trial; a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge."

Since consolidation of claims cannot be thrust upon a presiding judge by edict of another judge, then, correspondingly, one judge should not have to follow the decision of another judge granting new trials on the joint claims previously presented in the earlier action.

As to the order setting the verdict aside; Affirmed.

As to the order awarding separate new trials on the two claims presented; Reversed.

Judges VAUGHN and CLARK concur.

JOSEPH H. WARD, ADMINISTRATOR OF THE ESTATE OF JOSEPH ANTHONY WARD, DECEASED v. THOMPSON HEIGHTS SWIMMING CLUB, INC.

No. 7515SC359

(Filed 15 October 1975)

1. **Electricity § 4— National Electrical Code — violation as negligence per se**

Violation of the National Electrical Code by defendant in its pump house was negligence per se.

2. **Principal and Agent § 8— unsafe electrical conditions — notice to agent as notice to principal**

A principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof; therefore, defendant had notice of the unsafe electrical conditions existing in its pump house where an employee of Oakley Electric, upon returning the motor from defendant's pump house after repairing it, told a lifeguard employee of defendant about the conditions.

3. **Negligence § 29— electrocution — negligence as proximate cause — sufficiency of evidence**

In an action to recover damages for the wrongful death of plaintiff's intestate, the trial court erred in directing a verdict for the defendant where there was sufficient evidence from which the jury could find that a ground fault occurred in defendant's pump house, and, as a proximate result of defendant's negligence in not complying with the National Electrical Code, this ground fault caused the motor to become lethally energized and to electrocute plaintiff's intestate when he came in contact with the motor.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 11 February 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 27 August 1975.

Plaintiff brought suit against defendant to recover damages for the wrongful death of plaintiff's decedent. From an order directing a verdict for the defendant, plaintiff appeals.

The evidence tends to show that the defendant is a nonprofit private corporation situated in Mebane, N. C. and engaged in the operation of a private swimming pool. In connection with operation of the swimming pool, defendant maintains an electrically serviced pump house at the southwest corner of the pool. In this pump house on or about 8 June and

9 June 1969 were conditions in violation of the 1968 National Electrical Code.

On 2 June 1969, the motor from defendant's pump house was removed for repairs. Upon returning the motor on 3 June, Carl Edwards, an employee of Oakley Electric, notified Wayne Gardner, employee of defendant, of the unsafe electrical condition existing in the pump house.

On 8 June 1969 plaintiff's intestate, Joseph Anthony Ward, was on the premises of the defendant at the request of pool lifeguard Wayne Gardner as a substitute lifeguard for Gardner. Ward's lifeless body was found at 1:20 p.m. 8 June 1969 in the pump house of defendant's pool. Chlorine was kept in the pump house at that time.

The expert testimony of a doctor tended to show that there were burns on the body of plaintiff's intestate which probably resulted from contact with an electric cord, wire, pipe, or other substance carrying electric charges and that death resulted from electrocution.

Further, five witnesses experienced in the field of electricity testified as to the presence of unsafe electrical conditions in defendant's pump house. Mr. T. C. Moody, a State Electrical Inspector, testified that he was familiar with the 1968 version of the National Electrical Code at the time he examined defendant's pump house on 9 June 1969. During this examination, he observed that the wiring in the pump house was not properly installed according to the National Electrical Code, which was in force and effect in North Carolina at that date.

At the close of the plaintiff's evidence, the court directed a verdict for the defendant, and plaintiff appeals.

Hemric & Hemric, P.A., and John K. Patterson by H. Clay Hemric, Jr., for plaintiff appellant.

Latham, Wood & Cooper, by B. F. Wood, for defendant appellee.

MARTIN, Judge.

Plaintiff assigns as error the allowance of defendant's motion for directed verdict on plaintiff's claim for damages.

On a motion for a directed verdict by the defendant, the court must consider the evidence in the light most favorable to

the plaintiff, and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. G.S. 1A-1, Rule 50(a), Rules of Civil Procedure; *Adler v. Insurance Co.*, 280 N.C. 146, 185 S.E. 2d 144 (1971); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972). Applying this test to the case at bar, it appears that the evidence presented was sufficient to go to the jury.

In *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955), the Court noted that the General Assembly can prescribe standards of conduct which have the force and effect of law. In G.S. 143-138, the General Assembly specifically set the standard of care in respect to the installing of the electrical system of a building and the electric wiring of buildings for lighting or for other purposes. The standard set is that the electrical system of a building shall be installed in conformity with the "National Electrical Code." The legislative purpose was to protect life, health and property. It is well settled law in this jurisdiction that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence per se. Of course, to make out a case of actionable negligence the additional essential element of proximate cause is required. *Lutz, supra.* Thus, on 8 June 1969 the National Electrical Code had the force and effect of law in North Carolina and criminal sanctions were provided for its violation.

[1, 2] There is plenary evidence to show that the electrical wiring in defendant's pump house was not properly installed as required by the National Electrical Code. The violations of this Code constituted negligence per se. *Lutz Industries, Inc. v. Dixie Homes Stores, supra; Jenkins v. Electric Co.*, 254 N.C. 553, 119 S.E. 2d 767 (1961). Plaintiff's evidence further tends to show that defendant had constructive notice of the unsafe electrical conditions existing in the pump house as early as 2 June 1969 in that defendant's employee, Wayne Gardner, was told by Carl Edwards that the dangerous electrical situation in the pump house should be corrected. The general rule is that a principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends, although the agent does not in fact inform his principal thereof. *Norburn v. Mackie*, 262

N.C. 16, 136 S.E. 2d 279 (1964). Thus, the notice to Gardner of the dangerous condition constituted notice to the defendant.

We now come to the question as to whether the plaintiff's evidence, considered in the light most favorable to plaintiff and giving him the benefit of every reasonable and legitimate inference to be drawn therefrom, is sufficient to carry the case to the jury that defendant's negligence was a proximate cause of the death of plaintiff's intestate.

[3] A proximate cause of an injury is "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. R. R.*, 253 N.C. 746, 117 S.E. 2d 844 (1961); *Jenkins v. Electric Co., supra.* In the present case, Lee Norman, the electrical inspector for Alamance County, testified:

> "No, sir, the condition that existed as to the wiring, would not in and of itself constitute a hazard in my opinion. As to what caused it to be a hazard, if you had a breakdown in the winding of this motor, if it had shorted out to the frame of the motor and this is what creates the hazard. No, sir, that hazard would not have been created if the motor had been properly grounded. In my opinion, it became hazardous when the frame of the motor became energized. If it had become energized, and if it had been properly grounded, it would have been conducted, this is the purpose for it, in case you do have abnormal condition, if this ground is present to take the ground fault off of the motor and not charge it up to where it would be dangerous and hazardous to someone coming in contact with it."

Further, T. C. Moody, a State Electrical Inspector, testified as follows:

> "A ground fault occurs when an energized conductor becomes active, becomes connected with the equipment case, the housing . . . There was no ground wire at Thompson Heights Swimming Club Pool. The ground fault was right here, almost in the center of this space and about right here (indicating) and in this area (indicating on the diagram) and the lower ground wire here (indicating). There was no ground wire from the switch box to the motor. As

to the function of the ground wire, the ground is a safeguard against current fault or ground fault. The ground line is a ground conductor. The ground conductor causes fault current to go back to the source. As far as safety is concerned, it keeps the motor from remaining hot, drains off the current on the casing of the motor. The ground conductor is most important in places that require equipment to be grounded at that location. The National Electrical Code requires motors run by electric cables to be grounded. I found no ground at Thompson Heights. . . . As to whether I said that a ground fault could be described as a shorting out in the motor, a ground fault is not necessarily a shortage, it might be in a sense. I said shorted out and moved from one location to another. In my opinion, those tests proved to me that that is what occurred on this occasion. As to whether there was a shortage inside the coil, the ground had gone to the case of the motor."

Application of the foregoing definition to the evidentiary material demonstrates that there was sufficient evidence from which the jury could find that a ground fault occurred, and, as a proximate result of defendant's negligence in not complying with the National Electrical Code, this ground fault caused the motor to become lethally energized and electrocuted plaintiff's intestate when he came in contact with the motor.

After careful consideration of the evidence in the light most favorable to plaintiff, and giving him all legitimate inferences to be drawn therefrom, it is our opinion that plaintiff was entitled to have the evidence considered by a jury to determine whether the plaintiff's intestate's death was proximately caused by defendant's negligence.

For the reasons stated, the judgment ordering a directed verdict in favor of defendant is

Reversed.

Judges BRITT and HEDRICK concur.

ALEXANDER SIMON BROOKS v. HILL ALSTON SMITH

No. 759SC375

(Filed 15 October 1975)

1. **Rules of Civil Procedure § 56— motion to continue summary judgment hearing — motion to suppress deposition**

The trial court did not err in the denial of plaintiff's oral motions to continue a summary judgment hearing and to suppress a deposition offered by defendant where plaintiff was served with notice of the hearing and with the deposition as provided in Rule 56(e), and plaintiff failed after notice to move for a protective order under Rule 30(b) or otherwise to oppose the taking and use of the deposition by defendant.

2. **Automobiles § 40— pedestrians — highway workers — special status — degree of care**

Plaintiff did not have a special status as a worker on the highway which required a higher degree of care on the part of defendant motorist than that owed to an ordinary pedestrian where plaintiff had left his place of work and was crossing the highway when he was struck by defendant's car.

3. **Automobiles § 83— striking highway worker — contributory negligence — summary judgment**

In an action to recover damages for injuries sustained when plaintiff was struck by defendant's car while installing underground cables along the highway, summary judgment was properly entered for defendant on the ground that plaintiff was contributorily negligent as a matter of law where defendant presented evidence at the hearing that plaintiff had left his place of work and was crossing the highway when he collided with the side of defendant's car, and the only evidence offered in opposition by plaintiff was his complaint.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 26 February 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 29 August 1975.

The plaintiff instituted this action to recover damages for injuries sustained when he was struck by an automobile operated by the defendant on 25 June 1973 while plaintiff was working as a construction crew member installing underground cables along U. S. Highway # 70 in Wake County, West of Raleigh, North Carolina. Signs were erected along the highway warning motorists that men were working in the area.

Defendant filed a motion for summary judgment on 21 January 1975. His motion was supported by the deposition of Gary Goodwin. Plaintiff's counsel did not appear for the taking

of the oral deposition of Goodwin, though duly notified; and the deposition transcript was served on plaintiff's counsel as provided by G.S. 1A-1, Rule 56(c). The motion came on for hearing as calendared on 24 February 1975. Plaintiff's attorney was present and consented to the opening and consideration by the court of plaintiff's deposition; but he objected to the use of the deposition of Gary Goodwin for that it was taken after time for discovery had expired, and moved for a continuance of the hearing on the grounds that he had had no notice of the hearing. Both motions were denied. Plaintiff excepted.

At the hearing plaintiff offered no response except his complaint, but he contended that he did have witnesses, not then available, whose testimony would raise issues of fact.

Plaintiff appealed from the summary judgment entered against him.

Hubert H. Senter for plaintiff appellant.

Boyce, Mitchell, Burns & Smith by Robert E. Smith for defendant appellee.

CLARK, Judge.

[1] In the order denying plaintiff's oral motions to continue the summary judgment hearing and to suppress the deposition of Gary Goodwin, the trial court found the plaintiff had been served with notice of the hearing and with the Goodwin deposition, as provided by G.S. 1A-1, Rule 56(c). The findings were fully supported. Plaintiff's claim that he had witnesses available for trial, who would offer evidence of defendant's negligence and injury to the plaintiff, is without merit. Since the plaintiff was duly served with notice, he had ample time to make a "response with affidavits or as otherwise provided by this rule." G.S. 1A-1, Rule 56(e). He failed to do so. He also failed after notice to move for protective order under Rule 30(b), or to otherwise oppose the taking or the use of the Goodwin deposition to support defendant's motion for summary judgment. His oral objection to its use, made during the hearing, was properly overruled. We find no error in the denial of the plaintiff's motions.

Plaintiff's primary assignment of error is the rendition of summary judgment for the defendant. G.S. 1A-1, Rule 56(c) provides in part that "if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue to any material fact" the appropriate judgment shall be rendered forthwith.

As movant, defendant had 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 treated." 6 Moore's Federal Practice (2d Ed. 1971), § 56.15(8), at 2439, quoted in *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). The movant must meet this burden even when he does not have the burden of proof at trial. *Savings and Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972).

In support of his motion for summary judgment, Smith offered the affidavit of Gary Goodwin, an eyewitness to the accident. This affidavit stated in part,

> "When Mr. Brooks came up onto the surface of the road and ran out into the road, the portion of the automobile that he collided with was about two foot back on the left front fender. In other words, he struck the side of the front fender on the driver's side of the automobile. He knocked one of the side mirrors off and his arm went through the windshield; and it just spun him around in the road and he fell back over the inside lane, the lane closest to the median. The automobile which Mr. Brooks collided with was traveling in the right-hand lane, the outside lane. There was other traffic there at the time of the accident. The traffic was heavy.
>
> * * *
>
> There was no difference in the speed of the automobiles which I saw passing the scene of the accident at the time of the accident. They were all traveling about the same speed . . . . "

This showing negates Brooks' claim that the accident resulted from an act or omission of Smith and initially carries the burden placed upon movant under Rule 56(c). "[I]f the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or

otherwise, that show there is a triable issue of material fact. . . . " *Pridgen v. Hughes,* 9 N.C. App. 635, 640, 177 S.E. 2d 425, 428 (1970).

[2] The plaintiff claims that as a worker in the highway he had a special status which required a higher degree of care on the part of the defendant than that owed an ordinary pedestrian. Some courts recognize such "special status" of a highway worker for the stated reason that the worker is directing his attention to his work and cannot be expected to keep a constant lookout for vehicles. See Annot., 5 A.L.R. 2d 758 (1949); and *Murray v. Atlantic Coast Line R. Co.,* 218 N.C. 392, 11 S.E. 2d 326 (1940). But in this case the plaintiff alleged and the evidence establishes that plaintiff had left his place of work and was crossing the highway when struck. Under these circumstances there is no support for the claim of special status. The plaintiff was an ordinary pedestrian and as such was under the duty to exercise due care for his own safety. Under G.S. 20-174(a) he had the duty to yield the right-of-way to vehicular traffic since he was crossing at a point other than a crosswalk. *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214 (1964). He also had the duty to maintain a reasonable lookout for oncoming traffic before stepping into the highway and while crossing. *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589 (1954). A pedestrian who fails to take these precautions cannot be said to exercise reasonable care for his own safety. *Brooks v. Boucher,* 22 N.C. App. 676, 207 S.E. 2d 282 (1974).

[3] In this case if the plaintiff had looked to his right before or while moving behind the first passing automobile, he could have seen the defendant's car and, seeing the car, presumably would not have run into its side. We find that the Goodwin deposition clearly establishes contributory negligence on the part of the plaintiff which was the proximate cause of his injuries.

The burden then shifted to the plaintiff under Rule 56(e) to show that there is a genuine issue for trial, or to provide an excuse for not doing so under Rule 56(f). The plaintiff failed to do so. The plaintiff in his deposition stated that he was rendered unconscious by the collision and now has no memory of the events surrounding the collision. The only response offered by the plaintiff was his Complaint. Under Rule 56(e) he could not rest upon the "mere allegations or denials of his pleading." If the defendant moving for summary judgment successfully

carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial and he cannot rest upon the very allegations of his complaint. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971). Here the purpose of this rule is more compelling in view of plaintiff's statement in his deposition that he had no memory of what happened.

We recognize that it is only in the exceptional negligence case that summary judgment should be allowed. But we find that the facts of this case present that type of exceptional case where summary judgment is appropriate since it was clearly established that the plaintiff was contributorily negligent as a matter of law. The summary judgment for the defendant is

Affirmed.

Judges MORRIS and VAUGHN concur.

IN THE MATTER OF: CRAIG ALLEN ARTHUR

No. 753DC421

(Filed 15 October 1975)

1. **Infants § 10— juvenile proceedings — due process**

Due process for a juvenile includes written notice of specific charges in advance of hearing, notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed, the privilege against self-incrimination, proof of the offense charged beyond a reasonable doubt, and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession.

2. **Constitutional Law § 31; Infants § 10; Narcotics § 3— report of analysis for narcotics — juvenile proceedings — constitutionality of admission statute**

The statute rendering a certified SBI laboratory report of an analysis of matter to determine whether it contains a controlled substance admissible in the district courts, G.S. 90-95(g), does not deprive a juvenile of the right of confrontation and cross-examination, although the juvenile has no right of appeal to the superior court for trial de novo where he could cross-examine the SBI chemist who prepared the report, since the juvenile is afforded a right of access to the report in ample time to prepare for trial and has the right to subpoena the person who prepared the report.

In re Arthur

APPEAL by juvenile from order of *Whedbee, Judge.* Judgment entered 17 April 1975 in District Court, CARTERET County. Heard in the Court of Appeals 16 September 1975.

On 2 March 1975, Patrolman W. E. Wilson of the Morehead City Police Department, in response to a radio call, went to the Morehead City Bowling Alley where he approached the appellant, Craig Allen Arthur, age 15. The officer had been informed that appellant had marijuana in his possession. When confronted by Officer Wilson, appellant denied having any marijuana and would not consent to a search. However, he agreed to accompany the officer to the police station.

Appellant and Officer Wilson left the bowling alley, went to the parking lot, and got into the patrol car. As Officer Wilson started the engine, appellant pulled a cellophane bag containing green vegetable matter from his pocket, laid it on a raincoat next to Officer Wilson and began telling the officer how he got the package. Wilson asked appellant to refrain from making any statement until they got to the station and his parents were notified.

At trial appellant was represented by counsel and the evidence consisted of the testimony of Officer Wilson and a S.B.I. laboratory report showing that the cellophane package appellant placed on the seat beside the officer contained 13.3 grams of marijuana. The report was allowed into evidence over objection from appellant's counsel who contended admission of the report in the context of a juvenile proceeding deprived appellant of the right to confront and cross-examine the State's witnesses.

The court entered an order adjudicating appellant a delinquent and placing him on two years' probation, subject to certain conditions, from which order he appeals.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Wheatly & Mason, P.A., by L. Patten Mason for the appellant.

BRITT, Judge.

Appellant assigns as error the admission of the S.B.I. laboratory report into evidence, contending that G.S. 90-95(g) as applied to him, a juvenile, is unconstitutional in that it deprives

him of the right of confrontation and cross-examination of witnesses. We find no merit in the assignment.

G.S. 90-95(g) provides as follows: "Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, (and other named laboratories) for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. . . ." Appellant argues that while the statute may be constitutional as applied to adults who have a right to appeal to superior court for a trial de novo, where they would have the right of confrontation and cross-examination of witnesses, a juvenile does not have this right of appeal, hence he is deprived of his constitutional rights.

[1] Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967). The scope of juvenile due process, however, is not as extensive as that incident adversary adjudication for adult criminal defendants. The guiding rule is one of fundamental fairness. *McKeiver v. Pennsylvania,* 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971), *aff'g sub nom,* 275 N.C. 517, 169 S.E. 2d 879 (1969). Due process for a juvenile includes written notice of specific charges in advance of hearing, notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination, proof of the offense charged beyond a reasonable doubt, and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967); *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970); *Ivan V. v. City of New York,* 407 U.S. 203, 32 L.Ed. 2d 659, 92 S.Ct. 1951 (1972) (per curiam).

These due process standards are incorporated in North Carolina juvenile procedure by G.S. 7A-285. *See* 3 R. Lee, North Carolina Family Law § 304A (Cumm. Supp. 1974). Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection

of the courts in accordance with constitutional safeguards. *McKeiver v. Pennsylvania, supra.*

Generally, the same rules of evidence apply in both criminal and civil actions as well as in juvenile proceedings. While the rules of evidence in juvenile proceedings may be relaxed to some extent, this must fall short of deprivation of juvenile due process. *F. & F. v. Duval County,* 273 So. 2d 15 (Fla. App. 1973), *cert. denied,* 283 So. 2d 564 (1973). Thus evidence in juvenile proceedings would include matter admissible under well recognized exceptions to the hearsay rule.

The prohibition against hearsay evidence, and the Sixth Amendment guarantees of the right to cross-examination and confrontation, while arising from the same source are not coextensive in scope. *Richardson v. Perales,* 402 U.S. 389, 28 L.Ed. 2d 842, 91 S.Ct. 1420 (1971); *Dutton v. Evans,* 400 U.S. 74, 27 L.Ed. 2d 213, 91 S.Ct. 210 (1970). Hence certain hearsay statements are admissible in juvenile proceedings when endowed with the requisite indicia of reliability even though there might be a technical deprivation of the right to confront and cross-examine witnesses. *In re Kevin G.,* 80 Misc. 2d 517, 363 N.Y.S. 2d 999 (Fam. Ct. 1975); *People v. Nisonoff,* 294 N.Y. 696, 60 N.E. 2d 846 (1944), *cert. denied,* 326 U.S. 745, 90 L.Ed. 445, 66 S.Ct. 22 (1945); S. Davis, Rights of Juveniles § 5.06 (1974).

North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. G.S. 8-34 (Official Writings); G.S. 8-35 (Authenticated Copies of Public Records); G.S. 8-37 (Automobile Ownership); G.S. 8-45.1 (Photographic Reproduction Admissible); G.S. 20-139.1(a) (Motor Vehicle Operators Blood Alcohol Content); G.S. 106-89 (Fertilizer Analysis). *See, e.g.,* 1 Stansbury's North Carolina Evidence §§ 153-55, 165 (H. Brandis Rev. 1973). The business records doctrine, recognized by statute in G.S. 55A-27.1, is an exception to the hearsay rule applicable to private sector records. 1 Stansbury's North Carolina Evidence § 155 (H. Brandis Rev. 1973). These exceptions to the hearsay rule form some basis for admission of the report in question notwithstanding G.S. 90-95(g).

[2] While the context of a juvenile proceeding effectively circumscribes appellant's opportunity to cross-examine the chem-

ist as in trial de novo, we discern no prejudice by the statute where, as here, appellant's right to compulsory process remains intact and he is afforded access to the report in ample time to prepare for hearing. Given the presumption of official regularity the report possesses the requisite indicia of regularity, trustworthiness and reliability. *Pasadena Research Laboratories Inc. v. United States,* 169 F. 2d 375 (9th Cir. 1948), *cert. denied,* 335 U.S. 853, 93 L.Ed. 401, 69 S.Ct. 83 (1948). *See generally* 1 Wharton's Criminal Evidence § 130 (13th ed. C. Torica 1972). The report is free from selfish or pecuniary interests which renders it compatible with other recognized and proven exceptions to the hearsay rule. *United States v. Frattini,* 501 F. 2d 1234 (2d Cir. 1974); *Kay v. United States,* 255 F. 2d 476 (4th Cir. 1958), *cert. denied,* 358 U.S. 825, 3 L.Ed. 2d 65, 79 S.Ct. 42 (1958); *United States v. Ware,* 247 F. 2d 698 (7th Cir. 1952); *State v. Torello,* 103 Conn. 511, 131 A. 429 (1925).

We do not think the deprivation of constitutional rights complained of here approaches the deprivation complained of in *McKeiver v. Pennsylvania, supra.* There, the court held that the juvenile was not entitled to a jury trial and he had *no* way of accomplishing that end. Here, if appellant felt the laboratory report inaccurate, he had the right to subpoena the person who tested the substance and rendered the report.

We hold that the challenged statute is constitutional and that it was not unconstitutionally applied to appellant in this case.

Affirmed.

Judges PARKER and CLARK concur.

MARTHA REAVIS v. GRACE CAMPBELL

No. 7522SC44

(Filed 15 October 1975)

1. Appeal and Error § 16— setting aside judgment after appeal — adjudication of abandonment of appeal

The trial court had jurisdiction to set aside summary judgment for defendant after plaintiff had given notice of appeal and to enter another judgment since the proceedings before the trial court con-

stituted an adjudication that plaintiff's appeal had been abandoned and that plaintiff, by moving to have the judgment set aside and by appearing at the hearing for that purpose, gave proper notice of her intention to abandon the appeal.

2. **Automobiles § 58— driver of turning vehicle — negligence — summary judgment — conflicting testimony at prior trial**

In a passenger's action against the driver of the car in which she was riding to recover for injuries received when defendant's car collided with an oncoming second car while attempting to make a left turn, the trial court erred in granting summary judgment for defendant where defendant offered the testimony of plaintiff at a prior trial arising out of the same accident to the effect that the driver of the second car, and not defendant, was negligent, but plaintiff offered testimony given at the prior trial by a patrolman and the driver of the second car tending to show that the collision was caused by defendant's negligence, since the contradiction in testimony raised an issue of credibility for the jury.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 11 November 1974 in Superior Court, IREDELL County. Heard in the Court of Appeals 19 March 1975.

Plaintiff brought suit against defendant to recover for injuries incurred in an automobile accident.

On 8 October 1972, plaintiff was the guest passenger in an automobile operated by defendant. An accident occurred in which a car operated by Barbara Gail Murdock collided with the car occupied by the plaintiff and defendant-operator. The accident occurred when the defendant was attempting to make a left-hand turn across the traffic lane in which Mrs. Murdock was proceeding. The right side of Mrs. Murdock's automobile collided into the passenger side of the automobile operated by the defendant.

In a previous trial arising out of the same set of facts, the plaintiff testified that the automobile in which she was riding was sitting still at the time the accident took place, and that the car was sitting two feet back of the centerline. In effect, plaintiff testified that Barbara Gail Murdock was the negligent driver, rather than Grace Campbell. In the case at bar, plaintiff is alleging that it was Grace Campbell who was negligent in that she failed to bring her automobile to a stop and failed to yield the right-of-way to the vehicle operated by Barbara Gail Murdock.

Both parties moved for summary judgment. Defendant based her motion upon plaintiff's testimony in the previous trial

arising out of the same set of facts. Plaintiff's attorney failed to appear at the hearing on the motions, and therefore was not heard. The court allowed defendant's motion. Plaintiff appealed from that judgment, and later moved to have the summary judgment set aside. Upon hearing the motion, the court set aside the prior judgment and again entered summary judgment in favor of the defendant upon evidence offered by both plaintiff and defendant. From this latter judgment, both plaintiff and defendant appeal.

Franklin Smith, for plaintiff appellant.

Sowers, Avery & Crosswhite, by William E. Crosswhite, for defendant appellee.

MARTIN, Judge.

[1] One question raised by this appeal, although not mentioned by either party, is whether the trial court had the jurisdiction to set aside the first judgment and enter the second judgment after the plaintiff had given notice of appeal.

In *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659 (1963), it was stated:

> "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.* ' . . . [A] motion in the cause can only be entertained by the court where the cause is.' Exceptions to the general rule are: (1) notwithstanding notice of appeal a cause remains *in fieri* during the term in which the judgment was rendered, (2) the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned, (3) the settlement of the case on appeal."

However, the general rule that an appeal divests the trial court of jurisdiction becomes inoperative when the trial judge, after due notice and on a proper showing, adjudges that the appeal has been abandoned. We construe the proceedings appearing in the record on 11 November 1974 to constitute an adjudication by the court that plaintiff's prior appeal from the entry of summary judgment in favor of defendant had been abandoned, and that plaintiff, by moving to have the judgment set aside and by appearing at the hearing for that purpose, gave proper notice of her intention to abandon the same. *Sink v. Easter,* 288 N.C. 183, 217 S.E. 2d 532 (1975). It follows,

therefore, that the superior court had jurisdiction on 11 November 1974 to hear plaintiff's motion to set aside the judgment entered 8 August 1974, and to enter another judgment.

[2] Another question presented by this appeal is whether the trial court erred in granting summary judgment in favor of defendant.

The first determination to be made in considering the propriety of summary judgment is whether Campbell, as the party moving for summary judgment, has met the burden placed upon her under Rule 56(c). The movant's burden was stated in *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972), as follows:

> "Our Rule 56 and its federal counterpart are practically the same. Authoritative decisions both state and federal, interpreting and applying Rule 56, hold that 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.' (Citations). Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. (Citations)."

In determining whether the movant has met this burden, the court may consider such evidence as " . . . admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971).

In support of her motion for summary judgment, defendant Campbell offered the testimony of plaintiff from a former trial arising out of the same transaction. In the former trial the plaintiff, Martha Reavis, was alleging that Murdock was responsible for her injuries which resulted from the same automobile accident. Plaintiff testified as follows:

> "Q. First, tell us if the Chevrolet you were riding in, was it sitting still at the time the accident took place?
>
> A. Yes, it was.

Q. Tell us where the automobile you were riding in was sitting with reference to the centerline.

A. Sitting two feet back this side of the centerline.

. . .

Q. You may state at the time the accident occurred what direction if any the Campbell vehicle you were riding in was traveling.

A. Going South.

Q. State if the vehicle was moving at all.

A. It was not moving.

. . .

Q. In your Complaint you make no allegations of negligence at all on the part of Mrs. Campbell, do you?

A. No."

The plaintiff offered, in support of her motion to set the 8 August 1974 judgment aside and in defendant's motion for summary judgment, a transcript of the testimony of Trooper M. K. Holcomb and Barbara Gail Murdock given at a former trial. Trooper Holcomb investigated the accident and Barbara Gail Murdock was the operator of the vehicle involved in the accident with defendant, Grace Campbell.

At the former trial, Holcomb testified:

"Q. Now, was any portion of the 1962 Chevrolet (Murdock car) located in the southbound lane?

A. . . . No.

Q. Was it completely in the northbound lane?

A. Yes.

Q. Approximately how much of the Campbell vehicle, the 1971 Chevrolet, was located in the northbound lane also?

A. The Campbell vehicle was better than three-fourths in the northbound lane."

Also at the former trial, Murdock testified:

"Q. When you saw the Campbell vehicle—I believe it was a 1971 Chevrolet?

A. Yes.

Q. Was it moving or stopped?

A. Moving.

Q. Did it thereafter stop, did it stop after you first saw it?

A. No, it did not.

Q. Anytime?

A. No."

Thus, the testimony of Holcomb and Murdock, which was offered in evidence by plaintiff, contradicted the testimony of the plaintiff which was offered in evidence by the defendant. This contradiction raises an issue of credibility sufficient to defeat defendant's motion for summary judgment and to advance the case for trial. *Railway Co. v. Werner Industries,* 286 N.C. 89, 209 S.E. 2d 734 (1974). Conceivably, plaintiff would not testify at the trial of this action. " 'Upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. (Citations).' " *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101, (1970). " 'If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . . ' (Citation)." *Kessing v. Mortgage Corp., supra.*

Defendant excepted to and gave notice of appeal from that part of the 11 November 1974 judgment setting aside the summary judgment dated 8 August 1974. While defendant filed no appellant's brief on this question, she argued the question in her brief as appellee on plaintiff's appeal. Assuming arguendo, the question is properly presented, in view of our holding above, we find no merit in defendant's contention.

For the reasons stated, those parts of the 11 November 1974 judgment denying plaintiff's motion for summary judgment and setting aside the summary judgment dated 8 August 1974 (filed 31 October 1974) are affirmed; but that part of the 11 November 1974 judgment allowing defendant's motion

for summary judgment and dismissing plaintiff's cause of action is reversed.

Affirmed in part.

Reversed in part.

Judges BRITT and HEDRICK concur.

EVELYN McDOUGALD, ADMINISTRATRIX OF THE ESTATE OF WENDELL McDOUGALD, DECEASED v. REBECCA ARNOLD DOUGHTY

No. 7512SC257

(Filed 15 October 1975)

1. **Trial §§ 32, 38— jury informed that instruction given at party's request**

Where the trial court prefaced the giving of plaintiff's requested instruction with the statement that he had been requested by counsel to read it, the jurors were not misled but properly understood that the court, in giving the requested special instruction, gave it as the court's instruction on the law and not merely as a contention of one of the parties.

2. **Automobiles § 90— striking minor bicyclist — instruction as to statute proper**

In an action for wrongful death of plaintiff's intestate who was killed when his bike and defendant's automobile collided, the trial court did not err in failing to refer specifically to G.S. 20-141(c) as that statute existed at the time of the accident in question, since the court did instruct the jury adequately on the substance of the statute as it related to the evidence in this case.

APPEAL by plaintiff from *Gavin, Judge.* Judgment entered 10 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 29 May 1975.

Civil action for wrongful death. Plaintiff's intestate, a thirteen-year-old boy, was killed as a result of a collision between his bicycle and defendant's automobile which occurred on the afternoon of 13 April 1973 on a rural paved road in Cumberland County. Issues of negligence, contributory negligence, and damages were submitted to the jury. The jury answered the first issue in favor of the defendant, and from judgment dismissing the action, plaintiff appealed.

MacRae, MacRae & Perry by James C. MacRae for plaintiff appellant.

Anderson, Nimocks & Broadfoot by Henry L. Anderson, Jr. for defendant appellee.

PARKER, Judge.

Appellant brings forward four assignments of error, all of which relate to the court's instructions to the jury. The first assignment of error relates to the following portion of the court's charge:

> "The Court charges you that negligence is the lack of ordinary care. It is failure to do what a reasonably careful and prudent person would have done, or the doing of something which a reasonably careful and prudent person would not have done, considering all of the circumstances then existing on the occasion in question.
>
> "Negligence is not to be presumed from the mere fact of an accident, or a wrongful death in this case. A party seeking damages as a result of negligence has the burden of proving not only that negligence but also that such negligence was the proximate cause of the damage or the wrongful death. In connection with this, I have been asked by counsel to read to you the following: 'The law imposes upon a motorist the duty to exercise due care to avoid injuring children whom he may see, or by the exertion of reasonable care should see, on or near the highway. In so doing, he must recognize that children have less discretion and capacity to shun danger than adults and are entitled to a care proportionate to their inability to foresee and avoid peril.
>
> "Due care may require a motorist in a particular situation to anticipate that a child of tender years whom he sees on or near the highway will attempt to cross in front of his approaching automobile, unmindful of the attendant danger.' "

[1] Appellant's counsel acknowledges that the special instruction was given in the exact form which he had requested, but contends that prejudicial error resulted when the judge prefaced the giving of this special instruction with the statement that he had been requested by counsel to read it. We have hereto-

fore had occasion to express our disapproval of the trial court's informing the jurors that particular instructions are given at the request of a party. *Womble v. Morton,* 2 N.C. App. 84, 162 S.E. 2d 657 (1968). When such instructions are given, they should be given as instructions from the court, else there is danger they be considered by the jury as being merely the contentions of one of the parties. However, in the present case we are of the opinion that no prejudicial error resulted. Subsequently, in the charge the court instructed the jury that "the fact that teenagers were on the highway in the vicinity of the accident, that the deceased Wendell McDougald, was on the highway on a bicycle, riding on the shoulder or on the highway, these are facts that must be considered by you and related to the law *as I have given it to you.*" (Emphasis added.) When the charge is considered as a whole, we are of the opinion that the jurors were not misled and properly understood that the court, in giving the requested special instructions, gave it as the court's instruction on the law and not merely as a contention of one of the parties.

[2] In her second assignment of error the appellant contends that the court committed error in failing to instruct the jury as to the duty of a motorist to decrease speed "when special hazard exists" and "as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway." A violation of this duty, which was expressly imposed by G.S. 20-141(c) as that statute existed at the time of the accident here in question, was alleged in plaintiff's complaint as one of the respects in which plaintiff contended that defendant was negligent. Although the court in its charge did not expressly refer to the statute, in our opinion it did instruct the jury adequately on the substance of the statute as it related to the evidence in this case. This is all that the court was required to do. In this connection the only "special hazard" disclosed by the evidence in this case was the presence of some "teenagers" on the shoulder of the highway at a point 300 to 400 yards before defendant's car reached the point of collision and the presence of plaintiff's intestate riding his bicycle on the paved portion and on the shoulder of the highway as defendant's car approached the point of collision. The court charged:

> "When the conditions existing at the scene, such as teenagers on the highway or young people on the highway,

increase the danger by comparison to that existing under normal conditions, the care required of the driver is correspondingly increased, and violation of this duty is negligence."

Immediately following this, the court clearly instructed the jury that "[t]he Motor Vehicle Law provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing," that "[a] violation of this law is negligence," that in determining whether a speed at which a motorist was proceeding was reasonable and prudent the jury should consider all circumstances shown to exist at the time at the scene, and that "a rate of speed may be unreasonable and prudent even though it is within the maximum speed limit at the place in question." Appellant's second assignment of error is overruled.

The two remaining assignments of error brought forward in appellant's brief both relate to portions of the court's charge to the jury bearing upon the issue of contributory negligence. Had there been error prejudicial to appellant in the portions of the charge referred to, and we find none, it was rendered harmless by the jury's answer to the first issue.

No error.

Judges BRITT and VAUGHN concur.

JUDY PHILLIPS JOHNSON, ADMINISTRATRIX OF THE ESTATE OF HENRY LEWIS PHILLIPS v. THE NORTHWESTERN BANK AND OPEL PHILLIPS ELLER

No. 7523SC243

(Filed 15 October 1975)

1. Banks and Banking § 4; Cancellation and Rescission of Instruments § 4— savings account — joint survivorship agreement — failure of one party to understand agreement

An administratrix was not entitled to set aside a savings account joint survivorship agreement signed by the intestate and his sister on the ground that the intestate's sister did not correctly understand the nature of the agreement which she signed where the intestate admittedly signed the agreement voluntarily and understandingly.

2. **Pleadings § 32— refusal to allow amendment to complaint**

The trial court did not err in refusing to allow plaintiff administratrix to amend her complaint where the amendment would assert a claim completely different from that alleged in the original complaint, on behalf of persons not parties to the present litigation, which plaintiff as administratrix had no standing to assert. G.S. 1A-1, Rule 15(a).

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 20 January 1975 in Superior Court, WILKES County. Heard in the Court of Appeals 27 May 1975.

Plaintiff, Administratrix of the estate of Henry Lewis Phillips, who died intestate 20 November 1973, commenced this action on 1 March 1974 to recover as an asset of the estate the sum of $17,975.02, being the balance on deposit in a joint survivorship savings account in defendant bank. The account was in the joint names of the decedent, Henry Lewis Phillips, and his sister, the individual defendant, Opel Phillips Eller.

In her verified complaint plaintiff in substance alleged: On 4 December 1970 Henry Lewis Phillips opened the savings account in defendant bank. All money deposited in the account belonged to him. Plaintiff is informed and believes that "without the knowledge or consent of the defendant, Opel Phillips Eller, the deceased opened said account in the name of Henry Lewis Phillips and Mrs. Opel Eller, as a joint survivorship account." After opening the account the deceased advised Mrs. Eller that it was necessary that she take some of his money and deposit it in the account and that upon her doing so it would be necessary that she sign a card at the bank. Mrs. Eller did deposit money belonging to the deceased in the account and did sign "some form at the bank." Mrs. Eller "did not understand or knew what form or what document she had signed." Plaintiff is informed that the document signed by Mrs. Eller was a joint survivorship contract. The defendant, Opel Phillips Eller, was not aware that any joint survivorship account existed until after the death of Henry Lewis Phillips. The funds deposited in the account are the property of the estate of Henry Lewis Phillips, but the individual defendant claims ownership of the funds in the account by reason of the joint survivorship contract.

The Northwestern Bank filed answer in which it acknowledged that the sum deposited in the account plus interest amounted to $17,975.02. The bank prayed that the court determine the proper claimant.

The individual defendant filed a verified answer in which she alleged that she and Henry Lewis Phillips opened the account on or about 4 December 1970 and at that time both signed a form provided by the bank wherein it was agreed that in case of death of either, the survivor would be sole owner of the account. A copy of this agreement, which was on the signature card provided by the bank and was in the form prescribed in G.S. 41-2.1, was attached to the answer.

On 22 March 1974 the individual defendant filed a motion for summary judgment, supporting her motion by her verified answer and by affidavits of her husband, of a friend of the deceased, and of the bank teller who opened the account. In these affidavits each affiant stated that Henry Lewis Phillips had discussed the bank account with the affiant and had expressed his understanding and intention that upon his death all funds in the account would be the sole property of his sister, the individual defendant.

In opposition to defendant's motion for summary judgment, plaintiff, on 6 May 1974, filed her own affidavit and an affidavit of her attorney. In her own affidavit plaintiff stated that following the death of her intestate she informed Mrs. Eller that the account was in the name of both the deceased and Mrs. Eller, and Mrs. Eller "expressed astonishment at this fact and advised the plaintiff that she was unaware that her brother had any funds in an account which was held jointly with her." Plaintiff further stated in her affidavit that following that conversation, Mrs. Eller "stated to the plaintiff her intentions of placing this money in trust for the plaintiff's children since none of the money deposited in said account belonged to her." In the affidavit of plaintiff's attorney it is averred that at a meeting on 30 December 1973 Mrs. Eller stated, in response to a question from the attorney, that she did not know that the account was deposited in her name and in the name of Henry Lewis Phillips until after her brother's death. The attorney's affidavit also contains allegations that Mrs. Eller further stated that all of the money in the account belonged to Henry Lewis Phillips, that she did make one deposit in the account on behalf of Henry Lewis Phillips, that she did sign a card at the bank, that it was her opinion it was necessary for her to do so in order for her to deposit the money, and that she did not read the card, was unaware of its contents, and was unaware that she had signed any kind of joint depository contract.

The attorney also stated in his affidavit that at the meeting on 30 December 1973 Mrs. Eller agreed to place all the money in the account in a trust for the benefit of plaintiff's children but that he was advised on 10 January 1974 that she had changed her mind.

The court granted the individual defendant's motion for summary judgment, and plaintiff appealed.

Simpson, Martin, Baker & Aycock by David S. Simpson and Samuel E. Aycock for plaintiff appellant.

William H. McElwee III for defendant appellee, Opel Phillips Eller.

Bradley J. Cameron for defendant appellee, The Northwestern Bank.

PARKER, Judge.

[1] No dispute exists and the pleadings and affidavits of both parties establish that plaintiff's intestate and his sister, the individual defendant, both signed the joint account agreement covering the bank account here in question, that this agreement expressly provides that in case of the death of either of the parties the survivor shall be the sole owner of the entire account, and that the agreement is in a form which brings it fully within the purview of G.S. 41-2.1. Plaintiff makes no contention that her intestate failed to understand the agreement or that his signature was affixed as a result of anything other than his own voluntary and knowledgeable decision. Nor does plaintiff contend that her intestate did not intend the agreement to have the survivorship consequences for which its language clearly provides. On the contrary plaintiff's contention is that the agreement is not binding on the estate which she represents solely because the other party to the agreement, the individual defendant in this case, was unaware of and did not correctly understand the nature and effect of the agreement which she signed. In effect, plaintiff's contention is that she is entitled to avoid the contract which her intestate admittedly signed voluntarily and understandingly solely because the other party to the contract did not understand it correctly. Plaintiff's contention cannot be sustained.

Even should plaintiff establish that Mrs. Eller did not correctly understand the nature of the agreement which she

signed, this would furnish no basis for granting any relief to the plaintiff. "A unilateral mistake may make a bargain voidable but it does not make it void. It is not voidable in favor of the party who made no mistake." 3 Corbin on Contracts, § 611, p. 697. Thus, whether Mrs. Eller did or did not fully understand the contract is simply not material in determining any issue presented in this case. A question of fact which is immaterial does not preclude summary judgment. *See Kessing c. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). We hold that summary judgment was properly entered in favor of the individual defendant.

[2] We also find no error in the court's denying plaintiff's motion, first made at the session at which defendant's motion for summary judgment came on for hearing, for permission to amend her complaint. The amendment which plaintiff desired was not to assert any claim on behalf of the estate which she represents but to assert a claim on behalf of her children. By the proposed amendment plaintiff would seek specific performance of an agreement which she alleges the individual defendant made with her to create a trust for the benefit of plaintiff's children with the proceeds of the disputed bank account. Although G.S. 1A-1, Rule 15(a) admonishes that leave to amend "shall be freely given when justice so requires," we perceive no injustice in the court's refusal in the present case to allow an amendment which would assert a claim completely different from that alleged in the original complaint, on behalf of persons not parties to the present litigation, which plaintiff as administratrix has no standing to assert. At all events the matter was one within the sound discretion of the trial judge, *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E. 2d 588 (1972), and no abuse of discretion has been shown.

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD MOORE, JR.

No. 7526SC390

(Filed 15 October 1975)

Narcotics § 5— possession of heroin — failure to allege and show prior conviction — sentence

The trial court erred in sentencing defendant to imprisonment for ten years for felonious possession of heroin where the indictment did not charge defendant with a prior conviction of that offense and the State did not prove a prior conviction, a sentence of five years being the maximum that could be imposed in such case. G.S. 90-95 (d) (1); G.S. 90-95 (e) (1).

APPEAL by defendant from *Falls, Judge.* Judgment entered 30 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 September 1975.

Defendant was tried on a bill of indictment charging him with the felonious possession of the controlled substance heroin, which is included in Schedule I of the North Carolina Controlled Substances Act. Upon a finding of guilty and judgment imposing imprisonment for a term of ten years, defendant appealed.

Attorney General Edmisten, by Associate Attorneys Noel Lee Allen and David S. Crump, for the State.

Elam & Stroud, by Keith M. Stroud, for defendant appellant.

VAUGHN, Judge.

Defendant contends that the trial court erred in sentencing him to a term of ten years' imprisonment, a term in excess of that allowed by G.S. 90-95 (d) (1). We agree.

G.S. 90-95 (a) (3), makes it unlawful for any person, except as authorized by the Act, to possess a controlled substance. Any person who violates that section by possession of a Schedule I controlled substance is guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars or both in the discretion of the court. G.S. 90-95 (d) (1).

Apparently the judge was attempting to sentence defendant under the following:

"If any person commits a felony under this Article after having been previously convicted of an offense under any

law of North Carolina or any law of the United States or any other state, which offense would be punishable as a felony under this Article, he shall be sentenced to a term of imprisonment of up to twice the term otherwise prescribed or fined up to twice the fine otherwise prescribed, or both in the discretion of the court." G.S. 90-95(e)(1).

This conclusion is reached by reference to a part of the judgment and commitment, as follows:

" . . . It is ADJUDGED that the defendant be imprisoned for the term of Ten (10) years in the State's Prison at Raleigh, North Carolina. This sentence to commence at the expiration of any or all sentences pronounced either in State or Federal Court *and particularly that certain Federal Court case tried in July, 1974.*" (Emphasis added.)

There is no other reference in the record to another conviction.

The indictment did not charge defendant with a conviction for a prior offense and the State did not prove a prior conviction. Both are required before the higher penalty can be imposed.

We call attention to G.S. 15A-928, effective 1 September 1975. Among other things, this statute allows a defendant to admit a previous conviction and thereby preclude consideration by the jury of any evidence thereon, (except as otherwise permitted), or deny the previous conviction or remain silent and make the State prove the prior conviction as part of the trial in chief.

We have examined the record with respect to defendant's remaining assignments of error and conclude that defendant's trial was otherwise free from prejudicial error.

Judgment is vacated and this case is remanded for entry of judgment not inconsistent with this opinion.

Vacated and remanded.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. RONALD MORRIS WEST

No. 759SC394

(Filed 15 October 1975)

1. **Criminal Law § 148— guilty plea — no right of appeal**
   There is no appeal of right from a plea of guilty. G.S. 15-180.2.

2. **Criminal Law § 139— youthful offender — sentence to maximum and minimum terms — error**
   The trial court erred in imposing a minimum as well as a maximum sentence on a youthful offender. G.S. 148-49.4.

APPEAL by defendant from *Judge Giles R. Clark.* Judgment entered 3 April 1975 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 2 September 1975.

Defendant was charged with felonious breaking and entering of a building with the intent to commit a felony therein, to wit: larceny. From a plea of guilty, the defendant was sentenced to a term of imprisonment of not less than four nor more than six years as a committed youthful offender. From his plea of guilty, the judgment and commitment imposed, the defendant appealed.

Other facts necessary to render the opinion are cited below.

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

Royster & Royster, by T. S. Royster, Jr., for defendant appellant.

MORRIS, Judge.

[1] G.S. 15-180.2 prohibits appeals from guilty pleas as a matter of right, but specifically provides for review by way of petition for a writ of certiorari. Counsel for the defendant candidly admits that his review of the record on appeal indicates no error in the trial, but requests that we review the record to determine whether the trial court committed prejudicial error. Because of error in the judgment, we choose to treat the appeal as a petition for a writ of certiorari which we have granted in order that we may review the record.

[2] Our review of the record reveals that although the trial upon a proper indictment was free from prejudicial error, the

court, in rendering judgment, erroneously imposed a minimum as well as a maximum sentence. Pursuant to G.S. 148-49.4, the trial court, at the time of commitment, ". . . *shall fix a maximum term* not to exceed the limit otherwise prescribed by law for the offense of which the person is convicted." (Emphasis supplied.) The judgment must, therefore, be vacated and the case remanded for the entry of a proper judgment.

Vacated and remanded for resentencing.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. TIMOTHY NORTON, KEITH WARD AND FRED PARRIS

No. 7525SC339

(Filed 15 October 1975)

Criminal Law § 158— record on appeal — insufficiency — dismissal of appeal

Appeal is dismissed for failure of appellants to bring forward a record that will enable the appellate court to decide the question raised on appeal where appellants who were convicted of felonious escape contended that their cases should have been submitted to the jury on the question of whether they were serving misdemeanor sentences at the time of their escape, but the record on appeal does not contain the judgments and commitments introduced in evidence and relied on to prove that defendants were serving sentences for felonies or any testimony showing that the sentences were for felonies.

APPEAL by defendants from *Ferrell, Judge.* Judgment entered 6 February 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 26 August 1975.

Each defendant was convicted of feloniously attempting to escape from the State prison system and judgments imposing prison sentences were entered.

Attorney General Edmisten, by Assistant Attorney General W. Woodward Webb and Associate Attorney Isaac T. Avery III, for the State.

Byrd, Byrd, Ervin & Blanton, P.A., by Joe K. Byrd, Jr., for defendant appellants Timothy Norton and Keith Ward; J. Bruce McKinney, for defendant appellant Fred Parris.

VAUGHN, Judge.

Each defendant, among other things, argues that his case should have also been submitted to the jury on the question of whether he was serving a sentence imposed for a misdemeanor. The bills of indictment allege that each defendant attempted to escape while serving a sentence imposed for a felony. The District Attorney elected to consent and stipulate to the docketing of a record on appeal in this Court that does not contain the judgments and commitments which he introduced as evidence and relied on to prove one of the essential elements of the crimes with which defendants were charged, that defendants were serving sentences imposed for felonies. There is reference in the testimony to judgments and commitments introduced into evidence against each defendant but no testimony indicating what they were for. On oral argument of these cases appellants' attorneys were unable to stipulate as to the contents of the judgments and commitments introduced into evidence.

It is the duty of the appellants to bring forward a record that will enable this Court to decide the questions raised on appeal. For failure to do so, the appeals are dismissed. Nevertheless, we have examined so much of the trial record as is before us and, in it, find no prejudicial error.

Appeal dismissed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. RALPH WILLIAM FULLER

No. 7524SC398

(Filed 15 October 1975)

1. **Criminal Law § 29 — mental capacity — failure of defendant to raise question**

Where defendant neither at trial nor on appeal contended that he was incompetent to stand trial, the trial court was not required, on its own motion, to make an inquiry as to defendant's mental capacity to plead to the charge.

2. **Criminal Law § 66— identification of defendant — failure to request voir dire**

The trial court did not err in failing to conduct a *voir dire* to make inquiry into the legality of out-of-court identification procedures

and pass upon the admissibility of the in-court identification testimony of the robbery victim where no objection was made to the victim's testimony and there was no request for a *voir dire.*

3. **Criminal Law § 76— admission of defendant — voluntariness**

In a prosecution for armed robbery of a "Service Distributor" service station attendant in Boone, the trial court did not err in allowing a police officer to testify that defendant admitted being at a "Service Distributor" in Boone on the night of the crime, since the trial court specifically found that defendant understood his rights as explained to him by the officers and that defendant knowingly, understandingly, and voluntarily made the statement.

4. **Criminal Law § 119— jury as sole triers of fact — no request for instruction**

The trial court did not err in failing to instruct the jury that they were the sole triers of fact and to take their own recollection of the evidence and not that of the court, and that it was within their province to take into consideration the demeanor of the witnesses as they testified or that they could believe all, some or none of what a witness testified to, since defendant made no request for such an instruction.

5. **Criminal Law § 114— jury instructions — "tended to show" — no expression of opinion on evidence**

The trial court's statement "tended to show," used in summarizing the evidence, did not constitute an expression of opinion.

6. **Constitutional Law § 32— right to counsel — no denial**

Defendant was not denied his constitutional right to effective assistance of counsel.

ON *certiorari* to review proceedings before *Falls, Judge.* Judgment entered 17 January 1973 in Superior Court, WATAUGA County. Heard in the Court of Appeals 2 September 1975.

Defendant was found guilty of the felony of armed robbery and judgment imposing a prison sentence was entered. Through court-appointed counsel, he gave notice of appeal. The appeal was not perfected because of illness of counsel. Other counsel was appointed, and we allowed his petition for certiorari.

At trial, the State presented evidence tending to show that the prosecuting witness was a service station attendant working from 10:30 at night until 6:30 in the morning at a "Service Distributor" service station in Boone. On 12 May 1972 at approximately 1:45 a.m., defendant came into the station, pointed a gun at the chest of the attendant and demanded money. The attendant turned over $177.00 and was thereafter instructed to go in the bathroom and stay one minute and one-half and then

come out. The interior of the station was well-lighted, and the attendant had the opportunity to observe defendant for about five minutes. The attendant described the robber to the police as being "approximately 5 foot 10 inches tall, from 130 to 145 pounds, dark or black hair, combing his hair back on the sides and on top, a black mustache and a goatee of grayish tint; wearing a goatee."

Two days after the robbery, the attendant was taken to police department offices in Lexington by two officers of the Boone Police Department. As officers of the Lexington Police Department brought defendant down a hall, the attendant said, "that's the man that robbed me right there."

Defendant voluntarily accompanied policemen back to Boone and shortly after his arrival was served with a warrant for armed robbery and placed in jail.

Defendant presented no evidence.

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

Charles C. Lamm, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant first contends that the trial court erred by failing to make inquiry into the results of the defendant's mental examination and to pass upon the defendant's mental capacity to plead to the charge.

Defendant's argument appears to be based entirely on an order signed by Judge McConnell in Rowan County on 14 September 1972, when defendant was awaiting trial on three charges of forgery. It appears that Judge McConnell committed defendant to a State mental hospital for observation for 60 days to determine his competency to stand trial. There is nothing in the record to suggest that this order was ever called to the attention of the judge who presided over defendant's trial in Watauga County. Moreover, the record is silent as to the results of the commitment for observation. " 'Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proven.' " *State v. Hicks,* 269 N.C. 762, 153 S.E. 2d 488. Neither at trial

nor on appeal did defendant contend he was incompetent. His position that the judge should have, on his own motion, directed an inquiry on the question is overruled.

[2] Defendant next contends that the court erred by failing to conduct a *voir dire* to make inquiry into the legality of the out-of-court identification procedures and pass upon the admissibility of the in-court identification testimony of the attendant. No objection was made to the testimony of the attendant when he identified defendant as the man who robbed him at gunpoint and there was no request for a *voir dire*. Defendant's attempted showing of impermissible suggestiveness is raised for the first time on appeal and comes too late.

> "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and *the defendant interposes timely objection and requests a voir dire* or asks for an opportunity to 'qualify' the witness, such voir dire should be conducted in the absence of the jury and the competency of the evidence evaluated." *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583; *see State v. Phelps*, 18 N.C. App. 603, 197 S.E. 2d 558. (Emphasis added.)

Here, defendant neither requested a *voir dire* nor objected to the testimony. Moreover, the evidence is very persuasive that the in-court identification was an independent identification based upon the victim's observation of defendant at the time of this robbery and was not influenced by the confrontation with defendant at the Lexington police station. The assignment of error is overruled.

[3] After conducting a *voir dire* and making appropriate findings, the judge allowed a police officer to testify that defendant admitted being at a "Service Distributor" in Boone on the night of 11 May. On appeal defendant again refers to the order entered in Rowan County committing him for observation. Defendant argues that, despite that order, the judge failed to make findings as to defendant's mental or educational capacity to understand and intelligently waive his rights. The assignment of error is overruled. The judge specifically found that defendant understood his rights as explained to him by the officers and that defendant knowingly, understandingly and voluntarily made the statement.

[4] In assignment of error number four, defendant contends that the trial court erred in its charge to the jury in that they were not instructed that they were the sole triers of the facts and to take their own recollection of the evidence and not that of the court, and that it was within their province to take into consideration the demeanor of the witnesses as they testified or that they could believe all, some or none of what a witness testified to. There was no request for that instruction. When inquiry was made of defendant's counsel if he would like to have anything added to the charge, he asked only for a brief instruction on what a reasonable doubt is, to which the court obliged. Moreover, the trial judge, in his charge, covered most if not all of the areas pointed out by defendant in this assignment. Specifically, the jury was charged " . . . it is your responsibility and yours alone to remember all of the testimony. Every bit of it is important." The jury was also told it could find defendant guilty as charged, guilty of a lesser included offense or that they could acquit him.

[5] Defendant also contends the court's statement "tended to show," used in summarizing the evidence, constituted an expression of opinion. This contention is without merit. *State v. Huggins,* 269 N.C. 752, 153 S.E. 2d 475.

[6] Finally, defendant suggests he may have been denied due process of law by not being provided with effective and able representation by his court-appointed trial counsel. We concur with the words of the trial judge to the defendant after verdict and judgment. "I thought [trial counsel] did very well with what he had to work with. I don't criticize or commend him either one." It is very easy to go over a record after trial and suggest errors of judgment by trial counsel or that different strategies might have been employed. The illness or incapacity of trial counsel to which defendant refers took place months after trial. The constitutional right to assistance of counsel does not guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. *State v. Sneed,* 284 N.C. 606, 201 S.E. 2d 867; *United States ex rel. Weber v. Ragan,* 176 F. 2d 579. We hold that defendant's right to the effective assistance of counsel, guaranteed by the constitutions of North Carolina and the United States, has not been denied.

We find no prejudicial error in defendant's trial.

No error.

Judges MORRIS and CLARK concur.

RICHARD G. PRUITT, EMPLOYEE-PLAINTIFF v. KNIGHT PUBLISHING COMPANY, EMPLOYER-DEFENDANT AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. 7526IC405

(Filed 15 October 1975)

1. **Trial § 6— stipulations — binding effect on parties**

It is settled that stipulations duly made constitute judicial admissions binding upon the parties and a party may not thereafter take a position inconsistent therewith; therefore, defendants who entered into a stipulation before the hearing commissioner as to the sole question for determination could not raise on appeal two other questions not contained in the stipulation.

2. **Master and Servant § 69— workmen's compensation — disability defined**

The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; it is more than mere physical injury and is markedly different from technical or functional disability; it is the event of being incapacitated from the performance of normal labor. G.S. 97-2(9).

3. **Master and Servant § 66— preexisting condition — disposition to injury — no reduction in compensation**

That one employee is peculiarly disposed to injury because of an infirmity or disease incurred prior to his employment affords no sound basis for a reduction in the employer's liability.

4. **Master and Servant §§ 65, 66— workmen's compensation — preexisting condition — back injury — cause of disability**

Evidence was sufficient to support a finding that an injury sustained by plaintiff in defendant's plant in 1972 was the causal force which transformed latent infirmity into disability within the contemplation of the Workmen's Compensation Act where such evidence tended to show that plaintiff sustained a back injury in an automobile accident ten years prior to the accident in defendant's plant but the after-effects of the earlier injury, both long and short term, had abated to the extent that plaintiff regularly performed heavy manual labor—lifting lead plates—at defendant employer's printing plant.

5. Master and Servant § 72— workmen's compensation — preexisting condition — subsequent injury — apportionment of disability improper

Where there was evidence that plaintiff had a 35 percent permanent disability of the spine with 25 percent attributable to the preexisting injury and 10 percent attributable to aggravation by the subsequent injury at defendant's printing plant, the Industrial Commission erred in concluding that plaintiff's compensation should be based on the percentage of disability attributable to the injury sustained in defendant's plant.

Judge CLARK dissenting.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 25 February 1975. Heard in the Court of Appeals 4 September 1975.

For several years prior to 30 November 1972, plaintiff was employed by defendant employer in its printing plant. In his job plaintiff was required to handle heavy printing plates. On said date, while exerting unusual effort to jerk a stuck top from the gear box of a machine, plaintiff sustained an injury to his back. It was stipulated that the injury resulted from an accident arising out of, and in the course of, plaintiff's employment. He sustained temporary total disability for one year and was paid compensation for that period.

During the course of medical treatment, plaintiff was referred to Dr. J. L. Goldner at Duke University Medical Center for examination, treatment and evaluation. Some ten years previously, Dr. Goldner had treated plaintiff for a back injury sustained in an automobile accident prior to plaintiff's employment with defendant employer. This prior injury did not arise while plaintiff was serving in the Army or Navy of the United States, or as the result of a compensable injury. Dr. Goldner opined that the 30 November 1972 injury aggravated the previous injury. He rated plaintiff as having a 35 percent permanent partial disability of the spine with 25 percent attributable to the prexisting injury and 10 percent attributable to aggravation by the subsequent injury at defendant's printing plant.

The hearing commissioner concluded that " . . . because Dr. Goldner can definitely fix causation of the disability at 25% for a pre-existing condition and at 10% for the injury which is the subject of this action, the defendants should not be saddled with plaintiff's full disability. There must be a causal relationship between the injury and the disability and that relationship has been established by Dr. Goldner at a 10% disability of the back." From an award based on 10 percent perma-

nent partial disability, plaintiff appealed to the full commission who adopted as its own, and affirmed, the opinion and award of the hearing commissioner. Plaintiff appealed to the Court of Appeals.

Palmer, McMullen, Griffin & Pittman, P.A., by Richard L. Griffin, for plaintiff appellant.

Spears, Spears, Barnes, Baker and Boles, by Alexander H. Barnes, for defendant appellees.

BRITT, Judge.

[1] In their brief, defendants contend that prior to his request to the Industrial Commission for a hearing, plaintiff entered into a written settlement agreement with defendants which has not been set aside in the manner authorized by G.S. 97-17. They further contend that plaintiff did not give notice of appeal from the hearing commissioner to the full commission within the time prescribed by G.S. 97-85. We do not think the questions raised by these contentions are before us in view of the following stipulation entered into before the hearing commissioner: "The sole question for determination in this case is whether allocation of the disability to plaintiff's back as rated by Dr. Goldner should be prorated, or whether the defendants should bear the entire responsibility for the disability."

It is settled that stipulations duly made constitute judicial admissions binding upon the parties and a party may not thereafter take a position inconsistent therewith. 7 Strong, N. C. Index 2d, Trial, § 6, pp. 262-63. *See also Austin v. Hopkins*, 227 N.C. 638, 43 S.E. 2d 849 (1947), where the court held that the parties having stipulated that the only question involved was the location of the true dividing line between the respective lands, neither party could thereafter raise the question of title. Thus we find no merit in the contentions.

We then come to the real question presented by this appeal: Did the Industrial Commission err in concluding that plaintiff's compensation should be based on the percentage of disability attributable to the injury sustained on 30 November 1972? We answer in the affirmative.

[2] In cases covered by our Workmen's Compensation Act, disability is not a term of art but a creature of statute. G.S. 97-2(9) provides: "The term 'disability' means incapacity because of

injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Thus we see that disability is defined in terms of a diminution in earning power. It is more than mere physical injury and is markedly different from technical or functional disability. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). Our Supreme Court has described disability as the event of being incapacitated from the performance of normal labor. *Watkins v. Central Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *Hall v. Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

[3] An employer takes his employees as he finds them. *Mabe v. North Carolina Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972). *See e.g., Edwards v. Publishing Co.*, 227 N.C. 184, 191, 41 S.E. 2d 592, 594 (1947) (Concurring opinion of Seawell, J.). Each employee brings to the job his own particular set of strengths and weaknesses. That one employee is peculiarly disposed to injury because of an infirmity or disease incurred prior to his employment affords no sound basis for a reduction in the employer's liability. The fact that a person of normal faculties working under the same conditions might not have sustained the same injury to the same degree is immaterial. Plaintiff was putting forth a full day's work for a full day's pay. There is no evidence that plaintiff's capacity to earn in the course of employment at defendant's printing plant was at all impaired by after-effects of the 1961 automobile accident.

[4] The record reveals the 1972 injury as the causal force which transformed latent infirmity into disability within the contemplation of the Workmen's Compensation Act. The force of the earlier injury was spent; the after-effects, both long and short term, had abated to the extent that plaintiff regularly performed heavy manual labor—lifting lead plates—at defendant employer's printing plant. The vulnerative force of the 1972 accident acted directly upon the situs of the earlier injury and surgery, causing, ". . . the impingement of the old fusion on L3 spinous process." By invading theretofore unoffending aspects of the earlier injury the accident of defendant's printing plant became the prime cause of plaintiff's disability. *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 175 S.E. 2d 342 (1970), *cert. denied*, 277 N.C. 112 (1970). *See generally* the following related medico-legal articles: Grave,

Compensation Aggravation and Acceleration of Pre-Existing Infirmities Under Workmen's Compensation Acts, 22 Ky. L. J. 582 (1934); Flaxman, Pre-Existing Spondylolisthesis, Aggravation Of, 1956 Med. Trial Tech. Q. 127.

[5] In 2 A. Larson, Workmen's Compensation Law, § 59.20, pp. 10-270-273 (1972), we find:

> "Apart from special statute, apportionable 'disability' does not include a prior nondisabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and, except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. . . ."

Our act contains no special statute which would authorize apportionment in the instant case.

There is a distinction between a preexisting impairment independently producing all or part of a final disability, and a preexisting condition acted upon by a subsequent aggravating injury which precipitates disability. Plaintiff's claim falls in the latter category.

Our decision is in accord with the majority, and we think the better, view of those jurisdictions which have spoken on the subject of preexisting infirmities aggravated by subsequent industrial injury. 2 A. Larson, Workmen's Compensation Law, *supra;* 11 W. Schneider's Workmen's Compensation, § 2303 (perm. ed. 1957); Kendis and Kendis, Aggravation Under Workmen's Compensation, 17 Clev-Mar. L. Rev. 93 (1968); Comment, Successive Insurers and the Accident which Aggravates a Preexisting Condition, 1956 Wis. L. Rev. 331. *See e.g., Anderson v. Northwestern Motor Co., supra.* It is an established precept that employers take their employees as they find them. Branconnier's Case, 223 Mass. 273, 111 N.E. 792 (1916); *Belth v. Anthony Ferrante & Son, Inc.*, 47 N.J. 38, 219 A. 2d 168 (1966), *aff'g,* 88 N.J. Super. 9, 210 A. 2d 430 (1965); *Roberson v. Liberty Mutual Insurance Co.*, 316 So. 2d 22 (La. App. 1975). So long as an individual is capable of doing that for which he was hired, then the employer's liability for injury due to indus-

trial accident ought not be reduced due to the existence of a nonincapacitating infirmity. *Knudsen v. McNeely,* 159 Neb. 227, 66 N.W. 2d 412 (1954); *Gordon v. E. I. DuPont De Nemours & Co.,* 228 S.C. 67, 88 S.E. 2d 844 (1955); *Shainberg v. Dacus,* 233 Ark. 622, 346 S.W. 2d 462 (1961). While a distinction can be found in the cases, depending on whether the infirmity which is aggravated by subsequent industrial injury is traceable to *disease* or a previous injury, that point is not presently before us.

There are limited provisions for apportionment of disability under our Workmen's Compensation Law. Pursuant to G.S. 97-33 disability may be apportioned between injuries connected with military service and those sustained in the course of other employment. The Supreme Court has held the policy evinced by this statute is designed to thwart double recoveries. *Schrum v. Upholstering Co.,* 214 N.C. 353, 355, 199 S.E. 385, 387 (1938). G.S. 97-35 also has limited provision for apportionment. Its application is restricted to successive injuries arising out of the same employment, and certain other cases. Neither of these statutes is applicable to the facts of this case where plaintiff received no compensation for his earlier back injury which arose out of a noncompensable automobile accident separate and apart from any employment.

For the reasons stated, we vacate the 25 February 1975 order of the Industrial Commission and remand the cause for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge PARKER concurs.

Judge CLARK dissents.

Judge CLARK dissenting:

I cannot accept this proposition that where an employee suffers a job related injury the employer is liable for all disability, including a prior noncompensable injury outside and having no causal connection with his present employment.

The purpose of the Workmen's Compensation Act is to provide compensation for industrial injuries. It was not intended to provide compensation for injuries sustained outside

of and unrelated to employment. And construing *pari materia* the apportionment provisions in G.S. 97-33 and G.S. 97-35, it is my opinion that they are not, and were not intended to be, in derogation of the common law rules of proximate cause and damages. Nor do the *Mabe* and *Schrum* cases, relied on by plaintiff and cited by the majority, support the proposition.

The majority nonapportionment rule would result in the discharge of handicapped workers and impair the employment opportunities of the handicapped.

I agree with the ruling of the Industrial Commission that plaintiff recover only for the disability incurred by his employment-related injury.

JOHN C. CONKLIN, EMPLOYEE v. HENNIS FREIGHT LINES, INC., EMPLOYER, AND TRANSPORT INSURANCE COMPANY, CARRIER

No. 7521IC340

(Filed 15 October 1975)

1. **Master and Servant § 47— Workmen's Compensation Act — liberal construction**

The Workmen's Compensation Act should be construed liberally so that its benefits are not denied upon technical and narrow interpretation, and the strict rules applicable to ordinary civil actions are not appropriate in proceedings under the Act.

2. **Master and Servant § 85— jurisdiction of Industrial Commission after award — case kept open for additional evidence**

Where plaintiff presented evidence concerning his medical treatment for ten weeks but failed to present evidence of subsequent treatment, including back surgery, at a Veteran's Hospital, the Industrial Commission could keep the case open to allow plaintiff another opportunity to gather the missing evidence essential to the determination of the issue.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 12 February 1975. Heard in the Court of Appeals 26 August 1975.

For purposes of this appeal it is undisputed that the claimant sustained an injury by accident arising out of and in the course of his employment and that he was disabled for a period of ten weeks from 2 May 1969 to 11 July 1969.

The doctor who attended claimant testified that he saw him about once each week during the ten-week period and that he suggested claimant should see an orthopedic surgeon but claimant was reluctant to do so because of the expense. Finally the doctor advised claimant to seek help from the Veteran's Administration. The doctor next saw claimant on 22 October 1973 and observed that claimant had had a laminectomy of the lower lumbar and sacral area. On this occasion the doctor concluded that claimant had a 25% disability of the back. Claimant testified that he underwent surgery at a Veteran's Administration hospital and generally described his discomfort before and after the operation.

The Industrial Commission entered an award for the ten-week period, including an order for the payment of medical bills after their approval. The Commission concluded that because of the insufficiency of the evidence as it related to claimant's treatment at the Veteran's Hospital, it was unable to determine the benefits to which plaintiff might be entitled beyond the ten-week period. The order further provided that, in the event the parties could not agree on the additional benefits, if any, either party could "request a hearing pursuant to the provisions of the Workmen's Compensation Act."

L. G. Gordon, Jr., for plaintiff appellee.

Deal, Hutchins and Minor, by Walter W. Pitts, Jr., for defendant appellants.

VAUGHN, Judge.

In general, appellants contend that once claimant "rested" his case, the Commission should have decided the case on the basis of the evidence then in the record. Appellants argue that the Commission was without authority to retain jurisdiction and ordered another hearing upon the request of either party, thereby giving claimant a second chance to prove his case.

Appellants have not brought forward argument or referred us to cases that we find persuasive in support of their position.

[1] The Workmen's Compensation Act should be construed liberally, so that its benefits are not denied upon technical and narrow interpretation. The strict rules applicable to ordinary civil actions are not appropriate in proceedings under the Act. Although grounded on different facts and somewhat different

principles of law, the reasoning of the Supreme Court in *Hill v. Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 appears to support the actions of the Commission in the present case. The Court said that claimant should not be "precluded as a matter of law from presenting his claim for compensation to which he might be entitled; the claim, because of plaintiff's lack of evidence at the hearing, has not been adjudicated."

The Court thereafter quotes with approval additional language as follows:

> "(T)he facts that evidence claimed as a basis of a motion to open a compensation award is not newly discovered and might have been offered at the original hearing in the exercise of due diligence, and that counsel, through inadvertence, has failed to present a ground upon which compensation might be allowed, do not in themselves prevent the compensation commissioner from granting such a motion." *58 Am. Jur., Workmen's Compensation* § 541 (1948), *citing Olivieri v. City of Bridgeport*, 126 Conn. 265, 10 A. 2d 770, 127 A.L.R. 1471.

The Court also found convincing the following reasoning of the Connecticut court:

> " . . . 'In the absence of other than technical prejudice to the opposing party, the liberal spirit and policy, of the Compensation Act . . . should not be defeated or impaired by a too strict adherence to procedural niceties.'
>
> . . . Where an issue has been fairly litigated, with proof offered by both parties upon an issue, a claimant should not be entitled to a further hearing to introduce cumulative evidence, unless its character or force be such that it would be likely to produce a different result . . . On the other hand, mere inadvertence on his part, mere negligence, without intentional withholding of evidence, particularly where there is no more than technical prejudice to the adverse party, should not necessarily debar him of his rights, and despite these circumstances a commissioner in the exercise of his discretion might be justified in opening an award. . . The matter is one which must lie very largely within the discretion of the commissioner."

[2] On the facts of the case before us, we believe the Commission could have allowed claimant to reopen his case to

present evidence relating to the extent of his disability after the ten-week period, even though, in the exercise of due diligence, that evidence could have been presented at the first hearing. The same reasoning would certainly allow the Commission to *keep* the case open in order to give claimant another opportunity to gather the missing evidence essential to the determination of the issue.

The Commission's order is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. RUFUS WRIGHT

No. 7510SC407

(Filed 15 October 1975)

Crime Against Nature § 2— attempted crime against nature — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for attempted crime against nature where it tended to show that defendant and a 12 year old boy were in the restroom of a public library when defendant exposed his private parts, reached 3 or 4 times for the groin area of the child, kissed him on the lips 3 times, and asked the child twice if he would perform unnatural sex acts with him.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 21 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 4 September 1975.

Defendant was tried on charges of attempt to take indecent liberties with a twelve year old boy and attempt to commit crime against nature.

Both counts arose out of a single incident which occurred in the men's restroom of the Olivia Raney Library.

The evidence for the prosecution tends to show that the minor child went downstairs in the Olivia Raney Library, Raleigh, North Carolina, at about 2:00 p.m. on 2 November 1974 to go to the bathroom. A few seconds after the child was in the bathroom, the defendant came in and locked the door behind

him. The defendant then reached for the groin area of the child three or four times and kissed him three times on the lips. The child pushed him away after the third kiss, and defendant left the restroom.

During the time that they were together, the defendant asked the child twice if he would perform unnatural sex acts with him. When defendant exposed his private parts, the child began crying. The child had never seen the defendant before.

The evidence for the defense tends to show that on 2 November 1974, defendant was on a weekend pass from the Wake County Jail. While returning to the jail, he stopped by the Olivia Raney Library. He went into the restroom and made conversation with the child. He said that he had been drinking at his father's house prior to coming to the library and that he was "feeling no pain." He testified that he had no intention of doing anything out of the way with the child, but that he joked around with kids frequently. He did not remember touching the child and denied any homosexual advances.

At the close of the State's evidence and at the close of all the evidence the defendant moved for nonsuit as to each charge. All motions were denied. The defendant was convicted of both charges and received consecutive sentences. From that judgment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General John R. B. Matthis and Associate Attorney Daniel C. Oakley, for the State.

Deborah G. Mailman, for defendant appellant.

MARTIN, Judge.

Defendant assigns error to the court's failure to grant defendant's motion for nonsuit as to the charge of attempted crime against nature.

"It is elementary that upon such a motion the trial judge is required to take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein." *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974).

According to the court in *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691 (1965):

> "The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans *per anum* and *per os.* (Citation) '. . . our statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified.' (Citation) 'Proof of penetration of or by the sexual organ is essential to conviction.' (Citation)."

However, penetration is not necessary to convict for the offense of attempted crime against nature. "An attempt to commit a crime is an overt act in partial execution of the crime which falls short of actual commission but which goes beyond mere preparation to commit." *State v. Chance,* 3 N.C. App. 459, 165 S.E. 2d 31 (1969).

The evidence shows that the defendant exposed his private parts, reached three or four times for the groin area of the child, kissed him on the lips three times, and asked twice if he would perform unnatural sex acts with him. These acts of the defendant were directed toward the commission of an unnatural sex act with the child and showed an intent on his part to commit such an unnatural sex act. Taking this evidence in the light most favorable to the State, there was ample evidence to go to the jury on the charge of attempted crime against nature. This assignment of error is overruled.

Defendant's other assignments of error are without merit.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

AMERICAN LEGION, T/A MORRIS SLAUGHTER POST NO. 128, AND ALONZO FUNCHES, MANAGER, PETITIONER v. NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL, RESPONDENT

No. 7510SC417

(Filed 15 October 1975)

1. **Intoxicating Liquor § 2— sale of whiskey in social establishment — sufficiency of evidence to suspend permit**

Evidence tending to show that petitioner's bartender sold an undercover enforcement agent two drinks of whiskey was sufficient to support a finding that petitioner knowingly sold alcoholic beverages, since petitioner was responsible for the conduct of its employees.

2. **Intoxicating Liquor § 2— social establishment — control over lockers by bartender — revocation of permit proper**

Evidence that petitioner's bartender possessed a key that would unlock a number of lockers assigned to different members of petitioner's establishment was sufficient to support a finding that petitioner violated a regulation relating to possession of alcoholic beverages on premises holding a "Social Establishment" permit which required that any member storing alcoholic beverages in a social establishment should at all times retain control of his locker and beverages.

APPEAL by petitioner from *Brewer, Judge.* Judgment entered 17 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 15 September 1975.

On 16 April 1974, after notice and hearing, the State Board of Alcoholic Control, respondent, suspended permits held by petitioner for a period of 120 days. Judicial review was sought and an order staying respondent's decision was entered. The judicial review proceedings were conducted before Judge Brewer who entered judgment affirming respondent's decision.

The hearing officer for respondent made findings and conclusions, in summary, as follows: On 28 July 1973 petitioner's bartender sold two drinks of whiskey to an undercover enforcement officer. On 17 August 1973 petitioner's bartender was seen unlocking lockers assigned to different members of the petitioner's establishment. The same key would unlock a number of the lockers. The hearing officer concluded that the foregoing were violations of the appropriate statutes and regulations and recommended that petitioner's permits be suspended for 120 days. After hearing further evidence from petitioner, the Board adopted the findings of fact and recommendation of the hearing officer.

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

Westmoreland & Sawyer, by Barbara C. Westmoreland, for petitioner appellant.

VAUGHN, Judge.

[1] G.S. 18A-3(a) provides that it is unlawful to sell alcoholic beverages, except as authorized by statute. Petitioner does not suggest that it was authorized to sell alcoholic beverages or that its permits may not be suspended for a violation of that section. Petitioner does argue that there was no competent evidence that petitioner "knowingly" made the sales. Nevertheless, the officer's testimony that he bought the whiskey from petitioner's bartender was unequivocal and is sufficient to support the finding. The hearing officer was at liberty to disbelieve petitioner's opposing evidence. Petitioner acts through its agents and employees and is responsible for their conduct. *Boyd v. Allen,* 246 N.C. 150, 97 S.E. 2d 864. Petitioner's reliance on *Watkins v. Board of Alcoholic Control,* 14 N.C. App. 19, 187 S.E. 2d 500 is misplaced. In *Watkins,* the Board was not reversed because the *permittee* did not know of his employee's conduct in making an otherwise lawful sale of beer to an intoxicated person. The Board was reversed because of lack of evidence that the *employee* knew that the customer was intoxicated. For similar reasons the opinions of the Supreme Court in *Underwood v. Board of Alcoholic Control,* 278 N.C. 623, 181 S.E. 2d 1, and *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582, also cited by petitioner, are easily distinguished.

[2] Petitioner was also charged with violating Regulation No. 2 of respondent's regulations relating to possession of alcoholic beverages on premises holding a "Social Establishment" permit. Among other things, this regulation requires that any member storing alcoholic beverages in a social establishment shall at all times retain control of his locker and beverages. The hearing officer's finding that petitioner's bartender possessed a key that would unlock a number of lockers supports his conclusion that petitioner was in violation of Regulation No. 2.

After review of the whole record, including testimony describing the sales of whiskey by defendant's bartender on separate occasions and violations of Regulation No. 2, we hold that

respondent's conclusion that petitioner failed to give the premises proper supervision is also adequately supported.

Petitioner's remaining assignments of error have been duly considered and are overruled. Judge Brewer's order affirming the decision of the Board of Alcoholic Control is affirmed.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. RANDALL P. COURSON

No. 7512SC508

(Filed 15 October 1975)

1. **Criminal Law § 91— continuance — denial proper**

The trial court did not err in denying defendant's motion for continuance made on the ground that the trial court's commendation one day before of the district attorney for taking a nol pros in another case implied that there was sufficient evidence to convict in defendant's case.

2. **Witnesses § 1— nine year old crime against nature victim — competency to testify**

In a prosecution of defendant for crime against nature with his nine year old stepdaughter, the competency of the stepdaughter to testify was addressed to the discretion of the trial court.

3. **Criminal Law § 87— leading question proper**

The trial court did not abuse its discretion in allowing the prosecutor to ask a leading question, considering the youth of the witness and the sensitivity of the issue.

4. **Criminal Law § 34— prior acts of defendant — evidence admissible**

The trial court properly allowed evidence as to prior acts of defendant which showed intent, state of mind or design, and motive.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 13 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 September 1975.

Defendant was tried under an indictment charging him with the crime against nature with Kimberly Anne Yorke, the defendant's nine-year-old stepdaughter. The jury returned a verdict of guilty as charged. From a judgment imposing a prison sentence, the defendant appealed to this Court.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

James D. Little for defendant appellant.

ARNOLD, Judge.

[1] Defendant was tried a day after the trial judge commended the district attorney in the presence of the jury panel for taking a nol pros in another case. Defendant argues that it was error not to allow a continuance because the judge's remark implied that there was sufficient evidence to convict in his case.

A motion for continuance is addressed to the sound discretion of the trial judge and his ruling is not reviewable absent a manifest abuse of discretion. *O'Brien v. O'Brien,* 266 N.C. 502, 146 S.E. 2d 500 (1966); *Johnson v. Johnson,* 14 N.C. App. 40, 187 S.E. 2d 420 (1972). The trial judge did not abuse his discretion in denying defendant's motion for continuance.

[2] Defendant assigns error to the admission of the testimony of Kimberly Anne Yorke. The defendant contends that Miss Yorke was incompetent to testify because of her tender age and because of her lack of comprehension of the nature of the proceedings against her stepfather.

The competency of a witness is addressed to the discretion of the trial court and where the record discloses that upon the voir dire the court inquired into the child's intelligence and understanding and admitted her testimony upon evidence supporting the conclusion of competency, we will not find that the trial court abused its discretion. *State v. Bowden,* 272 N.C. 481, 158 S.E. 2d 493 (1968); *State v. Markham,* 20 N.C. App. 736, 202 S.E. 2d 790 (1974).

[3] Defendant further argues that the trial court erred in failing to sustain the objection to a leading question asked by the prosecutor. It is an established rule that it is within the discretion of the trial court to permit counsel to ask leading questions. *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95 (1967); *State v. Westmoreland,* 12 N.C. App. 357, 183 S.E. 2d 265 (1971); *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657 (1941). Considering the youth of the witness and the sensitivity of the issue, we find that the trial judge did not abuse his discretion.

[4] Finally, defendant contends that the trial court erred in failing to sustain objections as to prior acts of the defendant. It is generally recognized that evidence of other crimes may not be introduced for the purpose of showing the accused to be a man of bad character likely to commit the crime charged. However, in the present case the evidence was properly admitted to show intent, state of mind or design, and motive. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968); *State v. Spain,* 3 N.C. App. 266, 164 S.E. 2d 486 (1968).

We have carefully reviewed all defendant's remaining assignments of error. Defendant received a fair trial, free of prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JERRY MICHAEL SATTERFIELD

No. 759SC372

(Filed 15 October 1975)

1. **Criminal Law § 96— hearsay testimony withdrawn — no prejudice**

Defendant was not prejudiced where the trial court erroneously admitted hearsay testimony but subsequently excluded the testimony and sufficiently advised the jury to disabuse from their minds all reference to the hearsay testimony.

2. **Criminal Law § 173— invited error**

Defendant may not complain of the admission of testimony brought out by his counsel in the cross-examination of a witness for the State.

3. **Criminal Law § 73— availability of declarant — hearsay rule not invoked**

Where the declarant is available for cross-examination, the traditional hearsay considerations of veracity, perception, motive, deportment and accuracy are satisfied and there is no reason to invoke the hearsay rule.

4. **Criminal Law § 113— failure to define corroboration — no error**

The trial court did not err in failing to define the term "corroboration."

5. Criminal Law § 119— requested instruction given in substance

The trial court did not err in failing to include defendant's requested definition of "beyond a reasonable doubt" as meaning satisfaction to a "moral certainty" where the actual instruction tendered by the court reached the substance of defendant's request.

6. Criminal Law § 139— sentence of maximum and minimum terms — improper for youthful offender

Imposition of a minimum and maximum sentence as a Committed Youthful Offender could be inconsistent with G.S. 148-49.8, and the case is therefore remanded for the imposition of a sentence in compliance with the provisions of Article 3A, Chapter 148 of the N. C. General Statutes.

APPEAL by defendant from *Judge Giles R. Clark.* Judgment entered 12 March 1975 in Superior Court, PERSON County. Heard in the Court of Appeals 29 August 1975.

Defendant was indicted for felonious breaking and entering with the intent to commit larceny. Upon a plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to five to seven years imprisonment as a committed youthful offender, defendant appealed.

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

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Ramsey, Jackson, Hubbard & Galloway, by Mark Galloway, for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the court erroneously overruled his objection to alleged hearsay testimony relating to the presence of a car near the prosecuting witness' house. There is no question but that the testimony was hearsay and initially considered admissible by the trial court. However, once the trial court ascertained the inadmissiblility of the testimony, it properly excluded the testimony and sufficiently advised the jury to disabuse from their minds all reference to the hearsay testimony. As our Court has previously stated:

> " 'Where evidence is improperly admitted, but the court later withdraws the evidence and categorically instructs the jury not to consider it, it will be presumed that the

jury followed the instruction of the court, and the admission of the evidence will not ordinarily be held prejudicial.' " *State v. Fields,* 10 N.C. App. 105, 107, 177 S.E. 2d 724 (1970). Also see 3 Strong, N. C. Index 2d, Criminal Law, § 169.

[2] Defendant next contends that the trial court erred in failing to grant his motion to strike purported double, nonresponsive hearsay. Again, we find no merit in defendant's contention. The defendant, while cross-examining an alleged confederate in the crime charged, asked: "They [the police] told you they knew Mike Satterfield was involved in this?" The witness, responding to this line of inquiry, stated that the police "told [him] who told them he [Mike Satterfield] was in the car." Defendant invited this particular response and he " . . . may not complain of the admission of testimony brought out by his counsel in the cross-examination of a witness for the state . . . . " 3 Strong, N. C. Index 2d, Criminal Law, § 173.

[3] Notwithstanding the application of the invited error rule, we find no prejudice in allowing this testimony, because the actual declarant, a police officer, was available for cross-examination, and in fact, took the stand and testified to the very matters at issue. Where the declarant is available for cross-examination, the traditional hearsay considerations of veracity, perception, motive, deportment and accuracy are satisfied and there is no reason to invoke the hearsay rule. 1 Stansbury, N. C. Evidence, § 139 (Brandis Rev. 1973).

[4] Defendant next argues that the court, while explaining to the jury the corroborative purpose of proposed testimony, should have defined the concept of "corroboration" in "laymen's terms."

In *State v. Hardee,* 6 N.C. App. 147, 150, 169 S.E. 2d 533 (1969), in speaking to the identical question, we said:

"Defendant's assignment of error No. 7 is addressed to the failure of the court to define 'corroborative' evidence in its instructions to the jury at the time the testimony was admitted. Defendant cites no authority for his position, nor does the record indicate that he requested the court to define the term. Failure to define the term is not ground for exception. *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295. Defendant's mere assertion that the jury probably did not

know the meaning of the word is clearly insufficient to show prejudicial error."

This assignment of error is overruled.

[5] Finally, defendant asserts that the court failed to include his requested definition of "beyond a reasonable doubt" as meaning satisfaction to a "moral certainty." Again, we find no merit in defendant's argument. Upon examination of the court's instruction, we find that the actual instruction tendered by the court reaches the substance of defendant's request. Moreover, as our Supreme Court has held, "when instructions are prayed as to 'presumption of innocence' and to enlarge on 'reasonable doubt' it is in the sound discretion of the court below to grant the prayer." *State v. Herring,* 201 N.C. 543, 551, 160 S.E. 891 (1931). In the instant case, no showing of abuse of discretion has been shown.

We have examined the defendant's other assignments of error and find them also to be without merit.

[6] We note that the judgment of the court sentenced defendant to imprisonment for "the term of not less than five (5) years nor more than seven (7) years" as a "Committed Youthful Offender." G.S. 148-49.4 provides, in pertinent part, "At the time of commitment the court shall fix a maximum term not to exceed the limit otherwise prescribed by law for the offense of which the person is convicted." The imposition of a minimum and maximum sentence could conceivably be inconsistent with the provisions of G.S. 148-49.8 (Release of Youthful Offenders). The case must be remanded for the imposition of a sentence in compliance with the provisions of Article 3A, Chapter 148, General Statutes of North Carolina.

Judgment vacated and cause remanded.

Judges VAUGHN and CLARK concur.

JAMES LESTER PEELE v. HAROLD LAVERNE SMITH, WRIGHT CHEMICAL CORPORATION AND CAROLINA FLEETS, INCORPORATED

No. 7511SC446

(Filed 15 October 1975)

Evidence § 33— unidentified letter stating medical expenses — testimony from letter as hearsay

In an action to recover damages for personal injury allegedly resulting from defendants' negligent operation of a tractor-trailer rig on a public highway, the trial court erred in allowing plaintiff, who could not recall what his medical expenses were, to testify from an unidentified letter handed him by his counsel that the total amount of his bills was $3579.50, since no witnesses testified concerning treatment plaintiff received and charges therefor and plaintiff's testimony was hearsay.

APPEAL by defendant from *Hall, Judge.* Judgment entered 6 March 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 18 September 1975.

This is a civil action wherein plaintiff, James Lester Peele, seeks to recover damages for personal injury allegedly resulting from the negligence of the defendants, Harold Laverne Smith and Wright Chemical Corporation, in the operation of a tractor-trailer rig on a public highway.

The jury found that the plaintiff was injured as a result of the negligence of the defendants as alleged in the complaint and fixed plaintiff's damages at $55,000.00. From judgment entered on the verdict, defendants appealed.

Teague, Johnson, Patterson, Dilthey & Clay, by I. E. Johnson, Robert W. Sumner, and T. Yates Dobson, Jr., for plaintiff appellee.

Young, Moore, and Henderson, by B. T. Henderson II, and R. Michael Strickland for defendant appellants.

HEDRICK, Judge.

Defendants assign as error the denial of their motion for a directed verdict. Because of the error hereinafter discussed requiring a new trial, we think it sufficient to say that the record contains sufficient evidence to require submission of this case to the jury. This assignment of error is overruled.

Defendants assign as error the action of the court in allowing the plaintiff to testify over their objection as follows:

Q: Do you know at this time the total amount of the bills which you have incurred?

A: (No answer)

Q: Will you look at this letter, please?

A: Yes, sir, this is the principal figure.

Q: Would you tell us [what] that total is, please?

MR. STRICKLAND: Objection.

THE COURT: Overruled.

A: Three thousand, five hundred seventy-nine dollars and fifty cents.

With respect to the injuries he received in the automobile accident and the medical treatment therefor, the plaintiff testified that on the day of the accident he went to Johnston Memorial Hospital. Dr. Johnson treated him in the emergency room for about four or five minutes and he left. The next day he saw Dr. Cole. He continued treatment under Dr. Cole "every day," until he went to see Dr. Dameron in Raleigh on 29 January 1971. He continued under the care of Dr. Dameron until November 1972. During this time, Dr. Dameron performed surgery on plaintiff in Rex Hospital. Plaintiff remained in Rex for approximately two weeks followed by several months recovery at home. On 12 June 1973 he went to see Dr. Edwards in Raleigh. He remained under the care of Dr. Edwards, seeing him periodically up until the time of the trial.

No witness from the Johnston Memorial Hospital testifield regarding any treatment plaintiff received at the emergency room or any charges which were made by the hospital for any treatment given plaintiff. Dr. Cole did not testify with respect to his treatment of the plaintiff or as to any charges he made for such treatment. Dr. Dameron did not testify regarding the surgery he performed for plaintiff or any charges for such service. There is no evidence in the record as to any charges for plaintiff's hospitalization at Rex Hospital. Although Dr. Edwards testified regarding the plaintiff's injuries and disability, there was no evidence in the record as to any charges made by him for his services to plaintiff. The only

evidence in the record regarding any medical, hospital, or physician's expenses "incurred" by plaintiff is that contained in the testimony challenged by this exception.

Plaintiff argues that he used the letter referred to by his counsel to refresh his recollection; however, we think that portion of the record quoted above demonstrates clearly that the witness did not know what his bills were. Furthermore, we think it is clear from the record that plaintiff read from an unidentified letter. The response, in our opinion, was hearsay.

The plaintiff failed to lay a sufficient foundation for the admission of this testimony. Assuming that plaintiff did incur bills totaling $3,579.50, the record is totally lacking in any evidence tending to show any causal relation between these expenses and the injuries received in the accident. The prejudicial effect of this error, we think, is twofold. First, obviously it permitted the jury to award to plaintiff $3,579.50 which was not supported by competent evidence. Second, and equally important, the jury could infer that a large portion of the $3,579.50 was for the surgery on plaintiff's neck, and the hospitalization connected therewith; yet Dr. Dameron, and none of the other expert witnesses, testified that the surgery was for the treatment of injuries sustained in the accident.

Defendant has additional assignments of error which we do not discuss since they are unlikely to occur at a new trial.

For the reasons stated, there must be a new trial.

New trial.

Judges MORRIS and ARNOLD concur.

ROBERT N. PIERCE, EMPLOYEE, PLAINTIFF v. AUTOCLAVE BLOCK CORPORATION, EMPLOYER; AETNA CASUALTY AND SURETY COMPANY, CARRIER, DEFENDANTS

No. 7519IC434

(Filed 15 October 1975)

Master and Servant § 90— workmen's compensation claim — no written notice to employer — recovery denied

Trial court properly denied plaintiff recovery for an injury by accident arising out of and in the course of his employment where

plaintiff failed to give the employer written notice within thirty days after the accident, and plaintiff failed to show (1) that there was reasonable excuse for not giving the written notice, and (2) the employer was not prejudiced thereby. G.S. 97-22.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 28 February 1975. Heard in the Court of Appeals 17 September 1975.

This is a claim under the Workmen's Compensation Act in which plaintiff contends he received a compensable injury on 25 September 1969. The parties stipulated that on the occasion of the alleged injury, the parties were subject to, and bound by, the provisions of the act, that the employer-employee relationship existed between plaintiff and defendant employer, and that defendant insurance company was the carrier. Pertinent findings of fact by the hearing commissioner are summarized as follows:

Plaintiff began working with defendant employer as a laborer on 9 September 1969. On the morning of Thursday, 25 September 1969, plaintiff, while "duck-walking" backwards from under a freight car, lost his balance and twisted his left knee. He continued working but his knee began swelling and hurting, making it necessary for him to go home some two and one-half hours later. A short while after the occurrence, plaintiff told his foreman about the injury and he gave plaintiff permission to go home. The next day, around noon, plaintiff went to defendant employer's office and picked up his payroll check. He returned to the premises the following Monday but, being unable to perform physical labor, he left the job and did not return to work. He did not obtain medical attention for his knee until 3 November 1969. After examination and treatment in the offices of several doctors during November and December 1969, he entered a veterans' hospital on 2 January 1970 where surgery was performed by the removal of a meniscus from his knee on 6 January 1970. Plaintiff had a satisfactory recovery and was discharged from the hospital on 10 January 1970. On 5 February 1970, plaintiff went to the office of defendant employer and made a written report of the injury.

Plaintiff sustained an injury by accident arising out of, and in the course of, his employment, including a 10 percent permanent partial disability of his left leg. However, plaintiff failed to give defendant employer written notice of his injury

as required by G.S. 97-22 within 30 days after 25 September 1969, and no reasonable excuse has been given for failure to give written notice. Plaintiff did not seek medical attention for his knee until almost six weeks after the injury occurred; therefore, he did not procure timely medical care. Defendant employer has been prejudiced by the failure of plaintiff to give written notice within 30 days and by his delay in seeking medical attention.

The hearing commissioner made conclusions of law based on the stipulations and findings of fact and denied any recovery. Plaintiff noted exceptions to the hearing commissioner's findings and conclusions and appealed to the full commission who overruled the exceptions and affirmed the hearing commissioners' order.

Plaintiff appealed.

Haywood, Denny & Miller, by John D. Haywood, for plaintiff appellant.

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

BRITT, Judge.

Plaintiff's assignments of error relate to the commission's determination that plaintiff failed to prove reasonable excuse for not giving written notice as required by G.S. 97-22, and that defendant employer was prejudiced by the failure of plaintiff to give written notice within 30 days following the accident. We find no merit in the assignments.

G.S. 97-22 provides in pertinent part: " . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby."

The quoted statute clearly requires *written* notice by an injured employee to his employer within 30 days after the occurrence of the accident or death unless the commission is satisfied of two things: (1) that there was reasonable excuse for not giving the written notice, *and* (2) the employer was not prejudiced thereby.

We think it was incumbent on plaintiff to show reasonable excuse for failing to provide written notice. *Garmon v. Tridair Industries,* 14 N.C. App. 574, 188 S.E. 2d 523 (1972). This he failed to do. With respect to lack of prejudice to defendant employer, for plaintiff to prevail on this point required a positive finding that defendant employer had *not* been prejudiced by failure of plaintiff to provide written notice. We think the commission was fully justified in declining to make that finding.

For the reasons stated, the order appealed from is

Affirmed.

Judges PARKER and CLARK concur.

SARAH P. VANDOOREN v. PETER VANDOOREN

No. 753DC547

(Filed 15 October 1975)

Divorce and Alimony § 19; Judgments § 6— alimony award — judgment changed two years later — error

In an action for alimony without divorce, child custody, and child support where the court ordered that plaintiff wife have the use and benefit of the family home and make what use of the property as she deemed necessary, including the right to rent the guest home located on the property, the trial court erred in changing that judgment some two years later to provide that the guest house rental be credited against alimony on the ground of mistake in the original order.

APPEAL by plaintiff from *Wheeler, Judge.* Order entered 29 April 1975 in District Court, CARTERET County. Heard in the Court of Appeals 16 September 1975.

In May 1973, plaintiff-wife brought action for alimony without divorce, child custody, and child support. After hearing, by order dated 16 May 1973, the court granted to plaintiff custody of the two children and ordered defendant-husband to pay $800 per month alimony pendente lite and $200 per month child support; it was further ordered that she have the use and benefit of the family home located on Bogue Sound and "shall be entitled to make what use of said property as she

deems necessary and requisite, including the right to rent the guest home located on said property."

On 7 November 1974, defendant moved for a reduction in the payments required of him under the order of 16 May 1973, "for the reason that, having had eighteen (18) months experience operating under the prior order, respondent is now able to show a vast inequity in the distribution of income . . . ."

In the hearing on 21 November 1974, the evidence for the defendant-husband tended to show that his income since the original order of 16 May 1973 had increased, but that there had been an even greater increase in his expenses, a major item being federal income tax and penalty for the year 1972 in the total sum of $15,565. The plaintiff testified that she had been renting the guest house since November 1973 for $130 per month.

On 29 April 1975, Judge Wheeler entered two orders. In one he held that defendant had failed to show that there had been a change in circumstances entitling him to a reduction in the payments provided for in the May 1973 order. In the second order he stated that his intention in the original order was to provide that any money received by plaintiff as rent for the guest house be credited against defendant's alimony payments, and he ordered the May 1973 order amended to reflect this intention.

From this order, plaintiff appeals.

Wheatly & Mason, P.A. by L. Patten Mason for plaintiff appellant.

Sherman T. Rock for defendant appellee.

CLARK, Judge.

Plaintiff's only assignment of error is that the court erred by amending on its own motion the original pendente lite order to provide that the guest house rental be credited against alimony, on the grounds of mistake in the original order.

G.S. 50-16.9 provides that "An order . . . for alimony or alimony pendente lite . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. . . . " The judge entered findings of fact that defendant's income during

the eighteen-month period had increased but that he was not entitled to modification of the original order on the grounds of change of circumstance.

In *Rabon v. Ledbetter,* 9 N.C. App. 376, 176 S.E. 2d 372 (1970), the court held that a court is not warranted in modifying or changing a prior valid order absent a showing of a change in conditions.

The basis for the court's change in the original order is that "upon examination of the trial notes and upon the personal recollection, it appears to the trial Judge that he intended for the Defendant to have credit for the rentals on the guest cottage . . . . " The court then found as a fact that said credit was omitted from the original order by mistake.

At the hearing, more than five months before the amending order was entered, defendant did not contend that there was any error or mistake in the original order; nor is there anything in the record relating to said hearing to indicate that the trial judge then considered that there was error in or misunderstanding about the provisions of the original order.

This was an apparent attempt to amend the order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. However, we find that neither Rule 60(a) nor 60(b) justifies such a decision by the court. While courts have always had the inherent authority to correct clerical errors or errors of expression in a judgment, they have never been deemed to have the authority, outside of a term, to correct an error in decision, or to amend a judgment so as to adversely affect the rights of third parties. *H & B Company v. Hammond,* 17 N.C. App. 534, 195 S.E. 2d 58 (1973).

We find that the court in this case did not correct a mistake but changed a judgment. The amending order appealed from is vacated and this cause is remanded to the District Court.

Vacated and remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEWIS WALKER STEPHENS

No. 7526SC393

(Filed 15 October 1975)

1. **Criminal Law § 169— witness's answer presumed responsive — motion to strike overruled**

In a prosecution for uttering forged checks, where the question prompting a bank teller's statement upon cross-examination regarding her identification of defendant, "I know it was him because I had cashed some forgeries for him earlier," did not appear in the record, it is assumed that the teller's comment was responsive and in explanation of her identification of defendant, and the trial court did not err in overruling defendant's motion to strike the entire answer.

2. **Criminal Law § 169— response to question including facts not in evidence — no error**

It is improper for a prosecuting attorney to inject in his question supposed facts which are not supported by the evidence; however, such a question was not prejudical in this case where the record does not disclose the ruling on the objection nor any answer to the question, and it must therefore be assumed that the objection was sustained.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 17 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 September 1975.

Lewis Walker Stephens was charged with the crime of uttering forged checks drawn on the Ervin Company. The State offered in evidence five checks purportedly signed by Albert Anderson and Neal Hamilton on behalf of the Ervin Company. James White was named payee on two of the checks and Willie Green, John J. Robinson and Eael Geter were named as payee on the other three respectively.

Billie Hartis Utley, a teller at the drive-in window of a branch of North Carolina National Bank, testified that on the morning of 6 August 1973, defendant drove up to her window, presented her the five checks and a deposit slip, and asked to be given cash for all the checks except for $45 that he wished to deposit in his account, which she did.

The State also offered in evidence the testimony of a handwriting expert who found the checks to be in defendant's handwriting.

The defendant testified that on the morning of 6 August 1973, he was working at a gas station and did not cash any forged checks.

Defendant was found guilty and from a prison sentence appeals.

Attorney General Edmisten by Associate Attorney T. Lawrence Pollard for the State.

Plumides, Plumides and Shuster by Bart William Shuster for appellant.

CLARK, Judge.

[1] On cross-examination, Mrs. Utley, the bank teller, was questioned regarding her identification of the defendant. A portion of her response was, "I know it was him because I had cashed some forgeries for him earlier." The defendant assigns as error the denial of his motion to strike the answer and his motion for mistrial. The foregoing testimony appears in narrative form. The question which prompted the comment does not appear. Under these circumstances, we must assume it was responsive and in explanation of her identification of the defendant. Defense counsel assumes some risk of damage to his cause in the cross-examination of an adverse witness. Even the ablest occasionally suffer injury, sometimes irreparable, from response during cross-examination, unforeseeingly elicited and often the result of witness idiosyncrasy rather than advocate delinquency. When so educed and responsive, the suffering is seldom relieved by appellate review. *State v. Ritzel,* 24 N.C. App. 88, 209 S.E. 2d 883 (1975). Too, that part of the answer relating to the witness's past transaction with the defendant was responsive and admissible. The broadside motion to strike the entire answer was properly overruled. *State v. Patterson,* 284 N.C. 190, 200 S.E. 2d 16 (1973).

[2] In cross-examination the District Attorney asked the defendant, "When did you first begin having problems with the issuance of worthless and forged checks?" This question followed the defendant's testimony that he had been convicted of several worthless check charges and of store breaking and larceny. The defendant assigns error because there was no evidence that he had been convicted of forgery. Since the record does not disclose the ruling on the objection nor any answer

to the question, we must assume that the objection was sustained. It is improper for a prosecuting attorney to inject in his question supposed facts which are not supported by the evidence, but the impropriety becomes reversible error only when prejudicial to the accused. In *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), the court quoted with approval from 3 Strong, N. C. Index 2d, Criminal Law, § 169, p. 135, the following language: "Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result. . . . "

In this case, there was abundant testimony to support the case for the State. The defendant was positively identified by the bank teller, and the handwriting expert testified that in his opinion the defendant signed the checks. When we consider the alleged impropriety in the context of the entire evidence, we find that there is no reasonable possibility that the statement by the witness might have contributed to the conviction.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. BOBBY ALEX MOORE AND JAMES LEE SMITH

No. 7519SC478

(Filed 15 October 1975)

1. **Criminal Law § 162— objectionable question — failure to object at trial**

Where defendants contend on appeal that the trial court erred in permitting the district attorney to ask one defendant if he had participated in a crime unrelated to the charge for which he was being tried, but defendants failed to object to the question at trial, the competency of the evidence is not presented.

2. **Burglary and Unlawful Breakings § 7— verdict of "guilty as charged" — no ambiguity**

The verdict of the jury was not improper and ambiguous where the clerk asked the foreman, "How do you find the defendant, Bobby Moore, is he guilty or not guilty of felonious breaking and entering?" and the foreman replied, "He is guilty as charged."

State v. Moore

APPEAL by defendants from *Walker, Judge.* Judgment entered 4 March 1975 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 23 September 1975.

Defendants were indicted and tried on the charge of breaking and entering. Mrs. Lillian Bowden testified that the defendants forced open the back door to her home and entered without her permission and told her to give them her money. She tried to make the defendants leave and reached for her scissors and began screaming. The defendants went out the back door without taking any money.

Mrs. Bowden is blind but was able to identify the defendants by their voices. The defendants offered evidence attempting to establish that they did not break into the Bowdens' home. Furthermore, the defendants attempted to prove that Mrs. Bowden could not have recognized their voices. Both of the defendants took the stand and testified.

Mrs. Bowden was recalled and stated that she had left the courtroom after her testimony. She returned to the courtroom and again identified the defendants by their voices.

The jury returned a verdict of guilty of felonious breaking and entering. From a judgment imposing an active sentence, the defendants appealed to this Court.

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

Carl W. Atkinson, Jr., for defendant appellants.

ARNOLD, Judge.

[1] Defendants contend that the trial judge erred in permitting the District Attorney to ask defendant Bobby Alex Moore if he had participated in a crime unrelated to the charge for which he was being tried. Though he assigns error, there is no indication that the defendant objected to the District Attorney's question. "Where there is no objection to the admission of evidence, the competency of the evidence is not presented." *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341 (1967).

However, defendants' argument has been reviewed and no error is found. A criminal defendant may be asked, for the

purposes of impeachment, whether he has committed criminal acts or other specified acts of reprehensible conduct, provided the question is in good faith. *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975). Defendants offered no proof that the District Attorney acted in bad faith and this Court cannot find that he did not act in good faith.

Defendants further contend that the trial judge erred in permitting the State to reopen its case and refusing to strike the new testimony. Though defendants again failed to raise any objection, we have considered the merits of defendants' argument and find that the trial judge did not abuse his discretion in permitting the State to reopen its case.

Defendants argue that the trial judge expressed an opinion on the evidence in violation of G.S. 1-180 by giving greater weight to the State's evidence than to the defendants. Defendants concede that the number of words used or the number of pages covered is not the controlling factor in whether or not unequal stress is given. Reading the recapitulation of the evidence for both sides, this Court finds no error in the trial judge's charge.

[2] Finally, it is argued that the Court erred in taking the verdict in that the verdict as to Bobby Alex Moore was improper and ambiguous. The clerk asked the foreman, "How do you find the defendant, Bobby Moore, is he guilty or not guilty of felonious breaking and entering?" The foreman replied, "He is guilty as charged." Clearly the verdict was unambiguous.

No error.

Judges MORRIS and HEDRICK concur.

GEORGE A. SMITH, EMPLOYEE, PLAINTIFF v. WILLIAM MUIRHEAD CONSTRUCTION COMPANY, INC., EMPLOYER; AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7514IC365

(Filed 15 October 1975)

1. Master and Servant § 94— duty of Industrial Commission to find facts

While the Industrial Commission is not required to make a finding as to each fact presented by the evidence, it is required to make

specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.

2. **Master and Servant §§ 91, 94— filing of claim with Commission — delay — finding as to estoppel required**

Evidence was sufficient to require a finding of fact with respect to estoppel of defendant to plead the lapse of time between the date of plaintiff's receipt of his last payment for compensation for temporary total disability and plaintiff's request for a hearing before the Industrial Commission to determine his disability arising out of the accident in question where there was evidence that plaintiff's delay in requesting a hearing resulted from his reliance on representations made by defendant employer's secretary.

APPEAL by plaintiff from order of the North Carolina Industrial Commission entered 18 February 1975. Heard in the Court of Appeals 28 August 1975.

This cause involves a claim under the Workmen's Compensation Act and the record establishes the following facts:

On 22 October 1971, plaintiff sustained an injury by accident arising out of, and in the course of, his employment with defendant employer. On said date, plaintiff and defendant employer were subject to, and bound by, the provisions of the Workmen's Compensation Act and defendant insurance company was defendant employer's compensation carrier. Subsequently thereto, the parties entered into an agreement for the payment of compensation for temporary total disability, pursuant to which plaintiff was paid compensation for the period from 23 October 1971 to 22 November 1971. Within two weeks after 2 December 1971, plaintiff received Commission form 28B dated 2 December 1971. The form stated, among other things, that plaintiff had been paid $248 compensation and that he had returned to work on regular weekly wages on 23 November 1971. Item 14 of the form asks the question: "Does This Report Close the Case—including final compensation payment?" The question was answered, "YES." Thereunder, the following appears in the form:

> "NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is "Yes," this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check."

By letter to the commission dated 25 February 1974, plaintiff, through his attorney, requested a hearing to determine his disability arising out of the 21 October 1971 accident. A hearing was held before Deputy Commisisoner Rush (hearing commissioner) at which time plaintiff gave testimony, summarized in pertinent part, as follows: In late November 1971, after he had returned to work, he was called to defendant employer's office where he talked with Mrs. Coleman who worked in the office. Mrs. Coleman delivered to him a check for disability payments and, at her request, he signed a written document. Plaintiff told Mrs. Coleman on that occasion that he had not recovered from his accident, that he was working with only one hand, and that he had not been discharged by his doctor. Mrs. Coleman told plaintiff he was signing for the checks; "she assured they'd pay me for my total disability. Yes sir, temporary total disability." As to why plaintiff did not notify the Commission within one year after signing form 28B, he stated: " . . . and as to why I did not notify the Commission from the time I received that slip, I was still under the care of the doctor over a year after that and so I assumed that if there was any—any reaction of the injury after a year after discharge, that was the opinion I had, because I was still under the doctor's care over a year from this date." Plaintiff had appointments to see his doctor on 25 July 1972 and 9 March 1973 and kept the appointments. He last saw his doctor on 30 March 1973.

On 9 September 1974, the hearing commissioner filed his decision and award. In it he found as fact that plaintiff was under the care of physicians for his shoulder condition from 22 October 1971 to 30 March 1973 at which time he was discharged and given a rating. The findings of fact then included the following:

> "2. The plaintiff returned to work with the defendant employer on November 23, 1971. On December 7, 1971, the plaintiff was requested to report to the defendant's employer's office. When the plaintiff arrived at the office Patsy Coleman, a secretary of the defendant employer gave him his last check for temporary total disability compensation. She also gave the plaintiff a copy of Form 28B (Defendants' Exhibit 2) and requested the plaintiff sign a statement from the defendant carrier acknowledging receipt of Form 28B (Defendants' Exhibit 1). The plaintiff told Patsy Coleman that he was working with only one

hand and was not discharged by his doctor. He asked Patsy Coleman about the future condition of his left shoulder. She advised the plaintiff that he was requested to sign the statement only for the temporary total disability compensation checks. The plaintiff relied on the conversation with Patsy Coleman and signed the statement from the defendant carrier (Defendants' Exhibit 1) without reading it.

"3. Sometime later the plaintiff read the 'Notice to Employee' on the bottom of the Form 28B (Defendants' Exhibit 2). Since the plaintiff was still under the care of a doctor and had confidence in and relied on the statements of Patsy Coleman, he interpreted the one year provision in the 'Notice to Employee' to mean one year after his discharge by his doctor. The plaintiff, therefore, did not notify the Industrial Commission in writing within one year from December 7, 1971, that he claimed further benefits under the Workmen's Compensation Act.

* * *

"5. The conduct of the defendants amounts to equitable estoppel and the defendants are estopped to escape liability of the plaintiff's claim on account of the plaintiff's failure to notify the Industrial Commission in writing within the time required by statute."

The hearing commissioner concluded as a matter of law that the conduct of defendants constituted equitable estoppel and made an award in favor of plaintiff. Defendants appealed to the full commission who vacated the opinion and award of the hearing commissioner, except for stipulations, and made findings of fact including the following:

"2. The plaintiff returned to work with the defendant employer on November 23, 1971. On December 7, 1971, the plaintiff was requested to report to the defendant employer's office. When the plaintiff arrived at the office Patsy Coleman, a secretary of the defendant employer, gave him his last check for temporary total disability compensation. She also gave the plaintiff a copy of Form 28B (Defendants' Exhibit 2) and requested the plaintiff sign a statement from the defendant carrier acknowledging receipt of Form 28B (Defendants' Exhibit 1).

"3. The plaintiff did not notify the Industrial Commission in writing within one year from December 7, 1971,

that he claimed further benefits under the Workmen's Compensation Act."

The full commission concluded that " . . . plaintiff has shown no conduct on the part of the defendant which constitutes estoppel" and denied plaintiff's claim.

Plaintiff appealed to the Court of Appeals.

Eugene C. Brooks III, for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by Richard G. Bernhardt, Jr., for defendant appellees.

BRITT, Judge.

[1] Plaintiff contends that the full commission erred in vacating the opinion and award of the hearing commissioner. Among other things, he argues that the evidence raised the issue of equitable estoppel and that the full commission failed to make findings of fact on the issue. We find merit in the argument.

In reviewing the opinion and award of the hearing commissioner, the commission was authorized by G.S. 97-85 to "reconsider the evidence" and, if proper, to *vacate* the award. *Lee v. Henderson and Associates,* 284 N.C. 126, 200 S.E. 2d 32 (1973). The power of the commission to review and reconsider the evidence carries with it the power to modify or strike out findings of fact made by the hearing commissioner. *Brewer v. Trucking Company,* 256 N.C. 175, 123 S.E. 2d 608 (1962). While the commissioner is not required to make a finding as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. *Morgan v. Furniture Industries, Inc.,* 2 N.C. App. 126, 162 S.E. 2d 619 (1968).

[2] Next, we consider the question of estoppel. Plaintiff contends defendants are estopped to plead the lapse of time because of representations made to him by Mrs. Coleman at the time he signed form 28B. He argues that Mrs. Coleman's statements not only induced him to sign the form but also lured him into believing that the lapse in time following the last statement of compensation would not affect his right to receive additional compensation.

In *Watkins v. Motor Lines*, 279 N.C. 132, 139, 181 S.E. 2d 588, 593 (1971), in an opinion by Justice Huskins, we find:

> "The law of estoppel applies in compensation proceedings as in all other cases." *Biddix v. Rex Mills, supra.* In *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 (1937), Chief Justice Stacy, speaking for the Court, said: "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play."

While the evidence in the instant case on the question of estoppel was minimal, we think it was sufficient to raise the issue and require a finding of fact on the issue. In his paragraph numbered 2, set out above, the hearing commissioner made a finding on the question. In the commission's paragraph numbered 2, set out above, it merely eliminated the hearing commissioner's finding and made no finding in its place. The conclusion that "plaintiff has shown no conduct on the part of the defendant which constitutes estoppel" is not sufficient to meet the requirement with respect to findings of fact.

It has been held that it would be contrary to the essence of the fact finding authority conferred by G.S. 97-84 to make it obligatory upon the commission to accord unquestioned credence even to uncontradicted testimony. *Anderson v. Motor Company*, 233 N.C. 372, 64 S.E. 2d 265 (1951). Nevertheless, when evidence is presented in support of a material issue raised, it becomes necessary for the commission to make a finding one way or the other.

For the reasons stated, the order appealed from is vacated and this cause is remanded to the Industrial Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. WAYNE MELTON AND LESTER C. GILLIAM

No. 756SC403

(Filed 15 October 1975)

APPEAL by defendants from *Tillery, Judge.* Judgments entered 27 February 1975 in Superior Court, HERTFORD County. Heard in Court of Appeals 2 September 1975.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III, for the State.

Revelle, Burleson and Lee by L. Frank Burleson, Jr., for defendants.

CLARK, Judge.

The defendants appeal from judgments imposing prison terms after conviction for breaking or entering a store building in Ahoskie. The State's evidence tended to show that the Chief of Police and another officer were in the building when the defendants entered. We have carefully considered all assignments of error, and we find no prejudicial error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. GEORGE P. MUDD

No. 759SC388

(Filed 15 October 1975)

APPEAL by defendant from *Rouse, Judge.* Judgment entered 6 February 1975 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 2 September 1975.

Defendant was charged with misdemeanor escape from confinement. From a plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, the defendant appealed.

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

Smith & Banks, by James W. Smith, for defendant appellant.

MORRIS, VAUGHN and CLARK, Judges.

The defendant failed to file any brief within the time permitted by our Rules. He has, however, filed a motion in which he candidly concedes that defendant's trial was free from prejudicial error and requests that we consider the record and award defendant a new trial if prejudicial error appears. In view of the defendant's indigency, we have considered this appeal as an exception to the judgment, presenting the face of the record for review. We have reviewed the record and find that the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LANTIS JETTON GOOD

No. 7526SC521

(Filed 15 October 1975)

APPEAL by defendant from *Fall's, Judge.* Judgment entered 14 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1975.

Attorney General Edmisten by Assistant Attorney Conrad O. Pearson for the State.

John H. Cutter III, for defendant appellant.

MORRIS, HEDRICK and ARNOLD, Judges.

No error.

STATE OF NORTH CAROLINA v. WILLIAM JUNIOR MOSES

No. 7526SC467

(Filed 15 October 1975)

APPEAL by defendant from *Hasty, Judge.* Judgment entered 16 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 September 1975.

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

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

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. FRANK WALKER, JR.

No. 7418SC943

(Filed 29 October 1975)

Criminal Law § 134— proceeds of fines — county school fund

The trial court was without authority to direct that a portion of a fine imposed as a special condition of probation be paid to the Finance Officer of the City of Greensboro for use by the Vice Squad of the City of Greensboro since the proceeds of fines must go to the county school fund. Art. IX, § 7, N. C. Constitution.

HEDRICK, Judge.

PURSUANT to our order entered *ex mero motu*, we reconsider our decision in this case filed 19 March 1975 reported at 25 N.C. App. 157, 212 S.E. 2d 528 (1975), cert. denied, 287 N.C. 264, 214 S.E. 2d 436 (1975), cert. denied by the U. S. Supreme Court on 14 October 1975, insofar as it relates to the judgment of the superior court entered 31 July 1974 imposing a prison sentence of two years, which was suspended and the defendant placed on probation for five years upon the usual and regular conditions of probation plus the following special condition of probation:

> "(3) On the further condition that the defendant pay a fine of $1500.00 out of which $500.00 is to go to the Finance Officer of the City of Greensboro to be used if and when needed by the Vice Squad of the Greensboro Police Department, and the remaining $1000.00 to go to the school fund as all fines go, and that the defendant pay the court costs;"

Article IX, Section 7, of the North Carolina Constitution provides:

> "*County school fund.* All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

The imposition of the $1500.00 fine as a special condition of probation was proper. However, in our opinion, the court was without authority to direct the Clerk to pay any portion of such fine to the Finance Officer of the City of Greensboro to

be used by the Vice Squad of the City of Greensboro. N. C. Const., Art. IX, § 7.

Therefore, the judgment appealed from is modified by deleting therefrom the following:

> "out of which $500.00 is to go to the Finance Officer of the City of Greensboro to be used if and when needed by the Vice Squad of the Greensboro Police Department, and the remaining $1000.00 to go to the school fund as all fines go"

This court having concluded heretofore that the defendant had a fair trial free from prejudicial error, except as hereby modified, the judgment appealed from is affirmed.

The Clerk of this Court is directed to certify immediately a copy of this supplementary opinion to the Clerk of Superior Court of Guilford County and to the attorneys of record for defendant.

Modified and affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. PHILLIP DIETZ

No. 7530SC329

(Filed 5 November 1975)

1. **Constitutional Law § 30— delay between offense and notification of charges — reason for delay not in evidence — evidentiary hearing required**

In a prosecution for possession and sale of marijuana on 17 May 1974 where the evidence tended to show that shortly after that date the State possessed all of the evidence which it presented at defendant's trial, no warrant was ever served on defendant, the bill of indictment was not returned as a true bill until 30 September 1974, and even after that it was not until sometime in November that defendant was informed of the exact charges against him, the trial court should have held a hearing to determine the reason for the State's delay in bringing the charges against defendant, whether the delay was justified, or whether prejudice to defendant in fact resulted.

2. **Constitutional Law § 30— speedy trial — necessity for evidentiary hearing on issue**

The trial judge is not required to hold an evidentiary hearing each time a defendant contends that he has been denied a speedy trial;

however, where there has been an unexplained delay and a substantial showing that the delay may have impaired defendant's ability to present a defense, the trial judge should hold a sufficient hearing to permit him to determine the facts and to determine whether defendant has been prejudiced by the delay.

3. Criminal Law § 34— defendant's guilt of other offenses — question improper

In a prosecution for possession and sale of marijuana, the trial court erred in allowing the prosecuting attorney to ask defendant if anyone else besides the State's witness had ever approached him about buying marijuana, since that question had no probative value on the issue of defendant's guilt or innocence of the offenses for which he was tried but may have caused the jurors to speculate about other offenses committed by defendant of the nature of those for which he was being tried.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 3 December 1974 in Superior Court, JACKSON County. Heard in the Court of Appeals 25 August 1975.

By bill of indictment containing two counts defendant was charged with (1) the felonious sale and delivery to Dan Crumley on 17 May 1974 of more than five grams of the controlled substance marijuana and (2) the felonious possession with intent to deliver on 17 May 1974 of more than five grams of marijuana. He pled not guilty to both charges.

At defendant's trial Crumley testified that on 17 May 1974 he was a student at Western Carolina University and on that date went to defendant's room in Madison Dormitory where defendant sold him "$20. worth of marijuana," which on 23 May 1974 he turned over to S.B.I. Agent Maxey. The State's evidence showed that the green vegetable material which Agent Maxey received from Crumley on 23 May 1974 was delivered on 28 May 1974 to the State's chemist, who analyzed the material and found it to be 22.19 grams of marijuana.

Defendant testified that during 1974 and until June of that year he was a student at Western Carolina University, that he knew the State's witness, Crumley, and had seen him in and about Madison Dormitory, but that he did not at any time sell Crumley any marijuana.

The jury found defendant guilty of the charge contained in the first count of the bill of indictment but not guilty of the charge contained in the second count. From judgment imposed on the jury's verdict on the first count, defendant appealed.

Attorney General Edmisten by Associate Attorney General Daniel C. Oakley for the State.

Morris, Golding, Blue & Phillips by William C. Morris, Jr., for defendant appellant.

PARKER, Judge.

Prior to pleading to the indictment, defendant filed a written motion to dismiss the prosecution against him on the grounds that there had been an unreasonable delay between the time the State became aware of the alleged offenses and his being notified of the charges. In support of this motion defendant filed his affidavit in which he stated that no warrant was ever served upon him and that, although the indictment was returned as a true bill on 30 September 1974, no copy was furnished him until sometime in November 1974 and only then did he learn the nature of the offenses charged, the date on which they were supposed to have occurred, or the names of the witnesses against him. He alleged that by the time such information was made available to him, he was unable to remember precisely where he was on 17 May 1974, the names of persons he saw on that date, the classes he attended, the places he visited, or any other information which might be helpful to his defense. He asserted that if a warrant had been issued and served on him promptly after the State obtained its evidence against him, he would have been able to remember where he was on 17 May 1974 and might have been able to find witnesses to testify concerning both his and Dan Crumley's whereabouts and activities on that date. He contended that by this delay he was deprived of his constitutional right to a speedy trial and to due process of law in that his ability to defend was substantially prejudiced. The trial court denied defendant's motion without making any inquiry or determination as to the cause of the State's delay in bringing the charges or as to the effects of the delay upon defendant's ability to present a defense.

The right of an accused to have a speedy trial is, of course, part of the fundamental law of this State. In this context, "[t]he word 'speedy' cannot be defined in specific terms of days, months or years, so the question whether a defendant has been denied a speedy trial must be answered in light of the facts in this particular case. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by defendant are interrelated factors to be considered in determining

whether a trial has been unduly delayed." *State v. Brown,* 282 N.C. 117, 123, 191 S.E. 2d 659, 663 (1972). Whether a defendant has been denied the right to a speedy trial is a matter to be determined initially by the trial judge in light of the circumstances of each case. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

[1] In the present case defendant does not complain of any delay in bringing him to trial once the charges against him were made known. He complains of the delay which occurred in bringing those charges. In this connection he points out that shortly after 17 May 1974 the State possessed all of the evidence which it presented at his trial, yet no warrant was ever served on him, the bill of indictment was not returned as a true bill until 30 September 1974, and even after that it was not until sometime in November that he was informed of the exact charges against him. He contends that the lapse of time made it difficult for him to recall the events of the day on which the offenses were allegedly committed or to find witnesses who might be able to provide helpful information or testimony. Our Supreme Court has recognized that under certain circumstances the interval between the time the State acquires information sufficient to justify a criminal prosecution and the time charges are brought may constitute such a delay as to violate the constitutional rights to a speedy trial. " 'Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear.' " *State v. Johnson,* 275 N.C. 264, 272, 167 S.E. 2d 274, 279-80 (1969). Moreover, one who has not been charged with a criminal offense has no duty to bring himself to trial. Prior to arrest or indictment he is in no position to demand a speedy trial and therefore cannot be deemed to have waived his right to the constitutional guarantee.

[2] From the record before us it is impossible to determine the reason for the State's delay in bringing the charges against the defendant, whether the delay was justified, or whether prejudice to defendant in fact resulted. These are matters which should have been determined by the trial judge after a sufficient hearing to allow him to find the facts. We do not suggest that each time a defendant contends that he has been denied a speedy trial, the trial judge must hold an evidentiary hearing.

State v. Roberts, 18 N.C. App. 388, 197 S.E. 2d 54 (1973). However, where, as here, there has been an unexplained delay and a substantial showing that the delay may have impaired defendant's ability to present a defense, the trial judge should hold a sufficient hearing to permit him to determine the facts and to apply the balancing test referred to in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972), taking into account the interrelated factors referred to in that case and in *State v. Brown, supra.* This should have been done in the present case.

[3] On direct examination the defendant denied he had at any time sold marijuana to Dan Crumley and testified that "[o]n the occasions when Dan Crumley asked me to sell him marijuana, I simply refused him. I did not have any." On cross-examination, the prosecuting attorney asked:

> Question: "Has anyone else ever approached you about buying marijuana?"

Defendant's counsel promptly objected. The objection was overruled, and defendant answered, "Yes, sir, they have."

The prosecuting attorney's question was improper and defendant's objection should have been sustained. That other persons may have approached defendant about buying marijuana had no probative value on the issue of his guilt or innocence of the offenses for which he was tried. Anyone may be solicited to do an illegal act, yet evidence that this occurred fails to prove that he did so. Nevertheless, the solicitation carries with it the implication that the person making the request considers the person of whom the request is made as capable and even perhaps as willing to perform the illegal act requested. Thus, the jurors in this case may well have considered the prosecuting attorney's question and defendant's answer as the basis for determining that other persons had at least impliedly accused defendant of committing, or being willing to commit, offenses of the nature of those for which he was being tried. Defendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he would have been subject to cross-examination as to convictions for unrelated prior criminal offenses. *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362 (1967). But it is now settled that, for purposes of impeachment, "a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused,* either

informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial." *State v. Williams,* 279 N.C. 663, 672, 185 S.E. 2d 174, 180 (1971). We hold that error was committed in overruling defendant's objection to the prosecuting attorney's question above noted. Moreover, we cannot agree with the contention set forth in the State's brief in this case that the error was not prejudicial to defendant. The State's entire case depended upon the jury's evaluation of the credibility of its witness, Crumley, as weighed against the credibility of defendant. That the jury experienced some difficulty in resolving the conflict in the testimony given by Crumley and that given by defendant is evidenced by the fact that, after receiving the case and deliberating for some time in the jury room, on being recalled before the judge, their foreman reported they were divided as to their verdict in both cases and asked if they could have a transcript of defendant's testimony for use in their further deliberations. The judge properly denied this request and instructed the jury to take their own recollection of what the testimony had been. However, the fact the request was made and the nature of the verdicts rendered in the two cases point up the difficulty which the jury experienced in resolving the conflict in credibility.

We have not passed upon all of defendant's assignments of error because the problems presented will probably not recur upon a new trial. For the errors noted above defendant is entitled to a

New trial.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. LESLEY SPENCER

No. 752SC435

(Filed 5 November 1975)

1. Homicide § 21— aiding and abetting manslaughter — sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant's brother was guilty of manslaughter and that defendant aided or abetted him in that unlawful killing where it tended to show

that the victim lost his gun during a struggle with defendant's brother, the brother picked up the gun and shot the victim as he fled, defendant was present at the time of the killing, defendant had been slapped and threatened by the victim earlier that day, defendant told several people that day that he was going to kill the victim, defendant and his brother discussed some plan the night of the killing, defendant had been shot by the victim just previous to the killing and defendant had run across the street to get a jack iron, and immediately after the fatal shooting defendant beat the victim with the iron while the victim was lying on the floor.

2. **Homicide § 28— instructions — self-defense — defense of brother — aggressor**

In this prosecution of defendant for aiding or abetting his brother in the crime of manslaughter wherein there was evidence tending to show that defendant was initially attacked by the victim, who struck him with a pistol and shot him in the leg, and that defendant's brother entered the fight in defense of defendant, the trial court erred in giving the jury an unqualified instruction that one who voluntarily enters a fight is an aggressor and in failing to instruct that one is not an aggressor if he voluntarily enters a fight in defense of his brother.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 30 January 1975 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 16 September 1975.

The defendant, Lesley Spencer, was charged in a bill of indictment, proper in form, with the murder of Harvey Ward on 9 September 1972. At the call of the case for trial, the District Attorney announced that the State would only seek a conviction on the charge of manslaughter. The evidence offered by the State tended to show the following:

On Saturday, 9 September 1972, between 4:00 and 5:00 p.m., the defendant told William Oscar Grady that earlier in the day Harvey Ward had slapped him in the face. Defendant was angry and said he was not going to let Ward get away with it. Between 4:30 and 5:00 p.m., defendant saw Arthur Moore at Moore's Snack Bar, known as a "piccolo parlor" or "juke joint" on Fourth Street in Washington, N. C. Defendant told Moore that Ward had slapped him and taken his money.

Around 8:00 p.m. Grady saw defendant again, this time on Fourth Street near defendant's car. The defendant's brother was also standing in the area. While Grady was talking with them, Officer Gilgo of the Washington Police Department, along with another officer, approached defendant and asked him about a gun in the back of defendant's convertible. Defendant said it was his and it was loaded. Officer Gilgo took the gun—part

shotgun, part rifle—and kept it. Gilgo told defendant he could pick the gun up on Monday. He also told him that Fourth Street was no place to settle an argument. Defendant responded that he was not going to be slapped around and that he was going to kill Ward if he came out that night. Gilgo also testified that prior to approaching the car, he and the other officer had seen defendant's brother, Respass Spencer, going from one "juke joint" to another on Fourth Street looking in the doors. They asked him what was the trouble, and he responded that there was not any trouble. After the police left, Grady talked again with defendant and his brother Respass. Grady told Respass to stay out of any trouble, and "not to do what they planned to do."

Between 8:00 and 8:30, defendant saw Ward's girl friend in Moore's Snack Bar. He told her that he was going to kill Ward. Later, on the street outside Moore's, where a group of people were gathered talking among themselves, defendant saw Ward's daughter and told her that he was going to kill Ward. Sometime afterward, as defendant was walking back toward the door of Moore's, he met Ward coming out the door. Ward and defendant exchanged some remarks, and Ward grabbed defendant by the collar striking him several times across the face with a pistol. He then fired the pistol three times toward the ground, shooting defendant in the leg. Defendant's brother, Respass, came out of Moore's and joined in the struggle. He and defendant wrestled Ward to the ground. Defendant broke loose and ran across the street to his car to get a "jack iron." The gun had fallen from Ward's hand in the struggle and Respass picked it up. Ward got up and ran back into Moore's. Respass shot him in the head as he went back through the door. Ward fell dead onto the floor of Moore's, facing toward the door. Soon afterward defendant entered and struck the deceased several times with the jack before being disarmed.

Defendant offered evidence tending to show the following: Between 2:00 and 2:30 p.m., defendant had been in an argument with Ward. Ward had taken a dollar of defendant's, slapped defendant in the face, and threatened to kill him. Defendant was angry but never told anyone that he was going to kill Ward. The gun that defendant carried in his back seat was for his own protection. He did not protest to the police when they took the gun, and he never related any threats to them that

he was going to kill Ward. The reason his brother was seen looking into "juke joints" earlier that night was because he was looking for his children. Later that evening defendant talked to Ward's girl friend and daughter but did not threaten to kill Ward. Instead, they taunted him.

Ward grabbed defendant by surprise as defendant was talking to another man outside the door of Moore's. He beat defendant with a pistol and then shot defendant in the leg. Defendant broke free and began running across the street.

Respass testified that at this time he came out of Moore's and saw Ward aiming the gun at defendant who was fleeing. Respass told Ward not to shoot his brother any more and Ward turned, aiming the gun at Respass. Respass grabbed Ward's arm and they struggled. Respass knocked the gun out of Ward's hand. Respass and Ward broke apart and Respass grabbed the gun. When he looked up, he saw Ward coming toward him with a cue stick from inside Moore's. Respass shot in self-defense as Ward came toward him. Ward fell in Moore's with his head toward the door.

Defendant, after he had run across the street, saw the two men in a scuffle. He took out the jack iron as a precaution when he heard the shots. He thought it was his brother who was shot and returned to see, taking the "iron" with him. He never hit the deceased, but when he saw it was not his brother, and was told that Ward was dead, he walked outside and gave the "iron" to the police after they arrived. Soon afterward, defendant went to the hospital to be treated for his injuries.

From a verdict of guilty and imposition of a prison sentence of not less than ten (10) nor more than twelve (12) years, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr., for the State.

Carter and Archie by W. B. Carter, Jr., for defendant appellant.

HEDRICK, Judge.

[1] The defendant assigns as error the denial of his motion for judgment as of nonsuit. Obviously, the State tried defendant for manslaughter on the theory that defendant aided and

abetted his brother in an unlawful killing of Ward. To prove its case against defendant, the State had to prove that defendant's brother, Respass, was guilty of manslaughter and also had to prove that defendant aided or abetted him in that unlawful killing.

Manslaughter is the unlawful killing of a person without malice and without premeditation and deliberation. *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1970); *State v. Baldwin,* 152 N.C. 822, 68 S.E. 148 (1910). A person is guilty of manslaughter when the unlawful killing occurs while he is "under the influence of passion or in the heat of blood produced by adequate provocation . . . . " *State v. Wynne,* 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971).

The State offered evidence to show that Respass had been struggling with Ward, that Ward lost his gun, that Respass picked up the gun, and that Respass shot Ward as he fled. When the evidence is considered in the light most favorable to the State, it is sufficient to show that Respass Spencer was guilty of manslaughter.

To prove that defendant aided or abetted Respass in the unlawful killing, the State must show that in some way defendant advised, procured, encouraged, or assisted his brother in the commission of the crime. *State v. Cassell,* 24 N.C. App. 717, 212 S.E. 2d 208 (1975), cert. denied 287 N.C. 261, 214 S.E. 2d 433 (1975); *State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973). As stated in *State v. Hargett,* 255 N.C. 412, 415, 121 S.E. 2d 589, 592 (1961):

> "A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime." *State v. Holland,* 234 N.C. 354, 358, 67 S.E. 2d 272, 274; *State v. Johnson,* 220 N.C. 773, 776, 18 S.E. 2d 358. " . . . Mere presence, even with the intention of assisting in the commission of a crime cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to him (the perpetrator) . . . . " *State v. Hoffman,* 199 N.C. 328, 333, 154 S.E. 314, 316. However,

> there is an exception. " . . . when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of law this was aiding and abetting." *State v. Holland, supra.*

Accord, *State v. Cassell, supra* at 721. In addition to the relationship of defendant to the actual perpetrator, other circumstances to be considered include the motive tempting defendant to assist in the crime, presence of defendant at the time and place of the crime, and conduct of defendant both before and after commission of the crime. *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5 (1952) ; *State v. Cassell, supra.*

In the instant case, the State offered evidence tending to show (1) that defendant was present at the time of the killing; (2) that defendant and Respass were brothers; (3) that earlier in the day defendant had been slapped and threatened by Ward; (4) that defendant had threatened to kill Ward several times on 9 September 1972; (5) that defendant and his brother had discussed some plan earlier that night; and (6) that defendant had been shot by Ward just previous to the killing and defendant had run across the street to get a "jack iron." The jury could find that Respass knew all this. In addition, immediately after the fatal shooting, defendant beat Ward with the iron while Ward was lying on the floor. This evidence, when taken in the light most favorable to the State is sufficient to allow the jury to find that defendant instigated, encouraged, aided or advised his brother in the unlawful killing of Ward. See *State v. Lesley Spencer,* 18 N.C. App. 499, 197 S.E. 2d 232 (1973), where on a former appeal this court held that the evidence was sufficient to require submission of the case to the jury on the theory that Lesley Spencer aided his brother, Respass Spencer, in the second degree murder of Ward. (The former appeal in the case of Respass Spencer for that murder is reported at 18 N.C. App. 323, 196 S.E. 2d 573 (1973).) This assignment of error is overruled.

[2] Defendant also assigns as error certain instructions to the jury on the right of self-defense and the availability of that defense to one who voluntarily enters a fight. In charging the jury on the right of Respass Spencer to act in defense of himself or defendant, the court instructed the jury that for them to find that Respass acted in self-defense they must find that "he

or his brother [defendant] was not the aggressor. *If he voluntarily entered the fight he was the aggressor unless he thereafter attempted to abandon the fight and gave notice to Ward that he was doing so.*" (Emphasis added.)

This identical instruction was attacked and found to be erroneously applied to the evidence of the cases giving rise to the former appeals of Respass Spencer and Lesley Spencer reported as cited supra.

A general rule with regard to self-defense is that the defense is *not* available to one who enters a fight voluntarily because he would thereby be an aggressor. *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623 (1945). But, the crux of defendant's argument is that although Respass voluntarily entered the fight he was not an aggressor because one may come to the defense of members of his family, when that member of the family would be justified in defending himself. *State v. Hodges,* 255 N.C. 566, 122 S.E. 2d 197 (1961); *State v. Anderson,* 222 N.C. 148, 22 S.E. 2d 271 (1942); *State v. Respass Spencer, supra.*

From the evidence here presented, the jury could find that when defendant, Lesley Spencer, was initially attacked by Ward who struck him with the pistol and then shot him in the leg, he was justified in defending himself. By the same token, when Respass saw the fight between Ward and his brother, the jury could find, *he* was justified in entering the fight. Although such entry was voluntary, Respass would not be an aggressor since it was in defense of his brother. *State v. Respass Spencer, supra.*

In the present case, as before in *State v. Respass Spencer, supra,* the court's unqualified statement that one who voluntarily enters a fight is an aggressor, coupled with his failure to declare and explain that one is not an aggressor if he voluntarily enters a fight in defense of his brother, is erroneous. For the court's failure to properly declare and explain the law arising on the evidence, the defendant is entitled to a new trial.

We do not discuss the additional assignments of error, since they are not likely to occur at the next trial.

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. KENNETH YOUNG, JR., DENNIS LAMAR WILLIAMSON, CALVIN TURNER, AND LESTER ARTIS

No. 7526SC399

(Filed 5 November 1975)

1. **Arrest and Bail § 3; Searches and Seizures § 1— probable cause for warrantless arrest — search incident to arrest**

An officer had probable cause to arrest defendants without a warrant for the armed robbery of a motel clerk when an officer, informed by radio that four black males travelling in a dark vehicle had just robbed a motel clerk, observed, within 30 seconds of the radio call, four black males in a dark vehicle run through a stop sign and toss a dark bag from the car and experienced some difficulty in physically restraining one of the suspects for purposes of questioning; consequently the arrest was lawful and evidence obtained pursuant thereto was not tainted and inadmissible.

2. **Criminal Law § 84; Searches and Seizures § 1— search of police car — standing to object**

Defendants had no standing to object to the search of a police patrol car in which they rode after their arrest since they neither operated nor owned the car.

3. **Criminal Law § 89— object admissible for corroboration**

In this armed robbery prosecution, a bag allegedly thrown from defendants' car was admissible to corroborate an officer's testimony describing a dark object he saw thrown from the car.

4. **Robbery § 4— armed robbery — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of four defendants for the armed robbery of a motel night clerk.

APPEAL by defendants from *Smith, Judge.* Judgments entered 27 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 September 1975.

This case arose out of an armed robbery in Charlotte on 13 November 1974. According to the State's evidence, Mr. Charles Hadaway, the Alamo Plaza Motel night clerk and night auditor, was on duty when the defendants came to the electrically controlled door at approximately 2:25 a.m. Responding to the gestures of one of the defendants, Hadaway released the control button, and the defendants burst into the lobby as the door swung open. One of the defendants brandished a handgun, and Hadaway was knocked to the floor and tape placed over his

eyes. Hadaway heard the electric door close approximately 10 minutes after the defendants had entered the lobby. He removed the tape from his eyes and saw a dark vehicle pull away from the motel driveway. The area near his station was littered with shaving kits and paraphernalia which were usually stored under the counter for the use of visiting patrons. As the car moved out into the street, Hadaway phoned the police and told the dispatcher that four black males had robbed him. Hadaway later learned that approximately $72 was stolen.

As soon as the night clerk phoned in the report of the robbery, the police dispatcher signaled the message to the city's patrol cars. Officer Johnson was approximately one mile from the motel at the time of the radio announcement. Within 30 seconds of receiving the information, Johnson observed a blue Oldsmobile run through a stop sign and continue travelling in a direction away from the scene of the crime. Without using his siren or police dome lights, Johnson followed the Oldsmobile, and as the defendants' car passed over a set of railroad tracks, Johnson noted that a dark colored bag was thrown from the car. At that point, Johnson radioed the dispatcher with information of his continuing "tail" of four black males. Approximately seven blocks later, the Oldsmobile pulled over to the curb and parked. Defendant Artis, the driver, emerged from the car and walked toward an apartment building. Johnson went forward to stop Artis for questioning, but Artis refused to heed Johnson's call to stop and only stopped when the officer grabbed the defendant's arm on the porch of the apartment. Another police officer, D. A. Williams, came upon the scene and walked over to the Oldsmobile to watch the other three defendants while Johnson stopped Artis on the porch.

After searching the defendants and the Oldsmobile and finding no weapons or money on them or in the car, the officers placed the defendants into the squad cars and drove them back to the Alamo Plaza Motel. On the way back to the scene of the crime, Johnson stopped at the railroad crossing and retrieved the dark colored bag which he had earlier seen being thrown from the Oldsmobile. At trial, Johnson testified that the bag looked "like a shaving kit." It contained several dollars in bills and change. After returning to the motel, Johnson went back out to his patrol car, and checking the rear seat, discovered a roll of money amounting to $74 beneath the left rear seat, the place where defendant Artis had sat during the ride back to the

motel. Johnson testified that during a routine check of his car that evening at 11:15 p.m. he had found no money beneath the rear seat. Moreover, Johnson stated that from the time he went on duty until the robbery report at the Alamo Plaza Motel no one but Artis had sat in the back of his patrol car.

Defendants offered no evidence.

Defendants were charged with armed robbery, and the jury returned verdicts of guilty. From judgments sentencing them to terms of imprisonment, the defendants appealed. Defendant Young's appeal has abated because of his death since the time of his trial.

Attorney General Edmisten, by Assistant Attorney General Edwin M. Speas, Jr., for the State.

Clayton S. Curry, Jr., for defendant appellant Williamson.

Mercer J. Blankenship, Jr., for defendant appellant Turner.

Oliver, Downer, Williams & Price, by Paul J. Williams, for defendant appellant Artis.

MORRIS, Judge.

Defendants first contend that the police arrested them without probable cause, and that any evidence obtained pursuant thereto is tainted and hence inadmissible. We disagree. Our Supreme Court, following the broad guidelines of the United States Supreme Court, has repeatedly held that an arresting officer may arrest without a warrant ". . . when the officers have probable cause to make it." See *State v. Streeter*, 283 N.C. 203, 207, 195 S.E. 2d 502 (1973).

Though difficult to define, probable cause " 'has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. * * * To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith.' 5 Am. Jur. 2d, 'Arrests,' § 44 (1962). 'The existence of "probable cause," justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offenses involved.' " *Id.*, at 207, quoting from 5 Am. Jur. 2d, Arrests, § 48; other citations omitted. Similarly, the United States Supreme Court has held that the matter of probable cause turns on the " '. . . facts and circumstances within their [i.e., arresting officers'] knowledge and of which they had reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *Id.*, at 207, quoting from *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed. 2d 142, 85 S.Ct. 223 (1964). G.S. 15-41, effective at the time of this arrest, provided, *inter alia,* that:

> "A peace officer may without a warrant arrest a person:
>
> . . .
>
> (2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

Both the United States and North Carolina Supreme Courts have held that "reasonable ground" and "probable cause" are basically equivalent terms with similar meanings. *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971).

[1] Thus, the issue for this Court is "whether the facts afforded the officers probable cause to arrest [the] defendant[s] and whether the search of . . . [their persons and property] . . . was incident to that arrest." *State v. Streeter, supra,* at 207. We believe the following factors underscore our determination that probable cause for the arrest existed:

> (1) Officer Johnson was approximately one mile from the scene of the crime when he learned that the armed robbery just had occurred.
>
> (2) Officer Johnson knew through the dispatcher's report that the suspects were four black males and that they were seen leaving the motel in a dark vehicle.
>
> (3) During this early morning hour, when the streets were virtually deserted, the officer within 30 seconds of the radio notification, spotted a dark vehicle occupied by four black males as it ran through a stop sign and continued travelling in a direction away from the motel in question.

(4) The officer observed an object that looked like a dark bag being thrown from the defendants' car shortly after the policeman began his "tail."

(5) Defendant Artis continued to walk away from Officer Johnson after he was asked several times to stop.

When all of these factors are taken together, there is little question that the arresting officers had the requisite probable cause to make the arrest. Where the arrest is lawful, the police have the right, without a search warrant, to conduct a contemporaneous search of the person and area within the immediate control for weapons or for fruits of the crime or weapons used in its commission. *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969); *State v. Jackson,* 280 N.C. 122, 185 S.E. 2d 202 (1972).

[2] Moreover, none of the defendants have standing to object to the search of the patrol car wherein the money was found. Where the owner and operator of a vehicle consents to a search, third parties cannot protest. *State v. Harrison,* 14 N.C. App. 450, 188 S.E. 2d 541 (1972), cert. denied 281 N.C. 625 (1972). Here the City of Charlotte owned the vehicle and it was operated by Officer Johnson.

[3] Defendants next argue that the bag allegedly thrown from defendants' car as it crossed the railroad tracks is inadmissible. Again, we disagree. The bag is admissible as corroboration of Officer Johnson's testimony describing the dark object which he saw allegedly being thrown from the defendants' car. 2 Strong, N. C. Index, Criminal Law, § 89; Stansbury, N. C. Evidence 2d, §§ 49 and 50, cases there cited. In addition, J. G. Cobb, a witness for the State, referred to State's Exhibit # 3—the bag in question—as a shaving kit "of a very rough grain plastic type finish." He further testified: "There were several of *these* shaving kits on the floor and some masking tape and other things." (Emphasis supplied.) This testimony came in without objection.

[4] Finally, defendants contend that the court erred in overruling their motions for nonsuit. We find no merit in this contention. When considering the evidence in the light most favorable to the State, it is apparent that there was sufficient evidence for the jury to consider in reaching its findings and verdicts. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

We have considered the other assignments of error presented by the defendants and find no merit in them.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. EDWARD RUSSELL MITCHELL

No. 7526SC350

(Filed 5 November 1975)

1. **Narcotics § 3— items discovered in defendant's residence — relevancy**

In a prosecution for possession of marijuana with intent to distribute, the trial court did not err in the admission of testimony without any evidentiary exhibits that police found in defendant's residence various vials, packages, bags and rolled cigarettes containing white powdery material or brown liquid or green vegetable substance, a quantity of red and yellow pills, a box of chemicals, a razor, spoon and probe since evidence of such items, when considered with a large quantity of marijuana discovered in the apartment, was relevant to show the element of intent to distribute.

2. **Narcotics § 4.5— instructions — intent to distribute — possession of more than ounce of marijuana**

G.S. 90-95 *et seq.* clearly permits our courts and juries to examine and utilize the quantities of drugs seized as one possible indicator of intent to distribute, and the trial court did not err in instructing the jury that intent could be inferred if they found beyond a reasonable doubt that defendant possessed more than one ounce of marijuana.

3. **Narcotics § 4— possession of marijuana — proscribed variety — sufficiency of evidence**

The State's evidence was sufficient for the jury to find that marijuana seized from defendant was of the statutorily proscribed Cannabis Sativa L variety where the State's expert chemist gave his opinion from tests performed on the substance that it was of the proscribed variety, notwithstanding defendant's expert chemist testified it was not possible to identify this marijuana as Cannabis Sativa L.

4. **Criminal Law § 91— motion for continuance — absence of witness**

The trial court did not abuse its discretion in the denial of defendant's motion for continuance made on the ground of the absence of a witness where defendant did not indicate by affidavits the facts to be proved by the proposed witness.

ON *certiorari* to review proceedings before *Tillery, Judge.* Judgment entered 6 December 1974 in Superior Court, MECK-

LENBURG County. Heard in the Court of Appeals 28 August 1975.

Defendant was indicted for felonious possession of a controlled substance with intent to distribute, to wit: 34 pounds of marijuana. From judgment sentencing him to five years imprisonment, defendant appealed.

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

Scarborough, Haywood & Merryman, by J. Marshall Haywood, for defendant appellant.

MORRIS, Judge.

It appears that defendant did not docket his record on appeal within the time prescribed by the rules of this Court. He has, however, filed a petition for a writ of certiorari from which it appears that counsel was not remiss nor negligent but mailed the record on appeal in ample time for it to have been received by the Clerk within the time allowed. We, therefore, have allowed the petition for a writ of certiorari and will review the defendant's trial as requested.

Defendant brings forward four contentions for consideration. Defendant maintains that: (1) the court violated an exclusionary rule; (2) the State failed to establish an intent to distribute and the court subsequently erred in instructing the jury that intent to distribute may be inferred from the quantity of the marijuana seized; (3) the State was unable to identify the green vegetable material as marijuana of the proscribed Cannabis Sativa L variety; and (4) the court erred in failing to grant defendant's motion for a continuance. We reject all of these contentions.

[1] During the course of a search of defendant's residence pursuant to a valid search warrant, the police seized various suspicious substances and paraphernalia in addition to a footlocker containing approximately 35 pounds of a green vegetable material. Though the State only submitted the footlocker and its contents into evidence as Exhibit "C," the State's witness also described the suspicious items discovered during the search. Specifically, the testimony tended to show that defendant's residence housed an assortment of vials, packets, packages, bags and rolled cigarettes containing white powdery material or

brown liquid or green vegetable substance. Police also found a quantity of red and yellow pills, a box of "chemicals," a razor, spoon and probe. Approximately 23 green vegetable plants were also recovered from defendant's closet.

Defendant claims that this testimony was highly inflammatory and prejudicial and depicted defendant as either "a bad guy or heavily involved in drugs." Hence, defendant argues, the testimony, unsupported by any evidentiary exhibits, should have been excluded. We disagree. Where specific intent, knowledge, motive or scienter is a crucial 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 [or knowledge, motive or scienter], even though the evidence discloses the commission of another offense by the accused." (Citations omitted.) *State v. McClain,* 240 N.C. 171, 175, 81 S.E. 2d 364 (1954). The admission of such evidence, however, is not automatic. Justice Ervin, writing for the Court in *McClain,* noted that:

> " '. . . the acid test [for this exception to the exclusionary rule] is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence requires that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected.' " Id., at 177.

In the base at bar, one can clearly perceive the logical nexus between the tendered "extraneous criminal transaction and the crime charged." We, therefore, hold that the evidence tendered was relevant and admissible. Defendant is charged with possession of marijuana with the intent to distribute. The possession of the considerable inventory of marijuana, when analyzed

in the context of the other suspicious items taken during the search, raises the requisite element of intent. This nexus correspondingly vitiates any notion that this stockpile of marijuana was held by defendant for his private, personal consumption.

[2] In a related argument, defendant avers that the State failed to establish the requisite intent to distribute. More specifically, defendant contends that the court erred by instructing the jury that intent could be inferred if they found beyond a reasonable doubt that defendant possessed more than one ounce of marijuana. Defendant contends that this charge was erroneous and that without the presumption there was no evidence of intent to present to the jury. Defendant did not except to this portion of the charge nor assign it as error. The contention, therefore, is not properly before us. Even if it were, we would be disposed to reject the argument. Pursuant to the North Carolina Controlled Substance Act ". . . it is unlawful for any person . . . to manufacture, sell or deliver, or possess with the intent to manufacture, sell or deliver, a controlled substance." G.S. 90-95(a)(1). Other state courts, interpreting the same or similar statutory mandate, have held that the requisite intent element can, at least partially, be inferred from the mere quantity of the proscribed substance found in defendant's unlawful possession. *State v. Jung,* 19 Ariz. App. 257, 506 P. 2d 648 (1973); *State v. Aikens,* 17 Ariz. App. 328, 497 P. 2d 835 (1972); also see Arizona R.S. 36-1002.01 and 36-1002.06; *State v. Laurino,* 108 Ariz. 82, 492 P. 2d 1189 (1972); *Reynolds v. State,* 511 P. 2d 1145 (Okl. Cr. 1973); *Soles v. State,* 16 Md. App. 656, 299 A. 2d 502 (1973), cert. denied 415 U.S. 950; *Perry v. State,* 303 A. 2d 658 (Del. Supr. 1973)—based on statute now repealed and replaced. *Farren v. State,* 285 A. 2d 411 (Del. Supr. 1971). Thus, we hold that G.S. 90-95, et seq., clearly permits our courts and juries to examine and utilize the quantities of drugs seized as one possible indicator of intent. In an analogous case, the defendant was indicted under Arizona statutes which proscribed possession of illegal drugs for the purpose of sale. *State v. Jung, supra:* A.R.S. 36-1002.01 and 36-1002.06. There, the defendant was found to have had in his possession approximately six grams of marijuana, 100 grams of cocaine, weighing scales and separating knives. The Arizona Court of Appeals declared that

> ". . . the evidence was sufficient to support a conviction of possession for sale notwithstanding absence of evidence

> of any sale or transaction by defendant with respect to the narcotics. The quantity of narcotics found in defendant's possession, its packaging, its location, and the paraphernalia for measuring and weighing were all circumstances from which it could properly be inferred that it was possessed for sale rather than for personal use." *State v. Jung, supra,* at pp. 652-653.

The Maryland Court of Appeals, in reviewing the conviction of a defendant charged with possession of cocaine with intent to distribute, noted the quantity of materials in defendant's possession and found that this unlawful assortment of drugs and paraphernalia was indicative of an intent to distribute. *Soles v. State, supra,* at pp. 511-512.

In the instant case, the instruction could not have possibly resulted in prejudice to the defendant in light of all the evidence overwhelmingly pointing to defendant's guilt. *State v. Patterson,* 284 N.C. 190, 195, 200 S.E. 2d 16 (1973).

[3] Defendant next asserts that his motion for nonsuit should have been granted because there was no evidence that the marijuana actually seized was of the statutorily proscribed Cannabis Sativa L variety. Again, we disagree.

> "On motion for nonsuit, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable intendment thereon and every reasonable inference to be drawn therefrom." *State v. McClain,* 282 N.C. 357, 363, 193 S.E. 2d 108 (1972).

Here the State's expert witness, Dr. L. C. Portis, a Chemist in the Charlotte-Mecklenburg Crime Lab, prepared miscroscopic tests, chromotographic analyses and the Duquonois Levine color test, and concluded that the marijuana in question was Cannabis Sativa L. The defendant did present his own rebuttal expert witness, Dr. Aaron John Sharp, formerly of the University of Tennessee, who testified that it was not possible to identify this marijuana as Cannabis Sativa L. This rebuttal testimony, however, does not warrant a nonsuit. The question was properly a matter for the jury.

[4] Finally, defendant indicates, without presenting any supporting arguments, that the trial court should have granted defendant a continuance at the outset of the trial. The trial court's denial is not reviewable unless there is evidence of abuse

of discretion. 3 Strong, N. C. Index 2d, Criminal Law, § 175. Moreover, defendant's continuance motion is grounded upon the absence of a witness, and defendant must indicate by affidavits the facts to be proved by the proposed witness. *State v. Patton,* 5 N.C. App. 164, 167 S.E. 2d 821 (1969), cert. denied 275 N.C. 597 (1969); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). Here defendant made no such affidavit.

We have considered the other assignments of error raised by defendant and find no prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

CORINA B. BOGLE, ADMINISTRATRIX OF THE ESTATE OF ROY D. BOGLE, JR., DECEASED v. DUKE POWER COMPANY, A CORPORATION

No. 7525SC505

(Filed 5 November 1975)

1. **Death § 3; Negligence § 29— wrongful death action based on negligence — requisites for summary judgment**

In an action for wrongful death predicated on negligence, summary judgment for defendant is correct where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of decedent, or determines that the alleged negligent conduct complained of was not the proximate cause of the injury.

2. **Negligence § 1— definition — proximate cause — foreseeability**

Negligence is the failure to exercise that degree of care for the safety of others that a reasonably prudent person would exercise under the same circumstances, but to be actionable the conduct complained of must be the proximate cause of the injury; an essential element of causation is foreseeability, that which a person of ordinary prudence would reasonably have foreseen as the probable consequence of his acts.

3. **Electricity § 5— power lines — duty of electric companies**

Electric companies are required to exercise reasonable care in the construction and maintenance of their lines when positioned where they are likely to come in contact with the public.

4. **Electricity § 5— position and condition of power lines — reasonable care exercised**

Where defendant insulated its transmission line by height and isolation in accordance with existing regulations and equipped its poles and

lines with fuses and circuit breakers designed to alleviate the risk of an uncontrolled discharge of electricity, defendant exercised reasonable care in the operation of its transmission lines with which plaintiff's intestate came in contact and was not in breach of any duty of care toward plaintiff's intestate.

5. **Electricity § 5; Negligence § 9— power line near school — foreseeability of injury — presence of line not proximate cause**

Defendant's conduct in allowing a transmission line to remain near a school where plaintiff contends defendant knew or should have known it posed a hazard to maintenance personnel was not the proximate cause of death to plaintiff's intestate.

6. **Electricity § 8; Negligence § 35— electrocution when ladder hit power line — contributory negligence as matter of law**

The trial court in a wrongful death action properly granted defendant's motion for summary judgment where the evidence tended to show that plaintiff's intestate was contributorily negligent in attempting by himself to remove a metal ladder from a building after being warned of the proximity of a power line and in attempting to remove the ladder from the line.

Judge PARKER concurring.

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 20 March 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 25 September 1975.

This is an action for wrongful death instituted by Corina B. Bogle, administratrix of the estate of her son, Roy D. Bogle, Jr.

Plaintiff's complaint is summarized in pertinent part as follows:

On 17 May 1971 defendant, through transmission lines which it maintained, transmitted electric power to the Glen Alpine Grammar School in Glen Alpine, N. C., as well as to other communities in the surrounding area, and was well acquainted with the dangers incident to the transmission of electric energy. Defendant failed to exercise due care toward plaintiff's intestate by continuing to utilize transmission lines situated in such proximity to said school that it knew, or should have known, presented a hazard to maintenance men working in and around the school building; in failing to adequately insulate, inspect, repair and maintain said transmission lines; and in failing to provide warning signs alerting the public to the presence of a dangerous electrical hazard. The death of plaintiff's intestate was the direct and proximate result of negligent acts and omissions of defendant.

In its answer, defendant denied any negligence and pled the negligence of plaintiff's intestate as a proximate cause of the accident.

Extensive discovery was utilized by both parties. This included answers to interrogatories, depositions from E. D. Wortman, manager of defendant's operations in the Morganton area, Frank Corpening, the line foreman under whose supervision damage to the transmission line was repaired, as well as the affidavit of George M. Mode, the carpenter who plaintiff's intestate was employed to assist.

Defendant moved for summary judgment and materials submitted at the hearing established the following:

On 17 May 1971 plaintiff's intestate and Mode, employees of the Burke County Public School System, were called to the Glen Alpine Grammar School to check for leaks in the roof and to clean out some guttering. In the course of their work, they used a twenty-eight foot aluminum extension ladder to gain access to the roof. When they had finished clearing the gutters, intestate started to take down the ladder. Mode told intestate to wait until he could help and warned intestate about defendant's transmission line. The line was located some twenty-one feet from the building, suspended from a pole at a height of twenty-two feet, and had been so situated since before the line's acquition from another power company some thirty-five years earlier. Weather stripping on the line had become cracked and peeled away, leaving the copper line exposed.

Intestate ignored Mode's warnings and tried to take the ladder down by himself. As he pulled the ladder away from the building it fell against the transmission line, showering the area with sparks. Intestate then attempted to push the ladder off the wire; the ladder momentarily broke contact with the ground, causing the full charge of 7200 volts to pass through intestate's body. The line burned through where it came in contact with the ladder and snapped, throwing intestate to the ground. Despite efforts to revive him, he was pronounced dead shortly thereafter.

Defendant's motion for summary judgment was granted and plaintiff appeals.

Kenneth D. Thomas for plaintiff appellant.

Patton, Starnes, Thompson & Daniel, P.A., by Thomas M. Starnes, for defendant appellee.

BRITT, Judge.

We hold that the trial court properly granted defendant's motion for summary judgment.

[1] Under G.S. 1A-1, Rule 56, summary judgment is proper where there exists no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972), *rehearing denied,* 281 N.C. 516 (1972); *Kessing v. Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971). In an action for wrongful death predicated on negligence, summary judgment for defendant is correct where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of the decedent, or determines that the alleged negligent conduct complained of was not the proximate cause of the injury. *See,* Comment, Summary Judgment: A Comparison of Its Application By North Carolina and Federal Courts in Negligence Actions, 9 Wake Forest L. Rev. 523 (1973).

[2] Negligence is the failure to exercise that degree of care for the safety of others that a reasonable prudent person would exercise under the same circumstances. *Godwin v. Nixon,* 236 N.C. 632, 74 S.E. 2d 24 (1953). To be actionable the conduct complained of must be the proximate cause of the injury. *Meyer v. McCarley and Co., Inc.,* 288 N.C. 62, 215 S.E. 2d 583 (1975); *McNair v. Boyette,* 282 N.C. 230, 192 S.E. 2d 457 (1972). An essential element of causation is foreseeability, that which a person of ordinary prudence would reasonably have foreseen as the probable consequence of his acts. A person is not required to foresee all results but only those consequences which are reasonable. *Luther v. Asheville Contracting Co.,* 268 N.C. 636, 151 S.E. 2d 649 (1966).

[3, 4] Electric companies are required to exercise reasonable care in the construction and maintenance of their lines when positioned where they are likely to come in contact with the public. *Ellis v. Power & Light Co.,* 193 N.C. 357, 137 S.E. 163 (1927). Here, defendant insulated its transmission line by height and isolation in accordance with existing regulations. *See,* Rule R8-26, North Carolina Utilities Commission, incorporating by

reference the National Electrical Safety Code. It equipped its poles and lines with fuses and circuit breakers designed to alleviate the risk of an uncontrolled discharge of electricity. We hold that defendant exercised reasonable care in the operation of its transmission lines near the Glen Alpine Grammar School and was not in breach of any duty of care toward plaintiff's intestate.

[5] Defendant's conduct in allowing the line to remain near the school where plaintiff contends defendant knew or should have known it posed a hazard to maintenance personnel, was not the proximate cause of death to plaintiff's intestate. The law requires only the exercise of reasonable care to provide for those eventualities which a reasonable prudent person would have foreseen under the circumstances. *McNair v. Boyette, supra, Deese v. Light Co.*, 234 N.C. 558, 67 S.E. 2d 751 (1951). It would have been beyond the parameters of reasonable foreseeability to require defendant to construct and insulate its transmission line so as to withstand the impact of a heavy metal extension ladder. It is unreasonable to call on the defendant to foresee that plaintiff's intestate would ignore the warning of his supervisor and cause a metal ladder to fall against the line, setting in motion a series of events resulting in his death.

[6] Furthermore, we think summary judgment was proper because of intestate's contributory negligence. The materials presented at the hearing established that intestate, in attempting by himself to remove the ladder from the building after being warned of the power line, and attempting to remove the ladder from the line, failed to use ordinary care for his own safety and that such want of due care was at least one of the proximate causes of his death. *Jackson v. McBride*, 270 N.C. 367, 154 S.E. 2d 468 (1967); *Gibbs v. Carolina Power & Light Co.*, 268 N.C. 186, 150 S.E. 2d 207 (1966). "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided." *Rosser v. Smith*, 260 N.C. 647, 653, 133 S.E. 2d 499, 503 (1963).

For the reasons stated, the judgment allowing defendant's motion for summary judgment and dismissing plaintiff's action is

Affirmed.

Judges PARKER and CLARK concur.

Judge PARKER concurring:

I agree that summary judgment for defendant was proper and vote to affirm. There was no genuine issue as to the material facts relevant to the issue of negligence on the part of defendant and on those facts there was simply no showing that defendant was in any way negligent. I would affirm for that reason without reaching the issue of contributory negligence. As to that issue, the only evidence to show the conduct of plaintiff's intestate immediately prior to his death was that contained in the affidavit of Mode. That affidavit was presented by the defendant as an attachment to its motion for summary judgment. Since the burden of proof on the issue of contributory negligence was on the defendant, I do not believe that summary judgment for defendant on that issue would be proper where, as here, the credibility of defendant's witness is involved. A defendant's evidence may not be considered as a basis for granting a directed verdict in his favor on the ground of plaintiff's contributory negligence. *Connor v. Robbins*, 268 N.C. 709, 151 S.E. 2d 573 (1966); *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360 (1960). I see no reason why the same principle should not apply when passing upon a defendant's motion for summary judgment made upon the same ground.

STATE OF NORTH CAROLINA v. ROGER CALDWELL

No. 7525SC493

(Filed 5 November 1975)

1. **Indictment and Warrant § 14; Rape § 3— indictment — motion to quash**

A motion to quash lies only for a defect appearing on the face of the warrant or indictment and does not lie unless it appears from an inspection of the warrant or indictment that no crime is charged or that the warrant or indictment is otherwise so defective that it will not support a judgment; the allegations in the bill of indictment in this case are in all respects sufficient to charge the defendant with second degree rape under G.S. 14-21(b).

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

Evidence was sufficient to support the trial court's conclusion that a rape victim's in-court identification of the defendant as the

man who raped her was based solely on what she observed on the afternoon of the rape and was not tainted by any illegal out-of-court identification procedure.

APPEAL by defendant *from Ferrell, Judge.* Judgment entered 23 January 1975 in the Superior Court, BURKE County. Heard in the Court of Appeals 25 September 1975.

Criminal prosecution on a bill of indictment, proper in form, charging the defendant, Roger Caldwell, with the second degree rape of Anita Gragg. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

On 5 June 1974 at about 3:15 p.m., Mrs. Anita Gragg, a white woman, was coming out of her trailer in the Chesterfield Community in Burke County when she was approached by the defendant, a black man, who inquired if she knew where one Dwayne McClain lived. Mrs. Gragg at the time was scantily dressed in a two-piece bathing suit and was wearing a robe. She had been sun bathing. The defendant asked her if he could have a drink of water and Mrs. Gragg told the defendant she would get it for him. As she went into the trailer, the defendant forced his way in through the door which Mrs. Gragg was trying to close. The defendant put his hand over her mouth to silence her screams. He pushed her onto the floor, removed her clothing, undressed himself, and forced her to commit the act of fellatio. Afterwards, the defendant "drug me (Mrs. Gragg) into the bedroom, and that is where he raped me." Mrs. Gragg described in detail the manner in which defendant committed the crime charged in the bill of indictment.

After the act of sexual intercourse, Mrs. Gragg asked the defendant if he still wanted the water and when he said he did, Mrs. Gragg got up from the bed. She testified:

> "I got up and I got my baby that was lying in the bed in the living room and I picked her up and he saw me get her. I was trying to get out of the door and he caught me just as I got to the door and I started screaming again and about dropped my baby. He took my baby away from me and told me to get him water."

When Mrs. Gragg told defendant her husband would be home soon, the defendant left. She went immediately to her sister's trailer and told her what had happened. Mrs. Gragg

described scratches and bruises which the defendant had put on her body and her sister, mother-in-law, and an officer testified that they saw scratches and bruises on her body.

The defendant testified that Mrs. Gragg invited him into her home and encouraged him to make love to her and that they did have sexual intercourse by mutual consent. Three witnesses testified as to defendant's good character and reputation.

The jury found the defendant guilty as charged and from a judgment imposing a prison sentence of 16 to 20 years, the defendant appealed.

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

Fate J. Beal for defendant appellant.

HEDRICK, Judge.

[1] Defendant's first and second assignments of error are as follows:

> 1. "The Court below erred by overruling defendant's motions to quash the warrant and the bill of indictment, for the reason that defendant's constitutional rights had been violated as to his arrest, his identification, and as to being informed as to his rights."
>
> 2. "The Judge erred by overruling defendant's motions to quash the warrant and the bill of indictment for the reason that neither contains allegations sufficient to charge defendant with the crime of first degree rape, nor sufficient to charge defendant with the crime of second degree rape, nor to distinguish as to which crime he is charged with."

A motion to quash lies only for a defect appearing on the face of the warrant or indictment and "does not lie unless it appears from an inspection of the warrant or indictment that no crime is charged . . . or that the warrant or indictment is otherwise so defective that it will not support a judgment." *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972) (citations omitted). In ruling on a motion to quash, the court is not permitted to consider extraneous evidence. *State v. Bass, supra; State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663 (1949); *State v. Jeffries,* 19 N.C. App. 516, 199 S.E. 2d 286 (1973). The allegations in

the bill of indictment in the present case are in all respects sufficient to charge the defendant with second degree rape under G.S. 14-21(b). These assignments of error are overruled.

[2] Defendant's third and fifth assignments of error are as follows:

> 3. "HIS HONOR ERRED IN his ruling on the *voir dire* when he admitted into evidence the testimony as to the identification of defendant and refused to suppress other evidence after it had been shown that defendant had been denied his constitutional rights; and for the reason that the evidence brought out on the *voir dire* does not support his findings of fact, which, therefore, do not support his conclusions of law and his order."
>
> 5. "Court below erred by admitting evidence of identification of defendant as person who committed the crime, which identification was tainted by violations of defendant's constitutional rights and by improper presentations of defendant to state's witness."

The third assignment of error purports to be based on an exception to the trial judge's conclusion that Mrs. Gragg's in-court identification of the defendant as the man who raped her was based solely on what she observed on the afternoon of 5 June 1973 and was not tainted by any illegal out of court identification procedure. The fifth assignment of error purports to be based on six exceptions to Mrs. Gragg's testimony after the *voir dire* identifying the defendant as the perpetrator of the crime.

The conclusion challenged by assignment of error 3 is clearly supported by findings of fact made by the trial judge following a *voir dire* hearing conducted for the specific purpose of determining the admissibility of the witness' in-court identification. Moreover, there is plenary competent evidence in the record to support the findings of fact. Obviously, the testimony challenged by assignment of error 5 was admissible. These assignments of error have no merit.

Assignments of error 4, 6, 7, 8, 9 and 13, all relate to the admission and exclusion of testimony. We have carefully examined each of the seventeen exceptions upon which these assignments of error are based and find no error in any of the rulings challenged thereby.

Assignments of error 10 and 11 challenge the trial judge's denial of the defendant's motions for judgment as of nonsuit, motion to set aside the verdict, and objections to the entry of the judgment. Suffice it to say, the evidence offered at trial was sufficient to require the submission of the case to the jury on the charge set out in the bill of indictment and to support the verdict, which supports the judgment entered.

Assignment of error 12 is as follows:

> "Court below erred by failing to declare a mistrial by reason of the solicitor's prejudicial questions before the jury."

This assignment of error is based on exceptions to two questions asked the defendant on cross-examination. Defendant's objection to the first question was sustained, and the court instructed the jury not to consider it. Defendant's objection to the second question was overruled. We are of the opinion that both rulings were correct. No motion for mistrial was made. Defendant has failed to demonstrate any error.

Assignments of error 14, 15, 16 and 17 relate to the court's instructions to the jury. We have examined each exception upon which these assignments are based and find and hold that the trial judge fairly, correctly, and adequately instructed the jury in compliance with G.S. 1-180. Defendant has failed to demonstrate any prejudicial error in the charge.

The defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. RUFUS SHERMAN ALSTON

No. 7515SC537

(Filed 5 November 1975)

1. Narcotics § 4— possession of syringe and needle — sufficiency of evidence

In a prosecution for possession of a hypodermic syringe and needle for purpose of administering controlled substances, evidence was

sufficient to be submitted to the jury where it tended to show that officers observed defendant, who was sitting on the arm of a chair, remove something from his pocket, slide it down beside his leg and between the chair arm and cushion, an officer required defendant and the girl who was sitting in the chair to stand, and, on removal of the cushion, the officer found a cellophane bag containing the syringe and needle in question.

2. **Criminal Law § 158— search warrant and affidavit omitted from record — no consideration on appeal**

Where the search warrant and supporting affidavit were not brought up as a part of the record on appeal or as an exhibit, the court on appeal will not pass upon their validity.

3. **Criminal Law § 169— failure of record to include answers to questions —no prejudice shown**

Defendant failed to show any prejudice by the failure of the trial court to permit certain witnesses to answer questions propounded on cross-examination where the record failed to show what the answers to the questions would have been.

APPEAL by defendant from *Walker, Judge.* Judgment entered 2 April 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 14 October 1975.

Defendant was tried on (1) a bill of indictment charging him with illegal possession of heroin; and (2) on a warrant charging him with possession of a hypodermic syringe and needle for purpose of administering controlled substances, this case having been appealed from the district court. He pled not guilty.

A jury returned verdicts finding defendant not guilty on (1) and guilty on (2). From judgment imposing prison sentence of not less than 18 months nor more than 24 months, suspended on specified conditions including three years' probation and $200 fine and costs, defendant appealed.

Attorney General Edmisten, by Associate Attorney Daniel C. Oakley, for the State.

John P. Paisley, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motion for nonsuit. The evidence tended to show: On the night in question, police, armed with a search warrant, went to the trailer home of one Reeves. On entering the home they found that Reeves

was not present but defendant and several others were. Defendant was sitting on the arm of a chair and a girl was sitting in the chair. One of the officers observed defendant remove something from his pocket, slide it down beside his leg and between the chair arm and cushion. The officer required defendant and the girl to stand and, on removal of the cushion, found a cellophane bag containing the syringe and needle in question. In a trash can near the chair, officers found several glassine bags containing heroin. We hold that the evidence was sufficient to survive the motion for nonsuit and the assignment of error is overruled.

[2] Defendant assigns as error the admission of the syringe, needle, and heroin into evidence, contending that the search warrant was defective. The search warrant and supporting affidavit were not brought up as a part of the record on appeal or as an exhibit, therefore, we will not pass upon their validity. *State v. Haltom,* 19 N.C. App. 646, 199 S.E. 2d 708 (1973), *cert. den., appeal dismissed,* 284 N.C. 619, 201 S.E. 2d 691 (1974). We do not reach the question whether defendant had standing to challenge a search of the premises. The assignment of error is overruled.

[3] Defendant assigns as error the failure of the court to permit certain witnesses to answer questions propounded on cross-examination. The record fails to disclose what the answers to the questions would have been, therefore, defendant has failed to show any prejudice by failure of the court to admit the answers. 3 Strong, N. C. Index 2d, Criminal Law § 167. The assignment of error is overruled.

We have considered the other assignments of error argued by defendant and find that they too are without merit.

No error.

Judges VAUGHN and ARNOLD concur.

BERT W. OESTREICHER IN HER CAPACITY AS TRUSTEE FOR RACHEL W. OESTREICHER (NOW RACHEL O. HASPEL) AND DAVE OESTREICHER, II v. AMERICAN NATIONAL STORES, INC. a/k/a NATIONAL MANUFACTURE & STORES COMPANY, d/b/a JOHNSTON'S L & S FURNITURE COMPANY

No. 7519SC522

(Filed 5 November 1975)

Rules of Civil Procedure § 54— judgment adjudicating fewer than all claims — judgment not appealable

Plaintiff's appeal from a judgment adjudicating fewer than all the claims asserted and which contains no determination by the trial judge that there is no just reason for delay is premature and is therefore dismissed. G.S. 1A-1, Rule 54(b).

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 26 March 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 15 October 1975.

Plaintiff landlord brought this action against defendant tenant asserting three claims for relief: (1) a claim to recover damages "in excess of $10,000.00" because of defendant's breach of the lease agreement in understating the amount of net sales upon which percentage rental was computed and paid; (2) a claim to recover punitive damages in the amount of $100,000.00 because defendant willfully and fraudulently reported the net sales to plaintiff over a continuing period of time and fraudulently failed to pay plaintiff amounts due under the percentage provisions of the lease; and (3) a claim to recover damages in the amount of $30,000.00 for defendant's anticipated breach of the lease by threatening to vacate the premises prior to expiration of the lease. Defendant's motion for summary judgment was allowed as to the second and third claims but was denied as to the first claim. Plaintiff appealed.

Carlton, Rhodes & Thurston by Richard F. Thurston and David Oestreicher II for plaintiff appellant.

Coughenour & Linn by Stahle Linn and William D. Kenerly for defendant appellee.

PARKER, Judge.

The judgment from which appeal is attempted adjudicates fewer than all of the claims asserted. It contains no determination by the trial judge that "there is no just reaason for delay."

The judgment is not final and not presently "subject to review either by appeal or otherwise." G.S. 1A-1, Rule 54(b); *Raynor v. Mutual of Omaha*, 24 N.C. App. 573, 211 S.E. 2d 458 (1975); *Leasing, Inc. v. Dan-Cleve Corp.*, 25 N.C. App. 18, 212 S.E. 2d 41 (1975), *cert. denied*, 288 N.C. 241 (1975); *Arnold v. Howard*, 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Appeal dismissed.

Judges MORRIS and MARTIN concur.

HENREDON FURNITURE INDUSTRIES, INC. v. SOUTHERN RAILWAY COMPANY

No. 7525SC496

(Filed 5 November 1975)

Rules of Civil Procedure § 20— insurer as proper party — joinder discretionary

An insurer who has paid part of an insured's claim is a proper and not a necessary party to an action brought by insured against tortfeasor, and the addition of parties where they are not necessary is a discretionary matter for the trial court.

APPEAL by defendant from *Ferrell, Judge.* Order entered 19 March 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 25 September 1975.

Plaintiff filed complaint alleging that its tractor-trailer unit was being driven over defendant's railroad crossing at the direction of defendant's signalman when it was struck by a boxcar. Defendant answered denying negligence and alleging contributory negligence. Defendant counterclaimed alleging that plaintiff's driver did not heed their signals for him to stop. Defendant also moved for joinder of American Mutual Insurance Company as a party plaintiff alleging that it was the real party in interest since it had paid all of plaintiff's damages except a $1,000 deductible. Plaintiff replied to the counterclaim and prayed that American Mutual not be joined.

From an order finding that American Mutual was a proper party but not a necessary party and denying defendant's motion to join American Mutual, defendant appealed.

Hedrick, McKnight, Parham, Helms, Kellam & Feerick, by Richard T. Feerick and Edward L. Eatman, Jr., for plaintiff appellee.

W. T. Joyner and John H. McMurray for defendant appellant.

ARNOLD, Judge.

North Carolina case law provides that, although an insurer who has paid part of insured's claim "has a direct and appreciable interest in the subject matter of the action" brought by insured against tortfeasor, *Burgess v. Trevathan,* 236 N.C. 157, 161, 72 S.E. 2d 231, 234 (1952), the insurer is not a necessary party to the action, but only a proper party. *New v. Public Service Co.,* 270 N.C. 137, 153 S.E. 2d 870 (1967); *University Motors, Inc. v. Durham Coca-Cola Bottling Co.,* 266 N.C. 251, 146 S.E. 2d 102 (1966); *Burgess v. Trevathan, supra.* The addition of parties where they are not necessary is a matter within the trial court's discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. *New v. Service Co., supra; Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165 (1959); *Guthrie v. City of Durham,* 168 N.C. 573, 84 S.E. 859 (1915). Defendant has not shown how the interlocutory order appealed from deprives it of any "substantial right." G.S. 1-277. *See Funderburk v. Justice,* 25 N.C. App. 655, 214 S.E. 2d 310 (1975). Therefore, this appeal is premature and is dismissed.

Dismissed.

Judges MORRIS and HEDRICK concur.

THEODORE L. MODICA AND WIFE, JEANETTE M. MODICA v. JESSE RODGERS

No. 752DC566

(Filed 5 November 1975)

Appeal and Error § 26— exception to signing of judgment — face of record reviewed

An exception to "the signing and entry of judgment and findings of fact" presents only the face of the record for review.

Modica v. Rodgers

APPEAL by plaintiffs from *Manning, Judge.* Judgment entered 7 March 1975 in District Court, MARTIN County. Heard in the Court of Appeals 20 October 1975.

This is a civil action wherein the plaintiffs, Theodore L. Modica, and wife, Jeanette M. Modica, allege that defendant, Jesse Rodgers, owes them $800.00 on a modification of defendant's contract to build plaintiffs' residence.

Defendant filed answer denying the material allegations of the complaint and alleged a counterclaim seeking to recover $2,549.00 from plaintiffs. After a trial without a jury, the judge made detailed findings of fact and concluded that defendant was indebted to plaintiffs in the sum of $391.76 and that plaintiffs were indebted to defendant in the sum of $391.76. From a judgment that plaintiffs recover nothing of defendant on their claim and that defendant recover nothing of plaintiffs on his counterclaim, plaintiffs appealed.

Milton E. Moore for plaintiff appellants.

Griffin & Martin by Clarence W. Griffin for defendant appellee.

HEDRICK, Judge.

Plaintiffs excepted to "the signing and entry of judgment and findings of fact." This exception is broadside and does not bring up for review the sufficiency of the evidence to support the findings but presents only the face of the record for review, which includes whether the facts found or admitted support the judgment and whether the judgment is proper in form. *Davenport v. Travelers Indemnity Co.*, 283 N.C. 234, 195 S.E. 2d 529 (1973). Accordingly, we have carefully examined the face of the record and conclude the findings of fact support the judgment entered, and the judgment is proper in form.

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

BEACH AND ADAMS BUILDERS, INC. v. VERNON S. FELTON AND WIFE, MARIAN S. FELTON; WATAUGA SAVINGS AND LOAN ASSOCIATION; AND C. BANKS FINGER, TRUSTEE FOR WATAUGA SAVINGS AND LOAN ASSOCIATION

No. 7524SC546

(Filed 5 November 1975)

Rules of Civil Procedure § 54— judgment adjudicating rights of fewer than all parties — premature appeal

Summary judgment dismissing the action as to two defendants adjudicated the rights and liabilities of fewer than all the parties, contained no determination by the trial judge that there was no just reason for delay, and therefore was not a final judgment and not appealable. G.S. 1-1, Rule 54(b).

APPEAL by plaintiff from *Martin, Judge.* Judgment entered 13 March 1975 in Superior Court, WATAUGA County. Heard in the Court of Appeals 16 October 1975.

In this action plaintiff seeks (1) to recover judgment against defendants Felton and wife in the amount of $21,989.78 as balance due by contract under which plaintiff built a residence for the Feltons and (2) to have plaintiff's claim of lien against the Felton's property declared superior to a recorded deed of trust executed by the Feltons to defendant Finger as trustee for Watauga Savings and Loan Association. Defendants Watauga Savings and Loan Association and Finger, trustee, moved for summary judgment dismissing this action as to them. The court allowed the motion and plaintiff appealed.

Charlie R. Brown for plaintiff appellant.

C. Banks Finger and Donald M. Watson, Jr. for defendant appellees.

PARKER, Judge.

The summary judgment from which plaintiff attempts to appeal does not adjudicate the rights and liabilities of all the parties. It contains no determination by the trial judge that "there is no just reason for delay." Therefore, this is not a final judgment and is not presently "subject to review either by appeal or otherwise." G.S. 1A-1, Rule 54(b); *Leasing, Inc. v. Dan-Cleve Corp.,* 25 N.C. App. 18, 212 S.E. 2d 41 (1975), *cert.*

denied, 288 N.C. 241 (1975); *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Appeal dismissed.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. DOLAN CROSS

No. 7519SC588

(Filed 5 November 1975)

Assault and Battery § 17; Constitutional Law § 36— assault with deadly weapon — maximum sentence not cruel and unusual

Imposition of the maximum sentence of imprisonment of two years upon defendant's conviction for assault with a deadly weapon did not constitute cruel and unusual punishment.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 12 February 1975 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 22 October 1975.

Defendant was found guilty of assault with a deadly weapon. From the imposition of a sentence of imprisonment for two years, defendant appealed.

Attorney General Edmisten, by Associate Attorney William A. Raney, Jr., for the State.

Ottway Burton and Millicent Gibson, for defendant appellant.

VAUGHN, Judge.

Any person who commits an assault or an assault and battery, (unless his conduct is covered by some other provision of law providing greater punishment), using a deadly weapon, is guilty of a misdemeanor punishable by fine, imprisonment for not more than two years, or both such fine and imprisonment. G.S. 14-33(b)(1).

Defendant's sole assignment of error is that the trial court, by awarding the maximum sentence provided by law, has in-

flicted cruel and unusual punishment on defendant, under the circumstances of this case.

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. *State v. Spencer,* 7 N.C. App. 282, 172 S.E. 2d 280, modified on other grounds, 276 N.C. 535, 173 S.E. 2d 765.

A sentence of imprisonment which is within the limitation authorized by statute cannot be held cruel or unusual in the constitutional sense. *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34; *State v. Newell,* 268 N.C. 300, 150 S.E. 2d 405; *State v. Garris,* 265 N.C. 711, 144 S.E. 2d 901.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. CLIFFORD EARL MAYO

No. 7518SC517

(Filed 5 November 1975)

Gambling § 3; Criminal Law § 112— lottery — instruction placing burden on defendant erroneous

In a prosecution for possession of lottery tickets, the trial court properly instructed the jury that the State had the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets, but the court erred in instructing that, "under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed."

APPEAL by defendant from *Collier, Judge.* Judgment entered 19 February 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 October 1975.

Defendant was tried upon the charge of possession of lottery tickets in violation of G.S. 14-291.1. He was found guilty by a jury, and from a judgment imposing prison sentence defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Taylor, Upperman and Johnson, by Herman L. Taylor and Leroy W. Upperman, Jr., for defendant appellant.

ARNOLD, Judge.

The trial judge, instructing the jury on the elements of the crime, charged the State with the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets. However the trial judge then stated, "I instruct you that under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed." The defendant contends that the trial court's charge failed to place the burden of proof on the State. We agree.

The defendant's plea of not guilty casts upon him a presumption of innocence and the State has the burden of satisfying the jury from the evidence beyond a reasonable doubt of each and every material element of the offense. *State v. Moore*, 268 N.C. 124, 150 S.E. 2d 47 (1966); *State v. Dallas*, 253 N.C. 568, 117 S.E. 2d 415 (1960); *State v. Cephus*, 239 N.C. 521, 80 S.E. 2d 147 (1954). The trial court committed prejudicial error by requiring the defendant to negate the existence of a material element of the crime.

New trial.

Judges MORRIS and HEDRICK concur.

EARLINE COCKERHAM TAYLOR v. SHIRLEY WOOTEN BOGER

No. 7523SC453

(Filed 5 November 1975)

1. Evidence § 50— hypothetical question — facts not in evidence as basis

The trial court did not err in refusing to allow plaintiff's expert witness to answer a hypothetical question as to whether plaintiff's phlebitis could have caused varicose veins since there was no evidence admitted prior to the hypothetical question concerning plaintiff's varicose veins, and it is required that a competent hypothetical question include only such facts as are in evidence or such as may be justifiably inferred.

2. Damages §§ 3, 13— necessity for medical treatment — reasonableness of medical expenses — competency of evidence

In an action to recover damages for personal injury sustained in an automobile accident, the trial court did not err in refusing to allow plaintiff to testify concerning expenses for and treatment by a doctor in Ohio, since there was no evidence to show the necessity for plaintiff's treatment in Ohio and there was no evidence that the medical expenses paid in Ohio were reasonable in amount.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 10 March 1975 in Special Session of Superior Court, YADKIN County. Heard in the Court of Appeals 18 September 1975.

Plaintiff instituted action to recover damages sustained in an automobile accident. She alleged that the defendant's automobile crossed the center line of the highway into the lane in which plaintiff was driving and collided with her automobile. Plaintiff further alleged injuries to her head, neck, back, and leg and sought to recover damages. Defendant answered denying the plaintiff's allegations.

The issues were tried before a jury and a verdict was returned for the plaintiff in the amount of $1,200. Plaintiff excepted and appealed to this Court.

Franklin Smith for plaintiff appellant.

Deal, Hutchins, and Minor by Richard Tyndall, for defendant appellee.

ARNOLD, Judge.

By the testimony of Dr. Richard Adams, plaintiff attempted to establish that the blow received in the accident caused phlebitis in the plaintiff's right leg, which led to the development of varicose veins in that same leg. It was stipulated that Dr. Adams was a licensed practicing physician and a medical expert, specializing in the field of orthopedic surgery. Dr. Adams testified regarding his experience with varicose veins and phlebitis, and his background in dealing with vascular diseases and surgery of the vessels.

[1] Plaintiff asked Dr. Adams a hypothetical question to establish the causal connection between the trauma of the accident and development of varicose veins in the plaintiff's leg. Plaintiff asked a hypothetical question, because Dr. Adams had not examined the patient for varicose veins or phlebitis and there-

fore did not have personal knowledge of the plaintiff's condition. The trial court refused to allow the witness to answer the hypothetical question, because the doctor's testimony would be "speculative." The doctor's opinion would have been that the plaintiff's phlebitis could have caused the varicose veins.

We do not necessarily agree that the doctor's opinion should be excluded because it is "speculative." See *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964). However, we find no error in the ruling not to allow the answer.

The record discloses no evidence having been admitted prior to the hypothetical question concerning plaintiff's varicose veins. Thus the question contains facts which are not in evidence and which cannot be inferred from the evidence.

A well recognized rule in North Carolina requires that a competent hypothetical question include only such facts as are in evidence or such as may justifiably be inferred. *Bryant v. Russell,* 266 N.C. 629, 146 S.E. 2d 813 (1966); *Crutcher v. Noe,* 17 N.C. App. 540, 195 S.E. 2d 66 (1973); Stansbury, North Carolina Evidence, Brandis Revision, § 137 (1973).

[2] Plaintiff also assigns as error the court's refusal to allow her testimony concerning expenses for, and treatment by, a doctor in Ohio. We find no error in the court's rulings. There is no evidence to show the necessity for plaintiff's treatment in Ohio (where she lived for awhile after the accident in North Carolina). Furthermore, there is no evidence that the medical expenses paid in Ohio were reasonable in amount. *Ward v. Wentz,* 20 N.C. App. 229, 201 S.E. 2d 194 (1973).

We have reviewed plaintiff's assignment of error as to the judge's charge as well as her other assignments of error. We find no error in the trial.

No error.

Judges MORRIS and HEDRICK concur.

MARY ELIZABETH WORTHINGTON v. SOLOMAN ALLEY WORTHINGTON

No. 758DC385

(Filed 5 November 1975)

Appeal and Error § 57— findings supported by evidence — court on appeal bound

The court on appeal is bound by the findings of fact made by the trial court where there is some evidence to support those findings.

APPEAL by defendant from *Nowell, Judge.* Judgment entered 17 February 1975 in District Court, LENOIR County. Heard in the Court of Appeals 3 September 1975.

Defendant, age 68, appeals from an order directing him to pay alimony pendente lite and counsel fees to plaintiff from whom he was separated on 29 December 1974 following their marriage on 26 December 1974.

Jones and Wooten, by Lamar Jones, for plaintiff appellee.

Turner and Harrison, by J. Harry Turner and Fred W. Harrison, for defendant appellant.

VAUGHN, Judge.

Although we express no opinion on whether we would have reached the same result on the evidence before the court at the hearing for alimony pendente lite, there is some evidence to support the findings of fact made by the trial judge, and we are bound by them. The findings of fact are sufficient to support the order and it is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. LAWRENCE E. DAVIS

No. 753SC610

(Filed 5 November 1975)

Narcotics § 4.5— possession of amphetamines — instructions on possession proper

The trial court in a prosecution for possession of amphetamines properly instructed the jury on the law of possession arising from the evidence.

ON *certiorari* to review proceedings before *Fountain, Judge.* Judgment entered 3 June 1974 in Superior Court, CRAVEN County. Heard in the Court of Appeals 24 October 1975.

Defendant was found guilty of possession of less than 100 tablets of amphetamine and judgment imposing a sentence of imprisonment was entered.

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

Reginald L. Frazier, for defendant appellant.

VAUGHN, Judge.

The tablets were found in the pocket of a coat defendant was wearing at the time of his arrest. In support of his only assignment of error he contends that the judge did not properly instruct the jury on "the law of possession arising from the evidence." The argument is groundless. Among other instructions the judge advised the jury:

> "If the defendant had any amphetamine tablets in his pocket with his knowledge and consent that would constitute possession. If he had any in his pocket without his knowledge and consent, it would not constitute possession. So, it is a question of fact for you to determine."

We find no prejudicial error in defendant's trial.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. EUGENE BAILEY, JR.

No. 7526SC541

(Filed 5 November 1975)

APPEAL by defendant from *Falls, Judge.* Judgment entered 8 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 October 1975.

Attorney General Edmisten, by Assistant Attorney General Conrad O. Pearson, for the State.

William J. Eaker for defendant appellant.

BRITT, VAUGHN and ARNOLD, Judges.

No error.

STATE OF NORTH CAROLINA v. ROBERT ALEXANDER BELCHER

No. 7514SC564

(Filed 5 November 1975)

APPEAL by defendant from *Winner, Judge.* Judgment entered 7 February 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 20 October 1975.

Attorney General Rufus L. Edmisten by Attorney Noel Lee Allen for the State.

John C. Wainio for defendant appellant.

BROCK, Chief Judge, HEDRICK and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. NATHAN HARRIS

No. 7526SC464

(Filed 5 November 1975)

APPEAL by defendant from *Falls, Judge.* Judgment entered 15 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 September 1975.

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

Whitfield, McNeely, Norwood and Badger by Paul L. Whitfield for defendant appellant.

BRITT, PARKER and CLARK, Judges.

No error.

FRANCES L. GUY v. BOBBY G. GUY

No. 7511DC337

(Filed 5 November 1975)

1. Divorce and Alimony § 18— counsel fees pendente lite — silent record

The court erred in awarding plaintiff counsel fees *pendente lite* where no findings were made that plaintiff is entitled to the relief demanded, is a dependent spouse, and has insufficient means whereon to subsist during prosecution of the suit and to defray the necessary expenses thereof.

2. Divorce and Alimony § 18— subsistence pendente lite — lump sum

The trial court in a divorce action did not abuse its discretion in awarding plaintiff a lump sum of $3,000 in addition to subsistence *pendente lite* where plaintiff testified that she was living in an unfurnished house and she and her son were sleeping on the floor, and that she had to borrow money to maintain some basic standard of living and had to work two jobs.

3. Divorce and Alimony § 22— notice of child custody hearing — participation in hearing

Although notice of a hearing related only to alimony and counsel fees *pendente lite* and was silent as to custody and child support, defendant cannot complain that an award of custody was made without notice to him and without according him an opportunity to be heard where defendant participated in the hearing in which evidence con-

cerning custody and support was presented and defendant personally testified with respect thereto.

4. **Appeal and Error § 6— divorce action — enjoining withdrawals from bank accounts — joinder of banks as parties — interlocutory order — no appeal**

Order of the trial court enjoining the withdrawal of funds from savings accounts pending trial of an action for alimony and divorce and joining the banks holding the accounts as defendants in the action was interlocutory and not appealable.

APPEAL by defendant from *Lyon, Judge.* Judgment and orders entered 4 and 6 February 1975 in the General Court of Justice, District Court Division, HARNETT County. Heard in the Court of Appeals 26 August 1975.

Plaintiff wife, alleging physical and mental abuse, initiated divorce proceedings on 24 January 1974. Plaintiff sought, *inter alia,* custody of a minor child, child support, alimony pendente lite, permanent alimony, and attorney fees. Defendant denied all material allegations and also prayed for custody of the child. The case was heard 30 January 1975.

Within a week of the hearing, the plaintiff, having determined that any interest she might have in approximately $60,000 held by her estranged husband in various savings accounts might be in jeopardy, moved that the banks in which the savings accounts were held be made parties. Pursuant to plaintiff's motions, the court ordered the account-holding banks joined as defendants on 4 February 1975 and simultaneously enjoined the withdrawal of any of the funds then on deposit. Two days later, the court awarded plaintiff, *inter alia,* alimony pendente lite, a lump sum of $3,000, child custody, child support and attorney fees. From the order entered, defendant appealed.

Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan, for plaintiff appellee.

Johnson & Johnson, by W. A. Johnson, for defendant appellant.

MORRIS, Judge.

Defendant challenges (1) the award of attorney fees to plaintiff; (2) the lump sum award of $3,000; (3) the custody award to plaintiff and the visitation schedule which defendant contends makes his rights contingent on plaintiff's approval; (4) the joinder of the banks as defendants; and (5) the order en-

joining withdrawal of any disputed funds held by the defendant banks.

[1] We agree with defendant that the court erred in awarding plaintiff counsel fees. Under the statutory framework of G.S. 50-16.4, a court may tax "reasonable" counsel fees against " . . . the supporting spouse in the same manner as alimony." In order to obtain alimony, and therefore reasonable attorney fees, the dependent spouse must prove entitlement to such relief, and the court must make the requisite findings of facts from the relevant evidence presented. G.S. 50-16.3, et seq.; G.S. 50-16.8(f). Our Supreme Court, speaking through Justice Branch, has stated that:

> "The clear and unambiguous language of the statutes under consideration provide as prerequisites for determination of an award of counsel fees the following: (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.
>
> There is some language in our decisions which leaves the impression that the allowance of counsel fees and subsistence pendente lite lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion. . . .
>
> The correct rule, overwhelmingly approved by our Court, is that the facts required by the statutes must be alleged and proved to support an order for subsistence pendente lite." *Rickert v. Rickert,* 282 N.C. 373, 378-379, 193 S.E. 2d 79 (1972).

In the case before us, the court did not make the required findings of fact, and the silent record cannot support the award of counsel fees.

[2] Defendant also contends that there was no evidence warranting an award of $3,000 in addition to the subsistence support awarded plaintiff. We disagree. Plaintiff testified extensively with respect to her difficult and almost impecunious financial position. She stated that she was living in an unfurnished house and that she and her son were "sleeping on the floor." She also pointed out that she had to borrow money to maintain some basic standard of living and had to work two jobs. As our Court previously has held, the trial court must

exercise its own discretion in assessing the financial needs and equities of the dependent spouse. *Austin v. Austin,* 12 N.C. App. 390, 183 S.E. 2d 428 (1971); G.S. 50-16.3. The trial judge, reacting to each case flexibly and fairly, may award the financially strained spouse assistance through a lump sum payment, a monthly stipend, or some unique combination thereof, in his discretion. *Austin v. Austin, supra.* The dependent spouse, as in the case at bar, may recover this support ". . . not only from the time she instituted her action, but from the time . . . [of the separation]." *Austin v. Austin, supra,* at 393. We find no abuse of discretion in the combination award by the court. *Austin v. Austin, supra,* at 392-393. To the contrary, our perusal of the record indicates that the court responded effectively to the urgent economic situation in which the plaintiff wife was placed.

[3] Defendant next contends that the award of custody of the child to plaintiff was made without prior notice to him and without affording him an opportunity to be heard. The matter was first heard by Judge Godwin on 27 March 1974 on plaintiff's motion for custody of the child, alimony pendente lite, and child support. Evidence was presented and the court announced his decision but no order was entered. Defendant gave notice of appeal. The record is silent as to the evidence presented and the terms of the proposed order. On 7 October 1974, Judge Godwin entered an order reciting the events as they had transpired. He noted that plaintiff's counsel had not presented an order, that plaintiff had employed new counsel who had moved for mistrial and that the case be set for rehearing. He found that neither party would be prejudiced by "a setting aside by the court of all proceedings had in this matter to date," and ordered that "this matter be and the same is mistried as to all proceedings to date, that a hearing *de novo* be heard for any interlocutory matters now pending and that the said cause is ordered placed back on the calendar for hearing before another judge at such time as the parties might agree upon, or as ordered by the court." On 30 January 1975, plaintiff served on defendant a notice that the plaintiff, on 30 January 1975, would move "for an order awarding her alimony pendente lite, counsel fees, and possession of items of personal property belonging to the plaintiff that are now in the possession of the defendant, and for reasonable counsel fees as provided by law." The notice was silent as to custody of the child or child support. On 10 February 1975, two orders were filed, both dated 6 February 1975.

One made an award of alimony pendente lite, counsel fees, ordered defendant to deliver certain items of personal property to plaintiff, and ordered defendant to pay into the office of the Clerk the sum of $150 for the reasonable support of the minor child, the child support and alimony to be paid "for the use and benefit of the plaintiff." On appeal, defendant does not object to the portion of the order providing for child support. The other order filed awarded plaintiff custody of the child with right of visitation in the defendant. It is to this order that defendant objects, contending that he had no notice. We notice that at the hearing defendant objected and excepted to admissions of testimony with respect to acts of violence committed by him on the son. Those exceptions are not brought forward on appeal. Plaintiff testified with respect to the son's expenses and all of the testimony came in without objection. Without objection, she testified that the son spent no time with defendant. Defendant himself testified that he had made his son the beneficiary of insurance policies, that he had paid $100 per month for his support during 1974, that he had paid his dental bills, and that he had given the boy a Honda just before Christmas. It is difficult to imagine that defendant was not aware that child support and custody were at issue. While it is true that the notice of hearing was silent as to custody and child support, defendant's participation in the hearing, personally testifying with respect thereto, makes his position on appeal untenable, particularly in view of the total circumstances. He may, of course, make a motion in the cause if he be so advised.

[4] Finally, the defendant attacks the validity of the joinder and restraining orders.

The joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. G.S. 1-277; G.S. 1A-1, Rule 54; *Pruitt v. Williams,* 288 N.C. 368, 218 S.E. 2d 348 (1975). Justice Ervin, writing for our Supreme Court, forcefully amplified this general rule, warning that no appeal should lie ". . . unless such [interlocutory] order affects some substantial right claimed by the appellant and will work an injury if not corrected before an appeal from the final judgment. . . . There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through

the medium of successive appeals from intermediate orders." *Veazey v. City of Durham,* 231 N.C. 357, 362-363, 57 S.E. 2d 377 (1950). In the instant case, the deleterious impact on defendant is not so substantial at this stage of the proceeding that it must be immediately reviewed. There can be little doubt that a restraint on the use of these funds invokes some discomfort upon defendant. The court has yet to speak on the matter of ownership of the funds. This as yet unresolved question is a substantial feature of the case. Without question, fair play requires that ownership of the funds be expeditiously and dispositively resolved. Rule 65 provides a channel for an effective challenge to the order entered.

Unlike the question of subsistence pendente lite or temporary child custody, the matter of disputed ownership of considerable assets will turn on determinations made in the context of a final hearing on the merits of all the claims and assertions. When the court, on the other hand, awards susistence pendente lite, the supporting spouse can bring that intermediate matter to an appellate court for review because his financial detriment is palpable and immediate. When the court orders a freeze on disbursement of disputed funds, pending a hearing on the merits, it merely inconveniences the claimants and arguably may ultimately work no injury to the prevailing party.

Those portions of the judgments awarding alimony pendente lite, child support, child custody, and personal property are affirmed. That portion of the judgment awarding fees to plaintiff's counsel is reversed without prejudice to the right of plaintiff, upon proper showing, to procure reasonable counsel fees.

Affirmed in part.

Reversed in part.

Judges VAUGHN and CLARK concur.

Story v. Story

XOLA M. STORY PLAINTIFF (APPELLEE) v. JOHN PRESTON STORY DEFENDANT (APPELLANT)

No. 722DC611

(Filed 5 November 1975)

1. **Rules of Civil Procedure § 6— failure to receive five days notice of motion — absence of prejudice**

Defendant was not prejudiced by the fact that he received less than five days notice, excluding Saturday and Sunday, of a motion to dismiss his appeal where he attended the hearing on the motion and participated in it. G.S. 1A-1, Rule 6(a).

2. **Judgments § 2; Appeal and Error § 36— announcement of judgment — signing of judgment — entry of judgment — time for serving record on appeal**

Judgment was entered when the court announced the judgment in open court on 20 February and the clerk made a notation of the judgment in the minutes, not when the court thereafter signed the written judgment on 6 March, and where defendant gave notice of appeal in open court on 20 February, the time within which defendant was to serve his case on appeal commenced to run on that date and not on the date the judgment was signed.

3. **Evidence § 1— court minutes — judicial notice**

A court can take judicial notice of its own minutes.

APPEAL by defendant from *Olive, Judge.* Order entered 22 April 1975 in District Court, DAVIDSON County. Heard in the Court of Appeals 15 October 1975.

This is an appeal by defendant, John Preston Story, from an order dismissing his appeal from an order awarding plaintiff, Xola M. Story, alimony pendente lite and counsel fees.

The record reveals the following: On 19 and 20 February 1975, a hearing was held before Judge Olive on plaintiff's motion for alimony pendente lite, custody of child and counsel fees. The court minutes for 20 February 1975 are as follows:

"75 CVD 73—Xola M. Story vs: John Preston Story—

Witnesses were sworn, cross-examined and testimony continued through the day. Detailed Judgment to be drawn. Alimony pendente lite and possession of the house on Kindley Street awarded to the plaintiff. Custody of minor child was awarded to the defendant with visitation privileges granted to the plaintiff.

Defendant gave Notice of Appeal in open court to the North Carolina Court of Appeals regarding alimony pendente lite and support. 50 days was given the defendant to prepare the appeal; 20 days was given the plaintiff to serve countercase or objections thereto; bond was set at $200.00. (Attorney fees for the plaintiff to be paid by the defendant was set at $450.00.)"

On 6 March 1975 Judge Olive actually signed the detailed judgment referred to in the minutes. On 15 April 1975 the defendant caused to be served on the plaintiff a motion to extend the time "to serve case on appeal on appellee and to docket record on appeal in North Carolina Court of Appeals." On 16 April 1975 the plaintiff filed a motion to dismiss defendant's appeal, alleging that the time to serve the case on appeal had expired 11 April 1975.

After a hearing on both motions on 22 April 1975, Judge Olive entered an order dismissing defendant's appeal after making the following pertinent findings and conclusions:

"[A]nd it appearing to the Court and the Court finding as a fact that this cause was heard on February 19 and 20, 1975, before the undersigned, on the plaintiff's motion for custody, temporary alimony, child support and counsel fees; that the undersigned announced in open court on February 20, 1975 that the plaintiff was awarded temporary alimony, that possession of the house located at 318 Kindley Street was to be awarded to the plaintiff, that defendant was to make the mortgage payments on the Kindley Street property, that the defendant was to pay $400 as a lump sum payment to the plaintiff, that the defendant was to pay the sum of $45 per week to the plaintiff, that the plaintiff was to have the stored furniture she could use and any extra refrigerator that the parties own, that the defendant was to keep the hospital insurance which covers the plaintiff in effect, that custody of the child was to be awarded to the defendant with certain specified visitation privileges for the plaintiff which were announced in open court, that defendant would pay child support during those periods when the child is with the plaintiff in specified amounts which were also announced in open court, that the defendant was to pay $450 as counsel fees for the plaintiff's attorney; that the defendant gave notice of appeal in open court on February 20, 1975 after

the court had rendered its judgment as set out above; that the court announced in open court on February 20, 1975 that the defendant was to have 50 days to serve the statement of case on appeal and the plaintiff was to have 20 days to serve the countercase and the appeal bond was set at $200; that the Clerk entered the court's judgment in the minutes and also entered the defendant's notice of appeal in the minutes; that the plaintiff's attorney was to prepare the written judgment including the provisions of the order announced in open court together with the findings of fact and conclusions of law; that the Court further finds that the time to serve the case on appeal has expired since the 50 day period in which the defendant appellant was allowed to serve the statement of case on appeal began to run on February 20, 1975; that based upon the foregoing findings of fact the Court is of the opinion that the plaintiff's motion to dismiss the appeal should be granted and the defendant's motion for extension of time to serve case on appeal on appellee and to docket record on appeal in North Carolina Court of Appeals should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's motion to dismiss the defendant appellant's appeal is granted and the defendant's appeal is hereby dismissed and that the defendant appellant's motion for extension of time to serve case on appeal on appellee and to docket record on appeal in North Carolina Court of Appeals is hereby denied."

Defendant appealed.

Walser, Brinkley, Walser & McGirt by G. Thompson Miller for plaintiff appellee.

Ned A. Beeker for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends that the trial court was without authority to dismiss the appeal in that defendant did not receive the five-day statutory notice provided for in Rule 6(a) for hearings on motions. The record shows that defendant received notice on 16 April 1975 and attended the hearing on 22 April 1975. As provided by Rule 6(a) in not counting Saturdays and Sundays, it is true that defendant had less than five

days notice; but defendant has brought forth no argument that he was in any way prejudiced by lack of proper notice. *Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E. 2d 177 (1971). And, it is well settled that "[a] party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it." *Collins v. Highway Comm.,* 237 N.C. 277, 283, 74 S.E. 2d 709, 714-15 (1953). *Accord, In re Woodell,* 253 N.C. 420, 117 S.E. 2d 4 (1960); *Brandon v. Brandon, supra.* This assignment of error is without merit.

Defendant contends the trial judge erred in holding that the fifty-day period of time within which "the case on appeal" was to be served on plaintiff commenced to run on 20 February 1975 instead of 6 March 1975, the date Judge Olive actually signed the judgment theretofore rendered on 20 February in open court.

G.S. 1-287.1 in pertinent part provides:

"When it appears to the court that statement of case on appeal to the Appellate Division has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the judge, upon motion by the appellee, to enter an order dismissing such appeal . . . . "

G.S. 1-282 in pertinent part provides:

"A copy of . . . [the case on appeal] shall be served on the respondent within fifteen days from the entry of the appeal taken . . . . If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal . . . . The initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal, and any subsequent order of extension must be entered prior to the expiration of the time allowed by the preceding order . . . . "

G.S. 1A-1, Rule 58, in pertinent part provides:

"In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall

approve the form of the judgment and direct its preparation and filing."

[2] Since the time for the service of the case on appeal commences to run from the time of "the entry of the appeal taken," G.S. 1-282, and there can be no appeal until there has been an entry of judgment, we must first determine in this case whether judgment was entered on 20 February or 6 March 1975. We think the record before us clearly shows judgment was entered in open court on 20 February 1975.

[3] The only finding of fact excepted to by defendant in the order dismissing the appeal is "that the Clerk entered the court's judgment in the minutes and also entered the defendant's notice of appeal in the minutes." Defendant does not contend that the clerk did not "make a notation in his minutes" of the entry of judgment as provided by Rule 58. He merely argues that Judge Olive had no authority to consider the court minutes since they were not introduced into evidence at the hearing on the motion. We think it clear that any court can take judicial notice of its own minutes. *Staton v. Blanton*, 259 N.C. 383, 130 S.E. 2d 686 (1963); 1 Stansbury, N. C. Evidence (Brandis Rev.), § 13; 29 Am. Jur. 2d, Evidence, § 57. The minutes, as well as the detailed judgment signed on 6 March 1975 and the unchallenged findings of fact set out in the order dismissing the appeal, clearly show that judgment was entered on 20 Februarv 1975, and that defendant made his "entry of appeal" on 20 February 1975, and that the court pursuant to the authority granted by G.S. 1-282 extended the time for the service of "the case on appeal" for 50 davs from 20 Februarv 1975. Thus, the record clearly demonstrates that the time within which to serve the case on appeal had expired before defendant made his motion for an extension of time, and the trial court would have been without authority to allow defendant's motion for an extension of time. G.S. 1-282.

Furthermore, since the 50 davs defendant was allowed to serve the case on appeal by the order of 20 February 1975 had expired when plaintiff made her motion to dismiss, it was the judge's duty to dismiss the appeal. G.S. 1-287.1.

The order appealed from is

Affirmed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. PERCY LEE KEARNS

No. 7520SC401

(Filed 5 November 1975)

1. **Assault and Battery § 5; Robbery § 1— armed robbery — assault with deadly weapon with intent to kill inflicting serious injury — separate crimes**

Defendant could be convicted of armed robbery and of assault with a deadly weapon with intent to kill inflicting serious injury, since the crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury.

2. **Criminal Law § 7— coercion as defense to crime**

It is the general rule that in order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done; furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.

3. **Criminal Law §§ 7, 9— defendant as aider and abettor — coercion no defense**

The doctrine of coercion was not applicable and the trial judge was under no duty to charge on the doctrine where the evidence tended to show that one of the perpetrators of the crime who had a gun threatened him as he drove the car to the scene of the crime, the perpetrator who had threatened defendant and defendant's brother left the car and entered a store to commit the robbery, defendant made no effort to get away but instead waited outside while the crime took place, and defendant drove the car away after the robbery.

APPEAL by defendant from *Long, Judge*. Judgment entered 15 January 1975 in Superior Court, ANSON County. Heard in the Court of Appeals 3 September 1975.

The defendant pled not guilty to charges of (1) armed robbery, and (2) assault with a deadly weapon with intent to kill inflicting serious injury.

Sarah Deese testified that she was working in the grocery store near Wadesboro about 9:40 p.m. on 25 July 1974 when two boys walked in the store; one of them (Larry Johnson) pointed a pistol at her and said, "This is a holdup." The other (later identified as defendant's brother James Ernest Kearns) took about $1100 from the cash register. As Johnson backed

out the door he fired once, the bullet piercing her stomach. She had an operation and remained in the hospital eight days.

Two days later defendant voluntarily went to the police, and after being advised of his *Miranda* rights made a statement which was reduced to writing and signed. He stated that he, his brother, Larry Johnson, and another man were riding around. His brother had a gun. Johnson took the gun and told defendant to drive to Deese Variety Store. One said he wanted nothing to do with it, but Johnson said all of them were going to be in it or he would shoot them. Defendant parked the car near the store, and his brother and Johnson went in. As they were leaving he heard a pop. Johnson told him to drive away fast. He drove to his home, where his brother pulled out a roll of money and counted it. As his brother and Johnson left his home, his brother handed him $40.00. He then told his wife everything. She called his cousin, who advised him to go to the police.

After making the foregoing statement the defendant gave to the police the $40.00; he then went with them to Thomasville and High Point and led them to the apprehension of the other participants.

Larry Johnson, a witness for the State, testified that he was serving a sentence to imprisonment of 22 to 28 years after pleading guilty to the felonious assault of Sarah Deese; that the defendant had told them that the Deese store would be a good place to "hit"; that defendant drove the car for them; that after the robbery, the defendant's brother divided the money, but it was not done right; and that at no time had he threatened the defendant.

The defendant's testimony at trial was substantially the same as his statement to the police, but he added that he did not know there was going to be a robbery.

The jury found defendant guilty of armed robbery (Case No. 74CR2670) and guilty of assault with a deadly weapon inflicting serious injury (Case No. 74CR2671) and requested that consideration be given to the fact that he turned himself in and helped in the capture of the other participants. From the judgment imposing a prison term of five years for the assault and ten to fifteen years for the armed robbery, defendant appealed.

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

Henry T. Drake for defendant appellant.

CLARK, Judge.

[1] Defendant's motion that the judgment in Case No. 74CR2671 be arrested is based on the contention that the felonious assault for which he was indicted and assault with a deadly weapon inflicting serious injury for which he was convicted are lesser included offenses of armed robbery for which he was indicted and convicted in Case No. 74CR2670. The contention is without merit because the crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury. So the conviction of armed robbery did not establish defendant's guilt of assault with a deadly weapon inflicting serious injury. *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1971).

The defendant claimed the defense of coercion. He testified that just prior to the robbery, while he was driving the car to the store, Larry Johnson had a pistol and stated that "all of them were going to be in it or he'd shoot them." The trial judge stated the doctrine of coercion and placed the burden with the State. Defendant assigns as error the charge of the court relating to coercion in that there was no application of the law to the evidence.

Trial judges may find guidance for charging on the doctrine of coercion in *State v. Sherian,* 234 N.C. 30, 34, 65 S.E. 2d 331, 333 (1951), wherein Devin, Judge, wrote:

> "The defendants were entitled to have the court instruct the jury to the effect that if, upon a consideration of all the evidence, it failed to find beyond a reasonable doubt, that the assistance rendered to James Diggs, after he committed the felonious assault upon officer Howell, was rendered with the willful and felonious intent to aid Diggs to escape arrest and punishment, and not under compulsion or through fear of death or great bodily harm, it should return a verdict of not guilty."

[2] It is the general rule that in order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm. Annot. 40 A.L.R. 2d 908 (1955).

[3] In this case the defendant was convicted as a principal in the second degree in that he drove the car to the scene, waited outside the store while his brother and Larry Johnson committed the armed robbery, and drove the car away after the robbery. The jury found that he aided and abetted the perpetrators. His claim of coercion was based on threat made to him by Johnson as he drove the car to the scene; Johnson then left the car and entered the store. Defendant testified, "I don't really know why I didn't leave from the store while they went into it." At this time the defendant was in control of the car and had a reasonable opportunity to leave the scene and to avoid aiding and abetting the perpetrators. Under these circumstances, the doctrine of coercion was not applicable, and the trial judge was under no duty to charge on this doctrine. Assuming that there was a failure to apply the law of coercion to the evidence, such failure was not error.

We have carefully examined the other assignments of error and find that the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

PEOPLES BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF NINA P. BATTS, DECEASED v. ROSE ANN SHEARIN, W. M. BATTS, JAMES W. KEEL, JR., GUARDIAN AD LITEM FOR THE UNBORN ISSUE OF ROSE ANN SHEARIN, LILLIAN FAGALA, MARYANN NADER AND AGNES NAJAM

No. 757SC489

(Filed 5 November 1975)

Trusts § 5— husband as beneficiary — consideration of husband's income and separate estate before disbursing funds

Where a trust provided for the needs, protection, and support of testatrix' husband, but in doing so the trustee was directed to be "guided by practical considerations such as whether my husband is still working, his health and other factors," the clear implication was that the husband's income was to be considered in accomplishing the trust purpose, but there was no implication that the "considerations" extended to his separate estate.

APPEAL by defendant, James W. Keel, Jr., Guardian Ad Litem for the Unborn Children of Rose Ann Shearin, from *Small, Judge.* Judgment entered 17 March 1975, Superior Court, NASH County. Heard in the Court of Appeals 24 September 1975.

The controversy in this case centers around trust provisions of the will of Nina Batts, who died in 1973. Plaintiff qualified as executor and trustee. Plaintiff seeks a declaratory judgment as to its fiduciary duties under Article Eight of the Will which states:

> "The Trustee is authorized and directed to use both principal and income as may be needed for the benefit of my husband during his lifetime, and this includes luxuries as well as necessities. The Trustee shall be guided in the administration of the trust by practical considerations such as whether my husband is still working, his health and other factors. I wish him properly protected and supported, and I request the Trustee to inform itself as to his needs and to make provision for them whether or not he so requests, with specific authority to pay bills for his support, medical bills or expense of nursing home."

Plaintiff specifically requests advice as to whether in providing trust benefits to W. M. Batts, husband of testatrix, it

should consider the extent and availability of Batts' own separate property.

The will also stated that the remainder of the trust should go to Rose Ann Shearin, Mrs. Batts' daughter, or if she be dead, then to her issue, or if no issue, then in equal shares to three other named beneficiaries.

A guardian ad litem was appointed for the unborn contingent beneficiaries, and an answer was filed on their behalf. A judgment was entered which concluded that although the testatrix did not intend all of her husband's assets to be exhausted, she did intend that his income be expended before he received trust benefits. From this judgment, the guardian ad litem appealed.

Spruill, Trotter & Lane by F. P. Spruill, Jr., for plaintiff appellee.

George Paul Duffy, Jr., for defendant appellant, James W. Keel, Jr., Guardian Ad Litem for the Unborn Issue of Rose Ann Shearin.

CLARK, Judge.

The defendant groups his assignments of error under one broad question for consideration on appeal: Did the trial court err in holding that the testatrix intended that the trustee under the will involved should not consider the separate assets but only the income of the lifetime beneficiary before making disbursements to him?

Decisions are consistent in holding that the intention of the settlor must govern this type of will interpretation. *Bank v. Broyhill,* 263 N.C. 189, 139 S.E. 2d 214 (1964); *Callaham v. Newsom,* 251 N.C. 146, 110 S.E. 2d 802 (1959). Defendant asserts that the instrument implies that the testatrix wanted the beneficiary to be provided for if he could not provide for himself. The first rule of construction that he proposes is that a trustee is required to consider the beneficiary's other means unless an affirmative contrary intention is revealed by the will. The second rule of construction advanced is that the word "necessary" implies a necessity to carry out the purpose of the trust regardless of the beneficiary's other means while the word "needs" implies that only the beneficiary's actual needs are to

be provided for by the trust, if the beneficiary cannot provide them for himself. Annot., 2 A.L.R. 2d 1383 (1948).

The trial judge relied on language in the will itself to garner the testatrix's intention. Specifically, the instruction that the trustee be guided "by practical considerations such as whether my husband is still working" indicated an intent that Mr. Batts' income be used for his support before trust assets were invaded.

Kuykendall v. Proctor, 270 N.C. 510, 519, 155 S.E. 2d 293, 301 (1967), quotes Scott on Trusts, 2d Ed., § 128.4, as follows:

> " 'It is a question of interpretation whether the beneficiary is entitled to support out of the fund even though he has other resources. Where the trustee is directed to pay to the beneficiary or to apply for him so much as is necessary for his maintenance and support, the inference is that the settlor intended that he should receive his support from the trust estate, even though he might have other resources.' "

In *Kuykendall,* the trust indenture provided that the trustee was to use the rents and profits "or so much thereof as may be necessary" to keep the beneficiary in comfort. The court held this language was mandatory, was a limit only upon the amount required to accomplish the purpose of the trust, and did not mean that no funds were to be used for this purpose so long as the beneficiary had other properties.

Sub judice, the trust provides for needs, protection and support of the beneficiary, but in doing so the trustee was directed to be "guided by practical considerations such as whether my husband is still working, his health and other factors." The clear implication in this language is that the husband's income was to be considered in accomplishing the trust purpose, but there is no implication that the "considerations" extended to his separate estate. In our opinion the trial judge accurately interpreted the pertinent trust provisions of the will.

Affirmed.

Judges BRITT and PARKER concur.

DEFFET RENTALS, INC., PETITIONER v. THE CITY OF BURLINGTON, N. C., A BODY POLITIC INCORPORATED IN THE STATE OF NORTH CAROLINA, AND JACK D. CHILDERS, BUILDING INSPECTOR, FOR THE CITY OF BURLINGTON, NORTH CAROLINA, RESPONDENTS

No. 7515SC383

(Filed 5 November 1975)

1. **Municipal Corporations § 31— *zoning* — review of decision of board of adjustment**

Although the proper procedure for obtaining superior court review of a decision of the board of adjustment was not followed since petitioner instituted an action by filing a complaint and having summons issued rather than petitioning the superior court for a writ of certiorari, the court in effect allowed a petition for certiorari when it proceeded to hear the controversy and the cause will be treated as though it entered the superior court by way of certiorari.

2. **Municipal Corporations § 31— *zoning* — review of decision of board of adjustment**

In reviewing a decision of the board of adjustment, it is not the function of the reviewing court to find the facts but to determine whether the findings of fact made by the board are supported by the evidence before the board and whether the board made sufficient findings of fact.

3. **Municipal Corporations § 31— denial of building permit — vested rights — review by certiorari**

Certiorari is the proper procedure to review proceedings before a board of adjustment when an aggrieved party believes that his application for a building permit has been denied in violation of the "vested rights" doctrine.

4. **Municipal Corporations § 31— denial of building permit — insufficiency of findings**

Findings of fact by the board of adjustment were insufficient to enable the reviewing court to determine whether the board acted arbitrarily or committed errors of law in the denial of a building permit for the construction of apartments where the board merely found that at the time petitioner applied for the permit, the zoning classification for the property prohibited construction of apartments, and the board failed to make findings as to petitioner's contention that it had acquired a vested right to construct apartments on the property.

APPEAL by respondents from *Brewer, Judge.* Judgment entered 5 February 1975 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 3 September 1975.

The record discloses: On 26 March 1973 petitioner applied for a building permit to construct a multifamily apartment dwelling outside the City of Burlington but within the City's

zoning jurisdiction. The inspector refused to issue the permit and petitioner appealed to the Board of Adjustment. After hearing the appeal the Board affirmed the decision of the Building Inspector in refusing to grant the permit. The Board found as a fact that at the time petitioner applied for the permit, the property where the apartments were to be built was zoned R-15, a classification that prohibited construction of multifamily dwellings. The Board made no other findings of fact and concluded that the permit was properly denied.

On 5 March 1974 plaintiff (referred to as petitioner) brought this action against the City of Burlington and the Building Inspector for a writ of certiorari to obtain judicial review of the Board's decision. Respondents filed answer and the cause came on for trial. No testimony was offered by either party. The parties stipulated that the court hear the cause on the pleadings and on the briefs filed by attorneys for the parties without a jury. Petitioner's evidence consisted primarily of a written summary of the evidence offered before the Board of Adjustment which evidence tended to show: In August 1972 petitioner entered into a contract to purchase the property in question from Horace R. Kornegay, Annie Ben Kornegay, Gerald L. Clapp, and Nancy Clapp. The property was not zoned at that time. A representative of petitioner consulted with the City Planning Director who told him that there was a proposal to extend zoning to the area where the proposed apartments were to be located and that multifamily zoning would be recommended for the area. In December 1972 petitioner was ready to begin construction, but the City asked the petitioner to delay construction and expand its apartment project to include property owned by F. D. Fowler in addition to the Kornegay-Clapp tract. Petitioner delayed construction and commenced negotiations for the purchase of the Fowler tract. On 6 February 1973 the Kornegay-Clapp tract was zoned for single family residences. Petitioner nevertheless applied for a building permit but it was denied. Petitioner has incurred expenses of $6,600 in connection with the apartment project, including travel expenses, architect fees and a deposit on the purchase price of the property. It is obligated to pay the remaining purchase price of $42,000.00.

Respondents offered in evidence a letter from the planning director to a representative of petitioner, dated September 1972, stating that the property being purchased by petitioner would

probably be zoned for multifamily residences but that no guarantee could be given. They also offered a letter from the planning director to one J. R. Fowler, dated 6 December 1972, with a copy sent to petitioner, stating that the Fowler tract would probably be zoned for single family residences. Certain other correspondence was offered by respondents.

The superior court made extensive findings of fact, substantially as petitioner's evidence before the Board of Adjustment tended to show. It found that before the Kornegay-Clapp tract was zoned for single family residences, petitioner had expended substantial amounts of money in good faith and in reasonable reliance on the law as it then existed. The court held that the City had acted improperly in withholding the requested building permit and issued a writ of mandamus requiring the building inspector to issue the permit. The respondents excepted and appealed.

Allen, Allen & Bateman, by Robert J. Wishart, for petitioner appellee.

Robert M. Ward, for respondent appellants.

MARTIN, Judge.

In their first assignment of error respondents contend the court failed to follow proper procedure for reviewing an administrative decision pursuant to certiorari. The assignment has merit.

[1] It is noted that instead of petitioning the superior court for a writ of certiorari, petitioner instituted an action by filing a complaint and having summons issued. While the procedure appears to be unusual, we do not think it was fatal in this case in view of the stipulation providing that the court might hear the matter and the court's proceeding to do so. By proceeding to pass upon the controversy, the court, in effect, allowed a petition for certiorari and we will treat the cause as though it had entered the superior court by way of certiorari.

[2] The decision of a board of adjustment is final as to facts found provided there is evidence to support such facts. The court is empowered to review errors in law but not facts. It can give relief against orders which are arbitrary, oppressive, or attended with manifest abuse of authority and ones which are unsupported by the evidence. *In re Campsites Unlimited,*

23 N.C. App. 250, 208 S.E. 2d 717 (1974), aff. 287 N.C. 493 (1975). See *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128 (1946). It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board and whether the Board made sufficient findings of fact. *In re Campsites Unlimited,* 287 N.C. 493, 215 S.E. 2d 73 (1975).

It follows that in the instant case the trial court was without authority to make findings of fact and conclusions of law thereon. In so doing, it committed error.

Respondents next assign as error the action of the court in granting petitioner's relief based on the doctrine of vested rights. They contend that the Board of Adjustment acted properly in denying petitioner's application for a building permit.

Petitioner basically contends that at the time of the enactment of a zoning ordinance affecting its land it had acquired a vested right to proceed with construction. The respondents contend that petitioner was aware that zoning which might be adverse to the proposed use to which the petitioner was going to put the area in question was being contemplated.

[3] Certiorari is the proper procedure to review proceedings before a board of adjustment when an aggrieved party believes that his application for a building permit has been denied in violation of the "vested rights" doctrine declared in *Town of Hillsborough v. Smith,* 276 N.C. 48, 170 S.E. 2d 904 (1969).

In this case there was evidence which tended to show that petitioner negotiated the purchase of property for the purpose of constructing multifamily apartment dwellings. The land was located outside the corporate limits of the City of Burlington but within the extra-territorial zoning area controlled by the City. No zoning ordinances for this area had been enacted at that time. After entering into a contract to purchase this property and in response to requests by city officials, the petitioner delayed construction of its project until other property owners could be contacted with a view towards including the additional property in the project. The petitioner entered into an option contract to purchase this additional land and undertook substantial expenditures including major revisions in its preconstruction planning. Thereafter, on 6 February 1973 the City zoned the property for single family residences only.

Petitioner asserts a legal right to non-conforming use of the land in question. Whether it has such legal right depends upon factual findings.

"[O]ne who, in good faith . . . makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as a part of the acquisition of the building site or the construction . . . may not be deprived of his right to continue such construction and use. . . . " *Town of Hillsborough v. Smith, supra.*

[4] Safeguards against arbitrary action by zoning boards in allowing or denying the application of use permits require the board to state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision. See *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129 (1974). In this case the findings of fact by the Board of Adjustment are insufficient to enable the reviewing court to determine whether the Board had acted arbitrarily or had committed errors of law in affirming the Building Inspector and denying the permit.

Respondents' contention that petitioner has no standing for the reason that petitioner is an optionee has no merit. The record is clear that petitioner was bound by contract to purchase the land in question.

For the reasons stated, the judgment of the superior court is vacated; and the cause is remanded for entry of an order setting aside the findings of fact and conclusions of law made by the Board of Adjustment and directing that a further hearing be held by the Board for a determination, on competent and substantial evidence, of petitioner's asserted rights.

Error and remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. SHIRRELL GENE MULWEE

No. 7517SC552

(Filed 5 November 1975)

1. **Constitutional Law § 31; Criminal Law § 98— presence of defendant at trial — waiver of right**

It is well settled that a defendant in a criminal prosecution has the right to be present throughout his trial and that right may be waived only in prosecutions for less than capital offenses; it is also settled that in cases where a defendant is on trial for less than a capital crime, his voluntary absence from court after his trial begins constitutes a waiver of his right to be present.

2. **Criminal Law §§ 98, 102— absence of defendant — first degree murder charge waived**

The district attorney during the trial of defendant on a capital offense, and when defendant was voluntarily absent, could properly elect to waive the charge of first degree murder and proceed with the prosecution of a noncapital offense, second degree murder.

3. **Criminal Law § 24— not guilty plea to murder — inclusion of lesser included offenses**

Defendant's contention that the trial court erred in allowing the State to proceed on a charge of second degree murder without defendant entering a plea to such charge is without merit since the bill of indictment charged defendant with murder and included first and second degree murder, manslaughter, and possibly other lesser offenses, and defendant's plea of not guilty included all lesser included offenses embraced in the bill of indictment.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 12 February 1975 in Superior Court, STOKES County. Heard in the Court of Appeals 16 October 1975.

By indictment proper in form, defendant was charged with the murder of Michael Wayne Swain on 12 January 1974. He was placed on trial for first-degree murder and pled not guilty.

The trial lasted several days. Following the introduction of the testimony and a night's recess, defendant failed to appear when court convened the next morning at 9:30. At 10:30 a.m. defendant had not appeared and his counsel moved for a continuance but the motion was overruled, defendant was duly called and a capias instanter was issued for him.

At 2:25 p.m. on the same day, defendant still had not appeared and his counsel was unable to explain his absence. Defense counsel again moved for a continuance and then moved

for a mistrial. Neither motion was allowed. Thereupon, the district attorney announced that the State elected not to proceed further on the charge of first-degree murder but would ask for no greater verdict than second-degree murder. Defense counsel objected.

The court permitted the trial to proceed on the charge of second-degree murder throughout the afternoon without defendant being present. The next morning defendant was present in court and the trial proceeded to its conclusion with him present. The jury returned a verdict of guilty of second-degree murder and from judgment imposing prison sentence of not less than 18 years nor more than 25 years, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General John M. Silverstein, for the State.

Clarence W. Carter and Stephen G. Royster for defendant appellant.

BRITT, Judge.

All three of defendant's assignments of error relate to the trial proceedings conducted during his absence.

By his first and second assignments, he contends that the court erred (1) in proceeding in his absence when he was on trial for first-degree murder, and (2) in permitting the State, in his absence, to elect not to proceed on the first-degree murder charge and to proceed on the second-degree murder charge. We find no merit in these assignments.

[1] It is well settled that a defendant in a criminal prosecution has the right to be present throughout his trial, and that right may be waived only in prosecutions for less than capital offenses. *State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962), and cases therein cited. It is also settled that in cases where a defendant is on trial for less than a capital crime, his voluntary absence from court after his trial begins constitutes a waiver of his right to be present. *State v. Stockton,* 13 N.C. App. 287, 185 S.E. 2d 459 (1971), and authorities therein cited. The case at hand is complicated by the fact that certain proceedings *were* conducted in defendant's trial for a capital offense in his absence.

[2] The question presented is whether the district attorney during the trial of defendant on a capital offense, and when

defendant was voluntarily absent, could properly elect to waive the charge of first-degree murder and proceed with the prosecution of a noncapital offense. Under the facts in this case, we hold that he could.

The district attorney (solicitor) is a constitutional, judicial officer authorized and empowered to represent the State in criminal prosecutions. *State v. Miller,* 272 N.C. 243, 158 S.E. 2d 47 (1967). In *Miller,* at page 246, the court, speaking through Justice Higgins, states:

> " . . . When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the Solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the Court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the Solicitor has elected to abandon. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918."

While the above quoted statement includes "and in the presence of the defendant," and cases cited by defendant contain similar language, we think the authorities have to be considered in the context in which they were written. In our opinion, the context in the cases relied on by defendant is entirely different from that presented here. Furthermore, it is necessary that an appellant not only show error but that he was prejudiced thereby. 3 Strong, N. C. Index 2d, Criminal Law § 167. Surely, a defendant in a capital case is not prejudiced when the State elects to abandon the capital offense, which is equivalent to a verdict of not guilty on the more serious charge, and proceeds on a lesser offense included in the bill of indictment.

To accept defendant's contention could lead to impossible situations. If the court in the instant case could not permit the State to reduce the charge in the absence of defendant, how could it have allowed the motion of defense counsel for a continuance or a mistrial? If all proceedings were stayed, and defendant had remained away for an extended period of time, would it have been necessary to extend the February 1975 Session of Stokes Superior Court for weeks, months, or even years until such time as defendant saw fit to return for his trial? To accept

the contention could also mean that bail should never be allowed in capital cases.

[3] By his third assignment of error, defendant contends the court erred in allowing the State to proceed on a charge of second-degree murder without defendant entering a plea to such charge. This assignment is likewise without merit. The bill of indictment charged defendant with murder and included first and second-degree murder, manslaughter, and possibly other lesser offenses. When defendant was arraigned and pled not guilty, his plea included all lesser included offenses embraced in the bill of indictment.

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROBERT JEROME EDWARDS

No. 7521SC436

(Filed 5 November 1975)

1. **Criminal Law § 91— denial of motion for continuance**

The trial court did not abuse its discretion in the denial of defendant's motion for continuance made during pretrial arraignment so that defendant could cross-examine the State's identifying witness to establish the witness's testimony in the record for later impeachment purposes.

2. **Jury § 6— examination of prospective jurors — prejudices against homosexuality**

The trial court in a homicide case did not err in permitting the district attorney to question prospective jurors regarding their prejudices against homosexuality for the purpose of ascertaining whether the jurors could impartially consider the evidence with knowledge that the State's witnesses were homosexuals or transvestites.

3. **Criminal Law § 43— motion to reexamine photograph**

The trial court in a homicide case did not err in the denial of defendant's motion to reexamine photographs of the crime scene which were not presented into evidence by the State.

4. **Criminal Law § 80— request to see witness's statement**

Defendant in a homicide case was not prejudiced by the denial of his request to see the statement of a State's witness.

5. **Criminal Law § 169— exclusion of testimony — admission of other testimony of same import**

Defendant in a homicide case was not prejudiced by the exclusion of testimony as to the homosexual tendencies of the State's witnesses where other evidence was admitted regarding the homosexual and transvestite tendencies of the State's witnesses.

6. **Criminal Law § 102— argument of district attorney — failure of defendant to testify**

The district attorney did not comment on defendant's failure to testify in his argument to the jury on the effect of defendant's plea of not guilty and the resulting burden of proof imposed on the State in consequence of such plea.

APPEAL by defendant from *Albright, Judge.* Judgment entered 10 January 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 September 1975.

Defendant was charged in a bill of indictment with the first degree murder of Robert Lee Hauser. Defendant entered a plea of not guilty and was tried before a jury.

The evidence tended to establish that Robert Lee Hauser was in the bedroom of a liquor house watching television with Joseph and Cathy Parker. The defendant came into the bedroom and announced that "it was a stickup" and told Hauser to "get it." While the defendant was talking to Cathy Parker, Hauser ran by the defendant and out of the house. The defendant shot Hauser in the back as he ran away.

The jury returned a verdict of guilty of second degree murder. From a judgment imposing a prison sentence, the defendant appealed to this Court.

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

Moore, Green, Parrish and Yokley, by Thomas J. Keith, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in refusing to grant his motion for a continuance during pretrial arraignment. The defendant sought a continuance in order to cross-examine the State's identifying witness to establish the witness's testimony in the record for later impeachment purposes. It is a well established rule in North Carolina that granting a motion

for a continuance is within the discretion of the trial court and its exercise will not be reviewed in the absence of manifest abuse of discretion. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966); *State v. Morrison,* 19 N.C. App. 717, 200 S.E. 2d 341 (1973). We cannot say that the trial judge abused his discretion in denying defendant's motion for continuance.

[2] Defendant next contends that the trial court erred in overruling his objection to the District Attorney's questioning of prospective jurors regarding their prejudices against homosexuality. Defendant argues that the District Attorney was in essence testifying to facts which were never presented into evidence.

The exercise of the right to inquire into the fitness of jurors is subject to the trial court's close supervision. The regulation of the manner and extent of the inquiry rests largely in the trial judge's discretion. *State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972). The District Attorney was attempting to ascertain whether the jurors could impartially consider the evidence though knowing that the State's witnesses were homosexuals or transvestites. The purpose for the questioning was legitimately aimed at determining whether a juror, because of a prejudice or predisposition for or against certain witnesses, would be biased and therefore subject to disqualification. We cannot say that the trial judge abused his discretion in permitting the line of questions.

[3] Defendant argues that the pretrial arraignment procedure and trial before different judges prejudiced the defendant's discovery rights. He alleges that the trial judge erred in refusing to permit him to reexamine photographs taken at the scene of the crime. Defendant previously had the opportunity to examine the photographs which the State never presented into evidence. Furthermore, defendant does not allege that his defense was prejudiced by the denial of his motion to reexamine the photographs.

[4] Defendant further argues that the trial court erred in denying his request for the statement of the State's witness, Gary Adolphus Garret. The defendant concedes that the pretrial arraignment order was not violated but argues that he was surprised by the witness's testimony. However, examination of

Garret's testimony, noting the rigorous cross-examination, fails to show that the defendant was prejudiced by the surprise of Garret's testimony. We can find no prejudical error in defendant's contention.

[5] Defendant alleges error in the trial court's sustaining the State's objections to questions by the defendant regarding the homosexual tendencies of the State's witnesses. "It is permissible, for purposes of impeachment, to cross-examine a witness . . . by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct." *State v. Harrell,* 20 N.C. App. 352, 356, 201 S.E. 2d 716 (1974). However, the scope of such questions is subject to the trial court's discretion.

The record is replete with references to the homosexual and transvestite tendencies of the State's witnesses. The witness Ernest Maybanks admitted he had been convicted of female impersonation, and Silious Herring, another witness for the State, testified that it was natural for him to dress as a woman. Furthermore, Cathy Parker, another of the State's witnesses, testified that everyone, including the State's witnesses, except her brother and the defendant were dressed as women. We can find no prejudicial error in the trial judge's sustaining the State's objections to defendant's questions regarding the sexual tendencies of the witnesses when sufficient evidence was admitted establishing the sexual behavior pattern of the witnesses.

Defendant contends that the trial court inadvertently influenced the defendant's decision not to testify when the court informed him of his right not to take the stand. Defendant's contention is without merit. The trial judge gave to the defendant a fair statement of his constitutional right not to testify. The trial judge in no way advised the defendant not to testify on his own behalf.

[6] Finally, it is argued that the trial court erred in overruling the defendant's objection to the State's argument to the jury. Defendant contends that the District Attorney commented on the defendant's failure to testify. However, upon reading the portion of the District Attorney's argument complained of, it becomes evident that the thrust of the comment is not on the defendant's failure to testify, but on the effect of his pleading not guilty, and the resulting burden of proof imposed on the State in consequence of the not guilty plea.

Furthermore, if there were any implications upon the defendant's failure to testify that may have been raised by the District Attorney's argument, the judge's charge cured them. The jury was instructed that the defendant's failure to testify created no presumption against him, that the law gave him the privilege not to testify, and that "his silence is not to influence your decision in any way." See *State v. Bumpers*, 270 N.C. 521, 155 S.E. 2d 173 (1967), rev'd on other grounds, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797; *State v. Bryant* and *State v. Floyd*, 16 N.C. App. 456, 192 S.E. 2d 693 (1972). We have reviewed defendant's remaining assignments of error and can find no prejudicial error in the trial.

No error.

Judges MORRIS and HEDRICK concur.

KEITH DARREN HORNE, A MINOR APPEARING BY HIS GUARDIAN AD LITEM, KEITH C. HORNE, AND KEITH C. HORNE, INDIVIDUALLY v. JAMES ROBERT WALL AND TEXTILEASE CORPORATION

No. 758SC503

(Filed 5 November 1975)

1. Automobiles § 90— failure to state material evidence and explain law arising thereon

In an action to recover for injuries sustained by minor plaintiff when he fell onto the road while riding his bicycle and was struck by defendant's truck, the trial court erred in failing to relate to the jury plaintiff's evidence that defendant's truck was 349 feet away when plaintiff first fell onto the road and to declare and explain the law arising on such evidence.

2. Automobiles § 90— instructions — statement unsupported by evidence

In an action to recover for injuries sustained by minor plaintiff when he fell onto the road while riding his bicycle and was struck by defendant's truck, the trial court's statement in its instructions that plaintiff was trying to "beat the truck to the driveway" was unsupported by evidence and was prejudicial to plaintiff.

APPEAL by plaintiffs from *Webb, Judge.* Judgment entered 14 March 1975 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 September 1975.

Minor plaintiff's complaint alleges that on 12 January 1973, between 6:00 p.m. and 6:15 p.m., he was riding a bicycle from his grandmother's home to his home on a rural paved road. He fell onto the roadway and defendant's truck, traveling in the same direction, struck the 13-year-old plaintiff. Texilease, defendant Wall's employer, is joined as a party defendant.

Defendants deny negligence and allege contributory negligence in their answer. Plaintiff's reply alleges last clear chance.

There was evidence at the trial to show that the plaintiffs and the minor plaintiff's grandmother lived on Rural Paved Road 1545 in Wayne County. The grandmother's house was located north of plaintiffs' home, and there was a distance of 349 feet between the respective driveways of their homes leading into the paved road.

The evidence further tended to establish that at the time of the accident the road in front of plaintiffs' house was covered with six to eight inches of ice, and the ice extended 150 to 160 feet north of plaintiffs' driveway.

The minor plaintiff testified that he and his two younger brothers were riding their bicycles from their grandmother's south towards their home. Minor plaintiff saw the lights of defendant Wall's truck when it was approximately one-half mile north from plaintiffs' driveway. When the minor plaintiff attempted to turn into his driveway, his bicycle slipped from under him, and he fell. Minor plaintiff testified that at this time the defendant's truck was in the vicinity of his grandmother's driveway. When he attempted to get up he slipped and fell again, and defendant continued southwardly on highway 1545 and struck the minor plaintiff.

The jury found that plaintiff had not been injured by the negligence of the defendant. Plaintiffs appealed.

Dees, Dees, Smith, Powell and Jarrett, by William W. Smith, for plaintiff appellant.

Smith, Anderson, Blount and Mitchell, by James D. Blount, Jr., for defendant appellee.

ARNOLD, Judge.

Plaintiffs allege that the trial judge erred in his instructions to the jury by failing to relate and apply the law to the

plaintiffs' factual contentions. G.S. 1A-1, Rule 51 requires that the trial judge summarize the material aspects of the evidence sufficient to bring into focus the controlling legal principles. *Clay v. Garner,* 16 N.C. App. 510, 192 S.E. 2d 672 (1972).

"Rule 51 requires the trial judge to perform two positive acts: (1) to declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case." *Bodenheimer v. Bodenheimer,* 17 N.C. App. 434, 435, 194 S.E. 2d 375 (1973).

Rule 51 confers a substantial legal right, not dependent on a request for special instructions, and failure to charge on the material features of the case is prejudicial error. *Investment Properties v. Norburn,* 281 N.C. 191, 188 S.E. 2d 342 (1972); *Clay v. Garner, supra.*

[1] In the instant case, plaintiffs presented evidence attempting to establish that defendant was 349 feet away from the plaintiff at the time of plaintiff's first fall. This would mean that defendant drove over 100 yards toward plaintiff while plaintiff was struggling on the ice attempting to get out of the way. The distance between plaintiff and defendant, at the time defendant became aware of the dangerous situation, was critical to plaintiffs' effort in establishing defendant's duty of care. It was error for the trial judge not to mention this critical factual situation and relate the applicable principle of law in his charge to the jury.

[2] Plaintiffs, in their next assignment of error, allege that the trial judge erred by making factual statements in his charge which were not in evidence and were material to the issue of negligence. The trial judge repeatedly stated that the plaintiff was trying to "beat the truck to his driveway." The statement implies that the plaintiff was racing the truck to his driveway. The implication existed in spite of the fact that the trial judge corrected himself when he said that the plaintiff was racing. ["I keep using the word race which I should not use."] Defendant presented no evidence tending to establish that the plaintiff was "trying to beat the truck to his driveway." It was prejudicial error for the court to submit for the consideration of the jury facts material to the issue which are not supported by evidence. *Dove v. Cain,* 267 N.C. 645, 148 S.E. 2d 611 (1966); *Curlee v. Scales,* 223 N.C. 788, 28 S.E. 2d 576 (1944).

Since plaintiffs are entitled to a new trial we see no reason to discuss the remaining assignments of error.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ZEBBIE JUNIOR HINES

No. 7529SC450

(Filed 5 November 1975)

Homicide § 21— death by shooting — sufficiency of evidence

Evidence in a second degree murder prosecution was sufficient to be submitted to the jury where it tended to show that defendant was married and deceased was his lover, their affair was terminated several weeks prior to the date of the shooting, defendant threatened to kill deceased, four days before the shooting defendant went to deceased's home with a pistol and waited from 3:15 a.m. until 6:30 a.m. for her to return, on the date of the crime defendant and deceased engaged in an argument, defendant drove deceased in his vehicle to a deserted area, deceased was fatally shot with defendant's pistol, no powder burns were found on deceased's clothes, defendant's pistol would not easily fire by accident, and immediately after the shooting defendant told a friend that he had shot his wife, that he had "done messed up."

APPEAL by defendant from *Baley, Judge.* Judgment entered 20 March 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 18 September 1975.

Defendant was charged in a bill of indictment with the murder of Cheryl Ann Wilkie on 21 November 1974. The district attorney announced that the State would not try defendant on a first degree murder charge, but would seek a verdict of guilty of second degree murder or manslaughter, as the evidence may warrant.

The State's evidence tended to show the following: Defendant and deceased had been going together for some time, but had stopped going together about three or four weeks before 21 November 1974. Defendant threatened to kill deceased. On 17 November 1974, at about 3:15 in the morning, defendant went to the home of deceased. The deceased was not there, but her sister was. Defendant waited, sitting on deceased's bed with

his pistol beside him, until 6:30 the same morning. Defendant left the house and returned about 9:30 the same morning. Deceased still had not returned home.

On 21 November 1974 defendant and deceased talked together on the sidewalk, got into defendant's car, and drove away. About twenty minutes later defendant carried deceased to the hospital. She was dead on arrival at the emergency room. She had been shot one time through the heart and lung with a .25 caliber pistol. No powder burns were observed on deceased's clothing.

The State offered defendant's statement to the investigating officers. Defendant stated that deceased came to a friend's apartment where defendant was a guest. Deceased began to argue noisily with defendant, and defendant suggested that they go somewhere else to continue their discussion. They rode in defendant's vehicle to the scene of the shooting. Defendant stated that deceased argued that she would not give up defendant to someone else. Deceased removed part of her clothing and tried to get defendant to make love to her. Defendant stated that he reached in the console between the two front seats to get a pack of cigarettes. Deceased saw the .25 caliber automatic pistol in the console and grabbed for it. Defendant grabbed the pistol in his right hand, and deceased pulled defendant's arm towards her. The pistol discharged, striking deceased in the chest.

Defendant stated to another officer that after he stopped his vehicle, he and deceased got out. When he refused to make love to her, she pulled out a .25 caliber automatic pistol and threatened to shoot both defendant and deceased. They struggled over the pistol, and it discharged.

The State offered evidence which tended to show that the .25 caliber automatic pistol would not fire unless it was cocked, the safety released, and pressure applied to the trigger.

Defendant offered no evidence.

The jury found defendant guilty of voluntary manslaughter, and judgment of imprisonment was entered.

Attorney General Edmisten, by Associate Attorney T. Lawrence Pollard, for the State.

George R. Morrow, for the defendant.

BROCK, Chief Judge.

Defendant argues that it was error to deny his motion for nonsuit. It is his contention that the defendant's statements offered by the State are completely exculpatory and entitle him to a dismissal of the charge. In offering these statements, the State is not precluded from offering evidence to show the facts are different from those stated by defendant.

All of the State's evidence surrounding the actual shooting is circumstantial. "When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that defendant is actually guilty." *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968).

If there is more than a scintilla of evidence, direct or circumstantial, or both, to support the allegations of the indictment, it is the court's duty to submit the case to the jury. *State v. Brown,* 1 N.C. App. 145, 160 S.E. 2d 508 (1968).

The circumstances presented by the State's evidence justify a finding by the jury that defendant was married; that deceased was defendant's extramarital lover; that the affair between defendant and deceased was terminated several weeks prior to 21 November 1974; that defendant threatened to kill deceased; that on 17 November 1974 defendant went to deceased's home with a pistol and from 3:15 a.m. to 6:30 a.m. waited for deceased to return; that on 21 November 1974 defendant and deceased engaged in an argument; that defendant drove deceased in his vehicle to a deserted area; that deceased was fatally shot through the heart and lung with defendant's .25 caliber automatic pistol; that no powder burns were found on deceased's clothes; that defendant's .25 caliber automatic pistol would not easily fire by accident; and that immediately after the shooting, defendant told a friend he had shot his wife, that he had "done messed up."

The foregoing, we think, required submission of the case to the jury.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. TONY DARCELLA SMITH

No. 7520SC428

(Filed 5 November 1975)

1. **Constitutional Law § 32— appointment of counsel — finding that defendant was not indigent**

Evidence was sufficient to support the trial court's finding that defendant was not indigent and therefore entitled to appointment of counsel where such evidence tended to show that defendant was an E-4 in the U. S. Army with an income of $413 per month, he had $120 held for him or owed him, he was not married and had no children, and he owned a 1969 Chevelle which had a value of $1600-$1700 on which he owed $450.

2. **Constitutional Law §§ 32, 37— right to counsel — waiver — revocation on trial date — no good cause for delay**

Where defendant signed a waiver of right to have assigned counsel and delayed until the day his case was scheduled for trial before moving to withdraw the waiver and have counsel assigned, the burden was on defendant to show good cause for the delay, and, upon his failure to do so, the signed waiver of counsel remained valid and effective during trial.

ON *writ of certiorari* to review proceedings before *Kivett, Judge.* Judgment entered on 29 July 1974 in Superior Court, STANLY County. Heard in the Court of Appeals 16 September 1975.

Defendant was charged with felonious breaking or entering and larceny to which he pled not guilty.

The State's evidence tended to show that on 26 May 1974, Mr. Wade Furr found a window open at his business and certain items were missing, including a radio, spray guns, grinder and buffer and other tools.

Melvin Forrest testified that he rode with defendant and Paul Douglas in defendant's car to Furr's business on the night in question and that they made entry through a back window, took the equipment and hid it under a house where Paul Douglas lived. Later the equipment was pawned and defendant shared in the proceeds.

Deputy Mills testified that he went to Douglas's home and obtained permission to search a vehicle where he found a radio, some wrenches, jacks, and a water can which were later identi-

fied by Furr as belonging to him. Mills also found a spray gun and grinder at a pawn shop which were identified by Furr.

Defendant testified that at the alleged time of the entry and the theft he was in a motion picture theater and that he did not know anything about the pawned equipment.

Defendant was found guilty as charged and from the sentence to a maximum term of three years as a committed youthful offender, he appeals.

Defendant failed to perfect his appeal and on 21 November 1974, Judge Kivett found that he was indigent and appointed counsel to petition for appellate review.

Attorney General Edmisten by Associate Attorney David S. Crump for the State.

Brown, Brown & Brown by Charles P. Brown for the defendant appellant.

CLARK, Judge.

[1] Defendant assigns error in the finding that he was not indigent and the denial of his request for appointment of counsel. According to the record on appeal on 10 June 1974, he waived preliminary hearing and waived in writing the assignment of counsel. The case was calendared for trial on 22 July 1974. On that day the defendant appeared in court and filed an affidavit of indigency, disclosing facts as follows: That he was an E-4 in the U. S. Army with an income of $413.00 per month; that he had $120.00 held for him or owed to him; that he was not married and had no children; and that he owned a 1969 Chevelle which had a value of $1600-$1700, on which he owed $450.

Judge Chess found that the defendant was not indigent and denied the motion for appointment of counsel. This finding is supported by the evidence. The theory that right to counsel has been denied because of absence of definite standards for determining indigency has been rejected by this Court. *State v. Grier*, 23 N.C. App. 548, 209 S.E. 2d 392 (1974).

The waiver of right to have assigned counsel, which defendant signed in the District Court at preliminary hearing, was "good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that

he desires to withdraw the waiver and have counsel assigned to him." *State v. Watson,* 21 N.C. App. 374, 379, 204 S.E. 2d 537, 540 (1974).

[2] In this case the defendant delayed until the day his case was scheduled for trial before moving to withdraw the waiver and have counsel assigned. If this tactic is employed successfully, defendants will be permitted to control the course of litigation and sidetrack the trial. At this stage of the proceeding, the burden is on the defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay. Upon his failure to do so, the signed waiver of counsel remains valid and effective during trial. Judge Chess did all, if not more, than was necessary to meet the requirements of due process and fairness when he continued the case for a week so that the defendant could employ counsel if he desired to do so and to otherwise prepare for his defense.

When the case was called for trial the following week, Judge Kivett, presiding, again found that the defendant was not indigent. Upon arraignment, defendant pled not guilty. He did not claim he had made any effort to employ counsel or that he was unable to represent himself. We find this assignment of error without merit.

We note that the defendant has not assigned error in the rulings on evidence or on the charge of the court. There was abundant evidence to support the jury verdict. And, finally, though the defendant was convicted of two felonies, a lenient sentence of not more than three years as a committed youthful offender was imposed.

No error.

Judges BRITT and PARKER concur.

SMITH'S CYCLES, INC. v. J. F. ALEXANDER, COMMISSIONER OF MOTOR VEHICLES OF NORTH CAROLINA

No. 7510SC411

(Filed 5 November 1975)

1. **Automobiles § 5.5— motor vehicle franchises — granting of additional franchise — notice — request for hearing**

Where a motorcycle manufacturer gave plaintiff dealer notice under G.S. 20-305(5) of its intention to grant a new motorcycle franchise in plaintiff's trade area on or before 1 September 1973, but the manufacturer did not grant such a franchise by that date, the failure of plaintiff to request a hearing by the Commissioner of Motor Vehicles within 30 days after receipt of such notice did not give the manufacturer the right to grant a new franchise at any time in the future without giving plaintiff further notice under G.S. 20-305(5); and where the manufacturer granted a new franchise on 14 October 1974 without giving additional notice to plaintiff, the 30-day time limitation never began to run, and plaintiff properly filed its petition for a hearing on 19 October 1974.

2. **Administrative Law § 5; Automobiles § 5.5— review of order of Commissioner of Motor Vehicles — "Complaint and Petition" — treating as petition for review**

Where the Commissioner of Motor Vehicles dismissed plaintiff's petition for a hearing on a motorcycle manufacturer's intention to grant a new motorcycle franchise in plaintiff's area, a "Complaint and Petition for Writ of Mandamus," filed by petitioner in the superior court within 30 days thereafter and complaining of the Commissioner's order dismissing his petition without a hearing, was properly considered by the court as a petition for a review under G.S. 143-309.

APPEAL by plaintiff, Smith's Cycles, Inc., from *Preston, Judge.* Order of dismissal entered 27 March 1975, in Superior Court, WAKE County. Heard in the Court of Appeals 4 September 1975.

Under G.S. 20-305(5), before a motor vehicle manufacturer may establish a new dealership in any "line-make" of motor vehicles, it must give notice of its intention to all of the existing dealers in that "line-make" in the same trade area. Within 30 days after receiving such notice, any dealer may request a hearing before the Commissioner of Motor Vehicles. At this hearing the Commissioner must determine whether "after the grant of the new franchise, the market will not support all of the dealerships in that line-make in the trade area." If the Commissioner finds this to be the case, the manufacturer may not grant the proposed new franchise.

Plaintiff is, and has been since 1964, a Honda dealer in Greensboro, operating under a franchise from American Honda Company, Inc. On 25 July 1973, American Honda notified plaintiff that it intended to grant a new Honda motorcycle franchise in the Greensboro area on or before 1 September 1973. Plaintiff did not request a hearing before the Commissioner of Motor Vehicles. American Honda did not grant another franchise in the area as indicated before 1 September 1973. But, on 14 October 1974, without giving any additional notice to plaintiff, it granted a new franchise to Crown Pontiac, Inc. On 19 October 1974, plaintiff filed a petition with the Commissioner of Motor Vehicles requesting a hearing and determination as provided by G.S. 20-305(5).

On 5 December 1974, the Commissioner of Motor Vehicles entered an order of dismissal, concluding that plaintiff did not request a hearing and determination within 30 days after the notice of 25 July 1973, as required by G.S. 20-305.

On 12 December 1974, plaintiff filed a "Complaint and Petition for Writ of Mandamus" in the Superior Court of Wake County, which was construed as a petition pursuant to G.S. 143-309 by Superior Court Judge Donald L. Smith, who issued on 12 December 1974, a stay order as provided by G.S. 143-312. American Honda was allowed to intervene, and it filed a motion to dismiss the action under G.S. 1A-1, Rule 12(b)(6). From the order of Judge Preston dismissing the action, plaintiff appealed.

Attorney General Edmisten by Assistant Attorney General William W. Melvin for defendant appellee.

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

Allen, Steed and Pullen, P.A. by Arch T. Allen III for intervenor appellee, American Honda Motor Company, Inc.

CLARK, Judge.

[1] The Commissioner of Motor Vehicles and American Honda, Intervenor, apparently have taken the position that when American Honda, on 25 July 1973, notified plaintiff that it would grant a new franchise in the Greensboro area before 1 September 1973, the plaintiff should have requested a hearing and determination by the Commissioner; that his request or petition should have been made within 30 days after notice;

and that upon plaintiff's failure to do so, American Honda had the right to grant a new franchise at any time in the future, even more than a year later, without giving plaintiff any further notice under G.S. 20-305. This is an improper interpretation of the statute. The notice provision contemplates an analysis of relevant market conditions within the trade area at or about the time that the notice of the new dealership is made, not the distant past or future. Market and economic conditions change from time to time and place to place. In construing a statute the courts always look to its purpose and presume that the legislature acts with reason and common sense and that it did not intend an unjust or absurd result. *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970). When American Honda chose not to grant a new franchise before 1 September 1973, in accordance with its notice to plaintiff, a new notice should have been sent to plaintiff and other dealers in the area. Since it did not send a new notice, the 30-day time limitation under the statute never began to run, and the plaintiff has not violated it.

[2] Appellate review of an administrative decision is provided for under G.S. 20-300 and G.S. 143-309 by the filing of the petition in the Superior Court of Wake County, not later than 30 days after service of the administrative decision. The plaintiff sought appellate review by filing in the Superior Court of Wake County a "Complaint and Petition for Writ of Mandamus," in which plaintiff "complains and petitions" for an order to the defendant to hold the hearing as required by statute. In *Snow v. Board of Architecture,* 273 N.C. 559, 160 S.E. 2d 719 (1968), it was held that an action for mandamus may not be used as a substitute for appellate review. In that case plaintiff did not appeal from a decision of the Board of Architecture as provided by G.S. 150-24, but fourteen months later instituted in an action for mandamus to compel the renewal of his certificate to practice.

Sub judice, plaintiff's "Complaint and Petition" was filed in apt time under G.S. 143-309. It complained of the order of the Commissioner of Motor Vehicles which dismissed his petition and refused to conduct a hearing; it sought the determination of the question of law which is a proper subject of judicial review. *Foster v. Medical Care Comm.,* 283 N.C. 110, 195 S.E. 2d 517 (1973). Superior Court Judge Smith, in a stay order of 12 December 1974, treated plaintiff's "Complaint and Petition"

as a petition for review under G.S. 143-309, and it is our opinion that under the facts of this case, he acted properly. G.S. 143-309 must be liberally construed to preserve and effectuate the right of appellate review of a decision of a state agency. *In re Appeal of Harris,* 273 N.C. 20, 159 S.E. 2d 539 (1968).

The order of the Superior Court dismissing the plaintiff's appeal is reversed and this cause is remanded to the Superior Court with direction that it be remanded to the Commissioner of Motor Vehicles for a hearing and determination as provided by G.S. 20-305.

Reversed and remanded.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM ANDREW HARRIS

No. 7523SC459

(Filed 5 November 1975)

1. **Criminal Law § 138— severity of punishment — discretionary matter for trial court**

So long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office, and when the sentence imposed is within statutory limits, it cannot be considered excessive, cruel or unreasonable and will not be reviewed on appeal; notwithstanding the principle that such sentences are nonreviewable, appellate courts have reviewed sentences when the particular sanction imposed is clearly and palpably gross, harsh and abusive, but only when such an abuse of discretion is readily discernible will appellate courts intercede.

2. **Larceny § 10— felonious larceny conviction — sentence to maximum term — no abuse of discretion**

In an armed robbery case where defendant was convicted of felonious larceny, the trial court did not abuse its discretion by imposing the maximum sentence of ten years upon the defendant, an indigent college student with no prior record.

APPEAL by defendant from *Wood, Judge.* Judgment entered 19 March 1975 in Superior Court, WILKES County. Heard in the Court of Appeals 19 September 1975.

Defendant was indicted for armed robbery and from a plea of not guilty the jury returned a verdict of guilty of felonious larceny. From judgment sentencing him to a ten-year prison term, defendant appealed.

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

Max F. Ferree and Tom Groome, by Max F. Ferree, for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error is to the signing and entry of the judgment contending that the trial court abused its discretion by imposing the maximum sentence of ten years upon the defendant, an indigent college student with no prior record.

[1] Our Court has held that " . . . so long as the punishment rendered is within the maximum provided by law, an appellate court *must* assume that the trial judge acted fairly, reasonably and impartially in the performance of his office." (Emphasis supplied.) *State v. Spencer,* 7 N.C. App. 282, 285, 172 S.E. 2d 280 (1970); modified and affirmed 276 N.C. 535, 173 S.E. 2d 765 (1970). Moreover, when the sentence imposed is " . . . within statutory limits . . . [it] cannot be considered excessive, cruel or unreasonable." *State v. Johnson,* 5 N.C. App. 469, 470, 168 S.E. 2d 709 (1969). Thus, " . . . sentences imposed, which are within the limits provided by law, are beyond our review." *State v. Frazier,* 14 N.C. App. 104, 106, 187 S.E. 2d 357 (1972); cert. denied 281 N.C. 315, 188 S.E. 2d 899 (1972). Also see *State v. Wright,* 261 N.C. 356, 134 S.E. 2d 624 (1964). Notwithstanding the principle that such sentences are nonreviewable, appellate courts have reviewed sentences when the particular sanction imposed is clearly and palpably gross, harsh and abusive. Only when such an abuse of discretion is readily discernible will appellate courts intercede. *State v. Wright, supra,* at 357; *State v. Woodlief,* 172 N.C. 885, 889, 90 S.E. 137 (1916). The defendant, attacking a sentence, however, is confronted by the presumption that the trial judge acted " . . . fairly, reasonably, and impartially in the performance of the duties of his office. . . . Our entire judicial system is based upon the faith that a judge will keep his oath. 'Unless the contrary is made to appear, it will be presumed that judicial acts and duties

have been duly and regularly performed.' . . . So long as errants make it necessary for other men to judge them it is best to indulge the presumption that a judge will do what a judge ought to do." *State v. Stafford,* 274 N.C. 519, 528, 164 S.E. 2d 371 (1968). (Citations omitted.)

The presumption of lower court correctness and the wide discretion afforded our trial judges in rendering judgment is of necessity grounded on the theory that a trial judge who has participated in the actual disposition of the case and oversaw the detail inherent in the trial process is " . . . in the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant." *State v. Powell,* 6 N.C. App. 8, 11, 169 S.E. 2d 210 (1969); no error, 277 N.C. 672, 178 S.E. 2d 417 (1970). Our General Assembly enacted a flexible statutory scheme enabling the trial court to " . . . impose a sentence appropriate to the individual defendant and to the specific fact situation. As stated in *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695, a trial judge 'may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced.' " *State v. Stewart,* 4 N.C. App. 249, 251, 166 S.E. 2d 458 (1969).

[2] Here the trial court rendered a sentence which falls within the appropriate statutory limit and the record indicates no abuse of discretion. This trial court, reacting to the full implications of this particular case, resolved that defendant Harris should serve ten years in our State prison system. "In our lexicon a sentence is harsh only when it exceeds merited punishment." *State v. Stafford, supra,* at 528. The record is completely devoid of any circumstances which would bring this sentence within the situation referred to by Justice Higgins in *State v. Wright, supra,* which would allow this Court to review the trial judge as to quantum of punishment.

> "If defendant believes that the punishment imposed is unduly severe in fact, his recourse is to seek action by the Board of Paroles or other exercise of the power of executive clemency." *State v. Baugh,* 268 N.C. 294, 295, 150 S.E. 2d 437 (1966); *State v. Stewart, supra,* at 252.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES GIRLEY

No. 755SC431

(Filed 5 November 1975)

1. **Jury § 6— voir dire — questions on self-defense — examination by court proper**

The trial judge did not err in denying defendant the opportunity to define self-defense to the jury during *voir dire*, to conduct a reasonable examination on that subject, and to ask the jury if they believed in such a defense, since the judge himself questioned the jurors as to whether there was any member who would not accept his explanation and legal definition of self-defense.

2. **Assault and Battery § 15— instructions — final mandate — failure to include not guilty by reason of self-defense**

The trial court erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 7 January 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 September 1975.

Defendant was charged with felonious assault with a deadly weapon with the intent to kill, inflicting serious injury not resulting in death. The jury returned a verdict of guilty and from judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary to decision are set out in the opinion.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

Jay D. Hockenbury for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the trial court erred in denying him the right to advise the jury on the law of self-defense during the voir dire, to conduct a reasonable examination on that subject, and to ask the jury if they believed in such a defense. Pursuant to G.S. 9-15(a), the court may question and " . . . direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror . . . . "

In *State v. Dawson,* 281 N.C. 645, 654, 190 S.E. 2d 196 (1972), Chief Justice Bobbitt noted that:

> "Although G.S. 9-15(a) assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. If the court, when it conducts the questioning, declines to ask a question requested by the defendant's counsel, an exception may be noted so that an appellate court can consider the propriety, pertinence and substance of such question."

In the case at bar, the defendant's proposed line of inquiry regarding self-defense was handled sufficiently by the judge as shown by the following:

> "MR. HOCKENBURY: I object to not being able to define self-defense to the jury.
>
> COURT: I understand them to say that they understood it. You may ask if anyone has any disagreement with it or would not follow the law in that respect, but if you are going to explain self-defense to them, that—there is no need for that.
>
> MR. HOCKENBURY: I wonder if I could ask them the question if they believe in it.
>
> COURT: They said they did.
>
> MR. HOCKENBURY: I want to be sure that we are talking about the same self-defense. That is the only thing I want to know, Your Honor.
>
> COURT: I will let the ruling stand.
>
> MR. HOCKENBURY: Is there anybody that does not believe in self-defense as it is applied to the laws of North Carolina.
>
> COURT: Let me say this for you. I don't mean to give you a hard time. Ladies and Gentlemen, if there is evidence of self-defense in this case it can be argued to you by the attorney for the State and the attorney for the defendant and I will explain the legal effect of it. I will explain what it is and when it is applied. Now, is there any member of

> you who would not accept my explanation of it whether you disagree with it or not? Is there any member who would not accept my explanation and legal definition of self-defense if it comes to that point? If you wouldn't feel free to tell me and I will excuse you. All right."

Thus, "the procedure followed in the present case avoided repetitive questioning without precluding or restricting any inquiry suggested and requested by defendant's counsel. The procedure followed was not violative of G.S. 9-15(a) or otherwise objectionable, and defendants have failed to show any prejudice on account thereof." *State v. Dawson, supra,* at 654.

[2] Defendant contends that the trial court erred in failing to refer to the defendant's plea of self-defense in its last and concluding charge to the jury. In its final mandate the court stated to the jury:

> "Therefore, Members of the Jury, if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant James Girley did in fact commit an assault with a .22 caliber pistol on Richard Lee McDonald and caused him to suffer by reason of that assault serious injury to his person, then it would be your duty to return a verdict of guilty as charged. If the State has failed to so satisfy you or if upon a consideration of all the evidence you have a reasonable doubt as to his guilt, it would be your duty to return a verdict of not guilty."

This instruction is prejudicial and warrants a new trial. In *State v. Dooley,* 285 N.C. 158, 165-166, 203 S.E. 2d 815 (1974), our Supreme Court held that:

> "The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case."

We deem it unnecessary to discuss other errors assigned by defendant.

New trial.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES DEWEY WEBB

No. 7524SC570

(Filed 5 November 1975)

1. **Robbery § 4— armed robbery — victim's life threatened or endangered — sufficiency of evidence**

The State's evidence in an armed robbery prosecution was sufficient for the jury to find that a motel manager's life was endangered or threatened by use of a firearm where the manager testified that defendant pointed a chrome plated gun at her head, told her this was a holdup, and took $1415 in cash and earrings valued at $450 from her.

2. **Robbery § 5— armed robbery — instructions — felonious intent**

While the trial court in an armed robbery case must instruct the jury on felonious intent, the court is not required to use the specific words "felonious intent" but is merely obligated to give a correct description of the state of mind necessary for the crime.

3. **Robbery § 5— armed robbery — sufficiency of instruction on felonious intent**

The trial court's instruction on the "felonious intent" element of armed robbery was sufficient where the court instructed the jury that in order to convict defendant it must find that, at the time of the taking and carrying away, defendant "intended to rob" the victim and "knew that he was not entitled to take the property."

4. **Robbery § 5— armed robbery — failure to submit common law robbery**

Where all the evidence tended to show that defendant was guilty of a completed armed robbery, the trial court did not err in failing to charge the jury as to the lesser included offense of common law robbery.

APPEAL by defendant from *Martin, Judge.* Judgment entered 7 April 1975 in Superior Court, MITCHELL County. Heard in the Court of Appeals 21 October 1975.

Defendant was tried upon an indictment charging armed robbery. The State's evidence tended to establish that the defendant, armed with a chrome plated gun, robbed the Baker Motel and Mrs. Dorothy Greene, the motel manager, of $1415 cash and a set of earrings valued at $450. Defendant offered no evidence and the jury returned a verdict of guilty of robbery with a firearm.

From a judgment imposing a prison sentence, the defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney T. Lawrence Pollard, for the State.

Lloyd Hise, Jr., for defendant appellant.

ARNOLD, Judge.

[1] We disagree with defendant's first assignment of error which is the overruling of his motion for nonsuit. He contends there is insufficient evidence to find that the life of Mrs. Greene was endangered or threatened.

The records show clear evidence of the endangering or threatening a life with the use of a firearm. Mrs. Greene testified that the defendant had a chrome plated gun, about six to eight inches long, and that "[h]e put the gun in my face and said lady this is a holdup. If you don't start screaming and making too much noise I won't hurt you. The gun was laying on my forehead. . . . I started into the living room and he put the gun to my temple and told me to go back and turn the light on back there."

Considered in the light most favorable to the State, the evidence is clearly sufficient to prove that the defendant accomplished the robbery by the use or threatened use of a dangerous weapon and that the property taken had value. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Green,* 2 N.C. App. 170, 162 S.E. 2d 641 (1968).

Defendant next contends that the trial court failed in its charge to properly and adequately define the elements of the crime of robbery with firearms. Defendant argues that the trial court should have further defined and explained what "intending to rob Mrs. Greene" meant in order to fully explain the felonious intent necessary to constitute the crime of robbery.

[2] The felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery. The trial court is required to give some explanation of felonious intent in its charge, however, the court is not obligated to use the specific words "felonious intent." The trial court is merely obligated to give a correct description of the state of mind necessary to establish the defendant's culpability. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965); *State v. Spratt,* 265 N.C. 524, 144 S.E. 2d 569 (1965); *State v.*

Potter, 20 N.C. App. 292, 201 S.E. 2d 205 (1973); *State v. Moore*, 19 N.C. App. 368, 198 S.E. 2d 760 (1973).

[3] Considering the entire charge in the instant case the trial judge sufficiently described all of the elements of armed robbery including the necessary felonious intent. The jury was instructed "that at the time of the taking and carrying away the defendant *intended to rob* Mrs. Greene. Fifth, that the defendant *knew that he was not entitled to take the property.*" (Emphasis added.) The trial judge further charged the jury that if "the defendant knowing that he was not entitled to take the property and *intending at that time to rob* Mrs. Greene of the property *permanently*" he should be found guilty. (Emphasis added.) The expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose. *State v. Spratt, supra.*

[4] Finally, the defendant alleges that the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery. Defendant's argument has no merit. Where all the evidence tends to show that defendant was guilty of a completed armed robbery, the trial court did not err in failing to charge the jury as to the lesser included offense of common law robbery. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948).

Having considered all the assignments of error we find that the trial was free of prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RALPH O. JACKSON

No. 7512SC556

(Filed 5 November 1975)

1. Robbery § 5— failure to submit simple assault — no error

The trial court in a prosecution for armed robbery did not err in failing to submit to the jury the lesser included offense of simple assault where no evidence was introduced tending to establish that the victim was not robbed.

2. Criminal Law § 140— sentence imposed to run consecutively with other sentences

The trial court's judgment ordering confinement for a period of three years "to commence at the expiration of any and all sentences herebefore imposed upon the defendant" clearly reflected an intent to make the sentence run consecutively with other sentences imposed on the defendant.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 8 April 1975, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 October 1975.

Defendant was tried on an indictment charging him with armed robbery. The jury returned a verdict of guilty of common law robbery.

The State's evidence tended to establish that James Guy met with the defendant, an old acquaintance, at a St. Paul's grill from which the two men later left together to go to the motel for drinks. About 12:30 a.m. Guy and the defendant went out to eat and the defendant met and talked with several of his friends. After eating the defendant appeared to offer a friend, Robert Clark, a ride home. Instead, the defendant drove to a secluded dirt road where he and Clark got out of the car pretending that they "had to use the bathroom." Clark cursed obscenities at Guy and threatened to shoot him. The defendant took Guy's wallet and divided the money while Clark held a knife on Guy's neck. Guy managed to effect a successful escape and later notified the police authorities.

From a judgment imposing a prison sentence, the defendant appealed to this Court.

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

Mary Ann Tally, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

ARNOLD, Judge.

[1] Two arguments are presented by defendant in this appeal. First he contends that the trial court erred in failing to submit to the jury the issue of whether the defendant was guilty of the lesser included offense of simple assault. It is a well established rule that a trial court does not commit error by failing to submit to the jury lesser included offenses of which there is

no supporting evidence. *State v. Capel,* 21 N.C. App. 311, 204 S.E. 2d 226 (1974); *State v. Alexander* and *State v. Propst,* 13 N.C. App. 216, 185 S.E. 2d 302 (1971); *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194 (1966). In the instant case no evidence was introduced tending to establish that James Guy was not robbed.

[2] Defendant next contends that the judgment of the court was so vague and uncertain that the sentence should run concurrently with any sentence or sentences the defendant is presently serving. The judgment imposed on defendant ordered confinement for a period of 3 years "[t]o commence at the expiration of any and all sentences herebefore imposed upon the defendant." Defendant argues that the judgment requires evidence outside of the record, citing *In re Swink,* 243 N.C. 86, 89 S.E. 2d 792 (1955). See also *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169 (1945).

This Court held in *State v. Lightsey,* 6 N.C. App. 745, 171 S.E. 2d 27 (1969), that the imposition of a sentence "to begin at the expiration of any and all sentences the defendant is now serving in the North Carolina Department of Corrections" clearly indicates the intent of the trial judge that the sentence be served consecutively without resort to evidence aliunde. There is no doubt whatsoever that the trial court's judgment in the instant case clearly reflects an intent to make the sentence run consecutively with other sentences imposed on the defendant. *In re Smith,* 235 N.C. 169, 69 S.E. 2d 174 (1952); *State v. Thompson,* 16 N.C. App. 62, 190 S.E. 2d 877 (1972); *State v. Lightsey, supra.*

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JODIE VERNON AUSTIN

No. 7520SC562

(Filed 5 November 1975)

Criminal Law § 34— testimony that defendant committed another crime — testimony invited by defendant

In a prosecution for maliciously damaging real property, the trial court did not err in allowing defendant's daughter who was a State's

witness to testify on redirect examination that her father expected her to have sex with him and that he had threatened her on several occasions where on cross-examination defendant sought to impeach the credibility of his daughter by implying that she was a disobedient daughter whom he often had to discipline and that she was testifying out of spite.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 5 February 1975 in Superior Court, UNION County. Heard in the Court of Appeals 20 October 1975.

Defendant was charged in a warrant with the offense of maliciously damaging real property. He was found guilty in district court and appealed to the superior court where he was tried *de novo* upon the original warrant.

The State's evidence tended to show the following: At approximately 5:00 p.m. on Saturday, 24 June 1972, Trooper Donald E. Stone of the North Carolina Highway Patrol observed a small boy operating a "go-cart" in the parking lot of Little King Restaurant in the town of Wingate. Trooper Stone went to the parking lot and spoke with the small boy, advising him that he was operating the "go-cart" in a very reckless manner. Defendant's truck was parked in the parking lot, and defendant ran over to Trooper Stone. He told Trooper Stone that he would let his son operate the "go-cart" any way he wanted to operate it and that defendant would just kill all of the s.o.bs. in law enforcement. Defendant threatened the trooper with a screwdriver, but then loaded the "go-cart" on his truck and left, saying "I want you to remember I'll kill you and the rest of the s.o.bs." Between 9:00 and 9:30 that night, defendant fired a shotgun through the picture window of the living room in Trooper Stone's residence in the town of Wingate. The trooper and his family were not at home at the time. Defendant returned to his home, told his family he shot out the trooper's window, told them to say he had been at home all night, put his shotgun away, and went to bed. Defendant offered no evidence.

The jury found defendant guilty as charged, and judgment of imprisonment for two years was entered. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Alan S. Hirsch, for the State.

James E. Griffin and Charles D. Humphries, for the defendant.

BROCK, Chief Judge.

At trial defendant's daughter testified as a witness for the State. The only assignment of error brought forward and argued in defendant's brief relates to a portion of his daughter's testimony.

On cross-examination defendant sought to impeach his daughter's testimony by obtaining her admission that she had had numerous arguments with her father and that she was bitter towards her father. On redirect examination the State sought to reestablish her credibility by showing what caused the arguments and bitterness. The following transpired on redirect:

"Q. If you will state what the problem has been between—

MR. GRIFFIN: Objection.

COURT: Overruled.

Q. What is the problem between you and your father since that time?

A. He gets mad and he expects me to have sex with him.

MR. GRIFFIN: Move to strike.

COURT: Denied.

My father has threatened me on several occasions."

Defendant argues that he did not place his character in issue, and therefore the State is not allowed to offer evidence of another distinct criminal act. Defendant argues the well-known principle that, ordinarily, evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, is not admissible. Defendant cites *State v. Rinaldi,* 264 N.C. 701, 142 S.E. 2d 604 (1965); and Stansbury's North Carolina Evidence, Brandis Revision, §§ 104 and 108. The exceptions to the above general rule are set out with particularity in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954).

However, in our view, neither the general rule nor the exceptions thereto are applicable to the present case. Here, on cross-examination the defendant sought to impeach the credibility of his daughter by inferring that she was a disobedient

daughter whom he had often had to discipline and that she was testifying out of spite. The State had a right to have her explain the reason for her frequent arguments with her father and the reason for her bitterness. This is so even though the testimony may not have been competent in the State's examination in chief. "Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so." *State v. Glenn,* 95 N.C. 677 (1886); *see also* Stanbury's North Carolina Evidence, Brandis Revision, § 45. In our opinion defendant opened the door for the daughter's explanation, and he should not now be heard to complain.

No error.

Judges HEDRICK and CLARK concur.

NORTH CAROLINA REAL ESTATE LICENSING BOARD AND W. L. LEITSCH v. M. D. WOODARD T/A WOODARD REALTY CO.

No. 754SC524

(Filed 5 November 1975)

1. **Brokers and Factors § 8— revocation of real estate broker's license — construction of statute**

   The statute empowering the Real Estate Licensing Board to revoke the license of a real estate broker or salesman, G.S. 93A-6, is penal in nature, is in derogation of the common law, and must be strictly construed.

2. **Brokers and Factors § 8— suspension of real estate broker's license — insufficiency of findings**

   Finding by the Real Estate Licensing Board that "there is substantial evidence" that a real estate agent acted in violation of G.S. 93A-6(a)(8) in certain respects was insufficient to support a suspension of the agent's license since it was necessary for the Board to find that the agent "is deemed guilty of" a violation of the statute before his license could be suspended.

APPEAL by respondent from *James, Judge.* Judgment entered 28 March 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 15 October 1975.

W. L. Leitsch filed a complaint with the North Carolina Real Estate Licensing Board alleging misconduct on the part of M. D. Woodard, t/a Woodard Realty Co. Woodard requested

a hearing. The Licensing Board appointed a trial committee. At the hearing on 28 June 1974, Leitsch testified that Woodard advertised a house for sale, that he and Woodard signed a sales contract on 2 January 1971, providing for the delivery of a deed to Leitsch, the assumption of an existing debt, and the execution of a note secured by second mortgage, providing for monthly payments; and that he made the monthly payments until March 1974, when he learned that he did not have a deed and the land was not registered in his name.

Woodard testified that he repeatedly explained to Leitsch that the owners would not execute the deed until balance due on the purchase price above the assumed debt was paid in full. A deed was made to Leitsch on 5 June 1974.

The Board entered an order on 8 August 1974 finding facts substantially as set out above and concluded that "there is substantial evidence that . . . Woodard . . . acted in violation of G.S. 93A-6(8)" in that he did not adequately inform Leitsch of the transaction and in that he permitted Leitsch to make monthly payments unaware that title had not passed. It was ordered Woodard's license be suspended for 90 days. Woodard appealed to the Superior Court. From the judgment affirming the Board's order, defendant appeals.

Attorney General Edmisten by Deputy Attorney General Millard R. Rich, Jr., for North Carolina Real Estate Licensing Board, plaintiff appellee.

Ellis, Hooper, Warlick, Waters & Morgan by Harold L. Waters for respondent appellant.

CLARK, Judge.

G.S. 93A-6 grants power to the Real Estate Licensing Board to suspend or revoke a license "where the licensee . . . *is deemed to be guilty of*" (emphasis added) certain acts thereafter enumerated. This provision requires the Board to make a determination of the facts from the evidence before it and then conclude that the licensee is "guilty of" one or more of those acts before it can revoke or suspend a license. The conclusion that "there is substantial evidence" of a violation of the statute is not a determination of guilt. Substantial evidence of a violation falls far short of the required finding that the licensee "is deemed guilty" of such violation. The licensee may offer substantial evidence of innocence. Where the evidence is conflicting the

Board must resolve the conflict by finding facts and then conclude whether these facts constituted a violation of the statute.

[1] G.S. 93A-6 which empowers the Board to revoke the license of a real estate broker or a salesman is penal in nature, is in derogation of the common law, and must be strictly construed. *In re Dillingham,* 257 N.C. 684, 127 S.E. 2d 584 (1962); *Licensing Board v. Coe,* 19 N.C. App. 84, 198 S.E. 2d 19 (1973).

The courts will not review or reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable, or arbitrary action, or disregard of law. The findings of the agency must be made in accordance with the legal meaning of the terms of the statute. 1 Strong, N. C. Index 2d, Administrative Law, § 5, p. 43 (1967).

[2] Because of the failure to find as a fact the acts or conduct constituting a violation of G.S. 93A-6(a)(8) and to conclude that the licensee "is deemed to be guilty" of such violation, this proceeding is remanded to the Superior Court for remand to the North Carolina Real Estate Licensing Board for vacation of the license suspension, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. BOBBY SIMPSON

No. 7525SC529

(Filed 5 November 1975)

Constitutional Law § 32— probation revocation hearing — right to counsel

The trial court erred in conducting a hearing revoking defendant's probation where defendant was not represented by counsel. G.S. 15-200.1.

APPEAL by defendant from *Ferrell, Judge.* Order entered 6 February 1975 in Superior Court, BURKE County. Heard in the Court of Appeals 14 October 1975.

This is an appeal from an order revoking defendant's probation and activating a prison sentence imposed 23 February

1971 in the Superior Court of Burke County following defendant's pleas of guilty to misdemeanor breaking and entering and misdemeanor larceny.

On 9 August 1974 a hearing was held before Judge Thornburg on the State's motion to revoke the probation. At that hearing Judge Thornburg found as a fact that the defendant had violated the terms and conditions of probation but did not enter an order revoking probation. Instead he continued the hearing until 18 November 1974 where he conducted a further hearing. At this latter hearing, the defendant was represented by counsel. Judge Thornburg again found as a fact that the defendant had violated the terms and conditions of his probation as follows:

> "That the defendant has wilfully and without lawful excuse violated the terms and conditions of the probation judgment, however, the Court accepts the fact that the defendant has caught his support payments up to date on this date."

Judge Thornburg did not revoke defendant's probation at the November hearing but entered an order in pertinent part as follows:

> " . . . this probation hearing is continued until February 3, 1975, upon condition that he keep his support payments up to date as ordered July 30, 1974, in the Burke County District Court."

On 5 February 1975 this matter came on for hearing before Judge Ferrell who, on 6 February 1975, made findings and conclusions that the defendant had violated the terms and conditions of his probation and entered an order revoking the probation and activating the prison sentences theretofore imposed.

Defendant appealed.

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

Simpson, Martin, Baker & Aycock by Samuel E. Aycock for defendant appellant.

HEDRICK, Judge.

When this matter came on for hearing before Judge Ferrell on 5 February 1975, the defendant was not represented by

counsel. The record indicates the court reviewed the record and particularly the orders entered by Judge Thornburg following the hearings on 9 August and 18 November 1974. Apparently Judge Ferrell talked to the defendant regarding his employment status and questioned the clerk regarding "any other violations." Although Judge Ferrell incorporated in his findings of fact the findings made by Judge Thornburg in his two orders, it seems clear he revoked the defendant's probation on a finding that the defendant had failed to support his family pursuant to an order of the district court entered on 30 July 1974. If the defendant did in fact fail to support his family in violation of the district court's order, and such was a violation of a condition of probation, it occurred between 18 November 1974 and 5 February 1975, since Judge Thornburg found as a fact "that the defendant has caught his support payments up to date on this date."

Defendant contends, and the State concedes, error in that defendant was not represented by counsel at the hearing on 5 February 1975 before Judge Ferrell. G.S. 15-200.1; *State v. Atkinson,* 7 N.C. App. 355, 172 S.E. 2d 249 (1970). While the record indicates that the defendant was represented by counsel at the hearing before Judge Thornburg on 18 November 1974, it is clear he was not represented by counsel at the continued hearing wherein Judge Ferrell revoked the probation. Indeed, the record strongly suggests that no meaningful hearing was really conducted by Judge Ferrell.

For the reasons stated the order revoking defendant's probation is vacated and the cause is remanded to the superior court for further proceedings.

Vacated and remanded.

Chief Judge BROCK and Judge CLARK concur.

ALPINE VILLAGE, INC. v. LOMAS & NETTLETON FINANCIAL CORPORATION

No. 7512DC424

(Filed 5 November 1975)

Rules of Civil Procedure § 56— summary judgment before defendant's answer

Summary judgment for plaintiff was premature where defendant had filed no answer, summary judgment was entered and defendant's Rule 12(b)(6) motion to dismiss was denied on the same date, defendant still had 20 days after notice of the denial of its Rule 12(b)(6) motion in which to file answer, and defendant had not waived its right to file answer, since the trial court could not anticipate what defendant's answer would be if it filed answer.

APPEAL by defendant from *Herring, Judge.* Judgment entered 15 April 1975 in District Court, CUMBERLAND County. Heard in the Court of Appeals 16 September 1975.

This is a civil action wherein the plaintiff, Alpine Village, Inc., seeks to recover from the defendant, Lomas & Nettleton Financial Corp., $3,500.00, allegedly paid by it for services which the defendant never rendered.

On 19 December 1974 plaintiff's complaint was served on defendant. By stipulation, filed 16 January 1975, the parties agreed that defendant would have "up to and including thirty (30) days from 19 January 1975, in which to file an answer." On 18 February 1975, within the thirty (30) days, defendant filed and served on plaintiff a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. On 20 February 1975, plaintiff filed a motion for summary judgment which was served on 27 February 1975. Plaintiff's motion was supported by an affidavit which reiterated the allegations of the complaint. Upon motion made by defendant on 21 March 1975, the hearing on both the motion to dismiss and the motion for summary judgment was continued until 1 April 1975. On 26 March 1975 defendant, in opposition to the motion for summary judgment, filed an affidavit wherein a vice president of defendant corporation denied, on information and belief, the material allegations on the complaint and the affidavit filed in support of the motion for summary judgment. On 1 April 1975, a hearing on both motions was held, and Judge Herring denied defendant's 12(b)(6) motion and

allowed plaintiff's motion for summary judgment. Defendant appealed.

Smith & Geimer by Kenneth Glusman for plaintiff appellee.

Pope, Reid & Lewis by Marland C. Reid for defendant appellant.

HEDRICK, Judge.

Although the record indicates that defendant excepted to the order denying its 12(b)(6) motion, defendant has failed to bring forward and argue this exception in its brief. It is, therefore, deemed abandoned. Moreover, it is clear that the complaint does state a claim upon which relief can be granted.

Defendant assigns as error the entry of summary judgment for plaintiff. Since G.S. 1A-1, Rule 56(a) provides that claimant may file a motion for summary judgment at any time thirty days after the commencement of the action and G.S. 1A-1, Rule 6(b) provides that the time within which to file responsive pleadings may be extended for thirty days, summary judgment for claimant, under some circumstances, might be appropriate before the responsive pleading has been filed or even before the time to file responsive pleadings has expired.

In the present case, defendant filed no answer, but it had twenty days after it received notice that its 12(b)(6) motion had been denied within which to file an answer. G.S. 1A-1, Rule 12(a)(1). The affidavit filed by defendant in opposition to plaintiff's motion for summary judgment denied the material allegations of plaintiff's complaint; but this affidavit was rejected and not considered by the court because it was not in the form prescribed by Rule 56(e). We note the court's ruling in this regard was correct.

If the rejected affidavit had been filed as an answer, it would have raised genuine issues of material fact and summary judgment for plaintiff obviously would have been inappropriate. Since the defendant had not waived its right to file an answer and the defendant had even moved that the hearing on plaintiff's motion for summary judgment be continued, and the trial court could not anticipate what defendant's answer would be if it did in fact file an answer, summary judgment for plaintiff under the circumstances of this case was premature. Because of the unusual posture of the case at the time summary judg-

ment was entered for plaintiff, we need not consider the legal effect of the affidavit filed by plaintiff in support of its motion for summary judgment. *See Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Shearin v. National Indem. Co.*, 27 N.C. App. 88, 218 S.E. 2d 207 (1975).

For the reasons stated the judgment appealed from is vacated and the cause remanded to the district court for further proceedings.

Vacated and remanded.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. CALVIN MONROE

No. 755SC594

(Filed 5 November 1975)

1. **Constitutional Law § 37; Criminal Law § 75— waiver of rights form misplaced — confession voluntary**

Evidence was sufficient to support the trial court's findings that defendant's constitutional rights were explained to him, a waiver was explained to him, defendant knowingly, understandingly and voluntarily signed the waiver, but the waiver was subsequently mislaid, and defendant's confession was given freely, voluntarily and without duress.

2. **Constitutional Law § 37; Criminal Law § 81— waiver of rights form misplaced — best evidence rule inapplicable**

Introduction of oral testimony to show that defendant signed a written waiver of his rights was not precluded by the best evidence rule since the issue was not the contents or terms of the written document itself but was instead whether defendant knowingly and voluntarily waived his rights; furthermore, the State was not required to produce a signed written waiver of rights in order to make the confession admissible.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 28 February 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 23 October 1975.

Defendant was tried on a bill of indictment charging him with the felony of assault with a deadly weapon with intent to kill inflicting serious injury. He pled not guilty.

State's witness, James Rhodes, an employee of the Yellow Cab Company, testified that on 20 November 1974 at about 8:30 p.m., after receiving a call, he drove his cab to the intersection of Love's Alley and Taylor Street in Wilmington. No one was with him. Upon arriving, he was approached by three males who "automatically started shooting." Rhodes was struck in the head twice with .22 caliber rifle bullets. Rhodes could not identify the defendant as one of his assailants.

The State offered testimony on voir dire of Sgt. W. C. Brown to show that on 23 November 1974 the defendant, after being informed of his constitutional rights and signing a waiver of those rights, voluntarily confessed to participation in the crime. Sgt. Brown testified that he signed the waiver form as a witness but was unable to produce this written waiver and did not know where it was. Detective Todd testified on voir dire that he "saw a Rights Waiver that was signed by Calvin Monroe on the 23rd lying on Lt. Davis's desk."

The defendant denied that he had confessed to having participated in the shooting and offered evidence to show an alibi.

The jury found defendant guilty of assault with a deadly weapon inflicting serious bodily injury, and from judgment on the verdict, defendant appealed.

Attorney General Edmisten by Associate Attorney General David S. Crump for the State.

James K. Larrick for defendant appellant.

PARKER, Judge.

[1] Defendant contends that the court erred in admitting testimony of Sgt. Brown concerning defendant's oral confession. After extensive voir dire examination in which Sgt. Brown, Detective Todd, and defendant testified, the trial judge made findings of fact that on 23 November 1974 Sgt. Brown read to defendant his constitutional rights, explained them in detail, explained the waiver, and that "the defendant knowingly and understandingly and voluntarily signed a waiver which has since been misplaced." The court's findings were supported by competent evidence and these findings in turn support the court's conclusion that the defendant's statement was given freely and voluntarily and without duress.

[2] Defendant contends that the best evidence rule should have precluded the introduction of oral testimony to show that he signed the written waiver. This contention is without merit. What was at issue here was whether defendant knowingly and voluntarily waived his rights, not what were the contents or terms of the written document itself. The best evidence rule had no application to this case. 2 Stansbury, N. C. Evidence 2d (Brandis Rev. 1973) § 191. Furthermore, the State was not required to produce a signed written waiver of rights in order to make the confession admissible. Although such a writing was necessary under former G.S. 7A-457(a) to show waiver by an indigent defendant of his right to be represented by counsel, *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971), this requirement was deleted for all except capital cases by the 1971 amendment to that statute.

No error.

Judges MORRIS and MARTIN concur.

IRENE S. FELLOWS v. DAVID A. FELLOWS

No. 7510DC515

(Filed 5 November 1975)

1. Appeal and Error § 42— oral testimony not in record — presumption

Where the record does not contain oral testimony before the trial court, the court's findings of fact are presumed to be supported by competent evidence.

2. Attorney and Client § 7; Divorce and Alimony § 23— award of attorney fees — findings required

Where this cause was heard upon plaintiff's motion for an increase in child support payments and upon defendant's motion for a modification of the child custody order, the trial court's award of attorney fees did not have to be supported by a finding that the party ordered to furnish support (defendant) had refused to provide support which was adequate at the time of the institution of the action.

APPEAL by defendant from *Barnette, Judge.* Order entered 24 January 1975 in District Court, WAKE County. Heard in the Court of Appeals 14 October 1975.

Defendant is a former husband of plaintiff and appeals from an order increasing child support payments and awarding $500 fee to plaintiff's attorney.

Gulley & Green, by Jack P. Gulley, for plaintiff appellee.

Vaughan S. Winborne for defendant appellant.

BRITT, Judge.

First, defendant contends the court erred in making findings of fact concerning the financial needs of his three children and in concluding as a matter of law that there had been a substantial change in circumstances between 28 August 1972 and 24 January 1975, requiring an increase in support payments. We find no merit in the contention.

[1] While the record on appeal contains certain documents which were before the court at the hearing of this cause, the order reveals that oral testimony was presented. The record does not contain the oral testimony; therefore, the court's findings of fact are presumed to be supported by competent evidence. *Christie v. Powell,* 15 N.C. App. 508, 190 S.E. 2d 367 (1972), *cert. denied,* 281 N.C. 756, 191 S.E. 2d 361 (1972); *Cobb v. Cobb,* 10 N.C. App. 739, 179 S.E. 2d 870 (1971). The findings of fact support the conclusions of law with respect to a material change in circumstances, and the findings and conclusions fully support provisions of the order increasing support payments.

Next, defendant attempts to raise the question as to consideration and effect the court gave to defendant's new marriage and his responsibilities arising therefrom. Since we do not have before us all of the evidence the trial judge had before him, we are unable to pass upon this question.

[2] Finally, defendant contends the court did not make sufficient findings of fact and conclusions of law to justify awarding attorney fees. This contention is without merit.

Defendant argues that the following provision of G.S. 50-13.6 is applicable: " . . . Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; . . . . " Defendant points out that the court made no findings in compliance with the quoted provision.

Plaintiff argues that the following provision of said statute applies: "In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may *in its discretion* order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. . . . " (Emphasis added.)

We agree with plaintiff. The record discloses that after plaintiff filed her motion on 12 March 1974 asking for an increase in support payments, defendant filed a motion asking that custody of the children be taken from plaintiff and awarded to him. Although we do not have a record of the proceedings before the trial court, the order appealed from states that the cause was heard on plaintiff's motion for an increase in support payments *and* upon defendant's motion for a modification of the custody order. That being true, the court's award of attorney fees did not have to be supported by the findings which defendant contends were necessary.

For the reasons stated, the order appealed from is

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. LARRY DARNELL FOSTER

No. 7526SC400

(Filed 5 November 1975)

1. **Criminal Law § 118— instructions — overemphasis of State's evidence**

The trial judge in an armed robbery case erred in emphasizing the State's evidence and minimizing defendant's evidence where he gave a complete recitation of the testimony of the State's witnesses but referred to the testimony of defendant and his six witnesses only by stating that defendant contended he was elsewhere at the time of the robbery.

2. **Criminal Law § 117— instructions — defense witnesses as interested witnesses**

The trial court in an armed robbery case erred in instructing the jury that as a matter of law all of defendant's witnesses were interested witnesses.

3. Criminal Law § 113— instruction not supported by evidence

The trial court's statement in its instructions that defendant had said on cross-examination that he had given a detective a "statement implicating himself in this crime of robbery" was unsupported by the evidence and prejudicial to defendant.

ON *certiorari* to review trial before *Falls, Judge.* Judgment entered 13 February 1974 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 September 1975.

Defendant was convicted of armed robbery. The State offered evidence tending to show that about midnight on 4 July 1973, Thomas William Little was at a cafe in Charlotte. As he was leaving the cafe, a person whom Little identified as defendant, was standing near Little's automobile and asked if he could "bum a ride." Little said that he could.

After the two men had ridden for a short distance, defendant, pistol in hand, made it known to Little that he was going to rob him. Little was directed to some off-the-street location where his pockets and wallet were emptied, and defendant fled on foot. Defendant took money, credit cards, a watch and a cigarette lighter from Little.

The State introduced evidence that on 11 July 1973, defendant and another man attempted to make a purchase of clothing from a local store. The man who accompanied defendant presented a Master Charge card issued to Thomas W. Little in tender of payment for the goods. Little had identified the card as being in his wallet on the night of the robbery and one that had been stolen from him.

Defendant offered evidence, through himself and six other witnesses, to the effect that he and a group of friends had been on an outing to Chimney Rock Mountain the afternoon of 4 July 1973. Upon his return to Charlotte, defendant attended a party from about 10:30 p.m. on 4 July to about 3:00 a.m. 5 July. Defendant's evidence further showed that he did not leave the party during this period of time.

Additionally, defendant offered evidence to show that he did not know the credit card was stolen but that he and his brother had been in the store earlier referred to and that his brother had attempted to use the card to pay for the purchase. He initially told police officers he did not know the man he was with in the store in an effort to protect his brother.

From the imposition of a prison sentence, the defendant gave notice of appeal. Court-appointed counsel failed to perfect the appeal for the defendant, and new counsel was appointed to petition for Writ of Certiorari. We allowed his petition by order dated 20 February 1975.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

Craighill, Rendleman & Clarkson, P.A., by Hugh B. Campbell, Jr., for defendant appellant.

VAUGHN, Judge.

All of defendant's assignments of error are directed against the court's charge to the jury. Defendant contends that the judge emphasized the State's evidence and minimized that for defendant, erroneously instructed the jury as a matter of law that all of defendant's witnesses were interested witnesses and made misstatements of material facts not shown in the evidence.

[1, 2] We conclude that defendant's exceptions are well taken. The court appears to have given a fairly complete recitation of the testimony of each of the witnesses for the State. About the only reference to the direct testimony of defendant and his six other witnesses was to state that defendant contends he was elsewhere at the time of the robbery. The jury could also fairly conclude from his charge that the judge had determined that all of defendant's witnesses were interested witnesses, a determination not warranted by the record.

The jury was also told that, on cross-examination, defendant had said that he had given a detective "a statement implicating himself in this crime of robbery." This instruction is not supported by any view of the evidence in the record before us. Defendant denied any knowledge or involvement in the robbery. The prejudice inherent in the misstatement that defendant had confessed is apparent. Since there must be a new trial we need not discuss the remaining exceptions to the charge.

New trial.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. RANDALL BRICE HARRIS

No. 7526SC507

(Filed 5 November 1975)

Constitutional Law § 37; Criminal Law § 75— confession — oral waiver of rights

A confession obtained during custodial interrogation is inadmissible unless the defendant has signed a written waiver of rights, or at the very least, orally stated that he waives his rights; an oral statement that defendant *understands* his rights is not enough.

APPEAL by defendant from *Baley, Judge.* Judgment entered 7 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1975.

Defendant, Randall Brice Harris, was charged in a bill of indictment, proper in form, with the 11 October 1974 armed robbery of Debbie Adams. Upon the defendant's plea of not guilty, the State offered evidence tending to show that Debbie Adams was riding as a passenger in a car operated by Mary McKinney. Mary McKinney drove into the parking lot of a restaurant, and as she was parking, defendant walked up to the car. He pointed a pistol at Debbie Adams, took her handbag off her shoulder, and ran away. B. C. Hamlin, a Charlotte policeman, testified that on 18 October 1974, while being questioned in the Mecklenburg County Law Enforcement Center, defendant confessed to the robbery of Debbie Adams.

Before Hamlin testified as to defendant's confession, a voir dire hearing was held to determine whether this evidence was admissible. Evidence offered at the voir dire hearing tended to show that before questioning defendant on 18 October 1974, Hamlin advised defendant of his constitutional rights and asked defendant to sign a waiver form. Defendant said that he understood his rights but refused to sign the waiver. Hamlin then proceeded to question him, and he orally confessed to the crime. The court held that defendant had waived his constitutional rights and that his confession was admissible.

Defendant offered evidence tending to show that he was at the home of his parents on the night of 11 October 1974.

From a verdict of guilty as charged and the entry of judgment imposing a prison sentence of twelve (12) to fifteen (15) years, defendant appealed.

Attorney General Edmisten by Associate Attorney William H. Guy and Associate Attorney James Wallace for the State.

Lacy W. Blue for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error denial of his timely motions for judgment as of nonsuit. The record contains plenary competent evidence requiring the submission of this case to the jury on the charge of armed robbery.

Defendant assigns as error the admission into evidence of his oral confession to Officer Hamlin. Before the officer was permitted to testify as to the defendant's alleged confession, a voir dire inquiry was conducted to determine the admissibility of his testimony. After the voir dire, Judge Baley made findings of fact and drew the following pertinent conclusion:

> 4. "That he purposely, freely, knowingly, voluntarily and understandingly waived each of his rights and made a statement to the officer above mentioned."

Defendant contends, and we agree, that this conclusion is not supported by the evidence and the findings of fact. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), appears to be indistinguishable from the present case. In that case the defendant was questioned by law enforcement officers after being fully and properly advised of his constitutional rights. He expressly stated that he understood his rights, but he did not sign a written waiver of rights. The officers proceeded with the questioning, and defendant confessed to the crime with which he was charged. The Supreme Court held that his confession was inadmissible because he did not waive his constitutional rights. *Blackmon* establishes the rule that a confession obtained during custodial interrogation is inadmissible unless the defendant has signed a written waiver of rights, or at the very least, orally stated that he waives his rights. An oral statement that the defendant *understands* his rights is not enough. *Blackmon* further holds that the improper admission of a defendant's confession cannot be considered harmless error. *Id.* at 50.

Since our decision requires a new trial, it is not necessary that we discuss defendant's other assignments of error.

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. CONNIE LEE CRAWFORD

No. 7514SC444

(Filed 5 November 1975)

Larceny § 5— possession of recently stolen property — instruction proper

In a prosecution for breaking and entering and larceny, evidence identifying the items in defendant's possession several hours after the breaking and entering as the items taken during the crime was sufficient to warrant an instruction to the jury on the presumption arising from the possession of recently stolen property.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 14 January 1975, Superior Court, Durham County. Heard in the Court of Appeals 17 September 1975.

Defendant pled not guilty to a charge of breaking and entering Lawson's T.V. and Appliance Store and larceny therefrom.

The State's evidence tends to show that Lawson went to his business about 7:00 a.m. on 2 August 1974 and found a front glass window broken. There was blood on the window and several items were missing from the store. A fingerprint was lifted from the metal molding around the window and a fingerprint expert found eleven identical points of comparison with defendant's fingerprints.

Detective Hayes testified that he received a telephone tip from an informant about 8:00 a.m. the morning of 2 August 1974, and pursuant to that tip found defendant and a codefendant walking down the street, one carrying an amplifier, the other a radio, both covered with towels while being carried. The items were both identified by Lawson as items stolen from his store. The other stolen property was later recovered from a nearby creek.

Defendant neither testified nor offered evidence in his defense.

The jury found defendant guilty of both the breaking and entering and larceny charges. From consecutive sentences to prison, defendant appeals.

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

John C. Wainio for defendant appellant.

CLARK, Judge.

The defendant assigns as error the charge of the trial court on the presumption of possession of recently stolen property, contending that the property found in the possession of the defendant was not sufficiently identified as the stolen property. He relies on *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966), where the owner testified that he was unable to identify the six new Phillips 66 tires found in the possession of defendant but that they were the same brand and size as the tires stolen from his place of business. The court ruled that the evidence was not sufficient to support a verdict of guilty of the theft of the tires, but it upheld the conviction of the defendant for the misdemeanor theft of the battery charger which the owner identified as his property on the basis of a broken prong and a burn mark.

The State's evidence in this case tends to show that the amplifier and radio in possession of defendant and another several hours after the breaking and entering and theft were identified by the owner, who testified that he recognized the amplifier "from seeing it and using it so much," and that he recognized the radio as being the last one of a group that had on it a price tag in his handwriting.

It is not necessary that stolen property be unique to be identifiable. Often stolen property consists of items which are almost devoid of identifying features, such as coins and goods which are mass produced and nationally distributed under a brand name. When such items are the proceeds of a larceny, their identity as being in the possession of the accused must necessarily be drawn from other facts satisfactorily proved. 52A C.J.S., Larceny, § 95 (1968); *State v. Watson*, 10 N.C. App. 168, 177 S.E. 2d 771 (1970).

We find the identification evidence sufficient to warrant the charge on the presumption arising from the possession of recently stolen property. And we find no error in the charge on this presumption.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT LIPSCOMB

No. 7527SC451

(Filed 5 November 1975)

1. **Criminal Law § 139; Robbery § 6— minimum and maximum sentence the same — no error**

In a prosecution for armed robbery, the trial court did not err in sentencing defendant to prison "for the term of not less than thirty (30) years" without specifying a minimum term, since the maximum punishment for armed robbery was thirty years, and the judge set the minimum sentence at the maximum allowed by law.

2. **Criminal Law § 114— jury instructions — no expression of opinion by court**

Where there was considerable emphatic testimony of witnesses identifying defendant as the robber who wore the mask, the trial court's statement in its jury instructions that, "The State offered evidence further tending to show that there was no question but that the defendant was the participant with the stocking on his head and face," was an attempted paraphrase of the witnesses' testimony and did not amount to an expression of opinion by the court that a material fact had been proven.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 7 February 1975 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 18 September 1975.

Defendant was convicted of armed robbery. Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

Robert L. Harris, for defendant appellant.

VAUGHN, Judge.

[1] In pertinent part, the judgment from which defendant appeals is as follows:

> "It is ADJUDGED that the defendant be imprisoned for the term of *not less than thirty (30) years* in the Cleveland County Jail to be delivered to the Department of Correction, said sentence to commence at the expiration of and to run consecutively with the sentence or sentences imposed in 73CR2253 and 73CR2254 out of Rutherford County Superior Court." (Emphasis added.)

Citing *State v. Black,* 283 N.C. 344, 196 S.E. 2d 225, defendant argues that the court erred in not specifying a maximum period of imprisonment and suggests that there must be a difference between the minimum and maximum term imposed.

At the time the case was tried the maximum sentence for armed robbery was 30 years. G.S. 14-87. Defendant was sentenced to a term of not less than 30 years. The judge, therefore, set the minimum sentence at the maximum allowed by law. There is no requirement that he do otherwise. There is no requirement that the judge pronounce an indeterminate sentence. By the express terms of the statute it may be utilized in the "discretion" of the judge. G.S. 148-42.

[2] Defendant also contends that the judge expressed an opinion on whether a material fact had been proven. The State's evidence tended to show that three men participated in the robbery. One of them, defendant, was wearing a mask made from a dark stocking which came down to the end of his nose. It did not go completely over his head. The witnesses said they could see through the stocking and distinctly observe his nose, eyes and the contour of his face. The witnesses were emphatic in their identification of defendant as being the robber who wore the mask. They went into considerable detail about the physical characteristics that made them "positive" that defendant was the masked robber. In recapitulating the evidence the judge made the following statement and defendant excepts to the sentence in parentheses:

> "(The State offered evidence further tending to show that there was no question but that the defendant was the participant with the stocking on his head and face.)
>
> The defendant's eyes could be seen through the stocking, and his walk had a characteristic that was identifiable; that is, the defendant's walk."

It appears that the judge was attempting a paraphrase of the testimony from the several witnesses who were unequivocal in their identification of defendant and positive that he was the man they saw with the mask. When the entire charge is considered we conclude that the judge did not convey the impression that he considered a material fact sufficiently proven. Instead, he made it abundantly clear that the jury should consider only their own recollection of the evidence.

The evidence of defendant's guilt is overwhelming and includes incriminating testimony from a witness who admitted his own role in the robbery. A review of the record discloses that defendant was afforded a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

INTERIOR DISTRIBUTORS, INC. v. PROMAC, INCORPORATED; BOYCE SUPPLY COMPANY; SHAW DECORATING COMPANY, INC.; AMERICAN ACOUSTICAL & FLOORING COMPANY

No. 7510DC363

(Filed 5 November 1975)

Laborers' and Materialmen's Liens § 9— three second-tier contractors — payment on pro rata basis

Where two second-tier contractors gave written notice to the obligor of their claims, plaintiff who was also a second-tier contractor filed a notice of claim of lien in the superior court, the obligor acknowledged the three claims, withheld additional payment to the defaulting contractor and agreed to distribute the funds so withheld to the three second-tier contractors on a pro rata basis, plaintiff showed no priority or right to recover a greater percentage of his debt than the two other second-tier contractors, and the trial court properly directed payment to the three second-tier contractors on a pro rata basis. G.S. 44A-18(2); G.S. 44A-20; G.S. 44A-21.

APPEAL by plaintiff from *Winborne, Judge.* Judgment entered 20 March 1975 in District Court, WAKE County. Heard in the Court of Appeals 28 August 1975.

Promac is a general contractor. American subcontracted to do certain work for Promac and failed to complete the job. Promac owes American as a result of American's partial performance.

Plaintiff, Boyce and Shaw all furnished materials to American as second-tier subcontractors, and American is indebted to them. Boyce notified Promac of its claim in writing on 21 March 1974. Shaw gave Promac written notice of its claim on 28 March 1974. Plaintiff filed a notice of claim of lien in Wake County Superior Court (the work was performed on property

in Orange County). Promac received notice of plaintiff's claim on 9 April 1974. The form of plaintiff's notice generally followed that prescribed by G.S. 44A-19.

Promac recognized all three claims. The amount it owed American is insufficient to pay the three claims in full. It offered to make a pro rata distribution to plaintiff, Boyce and Shaw.

Plaintiff filed this suit seeking to recover all of the funds owed American and held by Promac.

The court entered judgment directing a pro rata distribution to plaintiff, Boyce and Shaw.

W. Hugh Thompson, for plaintiff appellant.

C. Horton Poe, Jr., for defendant appellee Boyce Supply Company; Spears, Spears, Barnes, Baker and Boles, by J. Bruce Hoof, for defendant appellee Shaw Decorating Company, Inc.

VAUGHN, Judge.

A second-tier subcontractor who furnishes labor or materials is entitled to a lien upon funds owed to the first-tier subcontractor with whom he dealt. G.S. 44A-18(2). The lien is perfected by giving notice to the contractor who is obligated to the first-tier contractor. Upon receipt of that notice the obligor must retain any funds subject to the lien. G.S. 44A-20. If the funds held are less than the amount of valid lien claims filed with the obligor, the parties are entitled to share the funds on a pro rata basis. G.S. 44A-21.

Here plaintiff, a second-tier contractor, contends that the other two second-tier contractors, Shaw and Boyce, are not entitled to share in the funds because their written notices to the obligor, which were given earlier than that of plaintiff, are not in the form prescribed by G.S. 44A-19. We need not decide whether the information given in the notices was in substantial compliance with that required by G.S. 44A-19. The obligor acknowledged the claims, withheld additional payment to the defaulting contractor and agreed to distribute the funds so withheld to the second-tier contractors on a pro rata basis. On the facts of this case and as between these parties, plaintiff has shown no priority or right to recover a greater percentage of his debt than have Boyce and Shaw.

The judgment of the District Court directing payment of the three second-tier subcontractors on a pro rata basis is affirmed.

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES L. LEEPER

No. 7527SC513

(Filed 5 November 1975)

Weapons and Firearms— discharging firearm into occupied dwelling — erroneous instructions

In a prosecution for wilfully or wantonly discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1, the trial court erred in giving an instruction which equated wilful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 24 January 1975 in Superior Court, GASTON County. Heard in the Court of Appeals 13 October 1975.

The defendant, James L. Leeper, was charged in a bill of indictment, proper in form, with the felony of willfully or wantonly discharging a firearm into an occupied dwelling in violation of G.S. 14-34.1. From a verdict of guilty as charged and the imposition of a prison sentence of 18 months, defendant appealed.

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

Atkins, Layton & Street, P.A., by Nicholas Street for defendant appellant.

HEDRICK, Judge.

The statute G.S. 14-34.1 under which defendant was indicted is as follows:

"*Discharging firearm into occupied property.*—Any person who wilfully or wantonly discharges a firearm into

or attempts to discharge a firearm into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a felony punishable as provided in § 14-2."

A person is guilty of the felony created by G.S. 14-34.1 "if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons." *State v. Williams,* 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973). In the instant case Judge Kirby instructed the jury in pertinent part as follows:

" . . . that the defendant acted wilfully or wantonly which means that he had knowledge that the property of Mr. McCleave's on this occasion and at this time was occupied by one or more persons or that he had reasonable ground to believe that Mr. McCleave's property on Hoffman Road might be occupied by one or more persons . . . . "

Citing *State v. Williams,* 21 N.C. App. 525, 204 S.E. 2d 864 (1974), and *State v. Williams, supra,* the defendant contends that the portion of the instruction set out above is erroneous and entitles him to a new trial. We agree. The challenged instruction equates willful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot.

The defendant at trial, and here, argues that he did not willfully, wantonly, or intentionally fire the shot into the house, but that he was firing at the steps. The record is replete with evidence tending to show that the defendant knew the house was occupied. Indeed, the defendant testified that he had just left the house where he had been assaulted immediately before firing several shots at the front steps. By equating, in the challenged instruction, willful or wanton conduct with knowledge that the house was occupied, the trial judge, in effect, removed from the jury's consideration defendant's contention that he did not willfully, wantonly, or intentionally fire the gun into the house. This error was prejudicial and entitles the defendant to a new trial.

New trial.

Judges MORRIS and ARNOLD concur.

FRANKIE CHEEK BOYER v. GEORGE W. BOYER

No. 7521DC572

(Filed 5 November 1975)

Contempt of Court § 6— failure to make child support and house payment — sufficiency of findings

The trial court's findings were sufficient to support its conclusion that defendant was in contempt of a court order to make child support payments and to make payments on a home owned by the parties as tenants by the entirety.

APPEAL by defendant from *Clifford, Judge.* Judgment entered 26 March 1975 in District Court, FORSYTH County. Heard in the Court of Appeals 21 October 1975.

On 10 May 1974 an order was entered requiring defendant, pending a final hearing on a motion relating to custody of his minor son, to pay $50 per week for the support of his minor daughter. The order also provided for plaintiff to have possession of the home owned by the parties as tenants by the entirety and "defendant should catch up any payments in arrears on said homeplace and should keep payments current on said home until the further orders of this Court." Defendant did not appeal from the order.

On 26 March 1975, pursuant to a show cause order and a hearing, the court entered an order finding, among other things, that defendant was $1,240 delinquent in making support payments required by the previous order and that he was three months delinquent in making house payments in the amount of $129 each. The court adjudged defendant in contempt and ordered that he be imprisoned until such time as he should purge himself of contempt by paying the $1,240 and the three house payments. Defendant appealed.

Wilson and Morrow, by Alvin A. Thomas and John F. Morrow, for plaintiff appellee.

Carol L. Teeter for defendant appellant.

BRITT, Judge.

Defendant's sole contention is that the facts found by the trial court are insufficient to support the order adjudging him in contempt. We find no merit in the contention. The court

found, among other things, that defendant had sold a business that he was engaged in for $24,000, that he had received $10,000 of the money and that the balance of $14,000 was being paid to him at the rate of $1,000 per month. The court further found that defendant is an able-bodied man, able to be gainfully employed, and able to comply with the orders previously entered in this cause. We hold that the findings are sufficient to support the conclusion of law and adjudication that defendant is in contempt of court.

Affirmed.

Judges VAUGHN and ARNOLD concur.

DEVONNA McCRAE HILL v. ALAN HILL

No. 7519DC527

(Filed 5 November 1975)

Attorney and Client § 7; Divorce and Alimony § 18— award of alimony pendente lite and counsel fees — insufficient findings

The trial court erred in ordering defendant to pay temporary alimony and counsel fees without making findings of fact as to whether plaintiff qualified for relief under G.S. 50-16.3.

APPEAL by defendant from *Montgomery, Judge.* Judgment entered 30 January 1975 in District Court, RANDOLPH County. Heard in the Court of Appeals 16 October 1975.

This is an action for temporary and permanent alimony without divorce, there being no children involved. Pursuant to notice, the court held a hearing with respect to temporary alimony and counsel fees. Following the hearing, the court entered an order finding certain facts and ordering, among other things, that pending further orders of the court and a final determination of the cause on the merits, that defendant pay $25 per week "for temporary subsistence" and pay $100 fee for plaintiff's counsel. Defendant appealed.

Ottway Burton and Millicent Gibson for plaintiff appellee.

DeLapp, Hedrick and Harp, by Charles H. Harp II for defendant appellant.

BRITT, Judge.

Defendant contends that the court did not make sufficient findings of fact to support its order. We agree with this contention.

G.S. 50-16.3 provides in pertinent part that a dependent spouse who is a party to an action for alimony without divorce shall be entitled to an order for alimony pendente lite when "(1) [i]t shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and (2) [i]t shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

G.S. 50-16.4 authorizes the court to enter an order for reasonable counsel fees for the benefit of a dependent spouse who is entitled to alimony pendente lite pursuant to G.S. 50-16.3. G.S. 50-16.8(f) provides that when a party applies for alimony pendente lite and a hearing is held, the judge shall *find the facts* from the evidence presented.

Specifically, defendant argues that before the court can award temporary alimony and counsel fees, in addition to other findings, it must make findings of fact as to whether plaintiff qualifies for relief under G.S. 50-16.3 and cites *Blake v. Blake*, 6 N.C. App. 410, 170 S.E. 2d 87 (1969); *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971); *Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973); *Newsome v. Newsome*, 22 N.C. App. 651, 207 S.E. 2d 355 (1974). The argument has merit.

In her complaint, plaintiff alleged that for some time after their marriage on 30 June 1973 the parties lived happily together, but thereafter defendant began using alcoholic beverages to excess, cursing and otherwise abusing plaintiff, and one occasion assaulted her. She further alleged that she was without means on which to subsist during the pendency of this action and was without funds to properly prosecute her action. Although plaintiff presented evidence supporting, and defendant presented evidence contradicting, these allegations the court made no findings with respect to them.

For failure of the court to make findings of fact on vital questions, the order appealed from must be vacated and the cause remanded for further proceedings.

Order vacated and cause remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. BONNIE SMITH LEWIS

No. 755SC448

(Filed 19 November 1975)

1. **Criminal Law § 9; Homicide § 21— aiding and abetting murder — absence of criminal intent**

The State's evidence was insufficient to support a jury finding that defendant shared her boyfriend's criminal intent to kill her husband, and defendant therefore could not be convicted of second degree murder of her husband as an aider and abettor, where the evidence tended to show that defendant and her husband engaged in an altercation near defendant's automobile, defendant shot her husband in the foot, while defendant's husband and defendant were struggling for the gun, defendant's boyfriend got out of defendant's car and shot defendant's husband three times, thereby causing his death, and after the shooting defendant and her boyfriend spent the night together in a motel.

2. **Assault and Battery § 14— felonious assault — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where it tended to show that defendant's husband stopped his pickup truck immediately behind defendant's car, defendant got out of her car carrying a gun and went to the window of the truck, an argument ensued, defendant's husband got out of the truck and advanced toward defendant, defendant stated, "I will kill you," and shot her husband in the foot, and the injury was sufficient to cause permanent impairment.

3. **Assault and Battery § 15— refusal to charge on self-defense**

The trial court did not err in the refusal to charge on self-defense in a felonious assault case where the evidence tended to show that defendant, who was armed with a gun, engaged in an argument with her unarmed husband, and as the husband advanced toward her, defendant stated, "I will kill you," and shot her husband in the foot, since there was no evidence that defendant was in such danger, either real or apparent, as would justify acting in self-defense.

4. **Assault and Battery § 13— prior threats — victim's reputation as fighting man**

The trial court in a felonious assault case did not err in the exclusion of testimony of prior threats made by the victim against defendant or of the victim's reputation as a violent and dangerous fighting man where there was no other evidence of self-defense.

5. **Criminal Law § 88— exclusion of questions calling for conclusions**

The trial court did not err in sustaining the district attorney's objections to questions asked a State's witness on cross-examination which called for conclusions by the witness.

6. **Criminal Law § 99— rulings, questions and comments by court — no expression of opinion**

The trial court did not sustain its own objections or cross-examine defendant and make comments about her credibility since the rulings, questions and comments of the court were for the purpose of clarifying defendant's testimony or were a proper exercise of the court's discretion in controlling the examination of the witness.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 13 January 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 18 September 1975.

The defendant, Bonnie Smith Lewis, was charged in one bill of indictment, proper in form, with the willful and felonious assault of William Randolph Lewis with a deadly weapon with intent to kill inflicting serious injury. She was charged in another bill of indictment, proper in form, with the murder of William Randolph Lewis. In open court the District Attorney announced that the defendant would be tried for second degree murder and assault with a deadly weapon with intent to kill resulting in serious injury. The defendant pleaded not guilty to both charges.

The State offered the testimony of three eyewitnesses which together showed the following: On 3 November 1973, at about 5:00 p.m., a car driven by the defendant was moving along the Carolina Beach Road in Wilmington, North Carolina. It stopped at an intersection called Monkey Junction and a green pickup truck driven by William Lewis, defendant's husband, stopped directly behind defendant's car. The defendant got out of her car, carrying a gun and went to the window of the truck. An argument ensued, none of the witnesses hearing exactly what was said, but the defendant was waving the gun around the window of the truck. Mr. Lewis opened the truck door and the defendant began backing away toward her car. Mr. Lewis got out of the truck and walked toward the defendant. As he advanced toward her, she said, "I will kill you." The gun was aimed at a downward angle; and as he came toward her, she fired, shooting Mr. Lewis in the foot.

After the defendant shot, her husband grabbed for the gun, holding on to her hand and her elbow. A few seconds after this, Tom Richardson got out of the passenger side of defendant's automobile, walked to the back of the car, and immediately fired four shots at defendant's husband. Mr. Lewis turned, and bracing himself on the hood of the truck, he walked back and

got into the truck. Richardson walked back to the door of the truck followed by the defendant. He shouted through the window, "I will shoot through the window and I will kill you." Mr. Lewis apparently did not respond. Richardson and the defendant got back into defendant's car and drove off.

Charles Smith testified that he and another member of the Rescue Squad arrived on the scene soon after the shooting. They saw that Mr. Lewis had been shot, but he was still breathing. They gave him oxygen, but he died while they were transporting him to the hospital. Detectives from the New Hanover County Sheriff's Department arrived at approximately 6:15 p.m. They searched the area and the truck but found no gun.

Testimony by Dr. Henry Singleton showed that three of the four bullets fired by Richardson struck Mr. Lewis. He died from "massive injury and tissue injury and bleeding" caused by one of the bullets which went through the chest and into the heart.

The State's evidence also showed that the defendant and Tom Richardson had been going together for a number of years, and that he was her boyfriend and lover. After the shooting, they spent the night together in a motel. The next day, after the defendant read in the paper that her husband was dead, she went to the Sheriff's Department.

After the shooting, the defendant and Richardson took two of the empty casings from Richardson's gun and placed them in defendant's gun. When the defendant turned herself in, she also turned in the gun with the empty casings still in it. Richardson had disposed of his gun by throwing it in the river.

The defendant's testimony tended to show that: On 3 November 1973, the defendant was driving her car, and Tom Richardson, her boyfriend, was riding with her. They both carried guns. They were headed down the Carolina Beach Road when she noticed her husband's truck moving up behind her. She speeded, weaving in and out of traffic trying to lose him; but he followed her, almost on her bumper. Finally, after four or five miles, she pulled into the turn lane at Monkey Junction and stopped. The defendant got out of the car and walked back to the window of the truck which had stopped behind her. She took her gun, because she thought her husband had a gun that had been stolen from her two days previously. She argued with her husband who got out of the truck. As he advanced toward

her, the defendant told him, "William, for the love of God go on," and when he continued toward her, she shot toward the ground, trying to scare him. He grabbed her, pinning her against the front fender of the truck. As they struggled, she heard two shots. Mr. Lewis stood up straight, and she heard two more shots. Mr. Lewis said, "All right, Tom, I am going to leave her alone. I am going." While she stood there, her husband walked back and got into the truck. Richardson walked up to the window and said something. He then told the defendant to get into the car and they left.

The defendant did not believe her husband had been hit, but she was worried about him. About 45 minutes later, she and Richardson drove back through Monkey Junction. She saw what she thought was her husband sitting behind the wheel of the truck talking to two deputy sheriffs. Believing he would have her arrested, she became scared to go home. Instead she and Richardson spent the night at a motel. She turned herself in to the sheriff the next day after learning her husband was dead. While in custody, she had inquired whether the police could tell how many times her gun went off.

The defendant also testified that she had separated from her husband in September 1973 because he was cruel to her, fought with her, and threatened to kill her. Just prior to leaving him, Mr. Lewis had held a shotgun on her, in the presence of her children, threatening to kill her. Five years earlier, while they had been separated, Mr. Lewis had come to High Point, broken into her home, assaulted her, and taken the children. On another occasion, while they were barning tobacco, her husband had attacked her in the presence of the other workers, cursing her, and ripping half her clothes off. On still another occasion, when she was pregnant, he had taken her out of bed and thrown her out the door into 23-degree weather. She testified that he was a big man and that she was afraid of him.

After leaving her husband, the defendant lived with a co-worker from Parker's Food Store. Defendant's husband would come to Parker's and hang around trying to get her fired. When she left at night, he would follow her car in his truck, trying to find out where she lived. He would drive the truck up close to her bumper to harass her as she drove. On one occasion, she had run a red light and he had run through also, chasing her along the street. She had complained to the police about his harassment, but they had not stopped it.

The jury returned verdicts of guilty of second degree murder and assault with a deadly weapon inflicting serious injury. From judgment entered that the defendant be imprisoned for ten (10) years for murder and five (5) years for assault, the two terms to run concurrently, the defendant appealed.

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

Jeffrey T. Myles for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the denial of her timely motion for judgment as of nonsuit on the charge of second degree murder. The State does not contend that defendant's gun inflicted the injuries resulting in her husband's death; rather, it contends that she aided and abetted Tom Richardson in the murder of her husband. Before the jury could find the defendant guilty of second degree murder, the State first had the burden of offering evidence from which the jury in this case could find that Tom Richardson had committed the crime of second degree murder.

The evidence introduced by the State was clearly sufficient to support a finding by the jury that Tom Richardson shot and killed defendant's husband with malice, and without just cause, excuse, or justification. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Banks,* 143 N.C. 652, 57 S.E. 174 (1907); *State v. Currie,* 7 N.C. App. 439, 173 S.E. 2d 49 (1970).

Although the evidence is sufficient for the jury to find that Richardson committed the offense of second degree murder as a principal in the first degree, this conclusion does not put an end to our inquiry. Our concern is whether the evidence is sufficient to raise an inference that the defendant aided and abetted Richardson and whether the evidence will support the verdict that the defendant is therefore guilty as a principal in the second degree.

> "The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may se-

cretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation.

To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator, and renders assistance or encouragement to him in the perpetration of the crime. While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime." *State v. Birchfield,* 235 N.C. 410, 413-14, 70 S.E. 2d 5, 7-8 (1952) (citations omitted).

To sustain a conviction of the defendant as principal in the second degree, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, 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, 185 (1973).

[1] Applying the foregoing well-established principles to the facts before us, we are of the opinion that the evidence is insufficient to raise an inference that defendant aided and abetted Richardson in the murder of her husband. While the evidence of the lover relationship between the defendant and Richardson and of defendant's conduct both before and after the shooting of her husband are strong circumstances from which the jury might infer that the defendant intended to kill her husband, or that she silently approved of Richardson's committing the act, or that she might have intended secretly even to aid him if such became necessary, there is nothing in the

evidence from which the jury might infer that the defendant *shared* Richardson's criminal intent to kill her husband. This is true since there is no evidence in the record from which the jury could find that the defendant knew that Richardson would come suddenly upon the immediate scene of her altercation with her husband and fire four shots at point blank range at her husband, or that the defendant by word or deed communicated any intention she might have had to Richardson which he might have considered as encouragement to him to commit the crime.

Under the circumstances here presented, the defendant had no control over her presence at the scene of the killing of her husband within the contemplation of the rule of law applied in *State v. Birchfield* and *State v. Rankin, supra.* No construction of the evidence here will permit an inference that the defendant had any knowledge that Richardson might get out of her automobile and shoot and kill her husband. In the absence of some evidence that the defendant had some knowledge, either actual or constructive, that Richardson intended to shoot her husband, the defendant could not have shared his criminal intent to commit the crime. The assignment of error is sustained.

[2] The defendant assigns as error the denial of her motion for judgment as of nonsuit as to the charge of assault with a deadly weapon with intent to kill resulting in serious bodily injury. The uncontradicted evidence shows that the defendant carried the gun with her when she went back to the truck and later shot her husband, inflicting physical injury. There was in addition evidence that the injury could have caused permanent impairment. Clearly, the evidence was sufficient to require submission of this case to the jury and would support the conviction for assault with a deadly weapon inflicting serious injury.

[3] Defendant assigns as error the refusal of the court to instruct the jury on the doctrine of self-defense as to the felonious assault charge. A person is justified in defending himself if he " . . . is without fault in provoking, or engaging in, or continuing a difficulty with another . . . . " *State v. Anderson,* 230 N.C. 54, 56, 51 S.E. 2d 895, 897 (1949). Where the jury finds that the defendant intended to kill and inflicted injuries, to be completely absolved, the jury must find that he acted in self-defense against "actual or apparent danger of death or great bodily harm . . . . " *State v. Anderson, supra* at 55, 51 S.E. 2d at 897. But, where the jury finds that the defendant did not intend to kill, the defendant " . . . is privileged by the law

of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm." *State v. Anderson, supra* at 56, 51 S.E. 2d at 897. Under either finding, though, the defendant must be without fault and must have acted in response to some danger of injury, either real or apparent.

The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. *State v. Goodson,* 235 N.C. 177, 69 S.E. 2d 242 (1952); *State v. Moses,* 17 N.C. App. 115, 193 S.E. 2d 288 (1972). No construction of the evidence here, in our opinion, gives rise to an inference that the defendant was in such danger, either real or apparent, as would justify acting in self-defense. This assignment of error is overruled.

[4] Defendant assigns as error the refusal of the trial judge to admit testimony of "prior threats the victim had made against the defendant," or testimony as to the "victim's reputation as a violent and dangerous fighting man." Where there is other evidence of self-defense, testimony of threats and of the victim's reputation are relevant in certain circumstances and generally admissible; but where there was no other evidence of self-defense, there was no prejudicial error in refusing to allow such testimony. Stansbury's, North Carolina Evidence 2d, Vol. 1, §§ 106, 162(a); *State v. Minton,* 228 N.C. 15, 44 S.E. 2d 346 (1947); *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443 (1956).

[5] Defendant assigns as error the trial court's action in sustaining the District Attorney's objections to the following three questions asked to State's witness Terry Wayne Brewer on cross-examination:

(1) "At any time did you see her [defendant] do anything to assist Tom Richardson in firing his four shots?"

(2) "When she [defendant] said this statement [where she told her husband she would kill him], did you catch every word that she said?"

(3) "O.K. Did William Lewis, was there enough room for that truck that was behind the car to have pulled out and gone straight down Highway 421?"

The judge is in charge of the scope of the cross-examination and we are not inclined to review his decisions unless the defendant has shown an abuse of that discretion. *State v. Lindley,* 23 N.C. App. 48, 208 S.E. 2d 203 (1974), *affirmed* 286 N.C. 255, 210 S.E. 2d 207 (1974). The questions asked call for a conclusion on the part of the witness. As such they were objectionable and the judge's ruling was not an abuse of his discretion. This assignment of error is overruled.

[6] By assignments of error IV and V, the defendant maintains the trial judge expressed an opinion on the evidence in violation of G.S. 1-180 by "sustaining his own objections throughout the trial" and in "cross examination of the defendant by the trial judge and comments by him as to her credibility." "It is well settled in this State that the trial judge can ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264; *State v. Stevens,* 244 N.C. 40, 92 S.E. 2d 409; *State v. Furley,* 245 N.C. 219, 95 S.E. 2d 448." *State v. Strickland,* 254 N.C. 658, 661, 119 S.E. 2d 781, 783 (1961). Similarly, " . . . judges do not preside over the court as moderators, but as essential and active factors or agencies in the due and orderly administration of justice." *Eekhout v. Cole,* 135 N.C. 583, 589, 47 S.E. 655, 657 (1904); *State v. Colson,* 274 N.C. 295, 308, 163 S.E. 2d 376, 385 (1968). The court has authority to limit examination and to exclude evidence which is wholly incompetent or inadmissible. *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960).

We have carefully examined each of the 15 exceptions upon which these assignments of error are based and find them to be without merit. The able judge did not sustain his own objections as contended by defendant, nor did he cross-examine defendant, or make comments about her credibility. The record discloses that the defendant on both direct and cross-examination repeatedly gave answers that were not responsive and testimony that was not clear. Each ruling, question, or comment challenged by these exceptions clearly was for the purpose of clarifying defendant's testimony or was a proper exercise of the judge's discretion in controlling the examination of the witness. These assignments of error are overruled.

The defendant has additional assignments of error with respect to the charge of second degree murder which we do not discuss in view of our disposition of the charge.

The result is: With respect to the charge of assault with a deadly weapon with intent to kill inflicting serious injury, we hold that the defendant had a fair trial free from prejudicial error.

No error.

With respect to the charge of second degree murder, the evidence was insufficient to support a verdict of guilty, and the defendant's motion for judgment as of nonsuit should have been allowed. Hence, the judgment entered on the charge of second degree murder is

Reversed.

Judges MORRIS and ARNOLD concur.

SHIRLEY T. TIDWELL v. DAVID BOOKER

No. 7526DC384

(Filed 19 November 1975)

1. **Evidence § 22; Rules of Civil Procedure § 36— prosecution for nonsupport — determination of paternity — no judicial admission in subsequent civil action for child support**

Evidence of a defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the liability sought to be established in a civil suit is not admissible unless such conviction is based on a plea of guilty. Moreover, purported "admissions" made in a criminal prosecution cannot be introduced as "judicial admissions" in any subsequent action. G.S. 1A-1, Rule 36(c).

2. **Parent and Child § 7— duty of parent to support child**

All men have a moral duty to support their children, legitimate or illegitimate, and to compel compliance with the duty of support, courts may impose a penal sanction, suspended on condition of payment of child support.

3. **Judgments § 44— nonsupport prosecution — subsequent civil action for child support — collateral estoppel**

Where defendant was tried and convicted in 1963 for wilful nonsupport of his illegitimate child and the judgment recited defendant's admission of paternity, the trial court in a 1974 civil action for child support did not err in determining that the 1963 prosecution conclusively decided the issue of paternity and had the effect of collateral

estoppel in the civil action, since (1) there was identity of subject matter in that both actions were instituted to compel support from the putative father of plaintiff's illegitimate daughter, (2) there was privity of parties in that plaintiff in the civil action was the prosecuting witness in the criminal case and the prosecuting witness had a critical financial interest in the outcome of the case, and (3) both actions incidentally involved the issue of paternity, and that issue was considered and determined in the criminal case.

4. **Bastards § 8; Judgments § 37— finding of paternity — res judicata as to future prosecutions**

The N. C. Supreme Court has held that a finding of paternity in one prosecution for wilful failure to support is *res judicata* as to future prosecutions, and use of the word "prosecution" by the Court does not necessarily limit a finding of estoppel to subsequent criminal actions.

5. **Bastards § 10— civil action for child support — paternity not in issue — no jury trial**

In an action for support of plaintiff's illegitimate child, defendant was not entitled to a jury trial on the issue of paternity, though he demanded one, since there was no issue of paternity in this action and all that remained for determination was the amount of award to be granted to the plaintiff. G.S. 49-14.

6. **Attorney and Client § 7; Bastards § 10— child support for illegitimate child — award of periodic payments and attorney fees proper**

In an action for support of plaintiff's illegitimate child and for attorney fees, the trial court did not err in awarding plaintiff continuing periodic support for the child and attorney fees, since support for an illegitimate child is to be determined and enforced in the same manner as if the child were legitimate, the court has statutory authority to award periodic payments for the support of a legitimate child, and the trial court in this action found that defendant had refused to provide adequate support under the circumstances and that plaintiff was an interested party acting in good faith who had insufficient means to defray the expense of the action. G.S. 49-15; G.S. 50-13.4; G.S. 50-13.6.

7. **Bastards § 10— child support award in lump sum — award for reimbursement proper**

In an action seeking periodic child support payments and reimbursement for amounts already spent for child support, the trial court did not err in awarding plaintiff arrearages of over $4000, since, under G.S. 50-13.4, the court may, in addition to periodic payments, order payment of lump sum amounts, and this lump sum award can be awarded for the purpose of reimbursement.

APPEAL by defendant from *Robinson, Judge,* and *Hicks, Judge.* Judgments entered 24 January 1975 and 16 April 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 3 September 1975.

The genesis of this present appeal dates back to December 1963 when the plaintiff mother in the present civil action swore out a warrant charging the defendant with the willful failure and refusal to support his and her illegitimate child. From a plea of not guilty, the then Domestic Relations and Juvenile Court Judge rendered a verdict of guilty and stated in the judgment entered that "the court finds as a fact, and the defendant admits, that he is the father of a child, Claudia Ann, born out of wedlock to the prosecuting witness, November 17, 1963." Sentence of six months was suspended upon the condition that the defendant pay $8 per week for child support. Defendant consented to the condition. The Domestic Relations and Juvenile Court retained the cause for further orders.

The plaintiff brought the present independent civil action in October 1974 in the District Court for Mecklenburg County instead of proceeding by way of a criminal action. Plaintiff claimed that since 1963, when defendant was conclusively declared the biological father, defendant had rendered virtually no support save sporadic small payments totalling approximately $211 and occasional gifts. Plaintiff averred that she had expended $4,169 for child support and prayed for reimbursement, additional support of $50 per week and reasonable attorney fees.

Defendant's answer denied paternity and claimed that notwithstanding the 1963 judgment he had never admitted paternity. Moreover, defendant maintained that he was neither represented by counsel in the 1963 prosecution nor intelligently waived his right to counsel therein. Thus, defendant argued that plaintiff was entitled to no support and that any money or gifts given to the child evinced defendant's sense of good will and was not indicative of his recognition of paternal obligations.

The District Court received into evidence the 1963 warrant and judgment and held that in view of the 1963 prosecution and the judgment rendered therein, the issue of paternity had been conclusively decided in that criminal action and had the effect of collateral estoppel in the then pending civil action. The District Court entered an order requiring defendant to make weekly payments of $33 and pay plaintiff's attorney fees of $350.

Plaintiff then moved for summary judgment on the lump sum claim. No additional evidence was submitted by either party, and the District Court granted the motion and further ordered

defendant to pay $4,169 to the plaintiff and taxed an additional $750 against defendant for plaintiff's attorney fees.

Other facts necessary for decision are set out in the opinion.

Hicks & Harris, by Tate K. Sterrett, for plaintiff appellee.

Reginald L. Yates for defendant appellant.

MORRIS, Judge.

[1] Defendant first contends that the District Court erred in considering and making findings of fact and conclusions of law based upon defendant's previous criminal conviction. Defendant, in support of his position, cites the North Carolina rule that " . . . evidence of a defendant's conviction in a criminal prosecution for the very acts which constitute the basis of the liability sought to be established in a civil suit is not admissible unless such conviction is based on a plea of guilty." *Beanblossom v. Thomas,* 266 N.C. 181, 185, 146 S.E. 2d 36 (1966). The rationale supporting this rule is that "while the same facts may be involved in two cases, one civil and the other criminal, the parties are necessarily different, for, whereas one action is prosecuted by an individual, the other is maintained by the state." *Trust Co. v. Pollard,* 256 N.C. 77, 79-80, 123 S.E. 2d 104 (1961).

Ancillary to the principles stated in *Beanblossom* and *Pollard* is the doctrine of mutuality which traditionally requires " . . . identity of parties, of subject matter and of issues . . . " in order to invoke the application of *res judicata* or collateral estoppel. *Moore v. Young,* 260 N.C. 654, 657, 133 S.E. 2d 510 (1963). Thus, to distinguish the facts in this case from the principles articulated in cases such as *Beanblossom, Pollard* and *Moore,* appellee plaintiff argues that: (1) paternity, not being the offense for which defendant was tried and convicted, raises the defendant's acceptance of the finding of paternity in the 1963 judgment to the status of a binding judicial admission; and (2) alternatively, collateral estoppel should apply under either an exception to the mutuality doctrine or a broad reading of the rule.

We do not agree with the plaintiff appellee's first counter-argument that the finding of paternity in the 1963 judgment is admissible in the 1974 civil action as a judicial admission. Pursuant to G.S. 1A-1, Rule 36(c), "any admission made pursuant

to this rule is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may the admission be used against him in any other proceeding." Federal courts, construing basically the same rule in the Federal Rules of Civil Procedure, have long held that the admission is limited to the action in which it arose. *Woods v. Robb,* 171 F. 2d 539, 541 (5th Cir. 1948); *Weis-Fricker Emp. & Imp. Corp. v. Hartford Acc. & I. Co.,* 143 F. Supp. 137, 149 (N.D. Fla. 1956); *Walsh v. Connecticut Mut. Life Ins. Co.,* 26 F. Supp. 556, 571-573 (E.D. N.Y. 1939); But cf: *International Carbonic Eng. Co. v. Natural Carb. Prod.,* 57 F. Supp. 248, 253 (S.D. Cal. 1944), wherein the plaintiff, who brought forward certain "admissions" in answering defendant's interrogatories, was bound by those responses which at least partially formed the basis of a counterclaim raised by defendant against the plaintiff.

Plaintiff also argues that *Beanblossom* is not applicable because the defendant's paternity was merely ancillary to the offense actually charged in 1963, to wit: willful failure and refusal to support. North Carolina's case law on this point is not settled in this area. In *State v. Green,* 277 N.C. 188, 193, 176 S.E. 2d 756 (1970), Justice Huskins, speaking for the majority, wrote that in a prosecution for willful refusal to support "the question of paternity is merely incidental to the prosecution for nonsupport and involves no punishment. . . . [T]he paternity itself is no crime." See also: *State v. Robinson,* 236 N.C. 408, 411, 72 S.E. 2d 857 (1952). Thus, the majority of our Supreme Court maintains that "[t]he mere begetting of a child is not a crime. The question of paternity is incidental to the prosecution for the crime of nonsupport—a preliminary requisite to conviction." *State v. Ellis,* 262 N.C. 446, 449, 137 S.E. 2d 840 (1964). (However, see vigorous dissent of Sharp, J. (now C.J.), joined by Chief Justice Bobbitt and Associate Justice Higgins in *State v. Green, supra,* at 194-197.) It appears that the present status of our case law would require a finding that paternity was merely incidental to the prosecution for nonsupport. Nonetheless, G.S. 1A-1, Rule 36(c) requires that we reject plaintiff's first argument.

[2, 3] We now must determine whether this case meets the collateral estoppel requirements of mutuality of subject matter, parties and issues.

Our Supreme Court has held that "[a]ll men have a moral duty to support their children—legitimate or illegitimate. . . . " *State v. Green, supra,* at 193. To compel compliance with the duty of support, our courts may, as the court in fact did in 1963, impose a penal sanction, suspended on condition of payment of child support. *Id.* at 193. When the plaintiff returned to the court in 1974, her intent was the same as in 1963; namely, compel assistance from the putative father of the plaintiff's illegitimate daughter. When stripped of the broader contexts of a criminal versus civil action, the two actions can be viewed as essentially similar causes. Both are designed to compel support. One uses the office of the prosecutor and the threat of a jail sentence and the other wields the traditional powers and authority inherent in our civil courts. Should the defendant disobey the edicts and orders of the District Court, he could be held in contempt and theoretically wind up in the same jailhouse as if he were found guilty of the criminal offense of nonsupport. In both situations the same goal is attained: forcing a nonsupporting parent to meet his parental support obligations. The uniquely hybrid nature of the prosecution for willful failure to support is inherent in the history of this particular cause of action. At one time the action was considered civil in nature. *State v. Green, supra,* at 195. The peculiar interrelating roles and interests of the various parties to the prosecution are easily perceived. The State and the prosecuting witness, in this case the mother of the child, both seek support from the recalcitrant father. The State wants to force his support in order to avoid bringing the child onto the State's welfare rolls as a charge of the State, and the mother wants the father to help her meet the financial burdens of parenthood. In a sense, therefore, the State is really bringing the action *ex rel* for the benefit of the prosecuting witness and is joining with her in reaching the very same result: support and assistance from the father.

Specifically, when examining two actions for purposes of mutuality of parties, we should not be constrained by the mere forms of the action but should look beneath the surface to determine the substance of the matter. Thus, "whether or not a person was a party to a prior suit 'must be determined as a matter of substance and not of mere form. . . . ' 'The courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.' " (Citations omitted.) *King v. Grindstaff,* 284 N.C. 348, 357, 200 S.E. 2d 799

(1973). The party who is able to control and shape the development of a lawsuit, "' . . . individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has proprietary interest or financial interest in the judgment or *in the determination of a question of act [sic] or a question of law with reference to the same subject matter, or transaction;* if the other party has notice of his participation, the other party is equally bound.'" (Citations omitted.) *Enterprises v. Rose,* 283 N.C. 373, 377, 196 S.E. 2d 189 (1973). Though *Rose* turned on the question of *res judicata,* for purposes of testing privity of parties, it is equally persuasive in this case which deals with collateral estoppel. It points out that privity or mutuality of parties essentially goes to the question of protection. Once a party has fully litigated a question against a particular litigant, he should not have to fear relitigation against that same party because that party has merely changed hats. Here the defendant, brought to court at the insistence of the mother, had a full opportunity to contest paternity in 1963 and attack the prosecuting witness's claim and if he believed the judgment was wrong in stating his admission of paternity, he should have timely attacked that judgment. Once he let the 1963 judgment go by unchallenged he was bound. "Normally, no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding . . . collateral estoppel effect in all courts, Federal and State, on the parties and their privies." *King v. Grindstaff, supra,* at 360. Moreover, the plaintiff, though not technically in control of the 1963 prosecution, was essential to its success as the prosecuting witness and in fact stood in the position of obvious beneficiary of its successful culmination. Thus, her financial interest was obvious and critical. In view of the unique nature of the two causes of action and the unique interrelationship of the State in the affairs of an illegitimate child and the mother of that child, the requisite privity of parties existed for purposes of mutuality and collateral estoppel.

Next, we must determine whether there was identity of issues.

> "In determining whether collateral estoppel is applicable to specific issues, certain requirements must be met: (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the

issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment. *King v. Grindstaff, supra,* at 358.

Thus, " 'if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties.' " (Citations omitted). *Id.* at 359. In the case at bar, paternity was an essential feature of the 1963 case and the defendant not only had the requisite opportunity for a hearing on the issue but in fact had that very matter considered and determined. "To make the plea effective it is necessary not only that the party have an opportunity for a hearing [on the question] but that the identical question must have been considered and determined. . . ." *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 170, 105 S.E. 2d 655 (1958). We have no record of the 1963 prosecution, but we do have the judgment rendered therein which states, *inter alia,* that defendant "admits" paternity and thus it would appear that the question was in fact addressed by all the parties in that action.

[4] It also should be noted that the North Carolina Supreme Court has already held that a finding of paternity in one prosecution for willful failure to support is *res judicata* as to future prosecutions. *State v. Ellis, supra; State v. Clonch,* 242 N.C. 760, 761, 89 S.E. 2d 469 (1955); *State v. Green, supra,* Justice Sharp's dissent at 196. The fact that the Court speaks in terms of a subsequent "prosecution" does not mean we necessarily are limited in finding an estoppel to subsequent criminal actions brought on the heels of an earlier prosecution.

We have little difficulty in finding a parallel between the situation before us in this case and that before the Court in *Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373 (1962). There the plaintiff instituted an action for absolute divorce. Defendant, answering, admitted the separation but averred that it was brought about by plaintiff's willful abandonment of her. For a further answer and defense and as a cross action for alimony without divorce defendant alleged that on 18 June 1958, plaintiff willfully and unlawfully and without just cause or provocation on part of defendant, abandoned her and the minor children. Additionally, she alleged that after the abandonment and

on 8 September 1958, plaintiff was convicted of abandonment and nonsupport of defendant and their three children. Copy of the court minutes relating to the prosecution was attached to her answer. Plaintiff replied, admitting that he was found guilty of abandonment and nonsupport but averred that he denied his guilt then and that he still contended he was not guilty. Plaintiff stipulated that no appeal was taken from the conviction. At trial, defendant moved for judgment on the pleadings dismissing plaintiff's action. The court granted the motion, and plaintiff's action was dismissed. On appeal, a unanimous Court, speaking through Bobbitt, J. (later C.J.), affirmed but limited the holding to a factual situation where the plaintiff is seeking to profit from criminal conduct for which he has been prosecuted and convicted. The Court, with approval, quoted from *Eagle, Etc. Ins. Co. v. Heller,* 149 Va. 82, 140 S.E. 314 (1927), where the Court "took the view that, to adhere to the general and traditional rule under such circumstances, 'would be a reproach to the administration of justice.' " *Taylor v. Taylor, supra,* at 135.

We think the following language of the Court is particularly appropriate here:

> "Technically, the parties in the criminal prosecution were different. Even so, the issue was identical, and the plaintiff, in the criminal action, had his day in court with reference to such issue. Compare *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 105 S.E. 2d 655, and cases cited. While the conduct for which plaintiff was convicted constitutes an offense against society, such conduct was made criminal to afford protection to the wilfully abandoned wife. In such criminal prosecution, the wife, although not technically a party, is the person upon whose testimony the State, in large measure, must rely; and the criminal prosecution is based on and arises from the rights and obligations subsisting between the prosecutrix (wife) and the defendant (husband)." *Id.* at 135.

Notwithstanding *Beanblossom,* we hold that the rules articulated in *Ellis* and *Clonch* are applicable to subsequent *civil* actions for willful failure to support a minor child where paternity was fully addressed in the prior *criminal prosecution* for willful failure to support. This holding is necessarily limited to the peculiar hybrid nature of the particular cause of action

raised in these cases. Thus, no error was committed by the District Court in considering the 1963 prosecution.

[5, 6] Defendant next contends that the District Court erred in awarding plaintiff continuing periodic support for the child and attorney fees. Specifically, defendant asserts that in any civil action, brought under G.S. 49-14, a jury trial on the paternity issue is required if demanded. This question must be answered, claims defendant, before the judge can enter any orders with respect to support. Here defendant in fact demanded a jury trial and claims that the judge should have entered no orders pending a jury's deliberation on the matter of paternity. We disagree. Our Court has noted previously that "in actions under G.S. 49-14, the jury decides only the factual issue of paternity, and the court decides what payments should be awarded for the support of the child." *Searcy v. Justice* and *Levi v. Justice*, 20 N.C. App. 559, 564, 202 S.E. 2d 314 (1974); cert. denied 285 N.C. 235 (1974); also see G.S. 49-15. Here, there was no issue of paternity for the jury to decide and all that remained for determination was the amount of award to be granted to the plaintiff, assuming, of course, that there was a finding of willful refusal and failure to support. Pursuant to G.S. 49-15, support for an illegitimate child is to be ". . . determined and enforced in the same manner, as if the child were the legitimate child of such father and mother." Under G.S. 50-13.4, the court may award periodic payments for the support of a legitimate child, and under G.S. 50-13.6 may award reasonable attorney fees. However, to award attorney fees, the court must ". . . find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . ." G.S. 50-13.6. Moreover, the interested, aggrieved party must have brought the action under a good faith belief in her insufficient means to defray the expense of the litigation. G.S. 50-13.6. In its order, the District Court stated that the "defendant has refused to provide support which is adequate under the circumstances existing at the time of the institution of this action . . . [and] plaintiff is an interested party acting in good faith who has insufficient means to defray the expense of this action." We find no error in the District Court's actions with respect to periodic support and attorney fees.

[7] Defendant next contends that the court erred in awarding plaintiff arrearages in the amount of $4,169. Under G.S. 50-13.4,

the court may, in addition to periodic payments, order payment of lump sum amounts. Moreover, we hold this lump sum award can be awarded for the purpose of reimbursement. 3 Lee, N. C. Family Law, § 229 (3d ed. 1963), at p. 57; *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31 (1947).

We have considered the other contentions raised by defendant and find them to be without merit.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. KATHERINE MARIE ATWOOD

No. 7521SC381

(Filed 19 November 1975)

1. **Automobiles § 3— suspension of driver's license — notice mailed to address shown on DMV records — due process**

The due process requirement of notice of the suspension of defendant's driver's license was met when the Department of Motor Vehicles mailed such notice to defendant at her address as shown on the Department's records in accordance with the provisions of G.S. 20-48, notwithstanding defendant had moved from that address and did not receive the notice.

2. **Automobiles § 3— suspension of driver's license — hearing before suspension — trials for speeding — opportunity for further hearing — notice**

Defendant was afforded a meaningful hearing before the suspension of her driver's license for two offenses of speeding in excess of 55 mph when she was charged and convicted of the speeding offenses; if further hearing was required to satisfy due process requirements, G.S. 20-16(d) met those requirements by affording defendant an opportunity for such a hearing, and mailing of notice to defendant's address as shown on the records of the Department of Motor Vehicles satisfied due process requirements with respect to notice of an opportunity for a hearing.

Judge MARTIN dissenting.

APPEAL by defendant from *Albright, Judge.* Judgment entered 6 March 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 September 1975.

This is a criminal action wherein the defendant, Katherine Marie Atwood was charged with unlawfully and willfully operating a motor vehicle on a public street or public highway while her license had been suspended, a misdemeanor under G.S. 20-28. She pleaded not guilty.

At trial the State offered evidence to show that in the early morning on 19 October 1974 Trooper J. G. George observed the defendant get into her car and drive off on University Parkway, a public highway. After running a check and finding that the defendant's driver's license had been suspended, Trooper George stopped the defendant at approximately 4:00 a.m. and issued her a citation. The State introduced portions of the defendant's driver's license record showing the suspension and dates thereof. The State offered further evidence to show that pursuant to G.S. 20-48, the Department of Motor Vehicles had mailed on 23 September 1974 to the address shown on their records, a notice to the defendant entitled "Official Notice and Record of Suspension of Driving Privilege." The notice informed the defendant that effective 3 October 1974 her license would be suspended for two (2) offenses of speeding in excess of 55 miles per hour, pursuant to G.S. 20-16(a)(9). The notice further provided that the suspension would be for two months, but that should the defendant desire, she could request a hearing (G.S. 20-16(d)) and one would be provided within twenty (20) days of the receipt of the request. At the close of the State's case, the defendant's motion for judgment as of nonsuit was denied.

Through the testimony of the defendant, the evidence showed that she had in fact been convicted twice of speeding in excess of 55 miles per hour. She testified that the address to which the notice was mailed was the address she had at the time her license had been issued, but that she had since moved. She further testified that she had never received the notice, but that she first learned of the suspension when she was stopped by Trooper George. The defendant also offered into evidence a certified copy of a "North Carolina Department of Motor Vehicles Driver's License Record Check for Enforcement Agencies" for Katharine Atwood, which showed a notation entered 2 October 1974 indicating that the notice of suspension mailed to defendant had been "unclaimed."

After a trial before a jury, the defendant was found guilty. She was sentenced to thirty (30) days imprisonment suspended

for two years on payment of a fine of $200.00 and costs. From the judgment entered, defendant appealed.

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

Stephens and Peed by Herman L. Stephens for defendant appellant.

HEDRICK, Judge.

[1] A valid conviction under G.S. 20-28(a) for driving while one's license is suspended requires proof of three (3) elements. The State must prove that the defendant (1) operated a motor vehicle, (2) on a public highway, (3) while her driver's license was suspended. *State v. Cook,* 272 N.C. 728, 731, 158 S.E. 2d 820, 822 (1968); *State v. Newborn,* 11 N.C. App. 292, 181 S.E. 2d 214 (1971). It is to the sufficiency of the proof of the suspension that the defendant focuses her arguments. The defendant contends that for the jury to find there was a valid suspension, the State must show that the defendant had an opportunity for a hearing before the effective date of the suspension and that the defendant had actual notice of the impending suspension and of the right to a hearing. It is the defendant's contention that minimum due process requires as much, and submits as error the court's refusal to dismiss the case for lack of proof of these elements by the State.

The defendant also assigns as error the court's instructions to the jury that a suspension is effective when the Department of Motor Vehicles deposits the notice in the United States mail at least four days prior to the effective date of the suspension in an envelope with postage prepaid addressed to the defendant at her address as shown by the records of the Department of Motor Vehicles. The defendant argues that the court should have instructed the jury that a prior hearing and actual notice of the suspension and right to a prior hearing were necessary for the suspension to be valid. In our opinion, defendant's assignments of error are without merit.

G.S. 20-48 in pertinent part provides that:

". . . notice [of suspension] shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at

his address as shown by the records of the Department [of Motor Vehicles]. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice."

G.S. 20-16(d) in pertinent part provides that:

"Upon suspending the license of any person as hereinbefore in this section authorized, the Department shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing, unless a preliminary hearing was held before his license was suspended, as early as practical within not to exceed 20 days after receipt of such request. . . ."

G.S. 20-25 provides, in pertinent part, that:

"Any person . . . whose license has been . . . suspended . . . except where each cancellation is mandatory under the provisions of the Article, shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court. . . ."

In *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1970), *cert. denied* 277 N.C. 459, 177 S.E. 2d 900 (1970), Chief Judge Mallard, speaking for this court at page 486, said:

"We hold that G.S. 20-48, which is the statute providing for the manner in which notice is to be given, is reasonably calculated to assure that notice will reach the intended party and afford him the opportunity of resisting or avoiding the proposed suspension, as well as to give him notification of the actual suspension of his operator's license and driving privilege."

Judge Mallard also said at page 487:

" . . . that the provisions of G.S. 20-48, together with the provisions of G.S. 20-16(d), relating to the right of review, and the provisions of G.S. 20-25, relating to the right of appeal, satisfy the requirements of procedural due process. . . ."

The defendant contends that the foregoing holding in *Teasley* has been abrogated by the holding of the United States Supreme Court in *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971), decided subsequent to our decision in *Teasley*. We do not agree.

The facts in *Bell* indicate that under Georgia's motor vehicle safety responsibility statute, an uninsured motorist, if involved in an accident, is required to post security or be subject to having his operator's license suspended. The petitioner was involved in an accident and did not post security, but at an administrative hearing prior to suspension, the petitioner offered to show that he was not liable for the accident. Such evidence was refused as being irrelevant to the issue of compliance with the statute. The decision of the administrative hearing was upheld in the Georgia courts.

The United States Supreme Court granted *certiorari* and ruled that whether the entitlement of a license is denominated a "right" or a "privilege," "[s]uspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970)" *Id.* at 539. In reversing the Georgia courts, the Supreme Court went on to say that the fault or possible liability of the defendant for the accident was an important element of the State's right to suspend the operator's license, and a refusal to hear evidence on that subject was a denial of due process.

As the defendant contends, this was an important case in defining the rights of a license holder, and the holding does require notice and an opportunity to be heard on the issue of liability, but we have examined that case and can find nothing in it concerning the *manner* in which notice must be given. We find nothing in *Bell* which in any way abrogates the holding in *Teasley*.

[2] Addressing ourselves to defendant's contention that *Bell* requires that the defendant be afforded a meaningful hearing *before* the Department of Motor Vehicles would have the authority to suspend the driving privileges of one holding a valid operator's license, we are of the opinion that in the present case, under North Carolina's statutes, the defendant was afforded such a meaningful hearing. She was actually charged and convicted of the speeding offenses which ultimately resulted in the administrative action of the Department in suspending her license. When the defendant's guilt or innocence in the speeding cases was adjudicated, the question of probable

liability discussed in *Bell* was determined. At that point, a hearing before the Department of Motor Vehicles could have reviewed nothing more than the record of the defendant's speeding convictions. If further hearing is required to satisfy the due process requirements of the Fourteenth Amendment, we are of the opinion that G.S. 20-16(d) meets these requirements by affording the defendant an opportunity for such a hearing. *State v. Teasley, supra,* makes it clear that giving notice to the defendant as provided in G.S. 20-48 satisfies the requirements of due process with respect to the notice of an opportunity for a hearing as well as of the suspension itself.

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

No error.

Judge BRITT concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting:

The minimum requirements of procedural due process with respect to notice and hearing were not met in the present case. The U. S. Supreme Court has often dealt with the question of what constitutes "the right to be heard" within the meaning of procedural due process. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1949), the Court said that the ". . . right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." In the context of this case, the question is whether the suspension of defendant's driver's license without reasonable notice and without a prior hearing violates procedural due process.

This Court held in *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1970), cert. denied 277 N.C. 459, 177 S.E. 2d 900 (1970), that G.S. 20-48 was reasonably calculated to assume that notice will reach the intended party and afford him the opportunity of resisting or avoiding the proposed suspension. The Court further said that "[w]hen the Department complied with the procedure set forth in the statute as to notice of suspension of the operator's license and driving privilege, such

compliance constituted constructive notice to defendant that his license had been suspended."

However, in *Carson v. Godwin,* 269 N.C. 744, 153 S.E. 2d 473 (1967), our Supreme Court expressed dissatisfaction with the use of regular mail as a means of notification of Departmental actions with reference to driver's licenses. The Court did not mention G.S. 20-48, nor decide whether notification by regular mail would be considered sufficient compliance with the requirements of due process. The Court noted that:

> "[a]n open letter to a former address may or may not be delivered, especially if there is a change of address. If the mails are to be employed for the transmission of notice, it would seem that a registered letter or a return receipt showing delivery would be a more complete compliance with the requirements of notice—essential of due process."

In *State v. Hughes,* 6 N.C. App. 287, 170 S.E. 2d 78 (1969), (a case decided before *Teasley),* this Court said:

> ". . . G.S. 20-20 provides that whenever any vehicle operator's license is suspended under the terms of Chapter 20, 'the licensee shall surrender to the Department all vehicle operator's licenses and duplicates thereof issued to him by the Department which are in his possession.' It is difficult to see how the licensee could be called upon to surrender his license because it had been suspended unless he is given notice of the suspension. Further, G.S. 20-25 provides that any person whose license has been suspended shall have a right to file a petition within 30 days thereafter for a hearing on the matter in the superior court. Again, the right to court review of the Department's action in suspending a license would be futile if the licensee received no notification that the license had been suspended. . . ."

Even in the "light" of the *Teasley* decision, the "constructive" notice to defendant is not sufficient to meet the minimum requirements of procedural due process in this case.

The evidence here indicates that the defendant did not receive the notice and that the Department of Motor Vehicles was on notice of that fact. Had defendant received the mailed notice, she would have had the opportunity of resisting or avoiding the proposed suspension as well as refraining from the commission of a criminal offense and subsequent arrest therefor.

In this case, G.S. 20-48 can hardly be described as a statute reasonably calculated to assure that notice will reach the intended party and afford her the opportunity of resisting or avoiding the proposed suspension as well as to give her notification of the actual suspension of her operator's license and driving privilege. It is my opinion that procedural due process requires as a minimum a manner of notification which will assure that notice will reach the intended party so that he may have the right to be heard.

Defendant's motion for dismissal should have been allowed.

STATE OF NORTH CAROLINA v. RAYMOND LEWIS HENDERSON AND JAMES MONROE HUNTLEY

No. 7526SC455

(Filed 19 November 1975)

1. **Criminal Law § 66— in-court identifications — observation at crime scene as basis**

Evidence was sufficient to support the trial court's finding that two witnesses' in-court identifications of defendants stemmed from reliable observations independent of allegedly suggestive pretrial identification confrontations where such evidence tended to show that one witness, who was the victim of the armed robbery, observed first one defendant and then the other when they entered at different times the store at which she was cashier, and the other witness, a police officer who was cruising the vicinity, observed one defendant as he ran in front of the officer's car and the other defendant as his car approached from the opposite direction and stopped directly next to the police car.

2. **Criminal Law § 66— voir dire on identification testimony — limitation of cross-examination proper**

The trial court did not err in limiting the defense attorney's cross-examination of a prosecution witness on voir dire to determine admissibility of her in-court identification of defendant where such cross-examination dealt with the witness's expectations preceding a showup which took place shortly after the robbery, and whether such information was important was a discretionary matter for the trial court.

3. **Criminal Law § 66— voir dire on identification testimony — limitation of questioning proper**

The trial court did not err in ordering defense counsel to cease a line of questioning on voir dire where pursuit of the questioning would have added nothing to testimony already given by the witness.

4. **Criminal Law § 88— witness's contact with Negroes — cross-examination improper**

The trial court did not err in refusing to allow defense counsel to question an armed robbery victim at trial about the extent of her social contact with members of the Negro race.

5. **Criminal Law § 42— items taken from store — pistol — admissibility in armed robbery case**

The trial court in an armed robbery prosecution did not err in allowing into evidence a bottle of Andre Cold Duck, a pack of Kool cigarettes, and a pistol which were identified by the robbery victim as the "same or similar" to those taken from the store or used during the robbery.

APPEAL by defendants from *Thornburg, Judge.* Judgments entered 6 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 September 1975.

Defendants were each charged, in separate bills of indictment, with the felony of armed robbery. The cases were consolidated for trial. A jury found the defendants guilty as charged, and both defendants appeal.

The State's evidence tends to show the following: On 11 July 1974 from 3:00 p.m. until 11:00 p.m., Vicki Chandler Smith was employed as the cashier of the Seven-Eleven Store at 1746 Camp Green Street in Charlotte, North Carolina. Sometime between 8:00 p.m. and 9:00 p.m. defendant Henderson made a small purchase at the store. He was wearing a T-shirt with a picture and the word "streaking" inscribed on the front. At 10:20 p.m. defendant Huntley entered the store. No other customers were in the store at this time. Huntley brought a bottle of Andre Cold Duck to the checkout counter and asked Miss Smith for a pack of Kool cigarettes. After these items had been "rung up" and placed in a bag, Huntley reached under his shirt and pulled out a small handgun. He told Miss Smith "this is a holdup" and demanded the money in the register. While she took out the five and one dollar bills, Huntley reached over the counter and grabbed the ten dollar bills. After the money had been placed in the bag with the cigarettes and Cold Duck, Huntley ordered Miss Smith to lie with her face down on the floor behind the counter as he fled. She remained on the floor until some customers came into the store two or three minutes later.

At approximately 10:30 p.m. Jeff Ensminger, a police officer with the Charlotte Police Department, was driving a patrol

car in the vicinity of the Seven-Eleven Store. As he turned right from Camp Green Street onto Royston Road, Huntley darted from a wooded area on the right, which separates the Seven-Eleven Store from Royston Road. Officer Ensminger slammed on the brakes to avoid hitting Huntley, who was carrying a brown paper bag and an unidentifiable object. At the same time a gold Plymouth Duster facing the opposite direction pulled up next to the police car. It was driven by Henderson. Huntley went behind the Duster, paused to stare at the police car momentarily, and got into the front seat with Henderson. The defendants drove 30 feet to the intersection of Camp Green Street and Royston Road, turned right, and sped off. Ensminger observed the license number of the vehicle. At approximately 10:35 p.m. Officers J. M. Harrill and Frank McKinney observed the gold Plymouth Duster drive into a parking lot at the Aloha Apartments. As the defendants got out of the car, Huntley was not wearing a shirt and was carrying a small brown paper bag which appeared to have a bottle sticking out the top. Huntley walked to a dark area under the stairs, while the defendant Henderson went upstairs to an apartment. Both men were placed under arrest when they returned to the car in the parking lot. The officers found the paper bag under the stairs; it contained a bottle of Andre Cold Duck, a pack of cigarettes, and a pistol. The defendants were promptly taken back to the Seven-Eleven Store, where Miss Smith identified Huntley as the robber. Miss Smith also recognized Henderson, the other suspect, as the same person who had come into the store earlier in the evening, but she did not mention this to police at the time of the showup at the Seven-Eleven Store because she was not asked about Henderson. Miss Smith identified Huntley again at a preliminary hearing. Later that night a search of defendant Huntley produced a ten dollar bill with the same serial number as the one Miss Smith had recorded at the Seven-Eleven Store.

Defendant Henderson offered evidence tending to show that he did not participate in the robbery and did not know Huntley had committed a robbery before he drove him to the Aloha Apartments. Defendant Huntley offered no evidence. Both defendants were found guilty of armed robbery. Defendant Henderson was sentenced to a prison term of not less than 10 nor more than 12 years. Defendant Huntley was sentenced to a prison term of not less than 20 nor more than 25 years.

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

George S. Daly, Jr., attorney for the defendant-appellant, Raymond Lewis Henderson.

Hugh J. Beard, Jr., attorney for the defendant-appellant, James Monroe Huntley.

BROCK, Chief Judge.

[1] Both defendants assign as error the admission of in-court identifications by prosecution witnesses Smith and Ensminger, which they contend were tainted by impermissibly suggestive identification procedures before trial.

Defendant Huntley argues that Miss Smith's in-court identification of him as the person who robbed the Seven-Eleven Store was fatally marred by two pretrial identification confrontations: the showup in the Seven-Eleven parking lot immediately following the robbery, and the preliminary hearing. Furthermore, defendant Huntley contends that Officer Ensminger's in-court identification of him was tainted by the same showup.

Defendant Henderson argues that Miss Smith's identification of him as a customer of the store on the evening of the robbery and Officer Ensminger's identification of him as the driver of the gold Plymouth Duster should have been excluded from the trial because of the alleged suggestive pretrial confrontations.

It is well established that pretrial identification procedures which are so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification are unconstitutional. However, alleged impermissibly suggestive pretrial confrontations do not affect the admissibility of the in-court identification if the in-court identification is determined to be of independent origin. Appellants' attack upon the in-court identifications of defendants by witnesses Smith and Ensminger raises the question of whether the in-court identifications were properly found by the trial court to be of independent and reliable origin. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

There is an abundance of evidence to support the trial judge's finding that the witnesses' in-court identifications of

the defendants were of an independent and reliable origin. Miss Smith specifically remembered defendant Henderson because of his "streaking shirt." According to her testimony on *voir dire:*

> "When Henderson came in, I guess it was between 8:00 and 9:00 o'clock that same night, I had about four customers in a line and I was there by myself. The reason I noticed that Henderson had on a streaking shirt was that he was standing at the candy counter and I figured he might swipe a bar of candy or something. I checked out those customers, and he bought some merchandise and I checked him out, and he left and I didn't see him no more until they brought him up that night. I would say I observed him from four to five minutes while he was in the store that night."

Similarly, it is clear from the circumstances of the robbery that Miss Smith's exposure to defendant Huntley was more than adequate to insure an accurate identification at trial.

Although Officer Ensminger's first encounter with the defendants occurred under rather unusual circumstances and during a relatively brief period of time, the evidence reveals that he had an adequate opportunity to observe defendants and accurately identify them at trial. When defendant Huntley ran in front of the police car, Officer Ensminger saw his face and noticed that he was wearing a tan, Army-type khaki shirt and carrying a brown paper bag and an object. Officer Ensminger testified on *voir dire:* "Mr. Huntley stopped at the rear of Mr. Henderson's car, looked directly at the police car, then got into the passenger's side of Mr. Henderson's car." Defendant Henderson first came into view as the gold Plymouth Duster approached slowly from the opposite direction and stopped directly next to the police vehicle. Henderson was driving. Officer Ensminger testified:

> "Mr. Henderson was wearing a light color, I believe it was white, T-shirt, had 'Keep on Streakin' ' on it. He had a small goatee and mustache. He was driving a gold Plymouth Duster. There was a street light right there at the corner of Camp Green and Royston Road. I would say I was two feet from Raymond Henderson when I saw him. I was able to clearly see his face. I don't have any trouble with my vision. Last time it was checked it was twenty-twenty."

Clearly there is sufficient evidence to support the trial judge's finding that the in-court identifications of defendants stemmed from reliable observations independent of the alleged suggestive pretrial identification confrontations.

[2] Defendant Huntley's assignments of error Nos. 1, 2, and 5 attack the restrictions imposed by the trial judge on defense attorney's cross-examination of Miss Smith on *voir dire* and during trial. At the *voir dire* hearing to assess the admissibility of Miss Smith's in-court identification of defendant Huntley, Huntley's counsel asked Miss Smith the following question: "Did you think when you went out they had picked up people they did not think had robbed you?" When objection to this question was sustained, he tried again: "When they told you to go out there what did you think?" Objection to this question was also sustained. Huntley argues that the court's rulings in these two instances were erroneous due to the importance of the witness's expectations immediately prior to the identification in determining whether the showup was improperly suggestive.

We find this argument unpersuasive in view of the total context of the cross-examination. The witness had already stated three times in response to continuous questioning by Huntley's attorney that the police said, "Go out and see if any one of the guys robbed you." By this time it was abundantly clear what Miss Smith remembered being told by police before the showup, and defense counsel's probe for evidence of improper suggestions by police had proven barren. Furthermore, while a witness's expectations may have some bearing on his or her susceptibility to suggestive circumstances and the ultimate risk of mistaken identification, it is not a critical factor as defendant Huntley concedes in his brief. Whether such information is important to a *voir dire* of this nature falls within the discretion of the trial judge. In this case there is no evidence of abuse by the trial judge in excluding the two questions by defense counsel on cross-examination.

[3] Defendant Huntley's assignment of error No. 3 pertains to the trial court's order to discontinue another line of questioning during the same *voir dire* hearing. Defense counsel asked Miss Smith what she said at the preliminary hearing. She testified that she was afraid she might not be able to identify defendant Huntley at the preliminary hearing because "he had done something to the top of his head and the sides

were shorter and he had shaved off his mustache." After testifying that she did not say anything to the district attorney about defendant Huntley before the preliminary hearing, she stated:

> "I didn't say to the Solicitor that I couldn't recognize him. The Judge said 'We have no doubt that a guy robbed you, but is this the guy?' As you remember I hesitated. I looked at the guy very carefully. I said 'Yes, that's the one that robbed me.' Immediately before the preliminary hearing started, I said to the District Attorney that I could recognize him."

At this juncture the court ordered defense counsel to cease the line of questioning. Defendant argues that the court's refusal to allow further questioning to develop the apparent discrepancy in Miss Smith's testimony about what she said to the district attorney before the hearing was error. We disagree. The witness's previous testimony fully disclosed the doubts and uncertainty she had about her ability to identify the defendant at the hearing. Consequently, whether the witness told the district attorney she could or could not identify the defendant before the hearing was superfluous; pursuit of this line of questioning would have added nothing to the candid admission of doubt by the witness in preceding testimony. Defendant Huntley's third assignment of error is overruled.

[4] Defendant's assignment of error No. 11 concerns defense counsel's attempt to question witness Smith at trial about the extent of her social contact with members of the Negro race. The court sustained objection to this question. Defendant argues that the extent of the witness's contact with Negroes is indicative of her ability to identify and distinguish one Negro from another. We find no merit in this argument. This assignment of error is overruled.

[5] Defendant Huntley's final assignment of error pertains to the admissibility of State Exhibits 2, 3, and 4—a bottle of Andre Cold Duck, a pack of Kool cigarettes, and a pistol, respectively—upon being identified by Miss Smith as the "same or similar" to those taken from the store or used during the robbery. In *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975), the Supreme Court reaffirmed the general rule in this jurisdiction that weapons may be admitted into evidence provided there is evidence tending to show that they were used in

the commission of a crime. The same principle applies to other articles or objects used in connection with the commission of a crime. Any conceivable error resulting from the admission of these objects into evidence was cured by Officer Harrill's subsequent identification of the objects as those which were found at the Aloha Village Apartments where defendants Huntley and Henderson were arrested on the night of the robbery.

In our opinion defendants received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. STANLEY E. HANSEN, ALIAS THOMAS CHARLES WILLIAMSON

No. 7512SC447

(Filed 19 November 1975)

1. **Searches and Seizures § 3— search warrant for narcotics — sufficiency of affidavit**

There was probable cause for issuance of a warrant to search defendant's suitcases for narcotics where the affidavit stated that the affiant, a police officer, had received information from a reliable informant that a person known to him as "Tom Williamson" had gone to California to obtain marijuana and was scheduled to return to Fayetteville by Piedmont Airlines on a specfic date and at a specific time, that the marijuana would be in two large brown suitcases, and that the informant had provided information on five prior occasions which resulted in five arrests.

2. **Searches and Seizures § 4— search under warrant — failure to obtain warrant prior to arrest**

A search of defendant's suitcase pursuant to a warrant was not rendered illegal by the officer's failure to obtain the warrant prior to defendant's arrest at an airport upon his arrival from another state rather than after his arrest.

3. **Searches and Seizures § 3— search warrant — failure to name defendant — search of suitcase**

Failure of a search warrant specifically to name defendant as purportedly required by G.S. 15-26 did not vitiate a search under the warrant where the officer who obtained the warrant sought to examine two suitcases and the warrant sufficiently described the luggage pursuant to statutory requirements, and the warrant also entitled

the officer to search the "subject unknown to affiant for the property in question."

4. **Searches and Seizures § 4— search under warrant — failure to give defendant copy of warrant**

Search pursuant to a warrant was not rendered illegal by failure of the officer to deliver a copy of the warrant to defendant as required by former G.S. 15-21 and former G.S. 15-25(d) where the officer read the warrant to defendant.

5. **Searches and Seizures § 4— search warrant — failure to file with clerk**

A search pursuant to a warrant was not rendered illegal because the warrant was never filed with the clerk of superior court pursuant to former G.S. 15-25(d).

6. **Searches and Seizures § 3— failure of record to show irregularity of warrant**

Contention that a search warrant was invalid because the affidavit and warrant were not attached together as required by former G.S. 15-26(b) will be considered to have no merit where the record does not show whether the affidavit was attached to the warrant.

7. **Criminal Law § 113— instructions — review of voir dire testimony — harmless error — waiver of objection**

In a prosecution for felonious possession of various narcotics, defendant was not prejudiced by the court's recapitulation of the voir dire testimony of an officer concerning information received from a confidential informant which led to defendant's arrest; furthermore, defendant waived objection to the court's review of such evidence by failing to object thereto before the jury retired.

ON *certiorari* to review proceedings before *Bailey, Judge.* Judgment entered 22 January 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 18 September 1975.

Defendant was charged with felonious possession of various quantities of hashish, marijuana, cocaine and Lysergic Acid Diethylamide.

This case arose initially from an informant's tip to a narcotics officer. In his affivadit to obtain a search warrant, arresting narcotics officer J. L. Beard of the Cumberland County Sheriff's office averred that the initial tip-off came through ". . . a reliable confidential informer. The informer told . . . [me] . . . that a subject known to him [i.e. the informant] as TOM WILLIAMSON had left for California to pick up several pounds of marijuana. The informer stated that the subject known to him as Williamson was returning to Fayetteville, N. C., on Piedmont Air Lines on Friday night, January 18,

1974, at about 10:45 p.m. and would have the marijuana in two br . . . [sic] large suitcases. The informer is knowledgeable as to the narcotics traffic in the Cumberland County area and has given . . . [me] . . . information on five occasions in the past that have resulted in five arrests." During a voir dire examination, with the jury outside of the courtroom, Beard further explained that the informant on Wednesday, 16 January 1974, had described the defendant as ". . . fairly thin, about five ten, five eleven to six feet tall, with long, sandy blonde hair down to his shoulders, complexion a little ruddy; he wore Indian type jewelry and that type of thing." On the next day, Thursday, Beard inquired with the Piedmont Air Lines personnel and was told that "they had no such reservation on file at that time." Beard further testified that he went to the airport Friday evening to pick up a friend and there learned for the first time from the airline company that a passenger fitting the description given to them by Beard on Thursday was apparently on board one of their in-bound flights. Beard stated that he saw the defendant emerge from the plane and watched him come ". . . down the steps. He had on a pair of blue jeans, a V-neck sweater, boots, his hair was down just about to his shoulders, I would say, a light colored shirt, and quite a bit of Indian turquoise jewelry around his neck, necklaces, and I believe he had on a turquoise bracelet. He did not have anything with him when he first got off the plane. . . . He went over to the claim area and claimed two suitcases." Beard approached defendant as soon as the latter had picked up the bags and identified himself as an officer and told defendant that he was being detained for a narcotics investigation. Taking defendant to a room inside the terminal, Beard advised defendant of his rights, but defendant said nothing when questioned. Beard then took the defendant to the Sheriff's office to obtain a search warrant and again advised defendant of his rights and told him that he ". . . was going to treat him right . . ." and allowed defendant to sit in the room unfettered by handcuffs. However, defendant broke from the room as Beard started to type the warrant. Recaptured in the hallway, defendant returned to the room and sat handcuffed to the chair while Beard read the contents of the warrant to him.

Beard recalled that upon opening the suitcases, he ". . . saw white plastic bags, baby powder, a few articles of clothing. The baby powder was just like somebody had taken the top off

of a bottle or two of baby powder and just poured it all over the inside of the suitcases, all on the plastic bags and in between the clothes. . . . Inside each of the suitcases, there were six of these white plastic bags with knots tied in them. . . . Inside the plastic bags there were two compressed bricks of green vegetable matter. . . . [Also found] in a side compartment of the smaller suitcase . . . [was] a glass vial containing a brownish substance, a piece of paper with fifteen, seventeen dots on it, and another piece of paper with two pink pills in it[,] . . . a small clear plastic bag with some green vegetable matter in it also. . . . [Asked] . . . where he had gotten the things in the bag, . . . [Hansen] . . . stated that he had bought them from some people in a park in Los Angeles." When asked by Beard what the material consisted of, defendant told the officer that the glass vial contained hash oil, the brown dots on the paper and the two pink tablets contained LSD, and the bricks contained approximately 50 pounds of marijuana. Finally, when asked whether he had missed anything in the search of the bag, defendant replied "No," but then ". . . pulled out a pack of cigarettes . . . and pulled out . . . a yellow piece or roll of paper, and . . . [said] he had some cocaine in his pocket. . . ."

The State then presented evidence by a chemist which tended to show that the material seized was marijuana, marijuana resine, cocaine and LSD.

Defendant presented no evidence.

From a plea of not guilty, the jury returned a verdict of guilty. From judgment sentencing him to a term of imprisonment, defendant appealed.

Other facts necessary to decision are cited in the opinion.

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

Anderson, Nimocks and Broadfoot, by Henry L. Anderson, Jr., for defendant appellant.

MORRIS, Judge.

Defendant first attacks various aspects of the search warrant and the subsequent search and seizure. Specifically, defendant contends that (1) the warrant, obtained on the basis of evidence presented in an affidavit, was issued without prob-

able cause; (2) the police should have obtained the search warrant prior to arresting defendant at the airport; (3) the warrant should have named the defendant as purportedly required under G.S. 15-26(a); (4) the arresting officer failed to deliver a copy of the warrant to defendant as required by G.S. 15-21 and 15-25(d); (5) the warrant was never filed with the Clerk of Superior Court pursuant to G.S. 15-25(d) and thus violated due process and adequate notice; and (6) the affidavit and warrant were not attached together as required under G.S. 15-26(b).

[1] There is little doubt that the arresting officer's affidavit to obtain a search warrant sufficiently detailed circumstances which would enable the magistrate to find probable cause. With considerable particularity and detail, the affidavit described the suitcases in which marijuana was allegedly being transported and indicated that the cases purportedly held in excess of 20 pounds of contraband drugs. The affiant further explained that the subject known as "Tom Williamson" had journeyed to California to make the pickup and was scheduled to return to Fayetteville on a specific date and at a specific time with the drugs in hand. Finally, Agent Beard pointed out that the informant had an accurate track record in this area and was considered reliable. In a similar case, North Carolina narcotics officers learned through a California police officer's phone call that the defendants were to fly into Greensboro with a considerable cache of drugs. The California phone caller described the suspects and their luggage and North Carolina officers reduced this information to writing in their affidavit to obtain a search warrant. *State v. Ellington,* 284 N.C. 198, 200 S.E. 2d 177 (1973). Justice Higgins, speaking for the Court in *Ellington,* reviewed carefully and critically the information outlined in the affidavit and declared that it furnished ". . . ample information upon which to find that probable cause existed for the search which the officers made." *Id.* at 203. In *Ellington,* the North Carolina authorities learned of the drug traffic through a California officer's account, essentially pieced together from West Coast sources and this "third-hand" account formed the basis of the lawful North Carolina search warrant. Here, the North Carolina officer, swearing out the affidavit against defendant Hansen, learned of the offense directly from his North Carolina informant. Arguably, this makes the facts in this case more compelling than the facts in *Ellington.* Defendant's con-

tention that there was no probable cause to issue a search warrant is without any substance.

[2] Defendant also maintains that the arresting officer should have obtained the search warrant prior to defendant's arrival at the airport in Fayetteville. We again find this contention lacking in merit. Beard testified that he actually did not know of defendant's impending arrival that evening until he actually walked into the airport terminal to pick up a friend who was visiting Fayetteville. At that point, Beard was simply a citizen waiting for a friend's arrival. However, upon Beard's arrival at the terminal, the airline desk personnel advised him that the suspect was in-bound on the same Atlanta flight which carried his friend. Beard recalled during a voir dire that "I thought to myself that if I hadn't been there picking that person up, and I had been involved with something else on the other side of town, I probably would have missed him [i.e. the defendant]. . . . I had expected Williamson on Friday night ever since Wednesday. I had reason to believe ever since Wednesday that he would be carrying two substantial size brown suitcases of contraband. The particular reason why the search warrant was not obtained on the basis of the information available in the Sheriff's Department was a couple of things; first of all, once you draw one at certain times, you know; they have to be nailed down pretty much. I think the time limit is twenty-four hours. So I would have to have drawn the search warrant sometime Thursday afternoon or sometime Friday morning. My information was that . . . Hansen was supposed to come back Friday night, and to the best of my people's knowledge, he was supposed to come back Friday night. He never booked a return flight. This was some more information I had. There is no way I could tell, and I just didn't want to go draw a search warrant and then maybe have the man come in on Saturday morning or Saturday afternoon or whatever." We believe Beard's reaction to the particular events and circumstances then confronting him was reasonable and prudent.

[3] Defendant, moreover, argues that the warrant should have specifically named him as purportedly required by G.S. 15-26. Here the officer primarily was seeking to examine two suitcases and the warrant sufficiently described the luggage pursuant to all statutory requirements. The warrant also entitled the officer to search the "subject unknown to affiant for the property in question." This description of the defendant is reasonable under

these particular circumstances. When Beard actually confronted defendant at the airport and asked for identification, all defendant could produce was a North Carolina hunting license showing the name "Thomas Charles Williamson." Later, police learned that this name was actually an alias. The warrant, drawn shortly after defendant's arrival, reflected accurately the still unsettled question of the defendant's actual identity and yet clearly identified the target of this particular search warrant. Our Court has previously stated that search warrants "'. . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.'" *State v. Flowers,* 12 N.C. App. 487, 492, 183 S.E. 2d 820 (1971); cert. denied 279 N.C. 728, 184 S.E. 2d 885 (1971); quoting from *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965).

[4] Defendant also avers that the arresting officer failed to deliver a copy of the warrant to defendant as required by G.S. 15-21 and 15-25(d). Beard testified that he read the warrant to defendant, and we can find no error in such a procedure. *State v. McDougald,* 18 N.C. App. 407, 408, 197 S.E. 2d 11 (1973); cert. denied 283 N.C. 756, 198 S.E. 2d 726 (1973). Moreover, G.S. 15-21, applicable to the instant case, though repealed effective 1 July 1975, provides that failure to comply with the technical provisions of the statute does not ". . . invalidate the arrest."

[5] Defendant further insists that his right to notice and due process was violated because the warrant was never filed with the Clerk of Superior Court pursuant to G.S. 15-25(d). Defendant cites no authority for this contention, and the State candidly admits that it too has failed to find any authority on the subject. However, the State notes correctly, and we so hold, that under G.S. 15-27(b) "no search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required." Here the error, if any, was simply technical and does no harm to defendant's constitutional rights to due process and notice. He simply cannot argue realistically that he did not know of the warrant.

[6] Defendant also argues that the affidavit and warrant were separated from each other in violation of G.S. 15-26(b).

Our Supreme Court has held that a " 'search warrant will be presumed regular if irregularity does not appear on the face of the record. ' " (Citation omitted.) *State v. Spillars,* 280 N.C. 341, 350, 185 S.E. 2d 881 (1972). Here, the record does not indicate whether the affidavit was attached to the warrant. We find no merit in this contention.

[7] Defendant's other major contention is that the trial court, while instructing the jury, erred by bringing to the jury's attention facts which had not been brought forth during the trial but only were expressed during a voir dire examination of Beard. Specifically, the judge stated to the jury that Beard had testified:

> "[T]hat he had received information at an earlier time that a person known to the informant as Thomas (John) Charles Williamson had been making trips from Fayetteville to the west coast and back; that Williamson when he went customarily went on Wednesdays, carrying two large brown suitcases which he carried away substantially empty; that he usually returned on Fridays with a substantial quantity of marihuana in the suitcases; that he traveled by air. The informant stated that the man known to him as Thomas (John) Charles Williamson customarily wore his hair to about the height to his shoulders; that he usually dressed in blue jeans with a V-sweater, was moderate to somewhat larger than moderate in size; that he usually wore a turquoise necklace and a turquoise bracelet. Based on this information, Mr. Beard made inquires of Piedmont Airlines as to whether or not a person by the name of Thomas Charles Williamson had a reservation into Fayetteville. He was informed that there was no such reservation at that time, and he asked the Piedmont agent to notify him if he learned of such a reservation."

The State does not challenge this contention but argues that its impact was harmless. We concur with the State's position and find no prejudice to the defendant by the trial court's error. Moreover, defendant has waived the right to contest this error. " 'The general rule in this State is that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal.' " *State v. West,* 21 N.C. App. 58, 60, 203 S.E. 2d 86 (1974);

cert. denied 285 N.C. 376, 205 S.E. 2d 101 (1974), quoting *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3.

Defendant next contends that he was not properly advised of his *Miranda* and *Escobedo* rights. The record clearly indicates that defendant was fully advised of his constitutional rights by Beard.

We have considered defendant's other contentions and find them also to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOANN LITTLE

No. 752SC465

(Filed 19 November 1975)

1. **Criminal Law § 42— rifle taken in breaking or entering and larceny case — identification testimony proper**

In a prosecution for felonious breaking or entering where a State's witness had just completed an identification of a 30-30 Winchester rifle which had been stolen from his home, the trial court did not err in allowing the State to ask the witness if he could "identify that rifle as being different from any other 30-30 Winchester Rifle."

2. **Criminal Law § 162— evidence admitted over objection — proper assignment of error**

If evidence is incompetent and is admitted over objection, the assignment of error should be to the admission of incompetent evidence, not to the failure of the court to instruct the jury to disregard it.

3. **Criminal Law § 42— coat worn by crime suspect — coat worn by defendant — descriptions properly admitted**

Where the evidence in a felonious breaking or entering and felonious larceny case tended to show that Rhodes' trailer was broken into and that a witness observed at Rhodes' door on the day of the crime a person in a short black and white fur, fuzzy coat, the trial court did not err in allowing Rhodes, who had known defendant for quite a while, to testify that on occasions he saw defendant, she customarily wore a little white fur coat.

4. **Criminal Law § 88— limitation of cross-examination proper**

The trial court did not err in limiting cross-examination of a witness where the testimony sought had already been given.

5. Burglary and Unlawful Breakings § 5; Larceny § 7— possession of recently stolen property — sufficiency of evidence

In a prosecution for felonious breaking or entering and felonious larceny, evidence was sufficient to invoke the principle of possession of recently stolen property and to require submission of the case to the jury where such evidence tended to show that the residences of Keys, Rhodes, and Johnson were broken into, various items of property were stolen therefrom, defendant placed in her brother's trailer on the day of the break-in items stolen from each of the three residences, defendant had in her immediate possession on the day of the break-in a blouse and some jewelry stolen from the Rhodes' residence, a female wearing a coat similar to defendant's coat was seen on the day of the break-in standing at the door of the Rhodes' residence, defendant attempted to induce another person to take the blame for the break-in, and defendant and her boyfriend undertook to stop the prosecutions by agreeing to pay damages for those items which were damaged or not recovered.

6. Criminal Law § 112— jury instructions — female defendant — use of masculine pronouns — no error

Trial court's use of the terms "he" and "his" instead of "she" and "her" in an instruction upon a general principle applicable to all defendants brought to trial in N. C. was not erroneous.

7. Burglary and Unlawful Breakings § 6— instruction as to "taking or entering" — lapsus linguae — no prejudice

In a prosecution for breaking or entering the trial court's statement in instructing the jury, "that the property was taken from a building after a taking or entering," was a *lapsus linguae* and did not confuse the jury, since immediately preceding the sentence complained of the judge used the term "breaking or entering" eight times, and immediately following the sentence complained of, the judge used the term "breaking or entering" four times.

8. Burglary and Unlawful Breakings § 7; Larceny § 8— felonious breaking or entering and felonious larceny — failure to submit lesser included offenses — no error

The trial court in a prosecution for felonious breaking or entering and felonious larceny did not err in failing to submit to the jury the lesser included offenses of misdemeanor breaking or entering and misdemeanor larceny where there was no evidence upon which to base a finding of guilt of lesser included offenses.

9. Criminal Law § 154— post-verdict testimony in record on appeal — inclusion discretionary matter

Inclusion of post-verdict testimony in the record on appeal was a discretionary matter for the trial judge, and absent a manifest abuse of discretion by the trial judge, the settlement of the record on appeal is not reviewable.

10. Criminal Law § 137— judgment inconsistent with verdict — guilty of receiving — recitation stricken

Where defendant was convicted of felonious breaking or entering and felonious larceny, the judgments entered which recited that de-

fendant was convicted of "receiving" were erroneous, but such errors were surplusage which should be deleted from the judgments and commitments.

ON *writ of certiorari* to review a trial before *Martin (Robert M.), Judge.* Judgment entered 6 June 1974 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 23 September 1975.

Defendant was charged in three three-count bills of indictment. (I) In No. 74CR217-A she was charged with (1) felonious breaking or entering (Keys residence), (2) felonious larceny, and (3) felonious receiving. (II) In No. 74CR217-B she was charged with (1) felonious breaking or entering (Rhodes residence), (2) felonious larceny, and (3) felonious receiving. (III) In No. 74CR217-C she was charged with felonious breaking or entering (Johnson residence), (2) felonious larceny, and (3) felonious receiving. Without objection the three cases were consolidated for trial, along with three similar indictments against her younger brother, Jerome Little. She was found guilty of (1) felonious breaking or entering, and (2) felonious larceny in each of the three cases. Under the instructions given by the trial judge, the jury was to consider the charges of felonious receiving only in the event they found defendant not guilty of the charges of felonious breaking or entering and felonious larceny. Therefore, under the verdicts rendered by the jury, the charges of felonious receiving were removed from its consideration.

The State's evidence tended to show the following:

During the daylight hours of 14 January 1974, the residence of James Earl Keys, Route 1, Box 306, Chocowinity, North Carolina, was broken into. Entrance was gained by prying open the front screen door and the main front door of the Keys' residence. A portable television set and a 30-30 Winchester rifle were taken. Both were recovered in the manner later disclosed by the evidence.

During the daylight hours of 14 January 1974, the trailer residence of Roland Rhodes in Sawyer's Trailer Park in Beaufort County was broken into. A tape player, a vacuum cleaner, all of the food from the refrigerator, all of the canned goods, five pairs of shoes, and some shirts were taken. Some of these items were recovered in the manner later disclosed by the evi-

dence. About midday the next-door neighbor of Rhodes heard a dog barking. She looked out of her window and saw two girls and a man at Rhodes' door. One of the girls was wearing a short black and white fur coat. Defendant Joann Little customarily wears a "little white fur coat." As a result of information given to Rhodes by his next-door neighbor, Rhodes and his girl friend went to see defendant Joann Little. When they arrived, Melinda Moore and Jerome Little were with Joann Little. Melinda Moore was wearing a blouse and some jewelry taken from Rhodes' residence. Joann Little told Melinda Moore to say that she, Melinda, did it because she, Melinda, was under age, and there was nothing that could be done to her. Melinda told Rhodes that it was Joann's idea to break into Rhodes' trailer. Some of Rhodes' property was recovered in the manner later disclosed by the evidence.

During the daylight hours of 14 January 1974, the trailer residence of Ronald Johnson in Sawyer's Trailer Park was broken into. Entry was gained by removing a back window. A television set, a piggy bank, some clothes, some shoes, and some kitchen appliances were taken. Some of these items were recovered in the manner later disclosed by the evidence.

Defendant Jerome Little testified as a witness for the State. Defendant Joann Little, age 20, lived with her boyfriend, Julius Rogers. Defendant Jerome Little, age 19, lived with his girl friend, Melinda Moore, age 14, in a trailer. During the afternoon of 14 January 1974, Joann Little asked Jerome Little if she could keep some things in his trailer. Later, on 14 January 1974, Joann Little and Julius Rogers brought some more clothes, a piggy bank, and some food to Julius Rogers' place on 4th Street. The blouse taken from the Rhodes' trailer was among the clothes. With Joann Little's permission, Melinda Moore put the blouse on and was wearing it when Rhodes and his girl friend arrived at Julius Rogers' place on 4th Street. Jerome Little told Rhodes that Joann and Julius planned the break-in of his trailer and that Joann went out and took his things from his trailer. Jerome Little asked Joann Little if the stuff she had placed in his (Jerome's) trailer had been stolen, and she said yes. Jerome took Julius Rogers' car, went to his (Jerome's) trailer, and loaded the things in the car. Jerome and Melinda Moore started to return the things to Rhodes' trailer, but they became afraid. They then started to take the things to the sheriff's office, but again became afraid.

In the meantime Rhodes had contacted a deputy sheriff, and they were proceeding to Rhodes' trailer residence for further investigation when they saw Jerome Little driving Julius Rogers' car. They stopped the car and observed in the back seat a television set, a rifle, Rhodes' vacuum cleaner, some shoes, and a "whole lot of clothes." The deputy directed Jerome to drive to the sheriff's office. As they were leaving, the deputy's car malfunctioned, and Jerome drove away. Jerome went to a deserted spot in the woods and unloaded everything from the car. Later Jerome drove to the sheriff's office. Thereafter Jerome led the deputy to the spot in the woods where he had unloaded the car; and many of the items taken from the Keys' residence, the Rhodes' residence, and the Johnsons' residence were recovered.

Defendant's testimony tends to show the following:

Joann Little owns a short black and white fur coat. Melinda Moore was wearing the coat on 14 January 1974. Joann Little did not go to the residences of Keys, Rhodes, or Johnson on 14 January 1974. She was with her boyfriend, Julius Rogers, all day. She knew nothing of a breaking and entering or stealing until Rhodes came to her boyfriend's place that evening. Joann Little and her boyfriend tried to get the victims to take their property back and let Julius Rogers pay damages in order to prevent prosecution of Jerome Little and Melinda Moore. They did this only in an effort to protect Jerome and Melinda.

Attorney General Edmisten, by Deputy Attorney General Andrew A. Vanore, Jr., for the State.

Paul, Keenan, Rowan & Galloway, by Jerry Paul, James E. Keenan, Karen B. Galloway, James V. Rowan, and James B. Gillespie, Jr., for the defendant.

BROCK, Chief Judge.

[1] Defendant's first assignment of error alleges that the trial court committed error in allowing the State's witness Keys to answer the following question: "Based on the description you just gave me can you identify that rifle as being different from any other 30-30 Winchester rifle?" Over objection by defendant the witness was allowed to answer as follows: "Well, yes sir, I think I can. I think if anyone would bring another one, I feel like I could. One thing this rifle has only been used about

three times and no oil has been put on it and if you look in the chamber also you can see it's got a dry shine and not an oily shine and I could identify it anyway."

When the foregoing exchange took place, the witness had just completed an identification of the 30-30 Winchester rifle which had been stolen from his home. He described a spot where the bluing of the metal had a light tint, and he described a scratch mark he had put in the metal with a nail for identification purposes. While we might agree that the question to which objection was made was beyond the scope of well-advised examination by the district attorney, we see no error prejudicial to defendant. The witness had already unequivocally identified the rifle as the one taken from his home. Clearly an innocuous question like the one to which error is assigned cannot constitute grounds for a new trial. The rifle was only one of two items identified as having been taken from Keys' residence and later removed from Jerome Little's trailer by Jerome. This assignment of error is overruled.

[2] Defendant's second assignment of error reads as follows: "The Court erred in failing to properly instruct the jury to disregard evidence that was admitted over objection." The fallacy in this assignment of error lies in the assertion that the court must instruct the jury to disregard evidence merely because it is admitted over objection. Clearly a mere objection does not require exclusion of evidence. If the evidence be incompetent and is admitted over objection, the assignment of error should be to the admission of incompetent evidence, not to the failure of the court to instruct the jury to disregard it.

In any event, the argument under this second assignment of error is addressed to the failure of the court to instruct the jury to disregard evidence which was actually excluded by the trial court. Each of the exceptions grouped under this assignment of error (exceptions Nos. 2, 3, 4, 8, and 9) is taken to rulings favorable to defendant. In one instance the court sustained defendant's objection and did not permit the witness to answer; in two instances defendant's objection and motion to strike the testimony were allowed; and in two instances, upon defendant's objection, the court specifically instructed the jury to disregard the testimony as to the defendant Joann Little. Apparently, on trial, counsel was satisfied with the sufficiency of the rulings of the trial judge and made no request for further instruction. This assignment of error is overruled.

[3] Defendant's third assignment of error is addressed to testimony about a coat that Joann Little customarily wore when the witness had occasion to see her. State's witness Rhodes testified that after talking with the witness Brooks, who had seen three people at the door of Rhodes' trailer residence on the day of the break-in, Rhodes went to see defendant Joann Little. He had known Joann Little for quite a while. The following questions and answers are the subjects of the exceptions grouped under this third assignment of error:

> "Q. Have you ever seen Joann Little when she was wearing a coat?
>
> "A. Yes.
>
> "Q. Does Joann Little have any particular coat she customarily wears when you have seen her?
>
> "A. Yes, it's a little white fur coat."

Obviously this testimony was prejudicial to Joann Little because the witness Brooks had described one of the persons she had observed at the door of the Rhodes' trailer residence on the day of the break-in as wearing a short black and white fur, fuzzy coat. Clearly the mere fact that the testimony is prejudicial to defendant does not make it incompetent. The witness Rhodes had known Joann Little for quite a while and had observed that she customarily wore the coat he described. In our opinion the evidence was competent and properly admitted. This assignment of error is overruled.

Defendant's fourth assignment of error is wholly without merit. No objection was made at trial to the admission of the evidence complained of, and defendant now seeks to insert an exception in the record on appeal. This assignment of error is overruled.

Defendant's fifth assignment of error is based upon defendant's exception No. 11. This exception appears in the record on appeal as follows:

> "Mr. Grimes: At this time the State will call the defendant Jerome Little to the stand.
>
> "Exception No. 11"

During the course of the trial, in the absence of the jury, the defendant Jerome Little tendered a plea of guilty to feloni-

ously receiving stolen goods. The plea was accepted by the State. Thereafter the trial proceeded against both defendants as though no such plea had been entered by Jerome Little, and the issues of his guilt or innocence were submitted to the jury. Clearly this was done with the concurrence, if not the request, of Joann Little because no request was made of the trial judge that he advise the jury of the plea. Although Joann Little was given ample opportunity to cross-examine Jerome Little, there was no cross-examination of Jerome Little concerning the plea of guilty; and Joann Little does not now argue that the issues of Jerome Little's guilt or innocence should not have been submitted to the jury as though no plea had been entered. Obviously, at trial Joann Little concluded that it was to her advantage that the jury not be advised of Jerome Little's plea of guilty. Defendant's arguments upon this assignment of error are beside the point and are overruled.

[4] By her sixth assignment of error, defendant argues that the trial judge erroneously restricted her cross-examination of a State's witness. Defendant cross-examined the State's witness Rhodes concerning an agreement proposed by Joann Little and her boyfriend, Julius Rogers, to pay Rhodes damages for the things taken from his residence. Defendant further cross-examined the witness concerning Jerome Little's refusal to sign such an agreement upon his assertion that he did not take anything from Rhodes' residence; that "all he was doing was just getting it out of his trailer." Defendant then asked Rhodes, "But, he was the one that had the stuff in his car?" Objection by the State was sustained, and the witness did not answer. Previously it had been made abundantly clear by the testimony of Jerome Little, by the witness Rhodes, and by a deputy sheriff that Jerome Little had many of the stolen items in his car. Therefore, the question propounded was argumentative to some extent and obviously repetitious of testimony which was not controverted. The trial judge has the duty to keep cross-examination within reasonable bounds, and we see no abuse of discretion or error prejudicial to defendant. This assignment of error is overruled.

[5] Defendant's seventh assignment of error argues that the charges against Joann Little should have been dismissed for lack of evidence sufficient to submit to the jury. We do not agree. When viewed in the light most favorable to the State, the evidence tends to establish that the residences of Keys, Rhodes, and

Johnson were broken into on 14 January 1974, and various items of personal property were stolen therefrom. It further tends to establish that Joann Little placed in Jerome Little's trailer on the day of the three break-ins items stolen from each of the three residences. Also it tends to establish that she had in her immediate possession on the day of the break-ins a blouse and some jewelry stolen from the Rhodes' residence. The State's evidence tends to establish that a female wearing a coat similar to Joann Little's coat was seen on the day of the break-ins standing at the door of the Rhodes' residence. Also there is the evidence tending to show that Joann Little attempted to induce Melinda Moore to take the blame for the break-ins and that Joann Little and her boyfriend, Julius Rogers, undertook to stop the prosecutions by agreeing to pay damages for those items which were damaged or not recovered. In our opinion this evidence is sufficient to invoke the well-established legal principle relating to possession of recently stolen property. If and when it is established that a building has been broken into and entered and that property has been stolen therefrom, the possession soon thereafter of such stolen property raises inferences of fact that the possessor is guilty of larceny and of the breaking and entering. *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578 (1965). The inferences of fact are strong or weak, depending upon the length of time that has elapsed and the greater or less possibility that other agencies have intervened. 2 Stansbury's N. C. Evidence, Brandis Revision, § 242. In our opinion the evidence was sufficient to require submission of the case to the jury and to support the verdicts. This assignment of error is overruled.

[6] Defendant's eighth assignment of error argues that the trial court committed prejudicial error when it used the terms "he" and "his" instead of "she" and "her" in the following instruction:

> "Now, members of the jury, the fact that the defendant has been indicted is no evidence of guilt. Under our system of justice when a defendant pleads not guilty he is not required to prove his innocence, he is presumed innocent. The State must prove to you the defendant's guilt beyond a reasonable doubt."

The instruction complained of was an instruction upon a general principle applicable to all defendants brought to trial in North Carolina. We think that defendant's argument that the

jury was so naive as to understand that the presumption applied only to male defendants and not to female defendants requires no serious discussion. This assignment of error is overruled.

[7] Defendant's ninth assignment of error argues that the following sentence of the instructions to the jury constitutes prejudicial error:

> "Sixth, that the property was taken from a building after a taking or entering."

We strongly suspect that the error was on the part of the court reporter instead of the judge. In any event it seems highly unlikely that this *lapsus linguae* could have confused the jury.

Immediately preceding the sentence complained of, the judge used the term "breaking or entering" eight times in defining the offense. Immediately following the sentence complained of, the judge used the term "breaking or entering" four times. The following is the instruction given by the trial judge leading up to the sentence of which defendant complains:

> "Now, I charge that for you to find the defendant guilty of felonious breaking and entering, the State must prove four things beyond a reasonable doubt.
>
> "First, that there was either a breaking or an entering by the defendant. The opening of a closed door or the breaking in and opening of a window would be a breaking. Simply going through an open door or through a window would be an entry.
>
> "Second, the State must prove that it was a building broken into or entered. And, a trailer would be a building.
>
> "Third, that the owner did not consent to the breaking or entering; and,
>
> "Fourth, that at the time of the breaking or entering the defendant intended to commit larceny therein. Larceny is the taking and carrying away of property of another without his consent with the intent to permanently deprive him of possession.
>
> "Members of the jury, each of the defendants is charged with felonious larceny pursuant to a breaking or entering. Felonious larceny pursuant to a breaking or entering is the taking and carrying away of personal property

of another without his consent, from a building, after a breaking or entering, intending at the time of taking to deprive the victim of its use permanently, the taker knowing that he was not entitled to take it.

"Now, I charge that for you to find the defendant guilty of felonious larceny, the State must prove six things beyond a reasonable doubt.

"First, that the defendant took property belonging to an owner and in this case it would be the three persons who are charged with having lost the property, either one, two or all three.

"Second, that the defendant carried away the property.

"Third, that the owner did not consent to the taking or carrying away of the property.

"Fourth, that at the time of the taking, the defendant intended to deprive him of its use permanently.

"Fifth, that the defendant knew that he was not entitled to take the property. And,

"Sixth, that the property was taken from a building after a taking or entering."

In our opinion the *lapsus linguae* in the sentence of which defendant complains, when viewed with the charge as a whole, was not likely to confuse the jury, and it does not justify a new trial. This assignment of error is overruled.

Defendant's tenth assignment of error has been disposed of in our discussion of her seventh assignment of error, and the same is overruled.

[8] Defendant's eleventh assignment of error argues that the trial court should have submitted to the jury the lesser included offenses of misdemeanor breaking or entering and misdemeanor larceny. We have already stated the facts which the evidence tends to show and will not here repeat them. The State's evidence tends to show breaking or entering with intent to commit larceny, and larceny pursuant to breaking and entering. There is no evidence to the contrary. Defendant's evidence tends to refute her participation in a breaking or entering, or larceny pursuant to a breaking or entering. There is no evidence upon which to base a finding of guilt of a lesser included offense.

The mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice to require submission of a lesser included offense. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954).

Defendant's twelfth assignment of error argues that the trial judge should have instructed the jury upon the legal principles applicable to accomplices. We find no evidence to justify or require such instructions. The entire theory of the trial and the evidence was that Joann Little was a principal in the first degree. This assignment of error is overruled.

[9] By defendant's thirteenth assignment of error, she objects to the trial judge's settlement of the record on appeal. The defendant served a proposed record on appeal upon the district attorney in due time. The district attorney, in due time, served on defendant a proposed alternative record on appeal, and defendant timely requested a settlement of the record on appeal by the trial judge. Defendant's only objection to the State's proposed alternative record on appeal was the inclusion of testimony taken after the jury had returned its verdicts. The trial judge ordered that the State's proposed alternative record on appeal, including the post-verdict testimony, shall constitute the record on appeal. Defendant assigns as error the inclusion of the post-verdict testimony in the record on appeal.

After the verdict was rendered and before judgment was entered, defendant, her mother, and others testified. Defendant took the witness stand and, under questioning by her attorney, admitted her participation in each breaking and entering and the larceny of the property. She explained how entry was gained, who participated, what property was taken, and that the stolen property was "dumped" in Jerome Little's trailer.

We agree with defendant's assertion that this post-verdict testimony has no effect on the issues presented by the appeal. The questions presented by defendant's assignments of error on appeal are resolved by application of the law. However, absent a showing of manifest abuse of discretion by the trial judge, the settlement of the record on appeal is not reviewable. Although the post-verdict testimony was of no use to this Court in passing upon defendant's assignments of error, since it was a proceeding before entry of judgment, we fail to see why defendant complains of its inclusion. This assignment of error is without merit and is overruled.

[10] Defendant's fourteenth assignment of error argues that the judgment entered in each of the three cases is erroneous because each recites that the defendant was convicted of "receiving." This assignment of error is meritorious. The record on appeal clearly discloses that the jury returned a verdict in each of the three cases that defendant was guilty of felonious breaking or entering, and guilty of felonious larceny. The jury followed the trial court's instruction that if it found Joann Little guilty of breaking or entering, or guilty of larceny, it would not consider the charge of receiving. Although the judgments sentence defendant only upon the felonious breaking or entering charges and upon the felonious larceny charges, each of them does recite that she was also convicted of felonious receiving. These are obvious ministerial errors and constitute surplusage which rightfully should be deleted from the judgments and commitments.

Although we find no prejudical error in the trial, we direct the Clerk of Superior Court, Beaufort County, to delete from the consolidated judgment and commitment entered in these three cases the words "and receiving" which appear three times in the second paragraph thereof, which begins with the words: "Having been adjudged by a jury of 12 guilty of . . . . "

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA EX REL. DOROTHEA DIX HOSPITAL v. EARL WILLIAM DAVIS AND LEONARD MASSEY, GUARDIAN OF EARL WILLIAM DAVIS

No. 7510SC425

(Filed 19 November 1975)

1. **Insane Persons § 5— mental patients — payment of costs of care — applicability to criminally insane**

Statutes requiring persons admitted to State mental institutions to pay the actual costs of their care, treatment, and maintenance at such institutions, G.S. Ch. 143, Art. 7, apply to mentally ill criminals committed pursuant to G.S. Ch. 122, Art. 11.

2. **Insane Persons § 5— mental patients — payment of costs of care — due process**

Statutes requiring mental patients to pay the actual costs of their care in State institutions do not give the hospital governing boards unbridled authority to determine the amount and under what circumstances patients shall pay or deny patients notice, hearing and appeal in violation of due process since it is the policy of the State that all patients pay the actual costs of their care and the governing boards are given authority only to determine the actual costs, and patients have the opportunity to resist all claims by the State in actions to recover such costs brought by the State under G.S. 143-121 in the Superior Court of Wake County.

3. **Constitutional Law § 7; Insane Persons § 5— determination of costs to mental patients — no delegation of legislative power**

The statute authorizing the governing boards of State mental institutions to determine the actual costs of the care, treatment and maintenance to be paid by patients at such institutions, G.S. 143-118, does not constitute an impermissible delegation of legislative power in violation of Art. 2, § 1, of the N. C. Constitution.

4. **Insane Persons § 5; Taxation § 2— payment of costs by criminally insane — no tax**

Statutes requiring patients at State mental institutions to pay the actual costs of their care, treatment and maintenance at such institutions do not impose a nonuniform tax in violation of Art. I, § 8 of the U. S. Constitution or Art. V, §§ 1 and 2 of the N. C. Constitution when applied to mentally ill criminals.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 30 December 1974 in Superior Court, WAKE County. Heard in the Court of Appeals 16 September 1975.

Action was instituted by plaintiff to recover the actual cost of services provided to the defendant while he was a patient at Dorothea Dix Hospital. Defendant answered plaintiff's complaint asserting that he was committed pursuant to G.S. Chapter 122, Article 11 as a mentally ill criminal and that his commitment was against his will and for the purpose of protecting the general public. Defendant further asserted the unconstitutionality of G.S. Chapter 143, particularly Article 7, and moved for summary judgment.

The court granted defendant's motion for summary judgment and held G.S. Chapter 143, Article 7 unconstitutional as a violation of the Fourteenth Amendment and Article 1, Section 8 of the United States Constitution, and Article 1, Section 19; Article 2, Section 1; and Article 5, Sections 1 and 2 of the North Carolina Constitution. From the foregoing judgment, plaintiff appealed to this Court.

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

Joseph B. Huff for defendant appellee.

ARNOLD, Judge.

Plaintiff's appeal presents two questions for this Court to decide. First, does G.S. Chapter 143, Article 7 apply to persons committed as criminally ill (pursuant to G.S. Chapter 122, Article 11), and second, if the statute is applicable, is it constitutional. We answer both questions affirmatively.

[1] Since there is no statutory authority specifically directing patients under criminal commitment to pay for their hospitalization it is defendant's position that he is not required to pay. He correctly points out that there is no reference in G.S. Chapter 122, Article 11 to payment by the criminally insane. Furthermore, defendant argues that the directive in G.S. 143-119 authorizing the removal of all inmates who refuse to pay is evidence that G.S. Chapter 143, Article 7 does not apply, because the criminally insane could not be removed regardless of whether they refused to pay.

Defendant misconstrues the implications of G.S. 143-119. The statute provides:

> " . . . all of the other provisions of this Article relating to the manner in which said board shall collect said costs, shall be construed to be *directory provisions* on the part of the authorities of said institutions and not mandatory, and the failure on the part of said authorities of such institutions to perform any or all of said provisions shall not affect the right of the State institutions so named to recover in any action brought for that purpose, either during the lifetime of said inmates or after their death, in an action against their guardian if alive, or other fiduciary, or against the inmate himself, and if dead, against their personal representatives for the cost of their care, maintenance and treatment in said institutions."

It is clear from a complete reading of the statute that dismissal from an institution for failure to pay is only one of the options created by the statute to enforce payment as equitably as possible.

G.S. 143-117 clearly states: "All persons admitted to Dorothea Dix Hospital . . . are hereby required to pay the actual cost of their care, treatment, training, and maintenance." The message of the statute is unambiguous. There is no indication whatsoever of an intent by the legislature to limit the statute's application to the civilly committed. Absent any indication of a legislative intent to limit the statute's application, it should be strictly construed.

Though there are no North Carolina cases dispositive of the precise issues involved here, North Carolina courts have repeatedly upheld the constitutionality of the principle freeing the State from bearing the expense of care, treatment, and maintenance for non-indigent patients in tax supported State institutions. *State Hospital v. Bank,* 207 N.C. 697, 178 S.E. 487 (1935); *Graham v. Insurance Co.,* 274 N.C. 115, 161 S.E. 2d 485 (1968); *Hospital v. Hollifield,* 4 N.C. App. 453, 167 S.E. 2d 45 (1969).

"There is no provision in the [N.C.] Constitution requiring or authorizing the General Assembly to provide for the care, treatment, or maintenance of nonindigent insane persons at the expense of the State. The General Assembly has at all times by appropriate statutes required such persons to pay at least the actual cost of their care, treatment, and maintenance, while they are patients in State institutions." *State Hospital v. Bank supra* at 704.

The defendant, in the instant case, was charged with the first-degree murder of his wife. By order of the judge of the Madison County Superior Court, the defendant was admitted to Dix Hospital January 13, 1967 under the provisions of G.S. 122-91. Defendant remained incompetent to stand trial until 21 October 1971. After trial, the jury returned a verdict for the defendant of not guilty by reason of insanity.

The State contends that charging defendant for the costs of his care, treatment, and maintenance while he is involuntarily criminally committed is not a tax, and is not violative of his Federal and State constitutional rights. We agree.

[2] In his argument defendant maintains that G.S. Chapter 143, Article 7 violates the due process clause of the Fourteenth Amendment of the U. S. Constitution and Article 1, § 19 of the N. C. Constitution. Defendant argues that (a) the hospital governing board has the unbridled authority to determine what

amount defendant shall pay and under what circumstances; and (b) that the defendant is not entitled to hearing, to notice, to an opportunity to be heard, to be represented by counsel, nor to appeal the board's ruling. These contentions are completely invalid. It is not required that defendant be given notice, a hearing, and a right to counsel before the governing board of the hospital. G.S. 143-121 establishes the cause of action by which the State brings this action. Before the plaintiff can recover anything the defendant has ample opportunity, following due notice, in the Superior Court of Wake County to resist all claims by the State. All due process, including a jury trial, is available to defendant.

There is no unbridled authority on behalf of the hospital to determine what amount is paid and under what circumstances. The governing board of plaintiff hospital is empowered to determine and fix the actual cost of care and maintenance for each respective inmate or patient. The policy stated by the General Assembly is that all persons admitted to State hospitals must pay the actual cost of their care, treatment and maintenance. (G.S. 143-117 & 118).

[3] Article II, Section 1 of the North Carolina Constitution provides, "The legislative powers of the State shall be vested in the General Assembly. . . . " The General Assembly may not abdicate or delegate its authority to make law to departments of government or administrative agencies. However, where the legislature has declared the policy to be effectuated, established a framework of law within which the legislative goals are to be accomplished, and created standards for the guidance of the administrative agency, it may delegate to such agency the authority to make determinations of fact upon which the operation of the statute is made to depend. *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E. 2d 517 (1973); *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953).

G.S. Chapter 143, Article 7 sets forth adequate standards from which the various boards of trustees or directors of the institutions can ascertain the charges against a patient. G.S. Chapter 143, Article 7 is not an impermissible delegation of power to the hospital board.

[4] Defendant also maintains that the determination of the amount of actual costs of care, treatment and maintenance to be charged a patient constitutes a tax in violation of Article

I, § 8 of the U. S. Constitution and Article V, §§ 1 and 2 of the N. C. Constitution. The Federal and North Carolina Constitutions require that all taxation be uniform and that any classifications, imposition of different rates, or imposition of different modes of assessment be reasonable and not arbitrary. Defendant argues that he was committed to Dix Hospital primarily for the benefit and protection of society generally, and that he is now forced to pay an additional tax.

Defendant reasons that he should no more be required to pay for his maintenance than a prison inmate, and that the legislature has imposed a nonuniform tax by arbitrarily singling out only dangerous hospital inmates to pay the costs as contrasted to all individuals confined for the protection of the public.

We see no distinction between persons civilly committed and those such as defendant who are found not guilty by reason of insanity and committed. All are patients of the hospital. All are under the custody, control and treatment of the Department of Human Resources. The statutory cost of the care, treatment and maintenance is placed on all patients, and therefore does not impose a nonuniform tax. Moreover, this statutory cost charged is not characteristic of a tax at all. It is compensation for services rendered the respective inmates or patients by the hospital.

The defendant in the instant case stood trial for a crime. However, the jury found him not guilty by reason of insanity. A verdict of not guilty by reason of insanity constitutes a full acquittal, and the purpose for commitment of a person acquitted of a crime because of insanity is not as punishment for the crime. *In re Tew,* 280 N.C. 612, 187 S.E. 2d 13 (1972). Though one of the purposes for committing the criminally insane is for the protection of society, the incidents of defendant's hospitalization make it evident that his commitment was not imposed as a criminal sanction. Defendant's commitment was for insanity. Unlike penal incarceration, upon defendant's rehabilitation (i.e., returning to sanity) he may be released from the commitment.

The defendant received actual services (i.e., care, treatment and maintenance) while in Dix Hospital. It is not a violation of defendant's constitutional rights to require him to pay for the services he received and from which he benefitted if he

has the ability to pay. Payment by defendant of the costs for his care, treatment and maintenance is payment for services received by him, and not, as defendant argues, a taking of private property without just compensation. See 20 A.L.R. 3d. 363, Insane Persons-Support, § 10.

G.S. Chapter 143, Article 7 is constitutional, and applicable to the criminally insane. The judgment below is

Reversed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROY BRADSHAW

No. 7515SC528

(Filed 19 November 1975)

1. **Rape § 18— assault with intent to rape — refusal to submit misdemeanor assault**

In a prosecution for assault with intent to rape, the trial court did not err in refusing to submit to the jury the lesser offense of misdemeanor assault where all of the evidence, including defendant's statement to the police, tended to show that defendant committed the assault upon the victim with the intent to gratify his passion notwithstanding any resistance on her part, notwithstanding defendant may have changed his mind during the assault.

2. **Criminal Law § 128— assault with intent to commit rape — defendant's intent on prior occasion — testimony by prosecutrix — motion for mistrial**

In this prosecution for assault with intent to commit rape committed in November 1974, the trial court did not err in the denial of defendant's motion for mistrial when the prosecutrix testified that defendant had come to her house in June 1974 with the intention of raping her where the court promptly instructed the jury not to consider the testimony and the prosecutrix subsequently gave testimony describing in detail her encounter with defendant in June 1974.

APPEAL by defendant from *Alvis, Judge.* Judgment entered 27 March 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 14 October 1975.

Defendant was charged in a bill of indictment, proper in form, with the felony of assault with intent to rape. Defendant was also charged in Orange County case number 74CR13006 with the felony of burglary upon allegations arising from the

same incident as the alleged assault with intent to rape. However, the jury was unable to reach a verdict upon the burglary indictment (74CR13006), and a mistrial was ordered in that case.

The State's evidence tended to show the following: Martina Upchurch, age 30, is a native of France who has been living in the United States for eight years. She and her husband, Michael Upchurch, "fixed up" an abandoned farmhouse on highway 70 near Efland in Orange County. She and her husband separated in October 1973, and she and her two children have continued to reside in the farmhouse. She is working for a Ph.D. degree at the University of North Carolina at Chapel Hill and is teaching French there. At approximately 9:30 p.m. on 8 November 1974, Martina Upchurch and her two children retired for the night. All three were sleeping in the living room, which was heated by a stove. The son, age 11, slept in a sleeping bag on the couch. The mother and daughter, age 7, each slept in a sleeping bag on the floor. At about 1:00 a.m., 9 November 1974, they were awakened by a knock at the back door. They did not answer the knock because of the hour. The back door was opened, and then the door to the living room was opened. A tall slender black man entered the living room and asked the son on the couch, "Which is which?" Then he said, "Who is in this sleeping bag?" The son said, "My mother." The man said, "All right, pull your blanket over your eyes and don't look or I'll kill you." The man leaned over Martina Upchurch and struck her with his fist, first on one temple and then the other. Next he said, "You are going to die tonight." Martina Upchurch asked, "What do you want?" The man replied in explicit vernacular that he wanted to have sexual intercourse. Roy Bradshaw had been to the Upchurch house before, and from his build and his voice she immediately ascertained that the man was the defendant, Roy Bradshaw. A fierce struggle ensued between Martina Upchurch and defendant. He dragged and held her continuously by her hair. During the struggle she bit him on his lower leg, and he bit her on the back. Defendant finally dragged her out into the front yard, bumping her head on the steps as she was dragged out. Martina Upchurch lost consciousness temporarily. When she regained consciousness, she was lying on her back in the front yard about twenty feet from the house, and defendant was lying on top of her. She managed to escape and run back into the house. Her children bolted the door and put furniture against it while she called the Mebane police and some neighbors.

As Mebane Police Chief Dan Tate proceeded to the Upchurch house in response to the telephone call, he encountered a black Ford pickup truck going in the opposite direction. Later that same morning he observed the same truck parked in defendant's yard. Defendant was arrested at his home at about 11:00 a.m. on 9 November 1974. The officers examined and photographed the teeth marks on the back of defendant's left calf muscle. On 11 November 1974 defendant made a voluntary statement to the officers, which he reduced to writing by his own hand. The statement reads as follows:

> "I left Carlton Long's house about 11:30 and went to Martina Upchurch's house and knocked on the door. No one answered the door. The door was not locked so I went in. I got in and saw a little boy and he was lying on the couch, and he called his mother. She was in a sleeping bag. She raised up her head and said 'What do you want' and I said 'You know,' and then she said 'You are the same one that was down in the field,' and I said 'No,' and then she told her little boy to call the Daniels and then I grabbed her by the arm. She got away and I grabbed her again. She pushed me away and I fell on the floor and she started biting me on the leg, and as I was getting up, I bit her on the back, but she still had a hold of my leg and I was trying to get away and I grabbed her by my leg to the door and I left."

Defendant offered no evidence. The jury returned a verdict of guilty of assault with intent to rape, and judgment of imprisonment was entered.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

Chambers, Stein, Ferguson & Becton, by Adam Stein, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that the trial court erred in refusing to submit to the jury the lesser offense of misdemeanor assault. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor." *State v. Melton*, 15 N.C. App. 198, 189 S.E. 2d 757 (1972). "The mere contention

that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Black*, 21 N.C. App. 640, 205 S.E. 2d 154 (1974), *affirmed* 286 N.C. 191, 209 S.E. 2d 458.

In this case all of the evidence tends to establish that defendant committed the assault with the intent to gratify his passion upon Martina Upchurch, notwithstanding any resistance on her part. Even from the defendant's statement offered by the State, defendant went into the Upchurch house in the nighttime without being admitted by anyone; he went to the room where Martina Upchurch and the children were sleeping; when she asked him what he wanted, he said, "You know"; he grabbed her, and a struggle ensued wherein she bit him and he bit her. Even though he said he was trying to get away and that he did leave after the struggle in the house, his own statement clearly shows his intent at the time he went into the house and first assaulted Martina Upchurch. Intent is an attitude or condition of the mind and is usually susceptible of proof only by circumstantial evidence. The circumstances disclosed by defendant's own statement tend to refute the contention that his entry into the house and the assault were done other than with the intent to gratify his passion upon Martina Upchurch, notwithstanding any resistance on her part. If defendant's assertion that he tried and succeeded in escaping from the struggle is accepted, it merely shows that he changed his mind. The offense of assault with intent to rape does not require that the defendant retain the intent throughout the assault, but if he, at any time during the assault, has an intent to gratify his passion upon the woman, notwithstanding any resistance on her part, the defendant would be guilty of the offense. *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963). In our view the evidence did not require submission of misdemeanor assault to the jury. This assignment of error is overruled.

[2] Defendant next argues that the trial court committed error when it denied defendant's motion for a mistrial after the prosecuting witness, Martina Upchurch, in testifying about an earlier encounter with defendant, stated that defendant had come to her house in June 1974 with the intention of raping

her. The following appears in the direct examination of Martina Upchurch:

"Yes, I had seen Roy Bradshaw before that night—once. It was in June, and that's what I was alluding to in the night.

"Q. Where did you see him at in June?

"A. He came with the intention to rape me.

OBJECTION AND MOTION TO STRIKE: SUSTAINED.

THE COURT: Ladies and gentlemen of the jury, do not consider the testimony as to what his intention was for any purpose."

The jury was then sent to the jury room, and defense counsel moved for a mistrial because of the witness's unsolicited statement. Ruling upon the motion was postponed by the trial judge until the completion of the evidence, and was denied after the presentation of evidence was completed.

The witness continued her testimony before the jury as follows:

"I saw Roy Bradshaw in June of 1974. A young man drove up to my house in his truck and he said that he was of the Bradshaw family and well acquainted with almost all of the members of the Bradshaw family—liked and respected—they have helped me on numerous occasions, but . . . The Bradshaw family lives very close to me, about a quarter of a mile. So this young man whom I had never seen before told me to go with him in the field near my pond—not MY pond, the pond of the property on which I live—and I declined and then he said, 'Well, I want to show you that there is some marijuana growing there,' and I wanted to go and get it off, so I went with him near the pond, and we walked all around the pond and there was no marijuana; and as we were coming to the edge of the woods, I told him, 'Well, there is no marijuana, I am going back home.' And I had my back towards him at that time because I was going to walk back home. I wasn't really afraid because he hadn't been threatening, but at that time he jumped on my back.

"Q. He did what?

"A. He jumped on my back.

He jumped on my back, and I was lying on the ground, and there was a very short, not very violent, fight, and I don't exactly remember how it happened, but I found myself sitting up with my legs folded towards me and he was sitting across from me, and we started talking. Yes, talking. Yes, sir; the man that I was talking to is the man seated over here—Roy Bradshaw. I talked to him perhaps half an hour; twenty minutes or half an hour.

"Q. Did you talk to him long enough that you'd be able to recognize his voice again?

"A. Definitely; that's why I thought it was the same man in the night when he broke into the house, in the night in November."

The statement of the witness which precipitated defendant's motion for a mistrial was promptly withdrawn from consideration by the jury.

"In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed." *State v. Strickland,* 229 N.C. 201, 49 S.E. 2d 469 (1948).

In this case the witness's subsequent testimony, describing in detail her encounter with defendant in June 1974, served to substantially mollify, if not nullify, any adverse effect from her earlier statement which may not have been erased by the trial judge's instruction to the jury. In our opinion the motion for mistrial was properly overruled.

Defendant finally argues that his motion to nonsuit should have been allowed. We have reviewed the evidence, and in our opinion it required submission of the case to the jury. This assignment of error is overruled.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. HORACE JUNIOR GREEN

No. 751SC471

(Filed 19 November 1975)

1. **Criminal Law § 7— officer's observation of drunk defendant in restaurant — subsequent arrest for driving under influence — no entrapment**

Where an officer saw defendant in a restaurant, observed that he was drunk, observed that he had a truck outside the restaurant, and advised him not to drive the truck but to sleep for a while or call someone else to come drive for him, the officer's failure to arrest defendant on a charge of public drunkenness upon observing his conduct in the restaurant but waiting for some several minutes and arresting him for operating a motor vehicle while under the influence of intoxicating liquor upon observing him driving his truck did not amount to entrapment.

2. **Automobiles § 126— breathalyzer test — impartiality of administering officer**

Though the officer who administered a breathalyzer test to defendant had observed defendant within 30 or 40 minutes prior to his arrest, the officer was nevertheless fair and impartial, since he was not the arresting officer, nor was he present at the time of the arrest.

3. **Automobiles § 126— breathalyzer test — sufficiency of warnings given to defendant**

Defendant was fully and completely advised of his rights before a breathalyzer test was administered to him, and the officer's error in stating that defendant could have a physician, registered nurse, or a qualified technician or qualified person of his own choosing to administer the test under the direction of a law officer instead of stating that defendant could have a qualified person of his choosing to administer a test or tests *in addition to* any administered at the direction of the law enforcement officer did not deny defendant his rights.

APPEAL by defendant from *Smith, Special Judge.* Judgment entered 20 January 1975, in Superior Court, GATES County. Heard in the Court of Appeals 23 September 1975.

On appeal to the Superior Court from a conviction in District Court, defendant was convicted of driving a motor vehicle under the influence of intoxicating liquor. The State's evidence was substantially as follows: On 1 February 1974, at 3:45 p.m.,

Highway Patrolmen Edwards and Harrell were having coffee at a restaurant in Gates County. Edwards saw defendant in the restaurant and observed that he was drunk. He also observed that defendant had a truck parked outside the restaurant. He advised defendant not to drive the truck away from the restaurant but to sleep for a while in the truck or call someone to come drive for him. Defendant agreed. Edwards and Harrell then left the restaurant. Each was in his own patrol car, and they went in different directions. At 4:10 p.m. Edwards saw defendant's truck on U. S. Highway 13 north of the restaurant. Defendant was driving and proceeding slowly in a northerly direction. He was not weaving across the center line, getting off the hard surface, or in any other respect driving improperly. Edwards stopped defendant and saw that he was still drunk. He swayed as he walked, his speech was difficult to understand, and there was a very strong odor of alcohol about his person. Edwards placed defendant under arrest and took him to the magistrate's office. He advised him of his rights and then administered the "balance test" and "finger to nose" test. On the balance test defendant swayed back and forth and on the "finger to nose" test, defendant touched his cheek under his left eye. Defendant told Edwards that he was then in Suffolk, whereas he was in Gates County at Eason's Crossroads. Edwards called Patrolman Harrell to administer the breathalyzer test. On that test a reading of .22% resulted.

Defendant offered no evidence but appealed from the judgment entered on the verdict of guilty.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, for the State.

L. Herbin, Jr., for defendant appellant.

MORRIS, Judge.

[1, 2] By his first two assignments of error defendant contends that the court erred in overruling his motions for a "directed verdict of not guilty." He argues that the officer's failure to arrest defendant on a charge of public drunkenness upon observing his conduct in the restaurant but waiting for some several minutes and arresting him for operating a motor vehicle while under the influence of intoxicating liquor upon observing him driving his truck, constituted entrapment. While appellate courts generally do not attempt to draw a definite

line of demarcation between what is and what is not entrapment because each case must be decided on its own facts, it appears that, in this State, entrapment exists if "an officer or his agent, for the purpose of prosecution, procures, induces or incites one to commit a crime he otherwise would not commit but for the persuasion, encouragement, inducement, and importunity of the officer or agent. If the officer or agent does nothing more than afford to the person charged an opportunity to commit the offense, such is not entrapment." *State v. Caldwell,* 249 N.C. 56, 59, 105 S.E. 2d 189 (1958). It is clear that upon the facts of the case before us, entrapment is not available as a defense. Defendant also contends that the State's case should have been nonsuited, because Officer Harrell administered the breathalyzer test when he had observed defendant within 30 or 40 minutes prior to his arrest. For that reason defendant urges that Officer Harrell could not be the fair and impartial witness required by *State v. Stauffer,* 266 N.C. 358, 145 S.E. 2d 917 (1965). We find this argument to be totally without merit. Officer Harrell was not the arresting officer, nor was he present at the time of the arrest.

For the same reason, defendant contends that the testimony of Officer Harrell with respect to the results of the breathalyzer test should have been suppressed upon his motion made prior to the officer's testimony. We find this contention to be without merit. Defendant further argues that the testimony of Officer Harrell with respect to the results of the test should be stricken. The testimony of Officer Harrell came in without objection. However, at the end of the direct examination of the officer, defendant moved to strike "all the testimony relative to the administering of the breathalyzer test pursuant to G.S. 20-16.2." The court denied the motion. Defendant contends that the basis for the motion at that time was that the officer had not given defendant all the warnings to which the statute entitled him. That aspect of defendant's argument will be considered separately. Suffice it to say at this point that even if defendant's contentions upon the basis he now asserts were properly before us, we would find his position meritless.

We now consider defendant's fifth assignment of error by which he contends that all testimony of the officer with respect to administering of the breathalyzer test and its results should be stricken because proper warnings were not given defendant.

[3] Trooper Harrell testified that he advised the defendant verbally and in writing that he had a right to refuse to take the breathalyzer test and that if he refused to take it, his license would be revoked for six months. Thereafter the solicitor asked: "What other rights did you inform him of?" To this question, the witness answered as follows: "First, you have a right to refuse to take this test. Your refusal to take this test will result in revocation of your driving privilege for a period of six months. Third, you may have a physican, registered nurse, or a qualified technician or a qualified person of your own choosing to administer the chemical test under the direction of a law officer." No objection appears to this testimony. Immediately following it appears "Exception Number 9(b)." The officer further testified that he read to the defendant "the fourth right, you have a right to call your attorney and select a witness to view for you the testing procedure provided the test shall not be delayed for a period in excess of thirty minutes from the time you are notified of your rights." He stated further that the defendant was advised at 4:30 p.m. of these rights, both verbally and in writing, and defendant, at no time, requested permission to contact an attorney or any other person. The breathalyzer test was administered at 5:06 p.m. and no objection was made to the introduction of the results in evidence. At the end of all the evidence defendant moved for a "Directed verdict of not guilty based on further grounds that even though the State has offered testimony the defendant was given some warnings of his rights, there has been no testimony that the defendant understood his rights or effectively waived any of said rights." It is this motion upon which defendant now basis his argument that defendant was not properly given his rights. It seems obvious to us that the rights read in open court were full and complete. However, the record before us indicates a discrepancy. G.S. 20-16.2(a) provides that the officer shall advise the defendant, verbally and in writing, of certain rights. Number 3 is as follows: "That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing *administer a chemical test or tests in addition to any administered* at the direction of the law enforcement officer." The words italicizied are the words omitted in the record before us.

We are aware, of course, of the holdings in *State v. Shadding,* 17 N.C. App. 279, 194 S.E. 2d 55 (1973), cert. denied 283 N.C. 108 (1973), and *State v. Fuller,* 24 N.C. App. 38, 209

S.E. 2d 805 (1974). In *Shadding,* defendant was not advised of his right to have a test of his own choosing administered and in *Fuller* the defendant was not advised of his right to have counsel or a witness present to view the taking of the test. In both cases, we ordered a new trial. In this case the officer gave defendant the statutory rights. The third one, however, was somewhat garbled. Nevertheless, the defendant was made aware that he had the right to have a physician, registered nurse, or a qualified technician or a qualified person of his own choosing present, albeit the right as stated in the record indicated that the person called would be called to administer *the* test. Nevertheless, it seems obvious that had defendant availed himself of the right given, even as given, the officer would have gotten the person requested and would have undoubtedly known that the purpose was to have an additional test administered. This, under the statute would be the only purpose of getting a person within the listed categories. We cannot see how the defendant could have possibly been prejudiced, nor do we consider this holdng in conflict with *Shadding* or *Fuller,* limited as it is to the unique situation of this case.

Finally, defendant argues that his motions after verdict should have been allowed. In support of this contention he reiterates his arguments with respect to the admission into evidence of the results of the breathalyzer test and further argues that there was nothing abnormal about the manner in which the truck was being operated by defendant at the time of his arrest. Defendant cites no authority for this proposition, and under the facts of this case, we deem it unnecessary to discuss this contention. There was more than ample evidence of defendant's condition, known to the arresting offcer, just minutes before defendant was observed driving the truck.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. DALLAS STEELE

No. 7526SC334

(Filed 19 November 1975)

Criminal Law § 62— polygraph results — stipulation of admissibility

In this prosecution for uttering a forged money order, the trial court did not err in the admission of the results of a polygraph test administered to defendant where defendant, defendant's attorney and the assistant district attorney entered into a written stipulation that the results of the polygraph test would be admissible in evidence, the court found that the polygraph operator was an expert in conducting and interpreting polygraph tests, defendant's attorney thoroughly cross-examined the polygraph operator regarding the nature of the test, its limitations, and the conditions under which the particular test was administered, and the court instructed the jury that the test results could not be considered as evidence of defendant's guilt but only as they might bear on defendant's credibility.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 17 January 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 August 1975.

Defendant was tried upon a bill of indictment charging him with uttering a forged money order.

The evidence for the State was to the following effect:

Wilbur T. Foushee is the owner of several convenience stores known as Foushee's Jiffy Markets. During the night of 14 and the morning of 15 October 1973, his store on North Caldwell Street in Charlotte was broken into and twenty-eight money order blanks along with other items were stolen. State's Exhibit #1 was identified by him as one of the money orders reported as stolen. Foushee never authorized anyone to fill in the money order blank nor received money in return for it.

Teresa Green was working as a bank teller on 23 October 1973 when defendant approached her to cash a money order (which she identified as State's Exhibit #1). She telephoned another office, gave the number of the money order, and learned that it had been reported as stolen. The police arrived in a matter of minutes and took defendant into custody.

R. B. Crenshaw of the Charlotte Police Department identified State's Exhibit #2 as a handwriting exemplar of defendant which was taken in Crenshaw's presence.

Lawrence A. Kelly, an examiner of questioned documents, testified that he compared the writing appearing in State's Exhibit #1 with that appearing in State's Exhibit #2. In the opinion of this witness, both were written by the same person.

To determine the admissibility of the results of a polygraph test administered to defendant, the trial judge conducted a voir dire hearing. After hearing testimony and receiving "Court's Exhibits" 1, 2, and 3, the trial judge made findings of fact, concluded that defendant had knowingly and voluntarily waived his right to object to the admission of the test results, and further concluded that the test results were admissible.

Officer W. L. Holmberg, a polygraph examiner for the Charlotte Police Department, testified in the presence of the jury concerning his qualifications, after which the trial court found him to be an expert "in the examination, conducting, and interpretation of the polygraph and its results." He testified that two relevant questions were asked and described defendant's reaction to the questions as "deception."

Defendant testified in his own behalf stating that he did not know that the money order was stolen.

The jury found defendant guilty as charged, and from judgment entered thereon defendant appealed.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

John G. Walker, for defendant appellant.

MARTIN, Judge.

Defendant, defendant's attorney, and the assistant district attorney entered into a written stipulation which provided that the results of a polygraph test would be admissible in evidence. Despite the stipulation, defendant assigns error to the admission of the test results.

In 1923, the first appellate court to consider the admissibility of polygraph evidence set out the standard for acceptance which has been followed ever since. Appellant in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) had been convicted of murder and appealed the trial court's refusal to admit the results of a fairly primitive lie detector test he had taken. The Court of Appeals for the District of Columbia Circuit, affirming the

conviction, explained that the scientific basis for an expert's testimony must be ". . . sufficiently established to have gained general acceptance in the particular field in which it belongs." The Court held that the lie detector had not yet achieved such standing and scientific recognition and therefore, the evidence had been properly excluded. Most subsequent decisions have followed *Frye* in excluding polygraph evidence as scientifically unreliable, often merely quoting *Frye's* language.

Our Supreme Court has consistently held that the results of a polygraph test are not admissible in evidence to establish the guilt or innocence of one accused of a crime. *State v. Foye,* 254 N.C. 704, 120 S.E. 2d 169 (1961). This holding was reaffirmed in *State v. Brunson,* 287 N.C. 436, 215 S.E. 2d 94 (1975), and in *State v. Jackson,* 287 N.C. 470, 215 S.E. 2d 123 (1975).

While the weight of authority repudiates the polygraph as an instrument of evidence in the trial of criminal cases, a few courts have recognized an exception to the general exclusionary rule. This exception arises when the parties have stipulated before the trial that test results should be admissible on behalf of either the prosecution or defense. Courts which have considered the effect of a stipulation have not been consistent as to a result. *See Annot.,* 53 A.L.R. 3d 1005 (1973).

In *People v. Houser,* 85 Cal. App. 2d 686, 193 P. 2d 937 (1948), the Court held that where the defendant stipulated in writing that the entire results of the lie detector tests could be received in evidence on behalf of either the prosecution or the defense, and that the operator of the lie detector was an expert operator and interpreter of results of said tests, the defendant could not object on appeal to the admission of such evidence on the ground that the operator of the lie detector was not an expert. (There is nothing in this decision to indicate that the defendant made a timely objecton to the admission of this evidence at the trial.)

State v. McNamara, 252 Iowa 19, 104 N.W. 2d 568 (1960), appears to be the first appellate case which directly held that the polygraph results were correctly admitted over proper objection by defendant who had entered into a written pre-trial stipulation that such evidence would be admissible. The Iowa Supreme Court held for the first time that the results of the lie dectector examination were admissible by reason of the stipulation to that effect signed by both parties.

However, the New Mexico Court handed down an opinion in the next year directly opposed to that in the *McNamara* case. In *State v. Trimble,* 68 N.M. 406, 362 P. 2d 788 (1961), the Supreme Court of New Mexico reversed defendant's conviction for incest on the ground that "[t]he signing of a waiver did not alter the rule with regard to the admissibility . . ." of lie detector evidence. In this case the Court did not mention the *Houser* or *McNamara* decisions.

Thus, the situation was in a state of flux when *State v. Valdez,* 91 Ariz. 274, 371 P. 2d 894 (1962), came before the Arizona Supreme Court. Although support for both sides of the question could be found, most courts had not admitted polygraph evidence over proper objection, with or without a pre-trial stipulation. In *State v. Valdez, supra,* the Court followed the precedent set forth in the *Houser* and *McNamara* decisions. It held that, subject to certain qualifications announced therein, polygraph results and expert testimony relating thereto are admissible upon stipulation in criminal cases.

In *State v. Chavez,* 80 N.M. 786, 461 P. 2d 919 (1969), the Court took the position that the rule in New Mexico is that regardless of whether there is a stipulation, or regardless of the contents of the stipulation, evidence as to polygraph examinations and results is not admissible over objection. In the *Chavez* case, however, the evidence was admitted because the defendant did not object to testimony concerning the examination. The admission of the evidence which could have been excluded was the decision of defendant and his counsel.

As can be seen from the foregoing cases, the courts are beginning to allow more exceptions to the general exclusionary rule set out in the *Frye* case. "Although much remains to be done to perfect the lie-detector as a means of determining credibility we think it has been developed to a state in which its results are probative enough to warrant admissibility upon stipulation." *State v. Valdez, supra.* Though the reliability of polygraph evidence has improved, there are still arguments against admitting such tests into evidence on the ground that such an admission amounts to a violation of the privilege against self-incrimination. This privilege can be waived, however, by a voluntary consent to submit to such a test.

The Court in *State v. Valdez* set out certain qualifications which must be met before the courts in that state would allow

such evidence even upon stipulation. The qualifications are as follows:

"(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

a. the examiner's qualifications and training;

b. the conditions under which the test was administered;

c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given."

Further, as suggested by the article in 46 Iowa L. Rev. 651 (1961), the following prerequisites must be met:

"Reliability depends greatly on the skill and experience of the expert. A much greater degree of interpretation is involved than in blood and ballistics tests. As prerequisites of admissibility, the qualifications of the examiner, questioning procedures, and the instrumentation should meet

scientific standards. A proper foundation should be laid at trial as to each of these elements. Test results should be accompanied by interpretation by the examiner. When admitted, it should only be considered with all other evidence in determining the guilt or innocence of the accused. Limiting instructions should prevent the examiner from supplanting the jury. He is an expert offering testimony; the trier of fact is left with the decision of how much weight, if any, should be given his testimony."

In applying these conditions on admissibility to the facts in the present case, it appears that the parties sufficiently complied with these "safeguards" in order to assure reliability of the test results. The defendant, his attorney, and the assistant district attorney stipulated in writing that the results of the polygraph examination would be admissible. According to the stipulation, defendant voluntarily requested a polygraph examination after being advised of its inadmissibility except by stipulation of all the parties. It was further agreed that the polygraph examination would consist of a conference, pretesting, total chart minutes, and interrogation by a qualified polygraph examiner. On voir dire the court found that defendant was ". . . thirty-three years of age, of sound mind, who finished the twelfth grade in high school, who without threats, duress, coercion, force, promises of immunity or reward, understandingly agreed and stipulated to take the polygraph examination, with the full understanding that whatever the results were they would be admissible into evidence, and with the further understanding from the District Attorney's Office that if the results indicated that there was no deception in his part during the course of examination, that the charges lodged against him would be nol prossed. . . ."

The court concluded that the results of the polygraph test were admissible and that the defendant voluntarily and understandingly waived his right to object to the admission of the test results. The judge found W. O. Holmberg to be an expert in the conduction and interpretation of a polygraph test and its results. Holmberg was cross-examined thoroughly by defendant's attorney regarding the nature of the test, its limitations, and the conditions under which the particular test was administered. In his charge to the jury the trial judge instructed them not to consider the results of the test as evidence of de-

fendant's guilt but that they could consider such evidence as it might bear on defendant's credibility.

Since the essential safeguards on the admission of polygraph evidence upon stipulation were met in this case, the trial court properly admitted the results of the polygraph into evidence.

The defendant had a trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. STEVE GLEN HODGE

No. 7510SC502

(Filed 19 November 1975)

4. **Criminal Law § 66— lineup — use of interrogation rights form**

Lineup identification testimony was not inadmissible on the ground that the form used to advise defendant of his rights was one used for in-custody interrogation rather than for lineup procedures where the officer, after using the rights form, informed defendant that he was to be in a lineup and had the right to have counsel present, and defendant stated that he did not want an attorney present.

2. **Criminal Law § 75— confession after request for counsel — interrogation about different crimes**

The trial court in an armed robbery case did not err in the admission of a confession to the robbery charge made after defendant stated that he wanted an attorney present during interrogation where defendant and two others were interrogated for an hour about thefts of radios and other equipment from vehicles, defendant then stated that he wanted an attorney present, the interrogating officer told defendant he was leaving the interrogation room to book one of the other persons on radio theft charges and that he would return to interrogate defendant about the robbery in question, when he returned to the interrogation room the officer reminded defendant that he had previously advised defendant of his *Miranda* rights whereupon, before the officer asked defendant any questions about the robbery, defendant stated that he did not know why he did it and made a statement giving details of his participation in the robbery, defendant's statement was reduced to writing and signed by him, and defendant did not request the presence of counsel after being informed that the officer wanted to interrogate him about the robbery, it being clear that defendant wanted a lawyer present only during interrogation about radio thefts.

3. Criminal Law § 138— sentencing — petition by residents of community where defendant lived

No abuse of discretion was shown in the sentencing of defendant for armed robbery on the ground that the State presented to the court a petition signed by many persons who lived in the community in which defendant resided stating that defendant had been corrupting teenagers in the community and that the moral welfare of children in the area would be influenced by the court's decision where the trial judge stated that he intended to pay the petition no heed.

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

Sentence imposed on defendant for armed robbery must be vacated and the cause remanded for resentencing where the record shows the severity of the sentence was based on the 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.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 20 March 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1975.

Defendant was charged with armed robbery of a convenience store manager and pled not guilty to the charge.

The State's evidence tends to show that on 2 January, 1975, Michael Ayscue was employed by a 7-Eleven store in Raleigh; that defendant entered the store about 1:30 or 2:00 o'clock a.m., went to a cooler and got an orange drink, then approached Ayscue from the rear, placed a knife against his neck and forced him to the floor; defendant then opened the cash register, took about $89.00, and ran from the store. During a subsequent investigation conducted by Deputy Sheriff Anthony, Ayscue gave a description of the person who robbed the store but was unable to positively identify the robber by looking at five or six photographs presented to him by Deputy Anthony. Defendant was arrested for probation violation on 20 January, taken to an interrogation room in the Wake County Courthouse about 9:00 p.m., where he was fully advised of his *Miranda* rights, and then signed a written waiver.

Deputy Anthony testified that he interrogated defendant and two others about a larceny of radios, unrelated to this robbery charge. About 45 minutes into the larceny interrogation, defendant said he wanted to talk to an attorney about the radio larceny; the interrogation was stopped. Deputy Anthony left the interrogation room to book one of the others on the radio theft after telling defendant that he would return to question

him about this robbery. When he returned to the interrogation room, Deputy Anthony told him that he had already advised him of his rights; and before asking a question about this robbery, defendant said he did not know why he did it, then made a confession, which was reduced to writing and signed by the defendant. Following this voir dire, the trial judge found the statement was voluntary and admitted it in evidence. On the following day the defendant was placed in a lineup with six others, and he was identified by Ayscue as the perpetrator. The defendant offered no evidence.

The jury found defendant guilty of armed robbery and from a prison sentence, defendant appeals.

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

Robert N. Hunter, Jr., for defendant appellant.

CLARK, Judge.

[1] Defendant contests the admission into evidence of the results of the lineup identification on the ground that the form used in advising the defendant of his rights was one used to advise suspects in custodial interrogation and was not properly used in lineup procedures. The record on appeal reflects, however, that the law officer, after using the rights form, which defendant signed, informed him that he was to be in a lineup and had the right to have counsel present. Defendant told the officer that he did not want an attorney present. G.S. 7A-457(c) provides:

> "An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel."

See *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968). The evidence fully supports the ruling of the trial judge in the admission of the identification evidence.

[2] Defendant assigns as error the admission of the statement to Deputy Anthony which was made after the defendant stated that he wanted an attorney present during the interrogation. Defendant relies on the following language in *Miranda v. Ari-*

zona, 384 U.S. 436, 474, 16 L. Ed. 2d 694, 723, 86 S.Ct. 1602 (1966):

> " 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.' "

Sub judice, the evidence reveals that Deputy Anthony arrested the defendant on a probation violation warrant and took him with two others to interrogation rooms to question them about thefts of radios and other equipment from vehicles, which were completely unrelated to the subject robbery charge. Some of the stolen radios were found in the trunk of the car occupied by defendant and one of the other two suspects. Defendant denied any knowledge of the thefts. Defendant and the two other suspects told different stories. The case against the defendant was based primarily on the presumption arising from possession of recently stolen property. After interrogating the three suspects for about an hour, Deputy Anthony felt that he had them trapped. At this point the defendant stated that he wanted a lawyer present. Rather than wait for a lawyer before pursuing the interrogation Deputy Anthony released one suspect, charged another with the radio thefts, and told defendant that he was leaving the interrogation room to book one of the suspects but that after doing so he would return to the room to interrogate the defendant about the armed robbery at the 7-Eleven store on Six Forks Road. After booking the one suspect on radio theft charges, Deputy Anthony returned to the interrogation room. He reminded defendant that he had previously advised him of his *Miranda* rights whereupon, before the officer asked him any questions about the subject robbery, defendant stated that he did not know why he did it; he then made a statement relating the details of his participation in the crime. His statement was reduced to writing and signed by him.

From this evidence it is clear that defendant wanted a lawyer present during interrogation on the radio theft charges only. These charges were entirely separate from and unrelated to the subject robbery charge, which had not been mentioned by the interrogating officer when defendant requested counsel. Defendant did not request the presence of counsel when in-

formed by the officer that he wanted to interrogate him about the subject robbery and would return to do so after booking the suspect on the radio theft charges nor did defendant request the presence of counsel at any time subsequent thereto. Under these circumstances the conclusion of the trial court that the statement of the defendant was knowingly and voluntarily made is fully supported by the evidence, and this evidence further supports the conclusion, inferred but not found by the trial court, that defendant knowingly and intelligently waived his right to have counsel present during interrogation.

The following statement also appears in *Miranda:*

> " 'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [384 U.S. 474-75]"

It is our opinion that the State has carried this heavy burden and has clearly and convincingly established that the rights of the defendant against self-incrimination were in no way violated.

[3] After verdict and before sentencing, the State presented to the trial judge a petition signed by many persons who lived in the community where defendant resided. Briefly it was stated in the petition that for some time the defendant had been corrupting teenagers in the community, and the suggestion was made that the moral welfare of the children in the area would be influenced by the court's decision. Defendant contends it was error for this petition to be brought to the attention of the court. When informed of the contents of the petition, the trial judge replied that he paid little attention to petitions and that he intended to pay it no heed. The general rule on sentencing is stated in *State v. Sudderth,* 184 N.C. 753, 756, 114 S.E. 828, 830 (1922): "It is the accepted rule with us that within the limits of the sentence permitted by law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse." In *State v. Stansbury,* 230 N.C. 589, 591, 55 S.E. 2d 185, 188 (1949), it was stated that the court could hear and consider "all available information concerning the nature of the offense with which the accused was charged,

and his character, propensities, and past record in fixing the kind and amount of his punishment." In this case it appears that the trial judge was not controlled or even influenced by the petition. We find no abuse of discretion.

[4] It appears from the record on appeal that the trial judge, prior to sentencing, made a statement expressing dissatisfaction with the length of time a committed offender remained in prison and assumed that prisoners would automatically be released on parole at the expiration of one-fourth of their sentence. On the authority of *State v. Snowden*, 26 N.C. App. 45, 215 S.E. 2d 157 (1975), the judgment must be vacated and the case remanded for resentencing.

We find no prejudicial error but for the reasons stated the sentence is vacated and the case is remanded.

Vacated and remanded.

Judges BRITT and PARKER concur.

QUEENIE DUKE MIZZELL AND HUSBAND, LOUIS MIZZELL; JEREMIAH DAVID DUKE AND WIFE, HAZEL DUKE v. DENNIS D. EWELL, SINGLE; VERGIE M. REED AND HUSBAND, HAROLD G. REED; RUTH EWELL KENNEDY AND HUSBAND, WILLIAM J. KENNEDY; ELWOOD EWELL AND WIFE, LUCILLE EWELL; ALICE B. EWELL WHITE, WIDOW; WELTON CHARLES EWELL, JR. AND WIFE, NANCY I. EWELL; PATRICIA A. EWELL O'BRIEN AND HUSBAND; ELVA W. SMITH AND HUSBAND, RALPH SMITH, JR.; VERONICA W. YOUNG AND HUSBAND, WILLIAM H. YOUNG; HAROLD A. WATERFIELD AND WIFE, HELEN C. WATERFIELD; CARL R. WATERFIELD, DIVORCED; AVERY WATERFIELD, WIDOWER; PATRICIA LEE WATERFIELD; EVELYN MARIE WATERFIELD; PATRICIA BEACHAM, AN INCOMPETENT AND WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE ESTATE OF P. P. GREGORY

No. 751SC500

(Filed 19 November 1975)

1. Adverse Possession § 1— elements necessary for proof of adverse possession

For a claimant to obtain title by adverse possession, there must be an actual possession of the real property claimed, the possession must be hostile to the true owner, the claimant's possession must be open and notorious, the possession must be continuous and uninter-

rupted for the statutory period, and the possession must be with an intent to claim title to the land occupied.

2. **Adverse Possession § 25— sufficiency of evidence**

Petitioner's evidence as to adverse possession was insufficient to be submitted to the jury where it tended to show only that the father of two of the plaintiffs was in "reputed possession" between 1915 and 1923, and one of the plaintiffs discovered in 1961 or 1962 that she had an interest in some land in Currituck County, but she could not locate the land or locate a deed conveying the land to anyone bearing her father's surname.

APPEAL by petitioners from *Alvis, Judge.* Judgment entered 19 March 1975 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 13 October 1975.

Petitioners, heirs of Andrew Duke, instituted this action as a special proceeding praying for the (1) partition sale of a tract of land known as the Andrew Duke Tract and (2) adjudication that the successors in interest of the late P. P. Gregory have no interest in another tract of land known as the Thomas Duke Tract in which the petitioners also claimed title. Defendant Wachovia Bank and Trust Co., devisee under the P. P. Gregory will as trustee of a charitable trust, answered alleging title to a tract of land which included most of the property claimed by petitioners. Petitioners' two causes of action were ordered severed, with the latter cause of action to be tried in the District Court Division as a civil action to remove a cloud on title.

While the action was pending, Wachovia sold its interest in the contested property to the State of North Carolina, and the State was joined as an additional defendant. The State instituted an action to have its title registered and confirmed pursuant to G.S. Chapter 43, the Torrens Act. The court appointed an Examiner of Title, who conducted a hearing, and rendered a report from which the Duke heirs excepted. Both the civil action and the Torrens Proceeding were then pending for trial. On a finding that the two actions involved a common issue of title, the civil action was ordered consolidated with the Torrens Proceeding for trial in Superior Court, Currituck County. However, when the cases were called the trial judge and the parties agreed that the cases would not be consolidated, but that the civil action alone would be tried; and that the judgment entered would be controlling on the issue of title in both the civil action and the Torrens Proceeding.

At trial the petitioners abandoned their efforts to prove their case by showing record title and relied entirely on the doctrine of adverse possession. Petitioners' evidence tended to establish the character of the land as inaccessible, swampy, woodland, and unfit for human habitation.

Frank Twiford testified that from 1915 to 1923 Andrew Duke was "reputedly in possession" of the contested tract of land. Andrew Duke was the father of plaintiffs, Queenie Duke Mizzell and Jeremiah Duke, and the grandfather or great-grandfather of the other plaintiffs.

Stanley White testified that in 1961 or 1962 his mother, Queenie Duke Mizzell, discovered that she had an interest in some land in Currituck County. Plaintiff and Stanley White attempted to locate the land by making several trips over the land. Neither Mr. White, his mother, nor any of the other Duke heirs were able to locate a deed in the Currituck County Courthouse conveying the land to any Duke.

At the close of petitioners' evidence, defendants moved for a directed verdict of dismissal for failure of the plaintiffs to introduce evidence sufficient to require the submission of an issue of fact to the jury. From the judgment granting defendants' motion for directed verdict dismissing the action, petitioners appeal to this Court.

Cherry, Cherry, Flythe and Evans, by Joseph J. Flythe, for petitioner appellants.

Attorney General Edmisten, by Assistant Attorney General T. Buie Costen, and Leroy, Wells, Shaw, Hornthal, Riley and Shearin, P.A., by Dewey W. Wells, for defendant appellees.

ARNOLD, Judge.

Petitioners contend that the trial court committed reversible error by granting defendants' motion for directed verdict of dismissal at the close of petitioners' evidence. They argue that the evidence viewed in the light most favorable to their case would establish their claim of title by adverse possession. We cannot agree.

In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others. The claimant must exercise acts of dominion over the land in making the ordinary use and

taking the ordinary profits of which the land is susceptible, with such acts being so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. *Lindsay v. Carswell,* 240 N.C. 45, 81, S.E. 2d 168 (1954); *Price v. Tomrich Corp.,* 275 N.C. 385, 167 S.E. 2d 766 (1969). In addition, the possession must be within known and visible lines. G.S. 1-40.

[1] "Every possession of land will not ripen into title. Each one of the following elements must be proved by a claimant in order for him to obtain title by adverse possession.

There must be an *actual possession* of the real property claimed; the possession must be *hostile* to the true owner; the claimant's possession must be *exclusive;* the possession must be *open and notorious;* the possession must be *continuous* and *uninterrupted for the statutory period;* and the possession must be with *an intent to claim title to the land occupied.*" Webster, Real Estate Law in North Carolina § 258, p. 319.

[2] It is clear from petitioners' own evidence that they have failed to meet the burden of proof required to make good their claim of adverse possession under known and visible boundaries.

"A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, . . . The test is involved in the question whether the acts of ownership were such as to subject the claimants continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass *quare clausam fregit* for damages." *Mallett v. Huske,* 262 N.C. 177, 181, 136 S.E. 2d 553 (1964), quoting *Shaffer v. Gaynor,* 117 N.C. 15, 23 S.E. 154 (1895).

Petitioners' strongest evidence of continuous possession is Andrew Duke's "reputed possession" between 1915 and 1923. However, the record does not show that Andrew Duke was ever in actual possession and reputation evidence is not admissible to show ownership of land but merely goes to the issue of notoriety of possession. *Brewer v. Brewer,* 238 N.C. 607, 78 S.E. 2d 719 (1953).

Petitioners' remaining assignments of error allege that the trial court erred by striking testimony favorable to the petitioners' case. Petitioners, in their brief, make no arguments

whatsoever, regarding prejudicial harm caused by the trial judge's ruling. Petitioners were successful in getting in the excluded evidence through other testimony. We can find no possible harm caused by the exclusion.

Affirmed.

Judges MORRIS and HEDRICK concur.

ANNETTE SEARCY LEVI v. GEORGE GIFFEN JUSTICE

GEORGE GIFFEN SEARCY BY HIS GUARDIAN AD LITEM, GREGORY W. SCHIRO v. GEORGE GIFFEN JUSTICE

No. 7521DC302

(Filed 19 November 1975)

1. **Bastards § 5— paternity action — admissions of intercourse with other men — tape recording**

In an action by the mother of an illegitimate child to establish paternity of the child, testimony by two witnesses as to statements made by plaintiff admitting she had had sexual intercourse with other men during a period when the child could have been conceived and a tape recording of a conversation between plaintiff and defendant in which plaintiff admitted she had had sexual intercourse with other men during such time were properly admitted as admissions by plaintiff; the trial court's instruction that the jury could consider such evidence only for the purpose of determining the credibility of plaintiff as a witness was error favorable to plaintiff and she cannot complain thereof.

2. **Criminal Law § 70— admissibility of tape recordings**

Sound recordings, if relating to otherwise competent evidence, are admissible providing a proper foundation is laid for their admission.

3. **Criminal Law § 70— tape recording — foundation for admission**

A proper foundation was laid for the admission of a tape recording where the person who made the recording testified as to the manner in which it was made, identified the reel and tape presented at the trial, testified that he knew the voice of the persons on the tape, that he heard all of the conversation between them, that the conversation was produced on the tape, and that nothing was left out, and possession of the tape was accounted for from the time it was made until the time of trial.

4. **Criminal Law § 70— tape recording — instructions on installation of recorder**

Testimony by defendant that he "got a man that runs a sound and record shop in Hendersonville" to instruct him how to install a

tape recorder in his automobile that was used to record a conversation between plaintiff and defendant did not violate the hearsay rule and was competent.

5. **Criminal Law § 70— tape recording — difficulty in hearing at prior trial**

The trial court did not commit prejudicial error in the exclusion of testimony by a court reporter that a tape was difficult to hear and understand when it was played at a previous trial since testimony as to whether the tape was more or less audible to a witness who heard it under other circumstances when played on different equipment on a prior occasion would have only limited probative value on the question of authenticity of the tape, and since the record reveals that plaintiffs were given ample opportunity prior to trial to investigate fully as to the authenticity of the tape and as to whether it may have been in any way altered.

APPEAL by plaintiffs from *Leonard, Judge.* Judgment entered 23 November 1974 in District Court, FORSYTH County. Heard in the Court of Appeals 25 August 1975.

These consolidated civil actions were brought under G.S. Ch. 49, Art. 3, by the mother of an illegitimate child and by the child through his guardian ad litem to establish the paternity of the child. The child was born on 26 August 1964 to the plaintiff, Annette Searcy Levi, and plaintiffs alleged that defendant is the father. A first trial resulted in verdict that defendant is the father. On appeal, a new trial was ordered for errors in the charge. *Searcy v. Justice* and *Levi v. Justice,* 20 N.C. App. 559, 202 S.E. 2d 314 (1974), *cert. denied,* 285 N.C. 235, 204 S.E. 2d 25 (1974).

On the new trial, plaintiffs offered evidence to show that the child's mother, then Annette Searcy, did not have sexual intercourse with anyone other than defendant from October 1963 until 1970, that defendant paid her hospital bill and gave her money, and that defendant treated the child as his until Annette Searcy's marriage to Vincent Levi in December 1970. Defendant admitted having had sexual intercourse with the child's mother in late 1963 but denied that he had ever acknowledged paternity of the child. He presented evidence to show that the child's mother had sexual intercourse with other men during the latter part of 1963. Over plaintiffs' objections, the court admitted into evidence a tape recording offered by defendant of a conversation between defendant and Annette Searcy (now Levi) which took place in January 1964. In this conversation Annette Searcy admitted having had sexual intercourse with five other men. Other evidence will be referred to in the opinion.

The jury returned verdict finding defendant was not the father of the child, and from judgment dismissing the actions, plaintiffs appealed.

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

Eugene H. Phillips for defendant appellee.

PARKER, Judge.

[1] Plaintiffs assign error to admission in evidence over their objections of testimony of defendant's witnesses Case and Smith, and the admission in evidence of the tape recording, all of which concerned statements made by plaintiff Annette Searcy (now Levi), mother of the child whose paternity is here at issue, in January 1964 in which she admitted having had sexual intercourse with other men. There was no error in admitting evidence concerning these statements. Contrary to plaintiffs' contention, the statements attributed to Annette Searcy concerned acts of intercourse which the jury could legitimately find from the evidence occurred during a period when the child could have been conceived. Plaintiffs' contention that the central inquiry here is not what Annette Searcy said but she actually did is, of course, correct. However, in this instance evidence of what she said she had done was clearly admissible to prove what she had actually done. She is a party to this action, and the statements attributed to her were admissible as admissions. 2 Stansbury's N. C. Evidence (Brandis Revision), § 167. Moreover, that on cross-examination she denied having made the statements did not preclude defendant from offering evidence that she did make them. Defendant's evidence was not offered or admissible merely for the purpose of contradicting plaintiff Annette Searcy Levi's testimony but as substantive evidence relevant to the central issue in this case. The trial judge's instruction to the jury that they could consider the challenged evidence only for the purpose of determining the credibility of Annette Searcy Levi as a witness was an error against defendant and favorable to plaintiffs for which they cannot complain.

[2, 3] The tape recording as such was also properly admitted in evidence. Sound recordings, if relating to otherwise competent evidence, are admissible providing a proper foundation is laid for their admission. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971); *Searcy v. Justice* and *Levi v. Justice, supra;* see Annot., 58 A.L.R. 2d 1024. Before the tape recording was ad-

mitted into evidence in the present case, defendant presented the testimony of his witness, Clifford Case, who made the recording, concerning the manner in which it was made. Case testified that at defendant's request in January 1964 he hid in the trunk of defendant's car where he operated a tape recording machine on which he recorded a conversation between defendant and Annette Searcy, who were seated in the front seat of the car. Case identified the reel and the tape presented at the trial as the reel and tape which he used to record the conversation. He also testified that he knew the voices of defendant and Annette Searcy, that he heard all of the conversation between them, that the conversation was reproduced on the tape, and that nothing was left out. Evidence was also presented to show that after the recording was made in 1964, the tape remained in defendant's possession until he was first charged in this case in 1971, when he delivered it to the attorney who then represented him in Hendersonville, N. C. The record on appeal contains the stipulation signed by counsel for plaintiffs and defendant that the tape recording offered in evidence by defendant at the trial is the same tape recording delivered to defendant's present counsel by his former attorney, that the tape recording was continually in the custody of the present counsel from the time of its delivery to him until the trial, that no alterations or additions were made to the tape subsequent to its delivery to defendant's present counsel, and that these matters were stipulated by plaintiffs' counsel upon *voir dire* prior to the time the tape was offered into evidence. We hold that a proper foundation was laid for admission of the tape recording in evidence and that it was properly admitted in evidence.

[4] While testifying as to the arrangements he had made in January 1964 to get a tape recorder and have the conversation recorded, defendant was asked by his counsel if he got "some expert help on it," to which he replied, "Yes, sir, from this sound technician." Plaintiffs' counsel moved to strike, and the court ruled, "As to expert, strike that." Defendant was then asked by his counsel if he had consulted "someone in the electronics field about it," to which he replied that he "got a man that runs a sound and record shop in Hendersonville to instruct us on how to install it after we got the power converter." Plaintiffs' counsel moved to strike, "particularly as to the instruction which is hearsay." The rulings of the court relative to this testimony form the basis of plaintiffs' third assignment of

error. In these rulings we find no error. The court allowed plaintiffs' motion to strike the reference to the sound technician "as an expert," and it was entirely competent for defendant to testify that he "got a man that runs a sound and record shop in Hendersonville" to instruct him how to install the recording machine. The rule excluding hearsay evidence was in no way involved.

[5] Plaintiffs called as a witness the court reporter who served at the first trial for the purpose of presenting her testimony that when the tape was played at a *voir dire* hearing on the previous trial, it was difficult to hear and she was able to understand "only a word every now and then." On defendant's objection the court excluded this testimony, to which ruling the plaintiffs now assign error. In this ruling we find no prejudicial error. The excluded evidence was relevant only on a question as to the authenticity of the tape. Even on that question it had only limited probative value, since whether the tape was more or less audible to a particular witness who heard it under other circumstances when played on different equipment on some prior occasion would not be determinative. Furthermore, the record reveals that plaintiffs here were given ample opportunity prior to trial to investigate fully as to the authenticity of the tape and as to whether it may have been in any way altered. Prior to the second trial, counsel for the parties met with the judge in chambers for the purpose of listening to the tape so that the court might make a determination as to whether it was of sufficient quality to be heard and understood by the jury. Following that meeting, plaintiffs moved to require that defendant permit the tape to be examined by an electronics expert of plaintiffs' choosing. Though no formal order was entered, at the court's suggestion defense counsel agreed that the tape might be so examined by plaintiffs' expert, subject to the case being continued if the expert concluded that the tape had been tampered with or was not the same. Plaintiffs' counsel later stated during the trial that "plaintiffs had decided not to have the tape examined by an electronic expert because the matters had already been the subject of numerous continuances and plaintiffs desired to have the case heard." Under these circumstances we find no prejudicial error in the court's ruling excluding the court reporter's testimony as to what she could hear when the tape was played during the course of the prior trial.

We have examined appellants' remaining assignments of error, and in the trial find

No error.

Chief Judge BROCK and Judge ARNOLD concur.

LARRY A. SLOOP AND CLAUDINE A. SLOOP, HIS WIFE, PLAINTIFFS v. ALVIN A. LONDON, TRUSTEE, CHARLES J. SMITH, AND DAC FINANCIAL SERVICES, INC. OF CHARLOTTE, DEFENDANTS AND CORA E. SLOOP, ADDITIONAL PARTY, DEFENDANT

No. 7519SC457

(Filed 19 November 1975)

Mortgages and Deeds of Trust § 39— wrongful foreclosure — sale conducted by secured party's agent

Plaintiffs' evidence was sufficient for the jury in an action for wrongful foreclosure of a deed of trust brought against the trustee, the secured party, and the secured party's manager where it tended to show that the deed of trust imposed a duty on the trustee to hold the property in trust for the secured party, to sell the property at public auction upon demand of the secured party, and to receive and disburse the proceeds of the sale; the foreclosure sale was conducted by the secured party's manager; neither the trustee nor his attorney was at the sale; only one bid was made at the sale; an attorney, as agent for the trustee, signed the preliminary "report" of the sale before the sale was ever conducted; the check for the purchase price was given directly to the secured party; and the trustee later ratified the sale in his "final report."

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 6 March 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 19 September 1975.

This is a civil action wherein the plaintiffs, Larry A. Sloop and his wife, Claudine A. Sloop, seek damages from the defendants, Alvin A. London, Trustee in a deed of Trust; DAC Financial Services, Inc. (DAC), the secured party in the deed of trust; and Charles J. Smith, Charlotte manager of DAC, for the alleged wrongful foreclosure of the deed of trust and the sale of plaintiff's property described therein. By order of the court, Cora E. Sloop, holder of a subordinate deed of trust on the same property was made an additional party defendant.

The plaintiffs' evidence tended to show: In 1959 Larry Sloop bought the property located at 507 McCombs Avenue in Kannapolis. In 1971 plaintiffs borrowed $10,000 from Citizens Savings & Loan using the property as security. On 28 September 1971 plaintiffs obtained a loan from DAC in the amount of $6,679.20, executing a deed of trust on their property as security for the loan. Alvin A. London was named trustee in the deed of trust securing plaintiffs' indebtedness to DAC. When plaintiffs obtained the loan from DAC, Cora Sloop held a security interest in the property which she agreed to subordinate to DAC's security interest in the property.

Plaintiffs stopped making payments on the loan from DAC in April 1972. On 23 June 1972, plaintiffs received a letter from Benjamin McCubbins, an attorney in Salisbury, advising plaintiffs that their payments on the loan from DAC were in arrears. They subsequently received three other letters from McCubbins, the last on 3 August 1972. Those letters informed plaintiffs that McCubbins had been requested to institute foreclosure proceedings; that he had instituted foreclosure proceedings; and that plaintiffs could "stop this process at any time prior to September 8, 1972 by paying the balance owed plus costs and fees involved." Plaintiffs went to Charlotte on 10 August 1972 and talked with Charles J. Smith at DAC who told them "he thought he could give . . . [plaintiff Larry Sloop] time to work the problem out," and "that he would stop any such letters as from McCubbins . . . . " But, foreclosure proceedings continued, notice being published in *The Concord Tribune* in accordance with the statute then in effect.

On 8 September 1972 at 12:00 noon, the foreclosure sale was conducted. London, trustee under the deed of trust, was not present at the sale nor was there any attorney present representing London. Instead the sale was conducted by Charles J. Smith. There was one bid made in the amount of the debt owing DAC; that bid being made by Allan Miles Companies, Inc., which made the check for the deposit payable to Benjamin McCubbins and later paid the balance, by check, directly to DAC. While neither London, trustee, nor McCubbins, the attorney, was present at the sale, a report of the sale to Allen Miles Company, Inc., signed:

ALVIN A. LONDON, Trustee
BY: s/ Benjamin D. McCubbins
Attorney for Trustee

was filed in the office of the Clerk of Superior Court at 12:01 p.m. on the same day.

Defendant London, on 26 September 1975, signed and filed a "final report of sale" in the office of the Clerk of Superior Court, indicating that he had conducted the sale on 8 September 1975; that Miles became the highest bidder at $4,838.75; that he had collected the purchase price from Miles; that he had disbursed the proceeds; and that he had executed and delivered the deed to Miles.

Plaintiff, Larry Sloop, testified that the property was worth not less than $22,000.00.

At the close of plantiffs' evidence, defendants London, Smith and DAC moved for a directed verdict. From the granting of defendants' motion, plaintiffs appealed.

Edwin H. Ferguson, Jr., for plaintiff appellants.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour for defendant appellees, Alvin A. London, Charles J. Smith, and DAC Financial Services, Inc.

No counsel for additional defendant Cora Sloop, appellee.

HEDRICK, Judge.

Plaintiffs assign as error the granting of defendants' motion for a directed verdict at the close of plaintiffs' evidence. In granting the directed verdict the court found, as defendants argued in their motion, "[t]hat the record contains no evidence . . . that would constitute a wrongful foreclosure in contemplation of law or evidence which would entitle the plaintiffs to recover money damage from the defendants or either of them."

As to evidence of damages, in a wrongful foreclosure action, it is not necessary to prove damages to withstand a directed verdict, since, regardless of proof of any actual damages, plaintiffs would be entitled to at least nominal damages should the jury find there was a wrongful foreclosure. *Bowen v. Fidelity Bank*, 209 N.C. 140, 183 S.E. 266 (1936); 5 Strong, N. C. Index 2d, Mortgages and Deeds of Trust, § 39, pp. 594-595.

In ruling on a motion for directed verdict, the plaintiffs' evidence along with any reasonable inference that can be drawn

from the evidence, must be considered in the light most favorable to plaintiffs, *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969), and only when it is clear as a matter of law that plaintiffs have shown no right to relief should the judge grant defendants' motion for a directed verdict. *Roberts v. Reynolds Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972); *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971).

The language of the deed of trust imposed a duty on the Trustee, London, to hold the property in trust for DAC and upon demand of DAC to sell the property at public auction. The deed of trust also imposed a duty on London to receive and to disburse the proceeds of the sale in accordance with the priorities enumerated in the deed of trust.

The clear language of the deed of trust as well as North Carolina law, imposes upon the trustee a *fiduciary* duty to use diligence and fairness in conducting the sale and to receive and disburse the proceeds of the sale. *Mills v. Mutual Building and Loan Assn.,* 216 N.C. 664, 6 S.E. 2d 549 (1940); *Hinton v. Pritchard,* 120 N.C. 1, 26 S.E. 627 (1897); *Huggins v. Dement,* 13 N.C. App. 673, 187 S.E. 2d 412 (1972), app. dismissed 281 N.C. 314, 188 S.E. 2d 898 (1972).

With these standards in mind, the evidence shows that London was the trustee under the deed of trust but that Charles J. Smith as agent of DAC conducted the foreclosure sale. The evidence further shows that London was not at the sale nor was he represented at the sale by McCubbins; that only one bid was made at the sale; and that McCubbins, as agent for London, signed the preliminary "report" of the sale before the sale was ever conducted. The check for the purchase price was given directly to DAC. In addition, London later ratified the sale in his "final report." The deed of trust itself imposes upon London the duty to conduct the sale. Clearly, the fact that London took no part in the sale yet ratified the sale conducted by Smith, the agent of the beneficiary, shows a breach of duty and of the terms of the deed of trust sufficient to withstand a motion for a directed verdict.

As to whether the directed verdict was proper as regards DAC and its agent Charles J. Smith, "[a] creditor can exercise no power over his debtor with respect to . . . property [subject to the deed of trust] because of its conveyance to the trustee with power to sell upon default of the debtor." *Mills v. Building*

& Loan Assn., supra at 669. "The power [to sell under a deed of trust] cannot be exercised by the holder of the obligation secured, if he is not the trustee . . . since his control over the security consists in his right to call on the trustee, when default occurs, to advertise and sell and to require him to comply . . . . " 59 C.J.S., Mortgages, § 555, p. 913. Since the trustee, London, had the sole authority and duty to conduct the sale, Charles J. Smith, as agent for the creditor DAC, was wholly without such authority under the deed of trust. The legal title to the property rested with the trustee. Under the deed of trust DAC, as creditor and holder of the note, could only demand that the trustee sell the property; it could not conduct the sale itself through one of its agents. Plaintiffs have charged London with a breach of his fiduciary duty. It seems no less than right to hold responsible those who have knowingly participated in that dereliction of duty. *Erickson v, Starling,* 233 N.C. 539, 542, 64 S.E. 2d 832, 834 (1951).

For the reasons stated, the judgment directing a verdict for the defendants London, Smith and DAC is reversed and the cause is remanded to the Superior Court for further proceedings.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. KAREY HARRIS

No. 7527SC608

(Filed 19 November 1975)

1. **Robbery § 4— attempted armed robbery — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for attempted armed robbery where such evidence tended to show that defendant entered his victim's country store, paid for some purchases, asked his victim for another item and stabbed his victim in the back when the victim turned to obtain the item.

2. **Robbery § 5— attempted armed robbery — failure to submit lesser included offenses — no error**

In a prosecution for attempted armed robbery where all the evidence tended to show that a knife was actually used in the perpetration of the crime charged, the trial court did not err in not instructing the jury on the lesser included offense of common law robbery, nor

did the court err in failing to submit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon since there was no evidence of such a crime of lesser degree.

ON *certiorari* to review defendant's trial before *Falls, Judge.* Judgment entered 10 September 1970 in Superior Court, LINCOLN County. Heard in the Court of Appeals 23 October 1975.

The defendant, Karey Harris, was charged in a bill of indictment, proper in form, with the attempted armed robbery of E. R. Ewing, in violation of G.S. 14-87. The defendant pleaded not guilty and was found guilty as charged. The trial court imposed a prison sentence of 30 years. This court allowed a Petition for Writ of Certiorari 16 July 1975.

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

C. E. Leatherman for defendant appellant.

HEDRICK, Judge.

The defendant contends the court erred in denying his motion for judgment as of nonsuit and in the judge's "failing to charge the jury as to lesser included offenses to the Bill of Indictment, such lesser offense included being attempt of common law robbery, assault with a deadly weapon, or attempt of assault with a deadly weapon." The defendant offered no evidence. The State's evidence tended to show the following:

[1] R. E. Ewing operated a "country store" on Highway 27 east of Lincolnton. On Sunday, 9 August 1970, Ewing opened his store at 7:30 a.m. and about ten minutes later, the defendant drove up in a 1969 Caprice Chevrolet. Defendant asked for two dollars worth of gas. As Ewing pumped the gas, the defendant entered the store. While in the store, the defendant took a popsicle out of the freezer; and when Ewing came into the store, the defendant paid him for the popsicle and the gas. As Ewing gave the defendant his change, the defendant asked for a cold remedy. Ewing went to the shelf to show the defendant what he had; and as he turned his back he "felt a knife enter [his] back." Ewing turned, and the defendant, who stood right behind him, made another lunge at him with the knife. Ewing then saw that the knife had a five or six inch blade. Ewing and the defendant struggled; and as they struggled, Ewing gave a "rebel yell" and they momentarily separated. Ewing ran

behind the counter and got his gun. The defendant fled out the door; and as the defendant got into his car, Ewing fired at him through the front window of the store, hitting the car with several of the shots. After the stabbing, Ewing was hospitalized for three days.

In *State v. Powell,* 6 N.C. App. 8, 12, 169 S.E. 2d 210, 213 (1969), we find the following quoted from an Annotation in 55 A.L.R. 714:

> "In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition."

The evidence tending to show that the defendant stuck a knife into Ewing's back is sufficient to show that the defendant's conduct had advanced beyond the stage of mere preparation. When the State is given the benefit of every inference reasonably deducible from the evidence, we are of the opinion it is sufficient to show that the defendant attempted to rob Ewing with the use of a dangerous weapon. *State v. Powell,* 277 N.C. 672, 178 S.E. 2d 417 (1971); *State v. Powell, supra.* The evidence was sufficient to require the submission of this case to the jury on the charge of attempted 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 presence of such evidence is the determinative factor.' *State v. Cox,* 11 N.C. App. 377, 181 S.E. 2d 205." *State v. Melton,* 15 N.C. App. 198, 200, 189 S.E. 2d 757, 758 (1972); *cert. denied* 281 N.C. 762, 191 S.E. 2d 359 (1972). "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of . . . [an included crime of lesser degree than that charged]." *State v. Black,* 21 N.C. App. 640, 643-44, 205 S.E. 2d 154, 156 (1974), *affirmed* 286 N.C. 191, 209 S.E. 2d 458 (1974).

[2] Since all of the evidence in the present case tended to show that a knife was actually used in the perpetration of the

crime charged, the trial judge did not err, as contended by defendant, in not instructing the jury on the lesser included offense of common law robbery.

"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." *State v. Richardson,* 279 N.C. 621, 628, 185 S.E. 2d 102, 107 (1971). Therefore, even though the crime of attempted armed robbery as defined in G.S. 14-87 includes the crime of assault with a deadly weapon, the absence of any evidence in the present case that the defendant committed such a crime of lesser degree made it unnecessary for the court to submit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon. The mere possibility that the jury might have accepted the State's evidence in part and rejected it in part and find the defendant guilty of assault with a deadly weapon did not require Judge Falls to submit that offense to the jury as one of its permissible verdicts.

We have carefully considered the remaining assignments of error brought forth and argued in defendant's brief and find them to be without merit. The defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

CAROLINA MILLS, INC.; MURRAY KAUFMAN AND WIFE, MARY KAUFMAN; FRANK S. FINOCCHIO AND WIFE, CAROLYN B. FINOCCHIO; DEWEY W. BERRY, JR., AND WIFE, ALICE FAYE BERRY; RALPH L. BUMGARNER, JR., AND WIFE, DORIS BUMGARNER; DAVID R. JORDAN AND WIFE, HELEN JORDAN; ALLEN MYERS AND WIFE, BARBARA H. MYERS; D. R. WALKER AND WIFE, ANN WALKER; RON ELLIS AND WIFE, DIANA ELLIS; AND EDWARD HARMAN AND WIFE, PHYLLIS HARMAN v. CATAWBA COUNTY BOARD OF EDUCATION

No. 7525DC509

(Filed 19 November 1975)

Deeds § 20; Eminent Domain § 2; Schools § 6— purchase of land by school board — restrictive covenant limiting to residential use — injunction — damages for taking

A board of education which purchases property for a valid school purpose pursuant to G.S. 115-125 cannot be enjoined to comply with restrictive covenants requiring that the property be used exclusively for residential purposes, the appropriate remedy for other landowners protected by the covenant being an action to recover damages for the taking of their property rights.

Judge CLARK concurring.

APPEAL by plaintiffs from *Beach, Judge.* Judgment entered 24 April 1975 in District Court, CATAWBA County. Heard in the Court of Appeals 14 October 1975.

This appeal stems from an attempt by plaintiffs to enjoin the Catawba County Board of Education (hereinafter referred to as Board) from using land purchased pursuant to G.S. 115-125 in violation of restrictive covenants requiring that the land be used only for residential purposes.

Plaintiffs consist of the corporation which developed the Carolina Terraces Subdivision in Maiden, North Carolina, and of the owners of property within the subdivision. The subdivision lots are subject to covenants restricting the use of the property to, among other things, residential purposes. By stipulation in the deeds to the subdivision lots, the restrictive covenants are in effect for twenty years from the date of initial purchase. On 7 August 1972 Richard L. Wade purchased Lot Nos. 1, 2, 3, and 4 of Block "A" in the subdivision from Carolina Mills, Inc. These lots form a single tract which borders the site of the Maiden High School football stadium. On 27 September 1972 the Board purchased the Wade property subject to the

restrictive covenants mentioned above. In the spring of 1973 the Board initiated construction of tennis courts on the property to be used in Maiden High School's physical education program. Plaintiffs promptly brought an action to compel the Board by injunction to adhere to the covenants requiring that the land be used exclusively for residential purposes. Plaintiffs' action was dismissed by an order granting defendant's motion for summary judgment, and from this order plaintiffs appeal.

The following conclusions of law are incorporated in the presiding judge's final order:

> " . . . [T]he restrictive covenants in the deed to the defendant are not enforceable against the Catawba County Board of Education inasmuch as it is a corporate body organized under the General Statutes of North Carolina with powers of Eminent Domain, and pursuant to the use of such powers the Board acquired Lots Nos. 1, 2, 3, and 4 of Block "A" of Carolina Terraces Subdivision by purchase to enlarge Maiden High School; and for this reason cannot be restrained in the use of said property as a school site.
>
> "2. The sole remedy available against the Catawba County Board of Education is an action for damages involving the inverse condemnation of negative easements if the proposed school use of said property amounts in a constitutional sense to a taking; and damage to said negative easement or the plaintiff's incorporeal property rights."

Cagle and Houck, by Joe N. Cagle, for the plaintiffs.

Sigmon and Sigmon, by W. Gene Sigmon, for the defendant.

BROCK, Chief Judge.

This appeal presents the question of whether a board of education which purchases property for a valid school purpose pursuant to G.S. 115-125 can be enjoined to comply with restrictive covenants requiring that the property be used exclusively for residential purposes.

In *Raleigh v. Edwards,* 235 N.C. 671, 71 S.E. 2d 396 (1952), the City of Raleigh instituted condemnation proceedings to acquire a tract of land in a residential subdivision to serve as the site for an elevated water storage tank. The plaintiffs, adjoining property owners, brought an action to recover dam-

ages for the City's breach of restrictive covenants limiting the property to residential use. The Court held that the City's violation of the restrictive covenants constituted a taking of vested property interests for which the owners were entitled to compensation commensurate with any loss they sustained. Although the issue was not directly before the Court, it is clear that injunctive relief to enforce the covenants was not available to plaintiffs. *"It is true that such other landowners may not enforce the restrictions against the condemnor,* but they are nonetheless entitled to an award of compensation 'where, through the exercise of the power of eminent domain, there is a taking or damaging of such property rights. . . . ' (citations omitted)" (emphasis supplied) *Raleigh v. Edwards, supra.* Indeed, the issuance of an injunction to compel a condemning authority to comply with restrictive covenants would defy the concept of eminent domain. By definition eminent domain represents the power of the state to acquire all private property rights for a public purpose, subject only to the requirement of fair compensation. This power, when exercised properly according to law, cannot be restricted by injunctive relief to enforce covenants binding on the condemned property. As a general rule the party whose property rights are damaged or taken by the condemning authority is entitled to an action to recover damages.

Plaintiffs attempt to distinguish the present case from *Raleigh v. Edwards* by focusing on the manner in which the property was acquired by the Board. Here, the Board acquired the property by purchase rather than by condemnation; as a result, plaintiffs argue that the Board is subject to the restrictive covenants as a private purchaser would be. This argument fails to grasp the full legal effect of the Board's action. Title to the property was purchased by the Board pursuant to G.S. 115-125, which authorizes the Board to acquire property for school sites and related school purposes by purchase, gift, and, if necessary, by condemnation:

> "§ 115-125. *Acquisition of sites.*—County and city boards of education may acquire suitable sites for schoolhouses or other school facilities either within or without the administrative unit; but no school may be operated by an administrative unit outside its own boundaries, although other school facilities such as repair shops, may be operated outside the boundaries of the administrative unit. Whenever any such board is unable to acquire or enlarge a suitable

site or right-of-way for a school, school building, school bus garage or for a parking area or access road suitable for school buses or for other school facilities by gift or purchase, condemnation proceedings to acquire same may be instituted by such board under the provisions of Article 2, Chapter 40 of the General Statutes, and the determination of the county or city board of education of the land necessary for such purposes shall be conclusive; provided that not more than a total of 50 acres shall be acquired by condemnation for any one site for a schoolhouse or other school facility as aforesaid. (citations omitted)."

The Board's power to purchase property under this section is tantamount to the power of eminent domain. To the extent that the Board's use violates and impairs the value of restrictive covenants running with the property, there is a taking whether the property is purchased or condemned, and the owners of the easements created by covenant are entitled to compensation. The appropriate remedy for plaintiffs in this case is an action to recover damages on the theory that the Board has taken their property rights. Injunctive relief to enforce plaintiffs' negative easements in the property acquired by the Board is not warranted on the basis of the illusory distinction between the authority to purchase and the authority to condemn prescribed by G.S. 115-125.

Plaintiffs' assignments of error are overruled, and the 24 April 1975 order is

Affirmed.

Judge HEDRICK concurs.

Judge CLARK concurring:

The power of eminent domain is founded on the law of necessity and is not to be exercised arbitrarily. In my opinion if the pleadings had properly raised the issue, the plaintiffs would have the right to a judicial determination of the legal authority and necessity for the taking of their vested interests and the right to an injunction pending this determination. But the complaint alleges that the intended use of the lots may become "an annoyance or nuisance to the neighborhood" and prays that defendant be restrained from violating the restrictive

covenants. Under these circumstances their remedy is compensation for the taking and not restraint of the defendant in the intended use of the property.

A & A DISCOUNT CENTER, INC. v. QUENTIN R. SAWYER AND LOU L. SAWYER

No. 7518SC512

(Filed 19 November 1975)

Evidence § 32— parol evidence rule — representation by salesman

A printed form contract for construction of a swimming pool executed by the parties was not intended to integrate and supersede all negotiations, representations and agreements between the parties, and the parol evidence rule did not exclude evidence of a representation or warranty by plaintiff's salesman that the pool would be suitable for commercial use.

APPEAL by defendants from *Crissman, Judge.* Judgment entered 27 March 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 25 September 1975.

In this action plaintiff seeks to recover of the defendants the sum of $6100 for the installation of a swimming pool. Jury trial was waived. The plaintiff's evidence tends to show that on 20 May 1972, its salesman, James Tumlin, met with the defendants at their home. A contract was executed providing for the installation by the plaintiff of a swimming pool, size 20′ x 40′, for which the defendants agreed to pay $6100 in cash. Installation was completed on 24 June 1972, when defendants signed a certificate that the work was satisfactorily completed and that they would pay cash within 60 days. Plaintiff's president, Jack Spital, visited the defendants in September and they advised him that they would not pay the $6100 until the pool was altered to a commercial pool. Spital agreed to change it to a commercial pool. He testified that weather conditions prevented the change until March 1973, when he sent a crew to do the work, but the defendants would not allow them to do so. By letter dated 2 March 1973 to the defendants, Spital wrote that he could not "argue with your justified position concerning the installation and service on your swimming pool." and that he was prepared to send a service crew but he understood that the defendants would not welcome them.

Defendants' evidence tended to show that they operated a campground; that plaintiff's salesman, Tumlin, told them the pool could be used commercially and that they would help pay for the pool by charging local kids for using it on a day camp basis. Defendants had no knowledge of the requirements for commercial use of the pool.

Defendants attempted to offer into evidence statements made by the salesman, Tumlin, to show that they were induced to sign the contract by his promise that the pool would be suitable for commercial use. The trial judge excluded this evidence.

The court found that the contract was duly executed, was performed by plaintiff and breached by the defendants, and rendered judgment for the plaintiff in the sum of $6100.

Alspaugh, Rivenbark & Lively by James B. Rivenbark for plaintiff appellee.

Harris & McEntire by Mitchell M. McEntire for defendant appellants.

CLARK, Judge.

The crux of defendants' argument on appeal is that the trial judge erred in excluding the testimony offered by them relative to the representations of plaintiff's salesman as to the suitability of the swimming pool for commercial use. When the trial court ruled that this evidence was not admissible, counsel for the defendants informed the court that he wanted to show that the purpose (commercial use of the pool) was known by the parties. The court replied that "the terms of the contract speak for itself and what led up to that signing is another proposition." It is apparent from this statement and other rulings on the evidence that the testimony offered by the defendants relative to suitability for commercial use was excluded by the court because of the parol evidence rule. It is also obvious that in rendering judgment for the plaintiff the court considered no oral agreement or promise outside the written terms of the contract.

The record on appeal does not disclose the standards imposed by local government for commercial swimming pools. However, it must be inferred from the evidence in the record that there were local ordinances which required that commercial pools meet certain physical standards which were not required

for residential pools. Defendants testified that they had no knowledge of the standards required for commercial use of a swimming pool, and that they told plaintiff's salesman they would need to use it commercially in order to pay for it. Apparently, the evidence excluded by the trial court tended to show that plaintiff's salesman told defendants that the swimming pool could be used by them commercially. This, in effect, was a representation or warranty that when the pool was installed as specified in the contract it would meet the standards imposed by local authority for commercial use. The printed form contract was then executed by the parties, and it contained no provision relating to suitability for either commercial or residential use. Under these circumstances, the written contract was not intended by the parties to include this representation.

If testimony is offered to prove that a party to the written contract made extrinsic promises, warranties, or representations the testimony is generally excluded by the parol evidence rule.

> "Nevertheless, such writings do not always state the entire bargain, even in the absence of such fraud or mistake as justify reformation or a decree setting aside an ordinary contract. The parties may merely omit one of the promises or warranties actually made. No supposedly implacable 'parol evidence rule' should close the door to proof that there was such an omission. The burden of establishing it may be heavy; but the surrounding circumstances and the testimony of disinterested witnesses may bear it successfully. . . . " 3 Corbin on Contracts, § 585, p. 481 (1960).

If a writing is intended to supersede all other agreements relating to the transaction, it may be termed a total or complete integration; if it supersedes only a part, it is a partial integration. In the latter case those portions of the transaction which were not intended to be superseded are legally effective and therefore may be shown by parol. 2 Stansbury, N. C. Evidence 2d, (Brandis rev. 1973) § 252.

It is our opinion that the printed form contract executed by the parties was not intended to integrate and supersede all of the negotiations, representations and agreements between the parties, and that the evidence of the representation or warranties that the pool would be suitable for commercial use was

not excluded by the parol evidence rule and was erroneously excluded by the trial court.

New trial.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES T. FOSTER AND RUDOLPH McCURDY, JR.

No. 7518SC532

(Filed 19 November 1975)

1. **Criminal Law §§ 34, 96— witness's and defendant's prior conviction — evidence withdrawn — prejudice not cured**

In a prosecution for armed robbery where defendants' only witness was required to testify over defendants' objection that he and defendant McCurdy had previously been convicted of armed robbery, the trial court's admonitions given the jury during his charge to disregard the testimony of the witness concerning prior convictions did not effectively erase the prejudicial effect of the evidence.

2. **Criminal Law § 113— witness's prior conviction — jury instruction**

There is no "presumption" or rule of law to the effect that a person of good character is less likely to tell an untruth than one whose character is bad, or one who has been convicted of a crime, and the trial court's instructions relative to the evidence of a witness's prior conviction should have limited jury consideration, if they believed the evidence, to its bearing on credibility.

APPEAL by defendants from *McConnell, Judge.* Judgments entered 31 January 1975, Superior Court, GUILFORD County. Heard in the Court of Appeals 15 October 1975.

Armed robbery charges against the defendants and Joe Medley were consolidated for trial. Medley participated in the jury selection, but before the jury was empaneled, his plea of guilty to accessory after the fact to armed robbery was accepted by the State, and his case was severed. Defendants then moved for mistrial or the selection of another jury which would not have knowledge of Medley's change of plea. The motion was denied.

The State's evidence tends to show that two black men wearing ski masks entered a self-service grocery store on 21

October 1974 and announced to T. W. Hollingsworth, operator, that "this is a holdup." One had a shotgun and the other a pistol. Hollingsworth opened the cash register, and one of the men removed the money. The men left the store, jumped into a waiting vehicle and sped off as Hollingsworth fired at the vehicle.

An eyewitness, Carolyn Owenby, heard the shots and saw two black males jump into the car which contained a third person in the driver's seat. Officer Allred received a description of the car and observed a black over red Dodge Demon containing five black males about 8:45 p.m. the same night, within 30 minutes of the robbery. The car was stopped. Defendant McCurdy was driving and defendants Foster and Medley were passengers.

Medley, owner of the car, gave permission for a search, producing the keys to the trunk. In plain view on the right front floorboard, the officers found a large bag containing rubber gloves, three ski masks and a large amount of cash, checks made out to Hollingsworth and money orders. A sawed-off shotgun and a .38 caliber pistol were found under the front seat of the car.

The defendants' only witness was Joe Medley, who testified defendants got out of his car at the apartment of some girl friends; that he and two others drove to Hollingsworth's store; the two others went into the store; that he heard shots about five minutes later; and that they came running back to the car and told him to drive off.

The jury found both defendants guilty of robbery with a firearm and from sentences to imprisonment, defendants appeal.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr., for the State.

Assistant Public Defender Richard S. Towers for defendant appellants.

CLARK, Judge.

[1] Joe Medley, the only witness to testify for the defendants, was asked about prior convictions; he answered that he had been convicted of armed robbery in Union County and that the case was now on appeal in the State's Supreme Court. He was then asked, "Who was convicted along with you?" The trial

court overruled defendants' objection and Medley replied, "McCurdy was convicted with me." Defendants then moved for a mistrial. The court denied the motion.

In the charge to the jury the trial court instructed as follows:

> "Upon cross examination it was brought out that the defendant Medley testified that he had been previously tried and convicted with defendant McCurdy. That was objected to at the time the State asked the question of Medley and the Court did not sustain the objection, but at this time I do sustain the objection and request and direct you that you are not to consider any testimony that McCurdy may have been convicted of any other crime. He and Foster did not go upon the stand, as they both had a right not to do, and the fact that they did not should not be considered against them and they are not being tried for any other crime, and if there is some testimony he may have been convicted of another crime, you should disregard it and not let it influence you in this case. He is being tried only on the alleged robbery of T. W. Hollingsworth."

Medley's testimony of the defendant McCurdy's prior conviction was erroneously admitted. The general rule is 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. This general rule and its exceptions are treated fully by Justice Ervin in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). The trial court attempted to negate the error by giving the foregoing cautionary instructions to the jury. In some cases the cautionary admonitions of the trial judge are ineffective to erase from the minds of a jury the effects of prejudicial testimony. *Bruton v. U. S.,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968); *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971).

Sub judice, Medley was the only witness for defendants. He and both defendants were charged with the same offense of armed robbery. He was required to testify that he and defendant McCurdy had been previously convicted of armed robbery. Under these circumstances the cautionary admonitions did not effectively erase the prejudicial effect of the evidence. And though the inadmissible evidence related only to defendant McCurdy's prior conviction, it was also prejudicial to defendant Foster since they were being tried together as codefendants.

[2] The defendants also assign as error the instructions to the jury which the trial judge gave, after referring to the evidence of prior conviction of the defendants' witness Medley, as follows:

> " . . . It goes only to the credibility of the witness, that is, it goes to his character, that is, that a person convicted of a crime is less apt to tell the truth than a man of good character who has not been convicted of such crime, but it does not go to the substance of this case, only goes to whether or not you believe or disbelieve the witness Medley."

There is no "presumption" or rule of law to the effect that a person of good character is less likely to tell an untruth than one whose character is bad, or one who has been convicted of a crime. 1 Stansbury, N. C. Evidence 2d, (Brandis rev. 1973), § 102. The court's instructions relative to the evidence of Medley's prior conviction should have limited jury consideration, if they believed the evidence, to its bearing on credibility, its weight and influence being solely for the jury to determine.

Since we must order new trials for both defendants for the errors as indicated, we do not consider now the other assignments of error.

New trials.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MAMIE RUTH HUNTER AND SYLVESTER GRAY

No. 757SC440
No. 757SC441

(Filed 19 November 1975)

1. Criminal Law § 66— in-court identification — independent origin

The evidence on voir dire in a robbery case supported the trial court's determination that the in-court identifications of the male defendant by two witnesses and the female defendant by one witness were of independent origin and not tainted by any illegal pretrial identification procedure where the evidence showed that both witnesses had ample opportunity to observe defendants under good lighting conditions during the course of the robbery.

2. Criminal Law § 92— consolidation of charges against defendants

The trial court did not err in consolidating for trial robbery charges against two defendants where the crimes were identical and were committed at the same time and place, evidence admissible against one defendant was admissible against the other, and their defenses were not antagonistic.

APPEAL by defendants from *Peel, Judge.* Judgment entered 10 January 1975 in Superior Court, WILSON County. Heard in the Court of Appeals 17 September 1975.

Defendants were individually charged with the felony of common law robbery. Upon motion of the State, the defendants' cases were consolidated for trial.

The State's evidence tended to show the following: On or about 6 November 1974 the defendants went to a small grocery store in Wilson County, owned and operated by J. E. Williams. On this particular morning, Williams and Arthur Jobe were in the store talking when defendant Hunter came in apparently to purchase a soft drink. After inquiring as to the price of the drink, Hunter went outside to get an empty bottle. Shortly after her return, defendant Gray entered and walked down one of the aisles. Gray then drew a gun and advised Williams that "This is a holdup, a real holdup." Hunter came over behind the counter and took money out of a cash register and a pouch containing a pistol and about $1,500.00 which was stored underneath the counter. As Hunter moved from behind the counter towards the door, Williams grabbed the pouch and a struggle ensued. Hunter called to Gray to "kill him" several times but Gray did not shoot. Instead, he ran over to Williams and hit him in the chest with the barrel of the gun knocking him to the floor. Gray and Hunter ran out of the store to a car and left the scene.

A change purse containing less than a dollar was also taken from the witness Jobe.

Hunter testified that she could not recall her whereabouts on the morning of 6 November 1974, but that she was not in Williams' store that morning nor at any other time before that date.

Gray then testified that he was a former employee of Orkin and had been in Williams' store while doing extermination work to get directions to houses or addresses in that particular neighborhood. Gray was fairly certain that he was probably asleep on the morning of 6 November 1974. Both defendants

testified that they had known each other for only a short period of time.

The jury found the defendants guilty, and from judgment imposing prison sentences, defendants appealed.

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

Moore, Moore and Weaver, by Stephen L. Beaman, for defendant appellant.

MARTIN, Judge.

[1] Defendants contend that the court erred in finding facts and making conclusions of law to the effect that the in-court identifications were of independent origin and not tainted by illegal pretrial identification procedure.

"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. (Citations.)" *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974).

In the instant case, upon objection by defendants to the identification testimony by Mr. Williams and by Mr. Jobe, the trial judge excused the jury and conducted voir dire hearings. On voir dire, Mr. Williams identified Gray as the man who robbed him. He testified that there was nothing over his face nor anything hindering him from looking at Gray's face. Williams further testified that the lighting in his store was not dim, and that the defendant was in his store not more than about five minutes. Mr. Jobe also identified Gray as the man who robbed Mr. Williams and identified Hunter as the female who accompanied him. He testified, "There's no doubt in my mind about the identification." He further testified that the lighting was good in the store at the time of the robbery.

At the conclusion of the voir dire hearings in which Mr. Williams and Mr. Jobe were examined, the court concluded as a matter of law that each of the in-court identifications of Gray had been entirely independent of any out-of-court confrontations and that the in-court identifications by the witnesses were not tainted in any manner. The court sustained the objection of Hunter to identification of her by Williams.

In the recent case of *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974), the rules governing voir dire hearings when identification testimony is challenged were concisely stated by Chief Justice Bobbitt:

> "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.)"

Here the voir dire evidence shows that both Williams and Jobe had ample opportunity to observe defendants under good lighting during the course of the robbery. The court declined to allow Williams to identify Hunter as one of the robbers. It did allow Jobe to identify both defendants and allowed Williams to identify Gray. The court's findings were supported by competent evidence and are therefore conclusive on this Court.

[2] Defendant Hunter also assigned as error the denial of the motion for a separate trial. The assignment of error is overruled. Defendants were charged with identical crimes that were committed at the same time and place. All the evidence that was admissible against one was competent and admissible against the other. Their defenses were not antagonistic. The judge, therefore, did not abuse his discretion when he ordered the cases consolidated for trial. *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975).

All of defendants' assignments of error have been considered and are overruled.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. GEORGE RAYNOR

No.7515SC358

(Filed 19 November 1975)

1. **Constitutional Law § 33— surrender of stolen item — voluntariness — no self-incrimination**

Where officers went to defendant's apartment with an arrest warrant that charged defendant with receiving stolen property, a stereo, defendant was told that he could hand over the equipment or a search warrant would be obtained, and defendant did in fact produce the stereo, the stereo was not taken from defendant in violation of his Fifth Amendment privilege against self-incrimination and was not therefore inadmissible since defendant produced the stereo without compulsion.

2. **Constitutional Law § 21; Searches and Seizures § 1— taking of stereo from defendant's home — no search and seizure**

In a prosecution for feloniously receiving stolen property, the trial court properly concluded that officers' taking of a stereo from defendant's home was not an unlawful search and seizure violative of the Fourth and Fifth Amendments of the U. S. Constitution and of Article I, § 15 of the N. C. Constitution since the officers did not search defendant's apartment, but defendant voluntarily relinquished the stereo.

APPEAL by defendant from *Winner, Judge.* Judgment entered 13 February 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 28 August 1975.

Defendant was charged in a bill of indictment with feloniously receiving stolen property.

The evidence tends to show that on 7 December 1974, the defendant was approached by Tyrone Hunter in a bar in Chapel Hill. Hunter and two friends had stolen a Panasonic stereo system from the Estes Hill School in Chapel Hill earlier in the evening in order to sell it to one Ronnie Christmas. Christmas was no longer interested in the stereo, but told Hunter that night in the bar that defendant might be interested. Christmas pointed out defendant in the bar. Defendant agreed to go with Hunter to see the stereo, which had been secreted by Hunter near the school building. Upon seeing the stereo, defendant purchased it for $50.00. Hunter never told defendant that the equipment was stolen.

On 16 December 1974 at approximately 9:30 p.m., Charlie Edmunds, the Captain of the Chapel Hill Police Department,

and another officer went to defendant's apartment with an arrest warrant that charged defendant with receiving stolen property, to wit, a Panasonic Stereo System purchased from Tyrone Hunter. Captain Edmunds knocked on the door and defendant answered. Edmunds explained to defendant what the warrant specifically charged and asked defendant to turn the equipment over to the police. Both arresting officers and defendant understood that he was under arrest. The officers did not inform defendant of his right to remain silent nor of his right to counsel.

Captain Edmunds testified during a voir dire that the defendant then made several incriminating statements. After defendant made these statements, Edmunds told defendant that he could cooperate and produce the equipment or a search warrant would be obtained in order to get the equipment. The defendant allowed the officers into his apartment while he went to get the stereo. The stereo was not in plain view of the officers and they did not search the apartment. The officers took the defendant and the equipment that he had produced to the Chapel Hill Police Station. At the close of voir dire, the trial court excluded defendant's incriminating statements, and, over defendant's objection, held that the stereo was admissible as evidence. The defendant objected to the ruling.

From a verdict of guilty and judgment imposed, defendant appealed.

Attorney General Edmisten, by William F. Briley, Assistant Attorney General, for the State.

Joseph I. Moore, Jr., for defendant appellant.

MARTIN, Judge.

[1] The defendant contends that the evidence obtained by the police was inadmissible because the stereo was taken from the defendant in violation of his Fifth Amendment privilege against self-incrimination.

In requesting the defendant to produce the stereo, the police were asking him to produce evidence that might be used to prosecute him for a criminal offense. He complied with their request after being told that they could obtain a search warrant if he would not cooperate with them. Assuming, arguendo, that an issue raised in this case is whether defendant's Fifth

Amendment privilege against self-incrimination has been violated, the critical question is whether petitioner was thus compelled to be a witness against himself or otherwise provide the State with evidence of a testimonial or communicative nature. *Schmerber v. California,* 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826. According to the U. S. Supreme Court in the Schmerber case, "[i]t is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications. . . ." However, it is not necessary in this case to decide whether defendant's act of producing the stereo was a "communicative act" within the protection of the Fifth Amendment since the defendant produced it without compulsion.

There is no merit in defendant's contention that he did not relinquish the stereo voluntarily because the officers told him that if he did not produce it 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 Raynor that they were prepared to do so. Further, the transaction was found by the court to be a voluntary relinquishment. This finding is not subject to review since it is supported by competent evidence. *See State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6 (1965). For the reasons stated, this assignment of error is overruled.

[2] Defendant next assigns as error the admission into evidence of the stereo which was in defendant's home. This article was delivered to the police at his home after he had been placed under arrest. Defendant contends the taking of the stereo from his home was an unlawful search and seizure violative of the Fourth and Fifth Amendments of the Federal Constitution and of Article I, Section 15 of the Constitution of North Carolina. The State contends no search was involved and that the defendant voluntarily relinquished possession of the stereo.

It is well settled that the constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant when no search is required. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970). Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. "A search ordinarily implies, a quest by an officer of the law, a prying into hidden places for that which is concealed." *State v. Coolidge,* 106 N.H. 186, 208 A. 2d 322 (1965).

However, there is ". . . an abundance of authority supporting the proposition that when the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures." *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970).

The record indicates that the officers did not search the defendant's apartment, and that the defendant relinquished the stereo pursuant to the officer's request. Further, the court concluded at the close of voir dire that the defendant voluntarily relinquished the stereo to the officers. Thus, the circumstances required no search, and the constitutional immunity never arose. This assignment of error is also overruled.

Defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

ROGER STALEY, INC., A NORTH CAROLINA CORPORATION v. WACO REALTY COMPANY, A NORTH CAROLINA CORPORATION

No. 7526DC423

(Filed 19 November 1975)

Principal and Agent § 7— undisclosed agency — liability of agent

Defendant was liable for the cost of a septic tank system and pump station installed on a third party's land by plaintiff at defendant's request where there was no evidence that plaintiff had knowledge that defendant was acting as agent for the third party as defendant contended.

APPEAL by defendant from *Stukes, Judge.* Judgment entered 10 March 1975 in District Court, MECKLENBURG County. Heard in the Court of Appeals 16 September 1975.

Plaintiff alleges that defendant, notwithstanding numerous demands for remittance, wrongfully refused to pay plaintiff on three distinguishable accounts totalling $3,427.94, including interest. The total amount prayed for includes: $2,807.04 due for installation of one pump station with plumbing for a septic

tank at the residence of Barry McKenna on Lands End Road; $99 for hauling fill dirt and using a loader on property situated on Powell Road in Charlotte; and $150 for rough grading a lot on Hood and Powell Road in Charlotte. Plaintiff alleged that all labor and materials were supplied and performed by plaintiff company.

Defendant answered denying all material allegations.

At trial, plaintiff's president, Roger Maurice Staley, testified that his company was primarily engaged in the business of septic tank installation and basic site preparation, including tasks such as preparing drainage systems and landscaping and grading of lots, and that prior to this present dispute with defendant, his company had established a successful course of dealing with defendant, spanning some three or four previous jobs. Throughout this period of time, plaintiff had consistently dealt with defendant's president, Mike Cockinos.

In 1973, plaintiff was contacted by Cockinos to do some work in Mecklenburg County, covering an area which included McKenna's lot on Lands End Road. Staley testified that at that time he did not know who in fact owned the land in question, but that he learned of McKenna's interest when he went to work on the job site and found McKenna there. However, McKenna appeared at the site ". . . only once, and never went over the specifications for putting in the septic tank and pump station." Cockinos talked with the witness about shaping the lot, grading the site for a basement and footings, and removing some tree stumps. The discussion also involved a decision that plaintiff was to install a septic tank system. Plaintiff proceeded on the McKenna project, but in view of an unfavorable health department on-site inspection, Staley discussed with Cockinos the necessity for further modifications of the septic tank system by the installation of a pump station. Staley stated that defendant told him to proceed with the installation of the pump station at an approximate cost of $2800. Staley testified: "I understood that Waco Realty Company's relationship with Barry McKenna was that of General Contractor. Mike Cockinos told me that."

Defendant's president, Mike Cockinos, testified that none of the money allegedly owed represented debts or liabilities of his company and that he was not the general contractor on the McKenna job, but merely served as McKenna's "advisor"

throughout the project. Cockinos explained that as advisor he was to receive a commission for providing names of companies and individuals who could meet the job specifications.

McKenna testified that defendant was his "supervisor," and as such, was not to pay any bills incurred pursuant to the job in question.

The court made the requisite findings of fact and held defendant liable for the amounts alleged by plaintiff to be due and outstanding. From judgment for plaintiff, defendant appealed.

Other facts necessary to decision are cited in the opinion.

Weinstein, Sturges, Odom, Bigger & Jonas, P.A., by T LaFontine Odom, for plaintiff appellee.

Whitley & Parsons, by Jerry W. Whitley, for defendant appellant.

MORRIS, Judge.

On appeal defendant does not make any contention or argument with respect to any portion of the judgment except that portion allowing a recovery of $2,807.04 upon the Lands End Road account. The defendant's position is that the court should have allowed its "motion for nonsuit" made "at the close of plaintiff's evidence and renewed at the close of all the evidence." Although plaintiff's motion did not state any grounds and referred to no rule, the court noted that the motion was made under Rule 41(b) and denied it. In support of its position, defendant contends that the evidence conclusively shows that it was not a party to the contract, the contract being between plaintiff and Barry McKenna; that defendant was acting as agent for McKenna; and that plaintiff knew of the agency relationship. It is true that defendant's witness, Cockinos, testified that he was acting as an advisor to McKenna and that he was to receive ten per cent of the cost of construction. He also testified that he did have conversations with plaintiff with respect to the pump station and septic tank installation and that he took Staley to the lot. He further testified that he did not try to find anyone to do the work cheaper and that he did not tell McKenna what the cost would be. With respect to what he told Staley as to his relationship to McKenna, he testified: "The conversation was that he would do this work at Barry

McKenna's on Lands End Road, who was building a house, that I was trying to help Barry McKenna and do this work for him, and I introduced him to Barry McKenna." McKenna testified: "Mr. Cockinos generally made the arrangements with most of the subcontractors insofar as negotiating the price and terms of doing the various subcontracting work. The people would then come, do the work, and give a bill to Mr. Cockinos. He would give it to me and I would pay it." He did not think Cockinos was serving as a general contractor.

Staley testified that Cockinos told him that he (Cockinos) was the general contractor.

There is no evidence that plaintiff had knowledge of the agency relationship contended for by defendant.

> An agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity . . . The disclosure of the agency is not complete so as to relieve the agent of personal liability unless it embraces the name of the principal. The duty is on the agent to make this disclosure and not upon the third person with whom he is dealing to discover it . . . It will not relieve the agent from personal liability that the person with whom he dealt had means of discovering that the agent was acting as such . . . When the principal becomes known, the other party to the contract may elect whether he will resort to him or to the agent with whom he dealt unless the contract is under seal, a negotiable instrument, or expressly excludes him." *Howell v. Smith,* 261 N.C. 256, 258-259, 134 S.E. 2d 381 (1964).

The court correctly denied defendant's motion.

Defendant next contends that the court erred in failing to include in its findings of fact and conclusions of law anything with regard to the agency relationship. The evidence was such that findings and conclusions with respect to the agency question would have been proper in the judgment. However, since the evidence clearly showed that plaintiff was without knowledge of the relationship claimed by defendant, no prejudice has resulted from the court's failure to include findings and conclusions on that question.

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. DONALD RAY ENGLISH

No. 7526SC609

(Filed 19 November 1975)

Searches and Seizures § 3— search warrant for methamphetamine — sufficiency of affidavit

An affidavit was sufficient to support a search warrant where it contained a recitation by a confidential informant that he had been with defendant within the past 24 hours and had seen him in possession of methamphetamine.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 19 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1975.

Defendant was charged in separate warrants with the misdemeanors of (1) possession of a hypodermic needle and syringe for purpose of administering controlled substances, and (2) possession of approximately 12 grams of marijuana. He was found guilty in district court and appealed to superior court from judgments imposing prison sentences aggregating 12 months.

Evidence presented by the State tended to show: Around 1:00 a.m. on 5 January 1974, Officer J. A. Bailey of the Charlotte Police Department obtained a warrant to search the room of defendant (Room 428) at the Days Inn Motel located at 4419 Tuckaseegee Road. Armed with the search warrant, Bailey and other officers went to the motel room at about 1:30 a.m. where they found defendant and four other persons. Defendant appeared to be under the influence of some type of drug; his face was flushed, he appeared nervous, and talked fast. After reading the search warrant to defendant, the officers proceeded to search the room. In the pocket of a flannel-type shirt or jacket located on a chair, the police found a quantity of marijuana and a needle and syringe with some type of liquid residue in it; they also found a quantity of marijuana on a table. While in the room defendant told the police that everything in the room was his and not to arrest any of the other people. The residue in the syringe was analyzed at the police laboratory and determined to contain amphetamines.

As a witness for himself, defendant admitted that he rented the room, that the jacket was his, and that he knew the contra-

band was in the room when the police arrived. However, he denied ownership of the contraband, contending that it was brought there by, and belonged to, other people.

The jury found defendant guilty as charged and the court entered judgments imposing a 12 months' prison sentence on (1) and a six months' prison sentence, to run concurrently, on (2). Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn, for the State.

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

BRITT, Judge.

All of defendant's assignments of error relate to his contention that the affidavit upon which the search warrant was issued is defective for the reason that it does not set forth sufficiently detailed underlying circumstances. The contention has no merit.

The affidavit provides as follows:

"J. A. Bailey, Patrolman, Charlotte-Mecklenburg Vice Control Bureau being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that Donald English has on his premises/on his person controlled substances, to wit: Methamphetamine in violation of the North Carolina law. These illegally possessed controlled substances are located on the premises/on the person described as follows: two story brick building at 4419 Tuckaseegee Rd. Room 428 Days Inn, Charlotte, N. C. The facts which establish reasonable grounds for issuance of a search warrant are as follows: I have received reliable information from a reliable and confidential informer who states that a white male known to him as Don English has Methamphetamine at his room in the Days Inn at 4419 Tuckaseegee Rd. I have known this informer for approximately 2 years. He has furnished information which led to the arrest and conviction of David Norman Bridges for possession of barbiturates, Marijuana, and tylenol with Codine. Bridges was arrested 27 January 1973. He also gave information which led to the arrest

and conviction of James David Redmon for possession of Marijuana. Redmon was arrested 6 May 1973.

"This informer states that he has been with this Don English within the past 24 hours and has seen him in possession of Methamphetamine. This informer states that he knows what methamphetamine is and in fact says he has used it in the past."

Defendant concedes that the description of premises proposed to be searched is sufficiently set forth in the affidavit and that it contains sufficient information to substantiate the reliability of the confidential informant as far as barbiturates, marijuana, and tylenol are concerned. However, he argues that the affidavit does not contain sufficient facts from which the magistrate could reasonably conclude that the controlled substance for which the search warrant was issued would be found on the premises.

It is now well settled that a search warrant will not be issued except upon a finding of probable cause. State and federal decisions require the issuing magistrate to have before him circumstances which raise a reasonable ground to believe that the proposed search will reveal the presence of the objects sought upon the premises to be searched and that such objects will aid in the apprehension or conviction of the offender. *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). The sufficiency of affidavits supporting search warrants has been discussed in several recent decisions: *See State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974), and cases therein cited.

In *Edwards,* the Supreme Court pointed out, among other things, that probable cause cannot be shown by affidavits which are purely conclusory and do not set forth any of the underlying circumstances upon which that conclusion is based. The court held insufficient an affidavit by an informant stating that "there is non tax paid whiskey at above location at this time" for the reason that the informant did not state the basis for his conclusion.

In the case at hand, the informant provided the basis for his conclusion—that he had been with defendant "within the past 24 hours" and had seen him in possession of Methamphetamine. While the search of defendant and his motel room did not reveal the specific controlled substance stated in the affidavit,

the seach did reveal other controlled substances and contraband, including a needle and syringe laced with an amphetamine residue. Defendant does not cite, and our research fails to disclose, any authority that would render the contraband found inadmissible when the search warrant and the supporting affidavit are legally sufficient.

We hold that the affidavit was sufficient to support the search warrant, that the search of defendant's motel room was legal, and that the admission of evidence with respect to contraband found in the room was proper. All of defendant's assignments of error are overruled.

No error.

Judges VAUGHN and ARNOLD concur.

BILL HOFFMAN v. CLEMENT BROTHERS COMPANY, A CORPORATION

No. 7525SC460

(Filed 19 November 1975)

Contracts § 27— payment of subcontractor — contract provisions followed — directed verdict proper

In plaintiff subcontractor's action to recover the balance allegedly due him from defendant prime contractor, the trial court erred in denying defendant's motion for directed verdict on plaintiff's cause of action based on specific contract and its motion for judgment n.o.v. where the contract provided that plaintiff was to be paid for his work on the same basis as payment was received by defendant from the owner, and plaintiff stipulated and admitted on cross-examination that defendant had paid him on the same basis as payment had been received by defendant from the project owner.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 14 March 1975 in Superior Court, CALDWELL County. Heard in the Court of Appeals 22 September 1975.

In this action plaintiff, a subcontractor, seeks to recover the balance allegedly due him from defendant, the prime contractor in construction of the Carter's Dam at Cartersville, Georgia. In his complaint, plaintiff pleads three alternative causes of action. First, he asks for $56,250, plus interest, allegedly due on specific contract. In the alternative, he asks

for recovery of the same amount on *quantum meruit*. As a second alternative, he asks for recovery in the amount of $60,000 based on alleged false representations made by defendant.

In its answer, defendant denied any indebtedness to plaintiff, further alleged that it had overpaid plaintiff in the sum of $6,618.34, and counterclaimed for that amount.

Prior to the trial the parties entered into stipulations which included the following: (numbering ours)

1. On or about November 12, 1968 the parties entered into a subcontract agreement, copy of which is attached to the answer.

2. Plaintiff began hauling dirt under the terms of the subcontract agreement, on or about December 9, 1968 and continued to work on the Carter's Dam Project until about October 31, 1969.

3. Plaintiff has received payment from the defendant for hauling 140,111 cubic yards of compacted dirt fill at 75 cents per cubic yard for a total of $105,083.25 (less payroll and expenses about which there is no dispute).

4. By December 1, 1969, Clement Brothers Company had accumulated retainages under the agreement amounting to $5,254.16.

5. Plaintiff received payment for compacted dirt fill placed in "Impervious Zone 1" on the same basis as payment was received by the defendant from the project owner.

Provisions of the contract between the parties pertinent to this appeal are as follows:

"WHEREAS, Clement Brothers Company is prime contractor on Contract Number DA-01-076-CIVENG-65-283 for construction of Carters Dam, Carters, Georgia. And for the purpose of this agreement the prime contractor agrees to subcontract to Hoffman Contracting Company a certain portion of the work as follows: Loading and hauling to the embankment approximately 150,000 cubic yards of compacted fill. Which is impervious zone one (1) and being a part of contract item number 7. Such material will be loaded and hauled from designated borrow sources within the government property and not to exceed a total length of 8,000 feet one way.

"The SUBCONTRACTOR agrees to load and haul to the embankment at a rate of approximately 2,000 cubic yards per 10 hour day.

"Payment is to be made on the above work on the same basis as payment is received by the prime contractor from the owner which is outlined in Section 4-12(6)(b)(1) which reads in part:

> Compacted impervious fill placed in embankment will be paid for at the contract price per cubic yard for Item number 7 which will be measured as the volume in place. Measurement to be made between the lines determined on the basis of a survey made prior to beginning work under this subcontract, and to survey lines determined at the completion of this subcontract. Payment for the above work will be at the rate of $0.75 per cubic yard determined on a monthly basis and payable within fifteen days after the prime contractor receives their estimate from the owner, less 5 percent retainage until satisfactory completion of the above work."

Admissions in the pleadings, stipulations, plaintiff's evidence and defendant's evidence which clarified or explained plaintiff's evidence, tended to show in pertinent part: The Carter's Dam project was an earth and rock filled dam owned by, and built under, the supervision of the U. S. Army Corps of Engineers and, upon its completion, was the highest earth and rock dam east of the Mississippi River. The structure, approximately 450 feet high and 2,000 feet across the top, was constructed in "zones" extending vertically from the base to the top of the dam. Zone 1, known as the "Impervious Zone," is the center of the dam and is made of clay. Transitional sections called Zone 2, made of decomposed rock, are on each side of the Zone 1 clay core. The dam had been raised to approximately 390 feet when plaintiff began his work which was to "top out" the final 60 feet of Zone 1. Defendant had been hauling Zone 1 clay in large "pans" until they approached the top of the core; it then became impractical to haul in pans because construction room was limited. Plaintiff had a trucking operation and it was determined that his trucks could move the dirt easier than the big pans. Defendant was engaged only to haul clay to Zone 1.

In his testimony, plaintiff described how he carried out his work. The outer lines of Zone 1 were indicated with stakes and while plaintiff's trucks were hauling and dumping clay into Zone 1, other equipment, owned or provided by defendant, was hauling material for adjacent zones. As plaintiff's trucks would dump their loads, the clay would be compacted with heavy equipment. On many occasions, raising the adjoining zone would be slower than the rate plaintiff was raising Zone 1, resulting in some of the clay that he hauled spilling over onto adjoining zones.

Issues were submitted to, and answered by, the jury as follows:

"1. What amount, if any, is plaintiff entitled to recover of the defendant based upon the written contract between the parties?

ANSWER: $5,254.16.

"2. Is the plaintiff entitled to recover of the defendant upon *quantum meruit* for work, labor and services performed by the plaintiff?

ANSWER: No.

"3. What amount, if any, is plaintiff entitled to recover of defendant for work, labor, and services performed?

ANSWER: None.

"4. What amount, if any, is defendant entitled to recover of the plaintiff based upon the written contract between the parties?

ANSWER: None.

From judgment predicated on the verdict ordering that defendant pay plaintiff $5,254.16, with interest from 23 October 1969, together with costs of the action, defendant appealed.

West & Groome, by Ted G. West, for plaintiff appellee.

Kluttz and Hamlin, by Richard R. Reamer, for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial court to grant its motion for directed verdict on plaintiff's cause of

action based on specific contract and its motion for judgment notwithstanding the verdict. We think the assignment has merit.

The contract clearly provides that plaintiff was to be paid for his work "on the same basis" as payment was received by defendant from the owner. In stipulation numbered 5 above, plaintiff admitted that he had received payment for dirt fill placed in Zone 1 on the same basis as payment was received by defendant from the project owner. On cross-examination plaintiff stated: ". . . I have been paid for everything that went into Zone 1 that Clement has been paid for and Clement has lived up to the contract by paying me for what stayed in Zone 1."

The only evidence supportive of a claim by plaintiff related to clay which plaintiff hauled and which spilled over into Zone 2. Plaintiff contends that the spillage was considerable and that defendant's agent agreed that they would "work out something" with respect to it. Defendant, on the other hand, contends that it not only received no benefit from the spillage but that it created a problem due to the different type and purpose of materials that were required for Zone 2.

Any claim which plaintiff might have for hauling clay which did not stay in Zone 1 would have to be based on *quantum meruit*. It is noted that the trial court's instructions with respect to the spillage were given on the second and third issues. A jury question was raised as to *quantum meruit*, the jury answered the issues against plaintiff, and plaintiff did not appeal from that determination. There is no evidence to support a verdict on the first issue relating to express contract.

Defendant was entitled to allowance of its motion for directed verdict with respect to the claim presented in the first issue. Since the court submitted the issue and it was answered in favor of plaintiff, defendant was entitled to an allowance of its motion for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50.

For the reasons stated, the judgment appealed from is vacated and this cause is remanded to the superior court for the entry of judgment setting aside the verdict on the first issue and dismissing the action.

Judgment vacated and cause remanded.

Judges PARKER and CLARK concur.

HELEN H. BEAMON, EMPLOYEE, PLAINTIFF v. STOP AND SHOP GROCERY, EMPLOYER AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7519IC651

(Filed 19 November 1975)

1. **Master and Servant § 55— workmen's compensation — compensable injury**

An injury to be compensable under the Workmen's Compensation Act must result from an accident, which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident.

2. **Master and Servant § 65— workmen's compensation — hernia or back injury — accident**

A hernia or back injury suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way.

3. **Master and Servant § 65— workmen's compensation — grocery store checker — injury while lifting charcoal — no accident**

A checker-clerk in a grocery store did not sustain an injury by "accident" arising out of and in the course of her employment when she picked up a 20 pound bag of charcoal from a grocery cart which a customer brought to her checkout stand and experienced pain in her lower back and hips where there was nothing unusual about the way plaintiff handled the bag of charcoal and nothing happened in the usual sense of an accident.

APPEAL by defendant from order of North Carolina Industrial Commission entered 1 May 1975. Heard in the Court of Appeals 10 November 1975.

This is a claim for benefits under the Workmen's Compensation Act for injuries suffered by plaintiff while in the employ of the defendant, Stop and Shop Grocery. The sole question is whether the injuries resulted from an accident within the meaning of the Act.

Plaintiff was employed as a checker-clerk whose duties included checking and bagging groceries. While so employed on the afternoon of 30 June 1973, she picked up a 20 pound bag of charcoal from the bottom of a grocery buggy which a customer brought to her checkout stand. When she did so, "something pulled in (her) back." She experienced pain in her lower back and hips. On 6 July 1973 she consulted Dr. Sellers, an orthopedic surgeon, who advised bedrest and medication. Dr.

Sellers diagnosed her condition as acute lumbosacral strain and felt she could return to work on 16 August 1973.

The Deputy Commissioner entered an order finding facts and concluding that plaintiff did not sustain an injury by accident arising out of and in the course of her employment within the meaning of the Workmen's Compensation Act.

On appeal, the full Commission made new findings of fact, including the following:

> "3. Plaintiff had done this work for about fifteen years and was doing her regular duties which included handling all kinds of groceries including ten pound bags of potatoes, cartons of Cokes, etc. There was nothing unusual about the way plaintiff handled the bag of charcoal and nothing happened in the usual sense of an accident. The pain in her back was the only difference and she does not know what caused it to hurt, really, which is what she stated, other than that she did not usually lift bags of charcoal."

The full Commission adopted the conclusion of law and award of the Deputy Commissioner and denied plaintiff's claim. Plaintiff appealed.

Davis, Koontz & Horton by Clarence E. Koontz, Jr., for plaintiff appellant.

Hedrick, McKnight, Parham, Helms, Kellum & Feerick by Philip R. Hedrick for defendant appellees.

PARKER, Judge.

The findings of fact made by the Industrial Commission are supported by competent evidence. They are, therefore, conclusive on this appeal. *Jackson v. Highway Commission,* 272 N.C. 697, 158 S.E. 2d 865 (1968). The only question presented is whether the findings of fact support the Commission's conclusion of law that plaintiff did not sustain an injury by accident arising out of and in the course of her employment within the meaning of the Workmen's Compensation Act.

[1, 2] An injury to be compensable under our Workmen's Compensation Act, G.S. 97-1 *et seq.,* must result from an accident, which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident. *Jackson v. Highway*

Commission, supra; Lawrence v. Mill, 265 N.C. 329, 144 S.E. 2d 3 (1965). The words "injury" and "accident," as used in the Act, are not synonomous. *Rhinehart v. Market,* 271 N.C. 586, 157 S.E. 2d 1 (1967). "Thus, an accident has occurred only where there has been an interruption of the usual work routine or the introduction of some new circumstance not a part of the usual work routine. A hernia or back injury suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. (Citation omitted.) Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings." *Russell v. Yarns, Inc.* 18, N.C. App. 249, 250, 196 S.E. 2d 571, 572 (1973).

Plaintiff cites and relies on *Smith v. Creamery Co.,* 217 N.C. 468, 8 S.E. 2d 231 (1940). The opinion in that case must be read in the light of what was said in *Hensley v. Co-operative,* 246 N.C. 274, 98 S.E. 2d 289 (1957). See *Gray v. Storage, Inc.,* 10 N.C. App. 668, 179 S.E. 2d 883 (1971).

[3] Here, the Industrial Commission has found on competent evidence that "[t]here was nothing unusual about the way plaintiff handled the bag of charcoal and nothing happened in the usual sense of an accident." This finding supports the Commission's conclusion that plaintiff did not sustain an injury by accident within the meaning of the Act.

Affirmed.

Judges MORRIS and MARTIN concur.

IN THE MATTER OF MARY G. GREEN, INCOMPETENT

No. 757SC477

(Filed 19 November 1975)

1. Judicial Sales § 6— rights of purchaser after confirmation

After confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale may then be set aside only for mistake, fraud or collusion.

2. **Judicial Sales § 7— confirmation by clerk and judge — upset bid — authority to order resale**

After the time provided by G.S. 1-339.25 for the placing of an upset bid had expired and after the order of confirmation had been signed by the clerk and approved by a superior court judge, the clerk had no authority to accept an upset bid, and in the absence of findings of fraud, mistake or collusion, a superior court judge had no authority to set aside the order of confirmation and to order a resale of the property.

APPEAL by Larry Dew and A. W. Strickland from *Webb, Judge.* Judgment entered 9 May 1975 in Superior Court, NASH County, Heard in the Court of Appeals 23 September 1975.

The following facts are not controverted: On 24 January 1975 Rosa Battle Woodley, general guardian of Mary Green, filed in the office of the Clerk of Superior Court of Nash County a petition to sell certain lands of the ward to create assets.

At the initial sale on 26 February 1975, Larry Dew and A. W. Strickland (Dew and Strickland) were the highest bidders at $15,000.00. Within the ten days allowed by statute, Roger Allen made an upset bid totalling $15,800.00; and pursuant to an order of resale, the property was sold again on 28 March 1975, when Dew and Strickland became the last and highest bidders at $31,000.00. This sale was reported to the Clerk on 28 March 1975. On 17 April 1975, there having been no upset bid filed since the report of 28 March, the Clerk of Superior Court signed an order confirming the sale to Dew and Strickland for $31,000.00; and on that same day Superior Court Judge Webb signed the order approving this sale.

On 21 April 1975, appellee Jackson tendered to the Clerk of Superior Court a purported upset bid in the amount of $32,600.00, which bid was accepted by the Clerk. Later in the day on 21 April, the commissioner presented the order of confirmation signed by the Clerk and approved by Judge Webb on 17 April to the Clerk for filing. The Clerk refused to file the order of confirmation.

On 23 April 1975 the commissioner filed a petition "requesting instructions from the Superior Court." On 9 May 1975 Superior Court Judge Webb, after reciting the facts as set out above, entered an order that the Clerk of Superior Court "order an advertisement for the resale of the property at an opening bid by Julian Jackson of $32,600.00." Dew and Strickland appealed.

Fields, Cooper & Henderson by Leon Henderson, Jr., for Dew and Strickland, appellants.

Howard A. Knox, Jr,. and Robert D. Kornegay, Jr., for Julian H. Jackson, appellee.

HEDRICK, Judge.

In the order appealed from, Judge Webb concluded "as a matter of law that any right of A. W. Strickland and Larry Dew had not been vested in the property at the time the upset bid was filed to the extent that the Court could not accept an upset bid."

Appellants argue that the quoted conclusion is erroneous simply because their interest in the land vested when the Clerk signed the order confirming the sale on 17 April, pursuant to G.S. 1-339.28, and the resident Superior Court Judge approved the sale and order of confirmation that same day pursuant to G.S. 1-339.14. Appellee, on the other hand, argues that the order of confirmation and approval on 17 April was not sufficiently final to vest in appellants the equitable title to the property, since the order had not been filed in the office of the Clerk of Superior Court at the time his bid was tendered and accepted by the Clerk. He contends that the filing of the order of confirmation in the office of the Clerk of Superior Court is a "necessary procedural detail" which the judge or clerk has authority to fix pursuant to G.S. 1-339.3(c), which is as follows:

> "The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure."

[1] It has long been the rule in North Carolina that after confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale then may be set aside only for "mistake, fraud, or collusion." *Becker County Sand and Gravel Co. v. Taylor,* 269 N.C. 617, 153 S.E. 2d 19 (1967); *Perry v. Jolly,* 259 N.C. 305, 130 S.E. 2d 654 (1963); *Upchurch v. Upchurch,* 173 N.C. 88, 91 S.E. 702 (1917). Before confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the approval of the court. *Page v. Miller,* 252 N.C. 23, 113 S.E. 2d 52 (1960). The court in exercising its sound discretion may reject the bid at

any time before confirmation. *Harrell v. Blythe,* 140 N.C. 415, 53 S.E. 232 (1906). But, upon confirmation the sale becomes final *(McLaurin v. McLaurin,* 106 N.C. 331, 10 S.E. 1056 (1890); *Smith v. Gray,* 116 N.C. 311, 21 S.E. 200 (1895)) and the vested interest of the purchaser is not lightly to be put aside, *Page v. Miller, supra.*

[2] Under the circumstances here presented, the Clerk was not authorized under G.S. 1-339.3(c) or any other statute to refuse to file and maintain in her records a valid order of confirmation. After the time provided by G.S. 1-339.25 for the placing of upset bids had expired and after the order of confirmation had been signed by the Clerk and approved by the Judge, the Clerk had no authority to accept an upset bid. In the absence of allegations, proof or findings of fraud, mistake, or collusion, Judge Webb had no authority to set aside the order of confirmation dated 17 April 1975, which was regular on its face.

For the reasons stated, the order appealed from is vacated and the cause is remanded to the Superior Court for the entry of an order directing the Clerk to accept for filing the order of confirmation dated 17 April and to refund the deposit accepted by her on the proposed upset bid of Jackson.

Vacated and remanded.

Judges MORRIS and ARNOLD concur.

LILLIE S. MATHIAS AND GLADYS M. TAYLOR v. EDWARD A. BRUMSEY AND WIFE, EVELYN BRUMSEY

No. 751SC480

(Filed 19 November 1975)

1. Boundaries § 8; Jury § 1— determination of boundary location — right to jury trial — no waiver

Defendants did not waive their right to jury trial on the issue of determining the location of the true boundary line between the lands of the parties by failing to make exceptions to specified findings of fact by the referee where exceptions which defendant did make were sufficient to give plaintiff notice and to present the issue in dispute to the court.

2. Boundaries § 9; Jury § 1— improperly worded issue — no waiver of jury trial

Though defendants improperly worded the issue they submitted for jury determination, they did not thereby waive the right to a jury trial.

APPEAL by defendants from *Alvis, Judge.* Judgment entered 17 March 1975 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 23 September 1975.

Plaintiff alleged that she was the owner of a contested strip of land and that defendants and their agents trespassed by cutting and removing timber. Defendants denied trespassing and asserted that they cut and removed timber only from land belonging to them.

A Reference Hearing was ordered and the Referee essentially found in favor of plaintiff. Defendants excepted to the Referee's report, demanded a jury trial, and tendered the issue: "What is the true dividing line between the lands of the plaintiff and the lands of the defendants as shown on the Court Map?"

Pursuant to G.S. 1A-1, Rule 53(g)(2), plaintiff thereafter moved for judgment adopting the Referee's report. From judgment granting plaintiff's motion the defendants appealed to this Court.

White, Hall, Mullen and Brumsey, by Gerald F. White and John H. Hall, for plaintiff appellee.

Frank B. Aycock for defendant appellant.

ARNOLD, Judge.

One assignment of error is raised for consideration by this Court. Defendants contend that the trial court committed reversible error by adopting the report of the Referee and disposing of the case without a jury trial. Plaintiff argues that the defendants waived their right to a jury trial by failing to except to the Referee's crucial finding of fact regarding the location of the boundary line, and by failing to tender an issue of fact with their exceptions to the report of the Referee.

The North Carolina Constitution, Article I, Section 25 provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of

the rights of the people, and shall remain sacred and inviolable." The North Carolina Supreme Court, articulating the extent to which the right to a jury trial should be applied in a civil action involving title to real property, held: "The Constitution of North Carolina guarantees to every litigant the 'sacred and inviolable' right to demand a trial by jury of the issues of fact arising 'in all controversies respecting property,' and he cannot be deprived of his right except by his own consent." *Sparks v. Sparks*, 232 N.C. 492, 493, 61 S.E. 2d 356, 357 (1950).

The right to a jury trial is a substantial right of great significance. "It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver." *In re Gilliland*, 248 N.C. 517, 522, 103 S.E. 2d 807, 811 (1958).

Plaintiff correctly argues that the underlying issue of fact for determination in this matter is the location of the true boundary line. She contends that there can be no jury trial on this question because defendants failed to except to the Referee's determination of the location of the boundary line, and that in the absence of exceptions thereto the findings of fact by the Referee are conclusive.

[1] It is specifically alleged by plaintiff that defendants waived their right to jury trial on the issue of determining the location of the true boundary line by failing to except to the Referee's Finding of Fact No. 20, which found that "the true boundary line between the lands of the plaintiff and the defendants is located and shown as extending from the letter 'T' to the letter 'P' on the Court Map."

While the record indicates that defendants did not except to Finding No. 20, they did except to Finding No. 19, and to Conclusion of Law No. 1, made by the Referee. Conclusion of Law No. 1, that "the true boundary line between the lands of the plaintiff and the lands of the defendants is the line extending from the letter 'T' to the letter 'P' as shown on the Court Map," is virtually identical to Finding No. 20. Finding No. 19

also states that plaintiff's land borders defendants' land along the line from "T" to "P" on the Court Map. The same finding by the Referee appeared more than once in the report, and we hold that defendants' exceptions are sufficient to give plaintiff notice, and to present the issue in dispute to the Court.

[2] Defendants tendered the following issue for determination by the jury:

> "1. What is the true dividing line between the lands of the plaintiff and the lands of the defendants as shown on the Court Map?"

Plaintiff contends that defendants have waived the right to jury trial by failing to submit a proper issue. She asserts that the issue as tendered by defendants presents no triable issue of fact, but instead presents a question of law. Citing *Brown v. Hodges,* 232 N.C. 537, 61 S.E. 2d 603 (1950), it is pointed out that *what* a boundary line is constitutes a question of law for the Court, and *where* a boundary line is constitutes a question of fact for the jury.

It is well established in North Carolina that the location of the boundaries on the ground is a factual question for the jury. The determination of what the boundaries are is a question of law for the court. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967).

In the instant case it is obvious that the underlying issue is the location of the true boundary line. It is evident that defendants made the wrong choice of interrogatives. However, the general rule as stated in *Cutts v. Casey, supra,* and *Brown v. Hodges, supra,* does not require a mechanical and technical application that defeats the purpose of the rule. Defendants are entitled to a jury trial on the issue of the location of the true boundary between their land and plaintiff's land.

New trial.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. LAWRENCE EDWARD SAMUEL

No. 7521SC499

(Filed 19 November 1975)

1. **Criminal Law § 92— consolidation of charges — no error**

Defendant was not prejudiced by the consolidation of his case with that of another person who was charged with the same armed robbery as defendant.

2. **Criminal Law § 158— photograph not in record on appeal — no error in admission shown**

Defendant failed to show error in the admission of a photograph into evidence where the photograph did not appear as a part of the record on appeal.

3. **Criminal Law § 60— fingerprint evidence — admission proper**

The trial court did not err in allowing a witness who qualified as a fingerprint expert to give opinion testimony as to the length of time a fingerprint had been on a cigar box from which money was seized during an armed robbery.

APPEAL by defendant from *Albright, Judge.* Judgment entered 13 March 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 September 1975.

In two bills of indictment, proper in form, defendant was charged (1) with the armed robbery of H. H. Carter and (2) with the armed robbery of Clifton Brown. In separate bills of indictment, one Hubert L. Dean II also was charged with the armed robbery of Carter and Brown.

At a previous session of the court, Dean was tried separately for the armed robbery of Carter and was found not guilty. At the 10 March 1975 Session of the court, the State moved that the remaining case against Dean and the two cases against defendant be consolidated for trial. Over defendant's objection, the motion was allowed.

Evidence presented by the State tended to show:

On 4 December 1974 Carter, a self-employed watchmaker, was operating his store on North Liberty Street in the City of Winston-Salem; his father-in-law, Mr. Brown, was also in the store. Around 11:00 a.m. two men entered the store. One of the men, whom Carter identified at trial as Dean, asked to see a watch. While Carter was showing Dean a watch near the front of the store, the other man went toward the back where Brown

was. Shortly thereafter Dean produced a pistol and announced a holdup. Thereupon the second man relieved Brown of his wallet, struck Carter over the head with a 12-inch file or rasp, lacerating the left side of his head, and seized money from a cigar box under the counter. After that the robbers took several watches including a Timex quartz watch, fled through the front door and headed north on Liberty Street.

Carter immediately notified police. Police Sergeant W. M. Reavis, parked in a car a short distance from the store, heard the broadcast regarding the robbery. He observed two subjects, meeting the descriptions of the robbers stated in the broadcast, coming down the street nearby. About that time the men began running in different directions. Aided by other police, Sergeant Reavis overtook Dean and placed him under arrest. At the time he was apprehended, Dean had in his possession a Timex quartz watch with blood on it.

Sergeant Boyd, who qualified as an expert in fingerprint identification, testified that he obtained a latent fingerprint from the cigar box from which the money had been taken, that the print was identical to prints from defendant's left middle finger; and that the latent print had been on the cigar box for no longer than two hours at the time he examined the box shortly after 11:30 a.m. following the robbery at 11:00 a.m.

Dean testified as a witness for himself, denying any participation in the robbery and asserting that the watch found in his possession was given to him by an unidentified person immediately before he began running. Defendant presented no evidence.

The jury found Dean not guilty but found defendant guilty as charged. The charges against defendant were consolidated for judgment and from judgment imposing prison sentence of not less than 25 nor more than 30 years, to begin at the expiration of another specified sentence, defendant appealed.

Attorney General Edmisten, by Assocate Attorney Joan H. Byers, for the State.

William Z. Wood, Jr., for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error, defendant contends the court erred in granting the State's motion to consolidate the

cases against defendant and the case against Dean for trial. We find no merit in the assignment.

It is well settled in this jurisdiction that the question of consolidation of indictments against defendants charged with committing similar offenses at the same time and place is addressed to the sound discretion of the trial court. *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883 (1967); *State v. Johnson,* 280 N.C. 700, 187 S.E. 2d 98 (1972); *State v. Arney,* 23 N.C. App. 349, 208 S.E. 2d 899 (1974); *State v. Locklear,* 26 N.C. App. 26, 214 S.E. 2d 797 (1975). While recognizing this rule, defendant argues that his case should be an exception as was true in *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45 (1942).

We find it easy to distinguish the cases. In *Bonner,* four defendants were charged individually and in separate bills of indictment with murder; at trial, the State relied heavily on confessions of two defendants separately made and on confessions of the other defendants jointly made; some of the confessions implicated other defendants who were not present when the confessions were made; and none of the defendants testified at the trial. Although the trial court instructed the jury to consider the confessions only as against the defendants making them, the Supreme Court held that the appealing defendants were prejudiced and should have been tried separately. In the case at hand, no confession is involved.

[2] By his second assignment of error, defendant contends the court erred in admitting into evidence a photograph allegedly portraying Carter's head injuries after the robbery. The photograph, about which defendant complains, does not appear as a part of the record on appeal, therefore, no error is shown. There is a presumption in favor of regularity and it is incumbent on an appellant to show otherwise. 3 Strong, N. C. Index 2d, Criminal Law § 158, p. 108; *State v. Hill,* 9 N.C. App. 279, 176 S.E. 2d 41 (1970), *rev'd on other grounds,* 277 N.C. 547, 178 S.E. 2d 462 (1971).

[3] By his third assignment of error, defendant contends the court erred in allowing Sergeant Boyd, who qualifed as a fingerprint expert, to give opinion testimony as to the length of time the print in question had been on the cigar box. This assignment has no merit.

In matters requiring expert skill or knowledge, about which a person of ordinary experience would not be capable of form-

ing a satisfactory conclusion, the admission of expert opinion is necessary, and in such cases competent. *Lindstrom v. Chesnutt,* 15 N.C. App. 15, 189 S.E. 2d 749 (1972), *cert. denied,* 281 N.C. 757, 191 S.E. 2d 361 (1972). In the case at hand, the witness gave sound reason for his opinion, namely, the presence of moisture on the print and the fact that moisture on a fingerprint gradually disappears as the print gets older. The assignment of error is overruled.

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

No error.

Judges PARKER and CLARK concur.

NANNIE HELTON v. JENNINGS R. COOK AND WIFE, MADELINE HELTON COOK

No. 7519SC470

(Filed 19 November 1975)

Adverse Possession § 5— continuity of possession — service of prison sentences

Plaintiff's claim of title by adverse possession under G.S. 1-40 was not defective as a matter of law because of her absence from the property to serve prison sentences of four months on one occasion and nine months on another occasion where plaintiff has occupied and used the land and dwelling thereon as her home since the early 1940's, the house was unfinished when she first took possession, plaintiff installed water and lights and had the bathroom fixed, plaintiff has since made various additions and repairs to the house, plaintiff paid off the $1500 mortgage on the house, plaintiff has listed the property for taxes and paid the taxes on it since 1950, and the holder of record title to the property had unequivocal notice that plaintiff occupied the property and used it for her own and knew that plaintiff's absences from the property to serve prison sentences were temporary in nature and did not represent a cessation of plaintiff's possession and exclusive claim to the property.

APPEAL by plaintiff from *Seay, Judge.* Judgment entered 3 March 1975 in Superior Court, CABARRUS County. Heard in the Court of Appeals 23 September 1975.

This appeal stems from an action brought by Mrs. Nannie Helton to declare ownership of a parcel of land and a house thereon in Sherwood Hills in the No. 4 Township of Cabarrus County. She owns a lot adjoining the disputed property and has occupied both this lot and the disputed property since the house was completed in 1940.

Following the close of all the evidence, defendants moved for directed verdict. The judge reserved his ruling on this motion and charged the jury on the law of adverse possession. The jury was asked to determine whether Mrs. Nannie Helton occupied the disputed property under known and visible lines and boundaries for more than twenty years under actual, open, hostile, exclusive and continuous possession. The jury returned a verdict in favor of plaintiff on 2 December 1974. On 4 March 1975 the judge entered judgment for defendants notwithstanding the verdict:

> " . . . [P]laintiff's evidence, when considered in the light most favorable to her, discloses that during the twenty-year period of time of alleged adverse possession, the plaintiff was incarcerated in the state penitentiary for a period totaling thirteen (13) months; that as a matter of law she was not in actual and continuous possession of said land during said thirteen (13) month period and that defendants' motion for directed verdict could properly have been granted and that defendants are entitled to judgment notwithstanding the verdict;
>
> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED under the provisions of Rule 50(c)(1) of the North Carolina Rules of Civil Procedure that plaintiff have and recover nothing of the defendants; that this action be dismissed; and that the costs of this action be taxed against the plaintiff."

From this judgment plaintiff appeals.

Williams, Willeford, Boger & Grady, by John R. Boger, Jr., for the plaintiff.

Hartsell, Hartsell and Mills, by W. Erwin Spainhour; and Irvin and Belo, by Gordon L. Belo, for the defendants.

BROCK, Chief Judge.

The sole question presented by this appeal is whether plaintiff's claim of title by adverse possession under G.S. 1-40 is

defective as a matter of law because of her absence from the property for four months and nine months to serve separate prison sentences. In view of the unique circumstances surrounding Mrs. Helton's occupation of the property, we hold that despite her temporary absences from the property in question Mrs. Helton's possession was sufficiently continuous to ripen her claim of adverse possession for the twenty-year statutory period.

Plaintiff's evidence tends to show that she has occupied and used the premises and dwelling as her home since the early 1940's. When she first took possession, the house was unfinished, and she immediately installed water and lights and had the bathroom fixed. Subsequently, she paid off the $1,500.00 mortgage on the house, put a new roof on the house, built a fence around the house, installed a new septic tank when the old one went bad, built a new porch, paid the assessment required for paving the road in front of the property, and built and blacktopped a driveway around the house. Moreover, she has paid property taxes on the house and disputed land since 1950. Mrs. Helton testified: "I list taxes, property taxes, on my house and lot. I have listed this property since 1950. I thought it was mine." Plaintiff's evidence further indicates that since 1945 she was forced to leave the property to serve two sentences of approximately four and nine months in the custody of the State Department of Correction. The following are excerpts from Mrs. Helton's testimony at trial:

> "I lived in this house when I was in prison. I locked it up. I locked the house up and went to prison and when I came back it was all cleaned up and I moved my clothes back in. . . . I locked up the house and left it while I was in prison. Nobody was living in it. My daughter looked after it. . . . My daughter looked after the house while I was in prison."

The defendant, Madeline Helton Cook, is plaintiff's former daughter-in-law. The property was deeded to her when she and her first husband, plaintiff's son, acquired the property and initiated construction of the house. Mrs. Cook's testimony reveals that she has been in regular contact and communication with plaintiff since plaintiff took possession of the disputed property. Not only did defendant Cook, the holder of record title to the property, have clear and unequivocal notice that Mrs. Helton occupied the property and used it as her own, but

also it appears that Mrs. Cook was in a position to know that plaintiff's absences from the property to serve the prison sentences were temporary in nature and did not represent a cessation of plaintiff's possession and exclusive claim to the property.

In view of the overall character of the plaintiff's possession of the property since the early 1940's, defendant's knowledge of plaintiff's possession throughout this period, and the temporary nature of plaintiff's absences from the property, this case is distinguishable from *Holdfast v. Shepard,* 28 N.C. 361 (1846); *Ward v. Herrin,* 49 N.C. 23 (1856); and *Malloy v. Bruden,* 86 N.C. 251 (1881), in which substantial gaps in the claimant's possession were deemed fatal. Whereas the occupation and use by the adverse claimant must be continuous, it need not be unceasing. *Cross v. R. R.,* 172 N.C. 119, 90 S.E. 14 (1916). Whether the possession is sufficiently continuous depends in large measure upon the unique facts and circumstances of each case. Here, from the standpoint of the holder of record title whom the continuity requirement is designed to protect, plaintiff's possession was continuous within the law of adverse possession.

The judgment notwithstanding the verdict is reversed, and the cause is remanded for entry of judgment for the plaintiff in accordance with the verdict.

Reversed and remanded with directions.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES WILLIS SMITH

No. 7514SC618

(Filed 19 November 1975)

1. **Criminal Law § 128— examination of witness as to "rabbit hunting" experience — no grounds for mistrial**

Where defendant's counsel conducted a lengthy cross-examination of a State's witness, the district attorney's question on redirect examination as to whether the witness had ever been "rabbit hunting" was not grounds for a mistrial.

2. **Narcotics § 1; Criminal Law § 127— possession and possession with intent to sell heroin — one offense — judgment arrested**

A defendant's unlawful possession of heroin is, of necessity, an offense included within the charge that he did unlawfully possess

with intent to sell or deliver, where, as in this case, both are in fact one transaction; therefore, judgment is arrested in the case charging defendant with felonious possession of heroin.

APPEAL by defendant from *Canaday, Judge.* Judgments entered 19 February 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 12 November 1975.

By separate indictments, proper in form, defendant was charged with (1) felonious possession of heroin with intent to sell (Case No. 74CR4545) and (2) with felonious possession of heroin (Case No. 74CR4546). Both offenses allegedly occurred on 2 March 1974. Without objection, the two cases were consolidated for trial, and defendant pled not guilty to both charges.

The State's evidence showed that on 2 March 1974 Durham City police officers, after obtaining a search warrant authorizing a search of an apartment at 2805 Ashe Street in Durham and of defendant's person, went to the apartment where they found defendant. Upon searching defendant, one of the officers found in the right front pocket of a sweater, which defendant was then wearing, twenty-four aluminum foil packages and one larger foil packet. These were delivered by the officer who found them to Leslie Lytle, a chemist employed by the SBI Laboratory in Raleigh. Lytle testified that he performed chemical and other laboratory tests on the contents of the packets and found they contained heroin.

Defendant did not testify. He presented the testimony of Mable Davis Wright, who testified she was in the apartment when the search was made, that when the police arrived defendant was asleep on the sofa, and that the officers picked up the sweater, which was on the sofa next to defendant.

The jury found defendant guilty in both cases. In Case No. 74CR4545, in which defendant was charged with felonious possession of heroin with intent to sell, judgment was entered sentencing defendant to prison for not less than eight nor more than ten years. In Case No. 74CR4546, in which defendant was charged with felonious possession of heroin, judgment was entered sentencing defendant to prison for not less than three nor more than five years, this sentence to begin at the expiration of the sentence imposed in Case No. 74CR4545. Defendant appealed.

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

Clayton, Myrick, McCain & Oettinger by Jerry B. Clayton, Robert W. Myrick, Kenneth B. Oettinger, for defendant appellant.

PARKER, Judge.

Thirty-four assignments of error are listed in the record on appeal. Only two questions are presented and discussed in appellant's brief. The questions raised by assignments of error which are not presented and discussed in appellant's brief are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals. (For cases in which notice of appeal is given on and after 1 July 1975, see Rule 28 of the North Carolina Rules of Appellate Procedure.)

[1] The first question presented and discussed in appellant's brief relates to denial of his motion for mistrial. Following a lengthy cross-examination of the State's witness, the SBI chemist Lytle, by counsel for defendant, the district attorney asked on redirect examination:

"Mr. Lytle, have you ever been rabbit hunting before, sir?" Defendant's counsel objected, whereupon the district attorney withdrew the question. Defendant's counsel then moved for a mistrial, contending that by asking the question, the district attorney was insinuating that defendant's counsel, in his cross-examination and in his representation of defendant, was "grasping at straws" and was attempting to focus the jury's attention on irrelevant and unimportant facts. The court denied the motion, and in this we find no error. Assuming the purport of the question was as appellant contends, the mere asking of the question was clearly insufficient grounds for a mistrial. Although more appropriately to be included in his argument to the jury, the contention that the defense was grasping at straws was not an improper one for the district attorney to make. "Moreover, the allowance or refusal of a motion for a mistrial in a criminal case less than capital rests largely in the discretion of the trial court." *State v. Foster,* 284 N.C. 259, 275, 200 S.E. 2d 782, 794 (1973). Clearly no abuse of discretion has been here shown.

[2] The second question presented and discussed in appellant's brief relates to the denial of his motion in arrest of judgment

in Case No. 74CR4546 in which he was charged with unlawful possession of heroin. Appellant's contention in this connection has merit. One may not possess a substance with intent to sell or deliver it without having possession of it. Thus, possession is an element of possession with intent to sell or deliver. A defendant's unlawful possession of heroin is, of necessity, an offense included within the charge that he did unlawfully possess with intent to sell or deliver, where, as here, both are in fact one transaction. *State v. Aiken,* 286 N.C. 202, 209 S.E. 2d 763 (1974).

The result is:

In Case No. 74CR4545, in which defendant was found guilty of felonious possession of heroin with intent to sell, we find

No error.

In Case No. 74CR4546, in which defendant was charged was felonious possession of heroin,

Judgment arrested.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. WILEY SPINKS

No. 7519SC461

(Filed 19 November 1975)

1. **Criminal Law § 92— consolidation of two cases — no error**

Trial court did not abuse its discretion in consolidating defendant's case for trial with that of another defendant who allegedly participated in the armed robbery with him.

2. **Criminal Law § 91— "surprise witness" — no continuance — no error**

The trial court did not err in allowing a "surprise witness" to testify without first granting a continuance to allow defense counsel to prepare where the court gave defense counsel an opportunity to consider the testimony to be given by the witness, the district attorney advised both the court and defense counsel that he would offer the testimony of the witness within a short time after he learned of the witness, and the record does not show that defendant moved for a continuance.

State v. Spinks

ON *certiorari* to review defendant's trial before *Exum, Judge.* Judgment entered 28 November 1973 in the Superior Court, RANDOLPH County. Heard in the Court of Appeals 19 September 1975.

The defendant, Wiley Spinks, was charged in a bill of indictment, proper in form, with the armed robbery of Reitzel Garner and John Pierce of approximately $500.00 in currency. Upon defendant's plea of not guilty, the State offered evidence tending to show the following: On 29 September 1973 at about 4:30 to 5:00 o'clock p.m., Reitzel Garner and John Pierce were on the side of a rural paved road in Randolph County working on Garner's automobile when two girls, Kay Gordon and Judy Freeman, came by and engaged them in conversation. Reitzel Garner gave each of the girls $1.00 from his wallet, which contained several hundred dollars. The girls invited the men to meet them later that day at their trailer in Asheboro. At about 5:30 p.m., the girls, both prostitutes, went to their trailer where they saw the defendant, Wiley Spinks, a black man who lived in the trailer with them. They told Spinks of their meeting with Garner and Pierce and that the men had some money and that they thought they could get it. They arranged with Spinks that they would lure the two men to a specific location where Spinks and others would rob them. As arranged, Garner and Pierce came to the trailer at about 6:30 p.m. Pursuant to their agreement with Spinks, the two girls lured Garner and Pierce into a remote area in Randolph County off Highway 49, where defendant Spinks and Reginald Garner, a defendant whose case was consolidated with that of Spinks, and another black man by the name of Earl Street, with the use of a shotgun and a brick, robbed John Pierce of $13.00 and Reitzel Garner of approximately $625.00. During the robbery, a shotgun was discharged, and Reitzel Garner was struck over the head with a brick and injured.

The defendant Spinks testified, denying participation in the robbery and offered evidence of an alibi.

From a verdict of guilty as charged and the imposition of a prison sentence of twenty (20) years, defendant gave notice of appeal, which was later withdrawn. By order dated 16 April 1975, this court allowed the defendant's petition for a writ of certiorari.

Attorney General Edmisten by Associate Attorney W. A. Raney, Jr., for the State.

William W. Ivey for defendant appellant.

HEDRICK, Judge.

Defendant first assigns as error the failure of the District Judge to assign counsel to represent him at the preliminary hearing. The record before us discloses that the defendant was represented at the preliminary hearing by Attorney Archie L. Smith. This assignment of error is not sustained.

[1] Next, defendant assigns as error the order of Judge Exum consolidating the defendant's case for trial with that of defendant Garner. Defendant did not object to the order consolidating the two cases for trial. Indeed, the record discloses that when the District Attorney moved to consolidate the cases, the trial judge inquired if the defendant objected and Attorney Coltrane replied for defendant Spinks, "No objection." Clearly, defendant has failed to show any abuse of discretion upon the part of the trial judge in consolidating the two cases for trial. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965).

[2] By his third assignment of error, defendant contends the court erred in allowing the witness Janet Cox to testify over his objection to what the defendant Spinks related to her regarding his participation in the robbery of Garner and Pierce. Defendant argues that because the witness was a "surprise" witness, the court should have continued the case to allow counsel an opportunity to prepare "his defense on the phase of the case to which the additional evidence related." We do not agree. Defendant concedes the allowance of testimony challenged by this exception was within the discretion of the trial judge. The record reveals that the court considered the element of surprise and gave the defendant's counsel an opportunity to consider the testimony to be given by the witness. The record further reveals that the District Attorney advised both the court and defendant's counsel that he would offer the testimony of Janet Cox within a short time after he learned of the witness. There is nothing in the record to indicate that defendant moved for a continuance. Under these circumstances, we perceive no abuse of discretion upon the part of the trial judge in allowing the witness to testify.

Defendant has other assignments of error which we have carefully considered and find to be without merit. Defendant had a fair trial, free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. REGINALD BLAKE GARNER

No. 7519SC472

(Filed 19 November 1975)

ON *writ of certiorari* to review trial before *Exum, Judge.* Judgment entered 28 November 1973 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 19 September 1975.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Hugh R. Anderson for defendant appellant.

ARNOLD, Judge.

The facts of this case are set forth fully in a companion case, *State v. Spinks,* No. 7519SC461, filed this day. Defendant Garner raises no assignments of error or questions that are not discussed in *State v. Spinks.* We find no prejudicial error in the trial.

No error.

Judges MORRIS and HEDRICK concur.

SHERRON M. TRAVIS v. ROBERT Y. TRAVIS

No. 7525DC576

(Filed 19 November 1975)

Divorce and Alimony § 18— alimony pendente lite — insufficiency of findings

Trial court's findings were insufficient to support an award of alimony *pendente lite* and counsel fees.

APPEAL by defendant from *Tate, Judge.* Judgment entered 22 April 1975 in District Court, CATAWBA County. Heard in the Court of Appeals 21 October 1975.

Plaintiff instituted this action for alimony without divorce, custody of their minor son, child support and relief pendente lite. She alleged that her husband abandoned her and rendered her condition intolerable and burdensome. Defendant denied the material allegations of plaintiff's complaint and alleged that the parties had mutually agreed to separate.

A hearing was held with Judge Tate making findings of fact and written conclusions of law upon the evidence presented. An order was subsequently entered awarding plaintiff alimony pendente lite, temporary custody, child support, and counsel fees. Defendant appealed to this Court.

No brief filed by plaintiff appellee.

Corne, Warlick and Pitts, by Stanley J. Corne and Larry W. Pitts, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the court's conclusions are not supported by findings of fact. The court concluded that (1) plaintiff is a dependent spouse; (2) plaintiff is entitled to relief sought; (3) plaintiff does not have sufficient means to subsist and prosecute her action; (4) plaintiff is a fit and proper person to have temporary custody; and (5) defendant shall pay alimony pendente lite and counsel fees for plaintiff's attorney.

We agree with defendant's contentions. The court's conclusions are not supported by its findings of fact.

While it is not required that the trial judge make findings of fact as to each allegation and evidentiary fact presented, it

is necessary for the trial judge to make findings of fact from which it can be determined upon appellate review that an award of alimony pendente lite is justified and appropriate. *Newsome v. Newsome,* 22 N.C. App. 651, 207 S.E. 2d 355 (1974).

The findings of fact are insufficient to support the order. The order is vacated and this cause is remanded for rehearing.

Vacated and remanded.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. FREDDIE WILSON THOMPSON

No. 7510SC483

(Filed 19 November 1975)

Assault and Battery § 15— assault on a female — instructions proper

In a prosecution for assault on a female where the trial court instructed the jury that they could return a verdict of guilty if they found from the evidence and beyond a reasonable doubt that defendant "grabbed or took Vivian Thompson by the arm in such a fashion and in such a manner as to put her in fear of bodily harm" and that she was a female person and defendant was a male person, such instruction was not error though it did not include the word "immediate" before the words "bodily harm."

APPEAL by defendant from *Chess, Judge.* Judgment entered 14 March 1975, Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1975.

Defendant was charged with assault on a female and pled not guilty.

The State's evidence tended to show that on the night of 14 August 1974, the prosecuting witness, Vivian Thompson, divorced wife of defendant, went to a restaurant and lounge for dinner with several friends. The defendant approached the table; Mrs. Thompson told him to leave, but he forcefully grabbed her by the arm and pulled her to the dance floor. Later he ordered her to go outside; when she refused, he twisted her arm behind her back and pushed her, but Mrs. Thompson broke away and

returned to her friends. Later she avoided defendant by using a back door in leaving the lounge.

Mrs. Thompson's friends testified that defendant was forceful in taking Mrs. Thompson by the arm and that drinks on their table were spilled as defendant pulled Mrs. Thompson to the dance floor.

Defendant testified to the effect that there was nothing unusual about his behavior and that he was merely dancing and conversing with Mrs. Thompson and did nothing that could be construed as an assault.

A jury found defendant guilty and from judgment imposing imprisonment and recommendation for psychiatric analysis, defendant appeals.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III, for the State.

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

CLARK, Judge.

In his final mandate to the jury the trial judge charged the jury to return a verdict of guilty of assault on a female if it found from the evidence and beyond a reasonable doubt that defendant "grabbed or took Vivian Thompson by the arm in such a fashion and in such a manner as to put her in fear of bodily harm" and that she was a female person and he, the defendant, was a male person. Defendant assigns this portion of the charge as error and contends that it fails to include the elements of assault in that the word "immediate" did not precede the words "bodily harm."

The Supreme Court of North Carolina has approved the broad definition that an assault is a show of violence causing a reasonable apprehension of immediate bodily harm. *State v. Allen,* 245 N.C. 185, 95 S.E. 2d 526 (1956) ; *State v. Hill,* 6 N.C. App. 365, 170 S.E. 2d 99 (1969). The Court has also approved the general common law rule that an assault is an intentional offer or attempt by force or violence to do injury to the person of another. *State v. Hefner,* 199 N.C. 778, 155 S.E. 879 (1930).

The evidence for the State discloses a battery, the forceful pulling and twisting of her arm. While every battery includes an assault, every assault does not include a battery. A battery

is the unlawful application of force to the person of another by the agressor himself or by some substance which he puts in motion. *State v. Hefner, supra.* Where "the evidence discloses an actual battery, whether the victim is 'put in fear' is inapposite." *State v. Lassiter,* 18 N.C. App. 208, 212, 196 S.E. 2d 592, 595 (1973).

While we do not commend the trial judge's final mandate as a model of clarity and accuracy, the State's evidence tends to show bodily harm occurring at the time of the battery; therefore, the failure to include the word "immediate" before the words "bodily harm" is not error.

We have carefully examined the other assignments of error, and we find the evidence sufficient to support the verdict and no prejudicial error in the admission of evidence challenged by the defendant.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. EDGAR JOHN HAYNES

No. 755SC544

(Filed 19 November 1975)

1. **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 and two companions went to a store for the purpose of robbing it, the two companions went inside while defendant remained in his car, the companions frightened the female cashier and took money from the cash register, and the defendant and his companions subsequently divided the money.

2. **Criminal Law § 113— jury instructions — summary of evidence proper**

The trial court in a common law robbery case did not err in his summary of what the State's evidence tended to show when he stated "that it was already discussed and understood between [defendant and his companions] that an effort would be made to take money from that establishment."

APPEAL by defendant from *Fountain, Judge.* Judgment entered 12 February 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 October 1975.

Defendant was charged in a bill of indictment with the felony of common law robbery. The jury returned a verdict of guilty of the felony of aiding and abetting in common law robbery. Defendant was sentenced to prison for a term of not less than five nor more than seven years.

Attorney General Edmisten, by Associate Attorney Isaac T. Avery III, for the State.

James K. Larrick, for the defendant.

BROCK, Chief Judge.

We commend defense counsel for his care in properly arranging the record on appeal in accordance with our rules.

[1] Defendant first argues that his motion for nonsuit should have been allowed because the State failed to show that violence was used against the victim or that the victim was put in fear. He argues that either violence or putting in fear is a necessary element of common law robbery, and without proof of the common law robbery, he cannot be guilty of aiding and abetting in common law robbery. While the principles argued by defendant may be sound, we disagree with his appraisal of the State's evidence.

The State's evidence tended to show that the State's witness, Stoudemire, one Randal, and defendant went to the 7-Eleven Store on Wrightsville Avenue in Wilmington in defendant's car for the purpose of robbing the store; that Stoudemire and Randal went into the 7-Eleven Store and took the money from the cash register while defendant waited for them in his car. They then drove to Randal's house where the money was divided equally among the three.

The manager of the store, Patricia Gardner, was the only employee in the store at the time of the robbery. She testified in pertinent part as follows:

> "When Mr. Stoudemire entered my store he went around the counter. He just stood there. I don't believe he had anything in his hands at the time. I think he had a jacket over his shoulders. I don't believe he had anything else. The other gentleman who came in the store is not in the courtroom.

"The other gentleman who came in my store had a paper bag in his hand and he was holding it like a bottle, in fact I thought it was.

"Neither of them said anything to me as they entered the store. The person who had the bag came over to the counter, put his arm up on the coffee maker, the coffee maker was sitting right on the corner, and told me to open the cash registers and come from behind the counter.

"The other gentleman, Mr. Stoudemire, was in behind the counter. Not behind the counter, on the far end. As I came out, he came in. As I come from behind the counter he came in.

"He told me to open the registers and come from behind the counter and I did.

. . . .

"The other gentleman who had the bag at the time he requested me to open the cash register was pointing it at me.

. . . .

"When I saw the gentleman approach me with a paper bag I was afraid."

In our opinion the circumstances shown by the foregoing testimony are reasonably likely to create an apprehension of danger to the victim and to justify the victim's assertion that she was afraid.

"Generally, the element of force in the offense of robbery may be actual or constructive. Actual force implies physical violence. Under constructive force are included 'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.' . . . "

State v. Norris, 264 N.C. 470, 141 S.E. 2d 869 (1965); *see also State v. Tudor,* 14 N.C. App. 526, 188 S.E. 2d 583 (1972).

This assignment of error is overruled.

[2] Defendant finally argues that there is a misstatement of a material fact in the trial judge's recapitulation of the evidence. Again defendant argues sound principles of law, but we do not agree that they are applicable to this case. In summarizing what the State's evidence tended to show, the trial judge stated "that it was already discussed and understood between them that an effort would be made to take money from that establishment." In our opinion this statement of what the State's evidence tended to show is supported by the testimony of the participant, Stoudemire, that defendant drove the three of them first to the Zip Mart; that they discussed the Zip Mart as being a "good mark" but didn't stop because it was crowded; that they then drove to the 7-Eleven Store where defendant stopped his car; that Stoudemire and Randal started into the store, and defendant said, "If you can't be good, be careful"; and that "the reason we went to that 7-Eleven Store was to rob it." This testimony gives rise to a reasonable implication that the three had already discussed and understood among them that an effort would be made to take money from that establishment. This assignment of error is overruled.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JAY HAROLD PRESSLEY

No. 7529SC452

(Filed 19 November 1975)

1. Criminal Law § 75— in-custody statements — admissibility

Statements given by defendant to law enforcement officers who interrogated him after his arrest were made freely, voluntarily and intelligently where defendant was given full *Miranda* warnings and then waived his constitutional rights.

2. Burglary and Unlawful Breakings § 10— possession of housebreaking implements — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for possession of housebreaking implements where it tended to show that defendant's car was stopped, there were a number of housebreaking implements in his car, and defendant himself made admissible in-custody statements which connected him with a brace and bit which were found on the roof of a building in the area.

APPEAL by defendant from *Baley, Judge.* Judgment entered 20 March 1975 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 18 September 1975.

Defendant was tried upon a bill of indictment charging him with possession of housebreaking implements.

The evidence tends to show that Deputy Sheriff Charlie Freeman of Rutherford County stopped a car in which Jay Harold Pressley and Roger Dale Moose were riding on 27 September 1974. The officer released the vehicle and then called Deputy Sheriff Carol Guest and told him that the back seat of the car had been removed. Being suspicious of two men riding around at approximately 3:35 a.m. with the back seat of their car missing, Guest stopped the vehicle and asked for the driver's license and for the car's registration card. Upon finding that the car was registered to Pressley, Guest asked both men for permission to search the car. After they gave permission to search the car, Guest searched and found a hammer, saw blades, wire cutters, chisels, pliers, gloves, penlight, pistol, punches, mace, screw drivers, wrenches, and some plastic bags. However, Pressley testified that he did not give anyone permission to search his car. After holding a voir dire hearing and making findings of fact, the court concluded as a matter of law that Officer Guest had probable cause to stop the vehicle and that the occupants gave a voluntary consent and permission to search the car and that the search of the car was a proper and legal search. After being arrested and taken to jail, Pressley was advised of his rights by Sheriff Blane Yelton. Sheriff Yelton testified that Pressley signed a waiver of rights. Carol Guest testified that he saw Mr. Pressley sign the waiver of rights and that he (Guest) signed the waiver of rights as a witness. Pressley testified that he did not sign a waiver of his rights. After the voir dire hearing at which Sheriff Yelton and defendant Pressley testified about the waiver of rights, the court found facts and made conclusions of law. The court concluded

that any in-custody statements made by defendant were voluntarily made with full understanding of his constitutional rights, and that the defendant voluntarily waived each of these rights.

While in custody, the defendant made certain incriminating statements which connected him with a brace and bit which were found on top of the Roberts Chain Saw Building in Ruth, North Carolina. This building had been damaged during the night of 26 September 1974 or during the morning of 27 September 1974.

Defendant's motion for nonsuit was overruled. From a verdict of guilty and judgment pronounced thereon, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb and Associate Attorney Isaac T. Avery III, for the State.

Robert L. Harris, for defendant appellant.

MARTIN, Judge.

[1] Defendant assigns error to the admission of statements given by the defendant to law enforcement officers who interrogated him after his arrest.

Two officers testified concerning an oral statement and a written statement given by the defendant to the officers as the result of an in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before the defendant was interrogated, he was given the full warning required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602. He also found that defendant waived his constitutional rights and that the defendant made the statements freely, voluntarily, and intelligently.

As our Supreme Court held in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974) :

> "[t]hese findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. (Citations.) An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. (Citations.)"

Thus, defendant's contention that his in-custody statements were inadmissible into evidence is without merit.

Defendant next contends that the court erred in admitting the brace and bit into evidence since they were connected to the defendant by virtue of defendant's in-custody statements. It follows that the admission of the brace and bit was also proper since defendant's in-custody statements connected him with them.

[2] Defendant's next contention is that the court erred in overruling his motion for nonsuit. There is no merit in this assignment of error. "It is elementary that upon such motion the evidence of the State is to be considered in the light most favorable to it and contradictions, if any, in the testimony of the State's witnesses are to be disregarded. (Citations.)" *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). There was positive testimony that when the Pressley car was stopped that defendant had a number of housebreaking implements in his car. The defendant himself made admissible in-custody statements which connected him with a brace and bit which were found on the roof of the Roberts Chain Saw Building. This evidence is sufficient to carry the case to the jury. This assignment of error is also overruled.

For the reasons stated, we find

No error.

Chief Judge BROCK and Judge VAUGHN concur.

A. GLENDON JOHNSON v. WILLIAM HARVEY HOOKS, JR.

No. 7510DC437

(Filed 19 November 1975)

Appeal and Error § 40— necessity for pleadings in record on appeal

Appeal is dismissed because of the absence from the record on appeal of the pleadings on which the case was tried. Former Court of Appeals Rule 19(a).

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 25 March 1975 in District Court, WAKE County. Heard in the Court of Appeals 17 September 1975.

This is an appeal by plaintiff from a judgment entered in a civil action tried by the court without a jury. The court made findings of fact, conclusions of law, and adjudged that plaintiff recover nothing from the defendant.

A. Glendon Johnson, plaintiff appellant, pro se.

Strickland and Rouse, by David M. Rouse for defendant appellee.

PARKER, Judge.

Notice of appeal in this case was given 26 March 1975. Rule 19(a) of the Rules of the Court of Appeals applicable to this appeal, provides that "[t]he pleadings on which the case was tried . . . shall be included in the record on appeal in all cases . . . . " (Rule 9(b)(1) of the Rules of Appellate Procedure applicable to appeals in which notice of appeal is given on or after 1 July 1975 makes the same requirement.) The record on appeal in this case does not contain the pleadings. The filing, as an exhibit, of a copy of the record on appeal from a former trial of this case, which contains the pleadings on which the case was previously tried, does not meet the requirement of the rules.

The requirement that the record on appeal contain copies of the pleadings on which the case was tried has been uniformly enforced. *Thrush v. Thrush,* 245 N.C. 63, 94 S.E. 2d 897 (1956); *Griffin v. Barnes,* 242 N.C. 306, 87 S.E. 2d 560 (1955); *Gardner v. Moose,* 200 N.C. 88, 156 S.E. 243 (1930).

Appeal dismissed.

Judges BRITT and CLARK concur.

CITY OF GREENSBORO v. KYLE H. HARRIS AND WIFE, FRANCES S. HARRIS; ROY M. BOOTH, TRUSTEE; GEORGE E. MILLER, MORTGAGEE

No. 7518DC643

(Filed 19 November 1975)

Municipal Corporations § 26— special assessments — interest

Where a city council resolution confirmed assessments against defendants' property and provided that the assessments would bear

interest of 6% and would be held in abeyance until the affected property was annexed by the city, the city was entitled to recover interest at 6% on the delinquent assessments from the date the property was annexed by the city. G.S. 160A-233(a).

APPEAL by plaintiff from *Haworth, Judge.* Judgment entered 28 April 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 14 November 1975.

Jesse L. Warren, City Attorney, by James W. Miles, Jr., Assistant City Attorney, for plaintiff appellant.

Booth, Fish, Simpson & Harrison, by Roy M. Booth, for defendant appellee.

ARNOLD, Judge.

This appeal involves an action by the City to recover for certain assessments against property owned by defendant and annexed on 29 June 1969. Judgment was entered in favor of the City for the base amount of the assessment accounts, but the court expressly held that the City was not entitled to interest upon the accounts.

The City Council, by resolution of 19 November 1962, confirmed the assessments against the property, provided that the assessments would bear interest at six percent per annum, and provided further that the assessments be held in abeyance until such time as the City annexed the property.

Defendant's brief stipulates that it was error for the court to refuse plaintiff the recovery of interest on the delinquent assessment accounts from 29 June 1969 to 8 April 1975. (G.S. 160A-233(a)).

Judgment is hereby modified to allow plaintiff to recover interest at the rate of six percent per annun from 29 June 1969 to 8 April 1975.

Modified and affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JACK CONRAD GLEASON

No. 7518SC647

(Filed 19 November 1975)

Criminal Law § 131— new trial for newly discovered evidence — discretion of court

A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, and refusal to grant the motion is not reviewable in the absence of abuse of discretion.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 1 May 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 November 1975.

Defendant was convicted at the 8 July 1974 Criminal Session of Guilford Superior Court of possession and sale of the controlled substance Methylenedioxy amphetamines (MDA). From judgment imposing prison sentences, he appealed to the Court of Appeals. In an opinion filed 5 March 1975 and reported in 24 N.C. App. 732, 212 S.E. 2d 213, this court found no error in the trial or judgment.

Thereupon, defendant filed a motion in the trial court asking for a new trial on the ground of newly discovered evidence. Following a hearing, the court entered an order denying the motion from which order defendant appeals.

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

Smith, Carrington, Patterson, Follin & Curtis, by J. David James, for defendant appellant.

BRITT, Judge.

It is well settled in this jurisdiction that a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court and refusal to grant the motion is not reviewable in the absence of abuse of discretion. *State v. Parker,* 235 N.C. 302, 69 S.E. 2d 542 (1952), *cert. denied,* 344 U.S. 825, 97 L.Ed. 642, 73 S.Ct. 25 (1952); *State v.. Morrow,* 264 N.C. 77, 140 S.E. 2d 767 (1965); *State v. Lee,* 22 N.C. App. 4, 205 S.E. 2d 360 (1974).

We have carefully reviewed the record in this case and conclude that the trial court did not abuse its discretion in denying defendant's motion.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN MAXWELL HAROLD, JR.

No. 759SC548

(Filed 19 November 1975)

Appeal and Error § 14— failure to appeal within 10 days after judgment

The Court of Appeals did not obtain jurisdiction where the appeal was not taken within 10 days after rendition of the judgment appealed from as required by G.S. 1-279, and the appeal must be dismissed.

APPEAL by petitioner from *Clark (Giles R.), Judge.* Order entered 28 April 1975 in the Superior Court, FRANKLIN County. Heard in the Court of Appeals 15 October 1975.

Attorney General Edmisten by Associate Attorney William H. Guy for the State.

Purser & Barrett by George R. Barrett for Petitioner Appellant.

HEDRICK, Judge.

This purports to be an appeal from an order entered by Judge Clark on 28 April 1975 denying the petition of W. A. Glenn, one of the sureties on the appearance bond of the defendant Harold, for relief under G.S. 15-116 from a judgment absolute entered 10 February 1975 in the Superior Court of Franklin County forfeiting his recognizance. It appears from the record before us that the petitioner did not give notice of appeal in this matter from the 28 April 1975 order entered by Judge Clark until 21 May 1975. Petitioner failed to comply with G.S. 1-279, which requires that appeal must be taken within 10 days after rendition of judgment. Under these circumstances the Court of Appeals has not obtained jurisdiction, and the

appeal must be dismissed. *Oliver v. Williams,* 266 N.C. 601, 146 S.E. 2d 648 (1966).

Dismissed.

Chief Judge BROCK and Judge CLARK concur.

CAROL CLARK, MR. AND MRS. ROBERT L. ANDERSON, ELANORE CAMP, J. M. SHOOK, MR. AND MRS. PAUL CALDWELL, MR. AND MRS. C. B. BITTNER, VIRGINIA HERNDON, RHONDA BLEVINS, MR. AND MRS. ANDREW MOLIVITZ, MR. MORRIS FOX AND MR. ROBERT SMITH v. VERNON RANDOLPH WALLACE, ALIAS VERNON HENDERSON, SANDRA HAMLIN WALLACE, ALIAS SANDRA HENDERSON, D/B/A INTERNATIONAL DANCE STUDIO, VERNON RANDOLPH'S DANCE STUDIO

No. 7528DC514

(Filed 19 November 1975)

Appeal and Error § 14— failure to appeal within 10 days after judgment

The Court of Appeals did not obtain jurisdiction where the appeal was not taken within 10 days after rendition of the judgment appealed from as required by G.S. 1-279, and the appeal must be dismissed.

APPEAL by plaintiff from *Allen, Judge.* Order entered 7 April 1975 in District Court, BUNCOMBE County. Heard in the Court of Appeals 14 October 1975.

Henry G. Fisher for plaintiff appellants.

S. Thomas Walton for defendant appellees.

CLARK, Judge.

It appears from the record on appeal that appeal was taken on 22 April 1975 from the order of dismissal rendered in session on 7 April 1975. Plaintiff failed to comply with G.S. 1-279, which requires that appeal must be taken within 10 days after rendition of judgment. Under these circumstances the Court of Appeals does not obtain jurisdiction, and we must dismiss it. *Oliver v. Williams,* 266 N.C. 601, 146 S.E. 2d 648 (1966).

Appeal dismissed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. MOSES ALLEN JACKSON

No. 7510SC560

(Filed 19 November 1975)

APPEAL by defendant from *Brewer, Judge.* Judgment entered 11 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1975.

By indictment proper in form, defendant was charged with the armed robbery of Mark Bradford, operator of a Kwik-Pik Store at 430 Buck Jones Road in the City of Raleigh. Defendant pled not guilty.

Evidence presented by the State, briefly summarized, tended to show: On 13 March 1975 at approximately 9:50 p.m., Bradford was working alone at the Kwik-Pik Store where he was employed. Two men with ski masks over their faces, one armed with a sawed-off shotgun and the other with a handgun, entered the store and proceeded to rob Bradford. At the direction of the man armed with the shotgun, Bradford placed money from the cash register and the safe into a heavy canvas bag, after which he was escorted to the restroom. While the robbery was in progress, Officer Branch of the Raleigh Police Department approached the store and parked some 75 feet from the front. He observed someone duck down behind a counter and proceed to the rear of the store; he also observed a man wearing what appeared to be a gold colored sweater and dark trousers follow Bradford to the rear of the store. Branch called for assistance in response to which Officer Kramer proceeded to the area back of the store where he saw two men emerge single file from the rear of the building. The first person out was wearing dark clothing and the second one out was wearing dark pants and a "goldish-mustard" shirt. Just outside the rear of the store, the second subject slipped and fell, discharging his weapon in the process. Kramer fired at the first subject but he escaped. Kramer kept the fallen man covered and found a shotgun approximately 15 inches from him; removal of the ski mask revealed the person to be defendant who had two 12-gauge shotgun shells in his pocket and a straight razor in a bag he was carrying.

Defendant offered no evidence.

The jury found defendant guilty of armed robbery and from judgment imposing prison sentence of not less than 20 nor more than 30 years, he appealed.

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

Joyner & Howison, by Edward S. Finley, Jr., for defendant appellant.

BRITT, Judge.

While defendant's court appointed counsel assigns numerous errors, we find no merit in any of them and no useful purpose would be served in discussing the various assignments. Suffice it to say, we have carefully reviewed the record, with particular reference to the questions argued in the briefs, and conclude that defendant received a fair trial, free from prejudicial error, and the sentence imposed is within the limits allowed by statute.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. GERALD EDWARD JONES

No. 7520SC606

(Filed 19 November 1975)

APPEAL by defendant from *Long, Judge.* Judgment entered 18 February 1975 in Superior Court, UNION County. Heard in the Court of Appeals 23 October 1975.

Attorney General Edmisten, by Associate Attorney Cynthia Jean Zeliff, for the State.

James E. Griffin, for the defendant.

BROCK, Chief Judge, HEDRICK and CLARK, Judges.

No error.

STATE OF NORTH CAROLINA v. WILLIAM ROUNTREE

No. 755SC646

(Filed 19 November 1975)

APPEAL by defendant from *Fountain, Judge.* Judgment entered 4 March 1975 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 November 1975.

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

Jay D. Hockenbury for defendant appellant.

MORRIS, PARKER and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. JOSEPH CARL BUNCH

No. 7510SC640

(Filed 19 November 1975)

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 8 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1975.

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

Johnson, Gamble and Shearon by Richard O. Gamble for defendant appellant.

MORRIS, PARKER and MARTIN, Judges.

No error.

STATE OF NORTH CAROLINA v. JOHN HOWARD NORWOOD, JR.

No. 7514SC458

(Filed 19 November 1975)

APPEAL by defendant from *Canaday, Judge.* Judgment entered 3 February 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 September 1975.

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

Vann & Vann, by Arthur Vann, for defendant appellant.

BROCK, Chief Judge, VAUGHN and MARTIN, Judges.

Affirmed.

STATE OF NORTH CAROLINA v. ROBERT WESLEY SELLS

No. 7520SC595

(Filed 19 November 1975)

APPEAL by defendant from *Chess, Judge.* Judgment entered 13 February 1975 in Superior Court, STANLY County. Heard in the Court of Appeals 23 October 1975.

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

Brown, Brown & Brown, by Fred Stokes, for defendant appellant.

MORRIS, PARKER, and MARTIN, Judges.

No error.

GREENSBORO ELKS LODGE T/A GREENSBORO ELKS LODGE #602, PETITIONER APPELLEE v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL, RESPONDENT APPELLANT

No. 7510SC557

(Filed 3 December 1975)

1. **Intoxicating Liquor § 12; Searches and Seizures § 1— search for ABC violations — permission to enter premises**

Local law enforcement officers are not required to request and obtain permission to enter the premises of an alcoholic beverage permittee before entering such premises for the purpose of checking for violations of the ABC laws under the authority of G.S. 18A-20(b).

2. **Intoxicating Liquor § 12; Searches and Seizures § 1— suppression of evidence in criminal case — admission in administrative proceeding**

A determination in criminal prosecutions in the district court that evidence was illegally seized and was therefore inadmissible did not bar use of the evidence in administrative proceedings to revoke ABC permits.

3. **Intoxicating Liquor § 12; Searches and Seizures § 1— ABC permittee — waiver of Fourth Amendment rights — search without warrant**

By seeking ABC permits, the permittee waived its Fourth Amendment rights as to searches and seizures to the limited extent of inspection by officers for violations of the State ABC regulations, and evidence of liquor sales and gambling obtained by officers who entered the permittee's premises without a search warrant and without obtaining the permittee's permission was properly admitted in an administrative proceeding to revoke the permittee's ABC permits.

APPEAL by respondent from *Alvis, Judge.* Judgment entered 25 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1975.

Petitioner operates the Greensboro Elks Lodge No. 602 in Greensboro and holds a retail malt beverage permit, and unfortified wine permit, a fortified wine permit, a special occasions permit, a social establishment permit, and a restaurants and related places permit from respondent Board of Alcoholic Control. On 30 August 1974, petitioner was notified to appear for a hearing before one of respondent's hearing officers on 19 September 1974 to show cause why its permits should not be revoked or suspended for the following violations of the state alcoholic beverage control laws and/or regulations: (1) selling or allowing sale of tax paid liquor in violation of G.S. 18A-3; and (2) allowing its premises to be used for unlawful purposes in violation of G.S. 18A-43(a), to wit: gambling in violation of

G.S. 14-292 and by keeping on its licensed premises gambling tables used for gambling in violation of G.S. 14-295 and malt beverage regulation No. 28(13). The violations allegedly occurred late on the night of 2 April 1974 and in the early morning hours of 3 April 1974.

Following a hearing, the hearing officer made a report in which he found facts including the following:

On 2 April 1974, at approximately 11:00 p.m., Greensboro Police Officer B. R. Dotson entered respondent's establishment. He purchased two bourbon and water drinks from one Leroy Galloway who was standing behind the bar. Mr. Galloway poured the drinks from a liquor bottle behind the bar and Officer Dotson paid 60 cents for each of the drinks. Dotson sampled the drinks both of which tasted and smelled like liquor. In a room adjoining the bar area, Dotson saw people standing and sitting around tables with dice and playing cards. After entering this room, Dotson observed two dice gambling tables covered with a green cloth. A man was rolling dice onto one of the tables while other people standing around were placing chips on the table. On one table Dotson observed a $100 bill along with dice and chips. A man operating each table would rake in the dice, chips and money after each throw.

Officer H. C. Tysinger entered petitioner's establishment along with Officer Dotson. Tysinger entered the room adjoining the bar area and observed people standing around three tables covered with green felt cloth. He observed playing cards, chips and money on each table and a game of "seven-card stud" in progress at each of the three tables. Tysinger observed several exchanges of money for chips between people sitting at the tables and observed bets made with chips and money at various tables. He also observed a wooden cage located in the room adjoining the bar area and saw two men in the cage receive money in exchange for chips in twenty to twenty-five separate transactions. He observed one instance in which a man approached the cage and exchanged $100 in cash for chips. He observed another transaction where a man approached the cage and exchanged one chip for a one dollar bill.

Tysinger observed another table covered with a green cloth on which a dice gambling game was being played and observed another table at which blackjack was being played. He observed an exchange of chips for money between one of the play-

ers and an operator of the blackjack game. Tysinger also purchased a bourbon and water drink from the bartender for 60 cents, bourbon being poured from a liquor bottle from behind the bar.

The hearing officer concluded that petitioner sold, or allowed to be sold, tax paid whiskey on its premises and allowed its licensed premises to be used for unlawful purposes in violation of G.S. 18A-43(a), namely, by permitting or allowing persons to play at games of chance at which money, property and other things of value were bet and by keeping on its premises gambling tables at which games of chance were being played.

The hearing officer recommended that the permits held by petitioner be suspended for a period of 180 days. Following notice of final administrative decision, respondent entered an order approving and adopting as its own the findings of fact made by the hearing officer and ordered that petitioner's permits be suspended for a period of 120 days effective 2 January 1975.

On 30 December 1974 petitioner filed a petition in the superior court asking that the proceedings before, and order of, respondent be reviewed pursuant to G.S. 143-312, et seq. On the same day, the court entered an order staying respondent's suspension order pending review of same by the court.

On 25 April 1975, following a hearing, the court entered an order containing findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The Greensboro Elks Lodge is a private club for the use of its members only, said members being issued a card key to be used for entry into the club premises.

2. Prior to April 2, 1974, members of the Greensboro Police Department Vice Squad had received information concerning activities on the premises of the Greensboro Elks Lodge, and, specifically, those officers had received information that on the night of April 2-3 there would be conducted on the premises of the Greensboro Elks Lodge the annual GGO stag party. The officers considered obtaining a search warrant, but did not believe that the information they had received from their informer was sufficient

for them to obtain a search warrant and, accordingly, on the morning of April 2, 1974, Vice Detective B. R. Dotson wrote a memorandum to his commanding officer purporting to document his intention to enter the Elks premises and stating: "As a result of this information, this writer intends to check the above-mentioned establishment on April 2, 1974, with other officers of the Vice Division, under authority given to local police officers in 18-A 20(b) of the Alcoholic Beverage Control laws of North Carolina." This memorandum was stamped on a time recording machine and delivered to the captain of the Greensboro Police Department Vice Division on the morning of April 2, 1974.

3. On the night of April 2-3, 1974, officers of the Greensboro Vice Division assembled on the parking lot of the Elks Lodge and waited for some period of time hoping to find means by which they could gain entry into the premises of the lodge, the doors into the lodge being locked to those seeking entry from the outside. There were signs about the premises indicating that entry was restricted to "members only" and neither of the officers were members of the club. Therefore, they did not possess the key cards necessary to gain entry.

4. Finally, the officers waiting on the parking lot saw a member of the club approach the door and insert his key card into the lock. Two of the officers followed the member into the club through the door which he had just unlocked and, having thus gained entry, those two officers admitted other members of the Greensboro Vice Squad through another door which could not be opened from the outside.

5. Having gained entry as described above, the officers seized certain property and made various arrests of individuals on the premises charging them with liquor and gambling offenses. As appears from the record in this case, the Greensboro Elks Lodge intervened in the criminal actions thus pending and moved to suppress all evidence seized by the officers on the ground that the entry was illegal, constituting an unreasonable search and seizure. Upon the motion of the Elks Lodge, the Honorable Elreta Alexander, Judge of the District Court before whom the criminal actions were pending, by order entered the 2nd day of May, 1974, required return of the property to the Elks Lodge

and suppression of all evidence obtained by the Greensboro Police Officers as a result of said entry.

6. This court finds that the order of the Honorable Elreta Alexander appearing of record was correctly and lawfully entered, and was introduced into evidence at the hearing before the North Carolina Board of Alcoholic Control.

7. All material evidence introduced before Hearing Officer Thomas Whitaker in this case was obtained by the Greensboro Police Officers on the night of April 2-3, 1974, after entry into the club premises in the fashion described above, no other material evidence having been introduced during the proceedings before the North Carolina Board of Alcoholic Control.

8. This court independently finds from the facts appearing of record in this case that entry by the officers into the club premises was not pursuant to any consent or permission granted by the Greensboro Elks Lodge or anyone acting on its behalf and further finds that the Greensboro Police Officers knew that there was no such consent or permission.

Upon the foregoing findings of fact the court enters the following

CONCLUSIONS OF LAW

1. No statute of North Carolina authorizes officers to enter private premises without a search warrant and without the consent or permission of the proprietor of those premises or those to whom he has delegated such authority. Specifically, this court concludes that the provisions of G.S. Sec. 18A-20 must be construed in *pari materia* with the provisions of G.S. Sec. 18A-19(c) providing that

> Refusal by a permittee or by any employee of a permittee to permit such officers to enter the premises shall be cause for revocation or suspension of the permit of the permittee.

When officers know entry to the premises is not open to the public, as they did in this case, in order to conduct an inspection under G.S. Sec. 18A-20 they must request permission from those in charge of the premises. If per-

mission is refused, G.S. Sec. 18A-19(c) provides for revocation or suspension of the alcoholic beverage permit. This court concludes that the Legislature did not intend to impose a forfeiture of the permittee's Fourth Amendment rights in addition to forfeiture of his alcoholic beverage permits.

2. All of the evidence introduced before the North Carolina Board of Alcoholic Control in this case, except for the permittee's record of no previous violations, the motion of permittee and the order of Judge Alexander, was therefore incompetent evidence and was insufficient predicate for the order entered by the Board on December 16, 1974, suspending the permits for a period of 120 days.

The court reversed the order entered by respondent and directed respondent to refrain from suspending petitioner's permits "by reason of the facts appearing in the record . . . . " Respondent appealed.

Attorney General Edmisten, by James Wallace, Jr., for the North Carolina Board of Alcoholic Control respondent-appellant.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd, for petitioner-appellee.

BRITT, Judge.

[1] Respondent-appellant contends that the court erred in concluding that applicable statutes require State and local A.B.C. and law enforcement officers to request and obtain permission to enter the premises of a permittee, and that the evidence with respect to selling whiskey and gambling presented to respondent's hearing officer in the case at hand was inadmissible. We think the contention has merit.

G.S. 18A-19(c) reads as follows:

"(c) All State A.B.C. officers shall have authority to investigate the operation of the licensed premises of all persons licensed under this Chapter, to examine the books and records of such licensee, to procure evidence with respect to the violation of this Chapter or any rules and regulations adopted thereunder, and to perform such other duties as the Board may direct. A.B.C. officers shall have the right to enter any licensed premises in the State in

the performance of their duty, at any hour of the day or night. Refusal by a permittee or by any employee of a permittee to permit such officers to enter the premises shall be cause for revocation or suspension of the permit of the permittee."

G.S. 18A-20(b) reads as follows:

"(b) Within their respective jurisdictions, all sheriffs, deputy sheriffs, municipal police, and local A.B.C. officers, as well as rural police and other local law-enforcement officers, shall have authority to investigate the operation of premises licensed under any provision of this Chapter and to *procure evidence* with respect to violations of this Chapter or any rule or regulation promulgated pursuant thereto. *These law-enforcement officers shall have the right to enter the licensed premises in the performance of their duties at any hour of the day or night.*" (Emphasis ours.)

The Twenty-First Amendment to the Federal Constitution redelegates authority for the control and regulation of intoxicating beverages to the states. *Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L.Ed. 2d 336, 86 S.Ct. 1254 (1966). It appears that all of the states have established regulatory systems to control the sale and distribution of alcoholic beverages, North Carolina's comprehensive plan being set forth in Chapter 18A of the General Statutes.

Some of the control mechanisms contained in our statutes are provisions for permits and licensing of outlets for distribution of alcoholic beverages. G.S. 18A-19 empowers respondent's agents to investigate facilities of permittees. Mere refusal of entry upon demand for inspection constitutes an adequate ground for revocation of permits under this section.

Recognizing the complexity of the problem and the necessity for effective statewide enforcement, the General Assembly enacted G.S. 18A-20 authorizing local law enforcement agencies to inspect facilities dispensing intoxicating beverages under permit. It appears that G.S. 18A-20(b), by authorizing local officers to enter and inspect the premises of permittees at any hour of the day or night, might afford them greater authority than that given state agents under G.S. 18A-19.

These statutes are aimed at a similar problem. Analogous in function, they are to be construed cumulatively as part of a

regulatory package although not necessarily in *pari materia* as held by the superior court. *Stevenson v. Durham,* 281 N.C. 300, 188 S.E. 2d 281 (1972). *See, e.g.,* 2A Sutherland Statutory Construction §§ 51.02-51.03 (C. Sands rev. 3d ed. 1973). The language is clear and unambiguous. To engraft the implied demand and refusal provision of G.S. 18A-19(c) onto the broad right of entry and inspection of G.S. 18A-20(b) would, in our opinion, frustrate legislative purpose.

[2] Respondent challenges the superior court's ruling that prior determination of inadmissibility barred use of evidence obtained by Officers Dotson and Tysinger by respondent in administrative proceedings to revoke petitioner's permits. We agree with respondent.

Judge Alexander's grant of petitioner's motion to suppress was not dispositive of the competency of evidence in a subsequent administrative proceeding. *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499 (1965). Thus, we proceed to analyze the competency of the evidence introduced before respondent's hearing officer.

Petitioner relies on the New York case of *Finn's Liquor Shop Inc. v. State Liquor Authority,* 24 N.Y. 2d 647, 301 N.Y.S. 2d 584, 249 N.E. 2d 440 (1969) (2 Judges dissenting), *rehearing denied,* 25 N.Y. 2d 777, 303 N.Y.S. 2d 526, 250 N.E. 2d 583 (1969), *cert. denied,* 396 U.S. 840, 24 L.Ed. 2d 91, 90 S.Ct. 103 (1969). This reliance is misplaced. The opinion in *Finn* involved determination of three license suspension cases consolidated for appeal all of which contained Fourth Amendment infractions inapposite the facts presented by this case. In *Finn,* officers violated the Fourth Amendment rights of defendants by searches which went beyond their statutory authority. In this case there was no ransacking or breaking and entering. Pursuant to G.S. 18A-20, Greensboro police officers had the right to go upon and enter petitioner's premises, at any time day or night and procure evidence of violation of State A.B.C. regulations. Further, in *Finn* Liquor Authority agents were held to be a part of the prosecution function on equal footing with the district attorney's office; therefore, even though not a party to the original proceeding, they were precluded by the prior determination of inadmissibility. Here, neither respondent nor petitioner was a party to the original criminal prosecution.

The sale and distribution of intoxicating spirits is a privilege subject to stringent state sanctions due to its sensitive

nature and high potential for corruption and vice. *Crowley v. Christensen,* 137 U.S. 86, 34 L.Ed. 620, 11 S.Ct. 13 (1890). *Compare, Note, Liquor License-Privilege or Property?,* 40 Notre Dame Law. 203 (1965). This position has been recognized by the United States Supreme Court even where the scope of state regulation impinges upon constitutionally guaranteed freedoms. *California v. La Rue,* 409 U.S. 109, 34 L.Ed. 2d 342, 93 S.Ct. 390 (1972). *See generally,* Kamenshine, *California v. La Rue; the Twenty-First Amendment as a Preferred Power,* 26 Vand. L. Rev. 1035 (1973).

Entertainment regulation aimed at sexually titilating performances has been held valid under the Twenty-First Amendment. *California v. La Rue, supra.* Similar exercises of the police power focusing on obscenity have been felled on First Amendment grounds as barriers to freedom of expression. *Roaden v. Kentucky,* 413 U.S. 496, 37 L.Ed. 2d 757, 93 S.Ct. 2796 (1973). States have acted within the Fourteenth Amendment's equal protection guarantee denying liquor licenses to private clubs precluding Negroes from membership. *B.P.O.E. No. 2043 of Brunswick v. Ingraham,* 297 A. 2d 607 (Me. 1972), *appeal dismissed,* 411 U.S. 924, 36 L.Ed. 2d 386, 93 S.Ct. 1893 (1973) (3 Justices dissenting); *rehearing denied,* 412 U.S. 913, 36 L.Ed. 2d 977, 93 S.Ct. 2288 (1973). *See Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 32 L.Ed. 2d 627, 92 S.Ct. 1965 (1972).

It has been held that where officers, without a warrant, enter commercial or private premises by breaking locks and tearing down doors, there is a clear violation of Fourth Amendment rights. *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 25 L.Ed. 2d 60, 90 S.Ct. 774 (1970). In this case, however, there was no breaking and entering by the police. There were no violations of petitioner's rights under the Fourth Amendment.

It is recognized that within the Fourth Amendment there are several different gradations of reasonableness. Different standards apply to a home from those applicable to a business or motor vehicle. Commercial premises are covered under the Fourth Amendment. *See v. Seattle,* 387 U.S. 541, 18 L.Ed. 2d 943, 87 S.Ct. 1737 (1967). The context of an administrative inspection or search is such, however, that entry otherwise than by warrant is not per se unconstitutional. *Camara v. Municipal Court,* 387 U.S. 523, 18 L.Ed. 2d 930, 87 S.Ct. 1727 (1967).

While there is a right to require a search warrant, that right arises upon demand for entry and refusal. *Camara v. Municipal Court, supra.*

The sensitive nature of certain trades gives rise to a corresponding state interest in regulating and controlling trade practices. Certainly, this is true where the authority to regulate is delegated to the states under the mandate of constitutional amendment. The United States Supreme Court has distinguished searches of regulated trades, such as the spirit industry.

> "A central difference . . . is that businessmen in such . . . licensed and regulated enterprises accept the burden as well as the benefits of their trade, ... The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez v. United States,* 413 U.S. 266, 271, 37 L.Ed. 2d 596, 601, 93 S.Ct. 2535, 2538 (1973).

[3] We are impressed with the logic of the dissenting judges in *Finn,* that by seeking liquor licenses, licensees (here permittees) waive their Fourth Amendment rights and consent to administrative searches. *Finn's Liquor Shop Inc. v. State Liquor Authority,* 24 N.Y. 2d 647, 301 N.Y.S. 2d 584, 595, 249 N.E. 2d 440, 448 (1969) (dissenting opinion). *See, e.g., United States v. Duffy,* 282 F. Supp. 777 (S.D.N.Y. 1968). A similar doctrine of implied consent appears well recognized in this State. *See generally,* G.S. 20-16 (Driver's license suspension); *Honeycutt v. Scheidt,* 254 N.C. 607, 119 S.E. 2d 777 (1961) (Driving privilege held conditional on obeying the law); G.S. 148-42 (Conditional release of inmates by Parole Commission); *State v. Caudle,* 7 N.C. App. 276, 172 S.E. 2d 231 (1970), *rev'd other grounds,* 276 N.C. 550, 173 S.E. 2d 778 (1970) (Sentence suspended on certain conditions). We feel that by seeking a permit, petitioner waived its Fourth Amendment right to the limited extent of inspection incident enforcement of State A.B.C. regulations.

Officers knew with certainty that intoxicating beverages were dispensed under permit at petitioner's lodge hall. They had reason to believe that liquor was being dispensed in violation of the conditions of these permits and that gambling was being allowed on the premises. Under G.S. 18A-20(b) they had a right to go upon and enter petitioner's lodge building at any time day or night in order to inspect for compliance with State

A.B.C. regulations. By virtue of G.S. 18A-43(a) either infraction would be sufficient in and of itself to warrant a revocation of petitioner's permits. Respondent found that petitioner had allowed its premises to be used for gambling as well as selling alcoholic beverages in violation of State A.B.C. regulations. We think the findings are correct and are supported by material and substantial evidence. Where the findings of respondent Board are supported by material and substantial competent evidence as here, they are conclusive on review by the superior court. *Parker v. Board of Alcoholic Control,* 23 N.C. App. 330, 208 S.E. 2d 727 (1974).

By Chapter 316 of the 1973 Session Laws, the General Assembly submitted to a statewide referendum the question of legalizing the sale of whiskey by the drink in North Carolina. In said referendum, held on 6 November 1973, the people of our State voted overwhelmingly against the proposition submitted, thereby establishing the public policy of our State on that question. By virtue of its police powers, the General Assembly, by the enactment of general criminal statutes, particularly G.S. 14-292, et seq., has condemned gambling and the operation of gambling establishments in this jurisdiction. *State ex rel. Taylor v. Carolina Racing Ass'n,* 241 N.C. 80, 84 S.E. 2d 390 (1954); *State v. Felton,* 239 N.C. 575, 80 S.E. 2d 625 (1954). It behooves the courts not to treat lightly public policy duly established.

For the reasons stated, we hold that the superior court erred in entering the order appealed from. The order is vacated and this cause is remanded to the superior court with direction that it enter an order affirming respondent's order suspending petitioner's permits.

Reversed and remanded.

Judges PARKER and CLARK concur.

WALTER G. GREEN v. THAD EURE, AS SECRETARY OF STATE

No. 7510SC347

(Filed 3 December 1975)

1. **Constitutional Law § 10— legislative acts — judicial power to review**

The Courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the Courts disapprove or, upon their own initiative, find to be in conflict with the Constitution.

2. **Constitutional Law § 4— constitutionality of statute — standing to raise**

Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights, and it is not sufficient that plaintiff has merely a general interest common to all members of the public.

3. **Constitutional Law § 4— citizen and taxpayer — no standing to raise constitutionality questions**

Plaintiff who alleged that he is a citizen and taxpayer of the State had no more than a general interest common to all members of the public in the questions he sought to have determined, and plaintiff neither alleged nor offered proof that he occupies with respect to those questions any status legally different from that of all other citizens and taxpayers of the State, notwithstanding his allegation that he is an attorney at law actively practicing his profession in this State.

4. **Constitutional Law § 10— judicial power — exercise only in actual controversy**

Because the courts possess only judicial power they may not decide mere differences of opinion between citizens, or between citizens and the State, concerning the validity of a statute; rather, exercise of the judicial power is properly invoked only when it is necessary to determine the respective rights and liabilities or duties of litigants in an actual controversy properly brought before the court.

APPEAL by plaintiff from *Brewer, Judge.* Judgment entered 7 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 27 August 1975.

As result of Acts adopted by the 1969 General Assembly, seven proposals for changes in the North Carolina Constitution were submitted to the voters of the State at the general election held on 3 November 1970. One of these, proposed by Ch. 1004 of the 1969 Session Laws, failed of adoption. Each of the other six, proposed by Chapters 827, 872, 932, 1200, 1258, and 1270, received a majority of the votes cast at the 3 November 1970 election in favor of adoption.

On 24 November 1970 plaintiff, alleging he is a citizen and taxpayer of the State of North Carolina, resident in Alamance County, where he is engaged in the practice of his profession as an attorney at law, brought this action against the Secretary of State of North Carolina seeking (1) judgment declaring the statutes under which the six proposals on which a majority had voted for adoption and the vote taken thereon on 3 November 1970 to be unconstitutional and void, and (2) an injunction to restrain defendant "from receiving, enrolling and preserving in his office, as constitutional amendments, the purported constitutional changes in said chapters set forth." Plaintiff alleged that the challenged Session Laws are void because each prescribed "the submission to the voters of constitutional changes in words which are so inadequately descriptive, and so false and misleading, as to the constitutional changes intended to be effected, that they are violative of the constitutional provision that all elections ought to be free, are devoid of the fundamental elements of due process of law, and calculated to prevent an expression of the will of the people." Additionally, as to the constitutional changes intended to be effected by Ch. 1258, described on the ballot as "revision and amendment of the Constitution of North Carolina," plaintiff alleged that the changes "are so many, and so extensive, as to propose in effect, and in fact, a new constitution, and as such do not constitutionally lend themselves to adoption under the provisions of section 2 of Article XIII of the Constitution of North Carolina."

On 22 December 1970 defendant Secretary of State filed answer in which he denied material allegations in the complaint dealing with the grounds for plaintiff's attack on the six statutes. Defendant's answer also asserted as affirmative defenses: (1) that on 9 December 1970 the Governor of North Carolina, pursuant to each of the acts referred to in the complaint, certified to defendant Secretary of State each Amendment to the Constitution which received a majority of the votes cast thereon at the 3 November 1970 General Election; that pursuant to such certification defendant Secretary of State had performed his ministerial duty of receiving and enrolling such amendments in his office; and that injunctive relief could not undo that which had already been done; (2) that plaintiff failed to state a claim upon which relief can be granted; and (3) that the Court has no jurisdiction of the defendant or the subject

matter in as much as this is an action against the State, which has not consented to be sued in this manner.

On 14 November 1972 defendant filed a motion to dismiss under Rule 41(b) for failure of plaintiff to prosecute his action. The motion was allowed, but on plaintiff's appeal, this Court reversed. *Green v. Eure, Secretary of State,* 18 N.C. App. 671, 197 S.E. 2d 599 (1973).

On 20 February 1974 plaintiff obtained leave to amend his complaint to allege "in the alternative that Chapters 827, 872, 932 and 1200 of the 1969 Session Laws were repealed by Chapter 1258 of the 1969 Session Laws; and that all things done, after the enactment of said Chapter 1258, under color of the provisions of said Chapters 827, 872, 932 and 1200 were unlawful and void." This alternative allegation was denied by defendant.

Also on 20 February 1974 plaintiff filed motion for judgment on the pleadings, or in the alternative for summary judgment, on the ground that the pleadings and other papers filed show there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. Defendant also moved for judgment on the pleadings and to dismiss (a) for falure to state a claim upon which relief can be granted, (b) for that the Court does not have jurisdiction of the persons or the subject matter, and (c) for that injunction is not proper, as all matters have been completed for which injunctive relief is sought. By agreement of the parties the Court reserved ruling on the motions and heard the case on its merits.

On 7 February 1975 the Court entered order denying plaintiff's motions and on the same date entered judgment making findings and conclusions, on the basis of which the Court adjudged that plaintiff's action be dismissed. Plaintiff appealed.

Walter G. Green, pro se, plaintiff appellant.

Attorney General Edmisten by Deputy Attorney General James F. Bullock for defendant appellant.

PARKER, Judge.

The trial court made findings and conclusions favorable to defendant both on the merits of plaintiff's contentions and on defendant's affirmative defenses. Because we find that plain-

tiff lacks standing to raise the questions which he seeks to have adjudicated in this action, we affirm the judgment dismissing the action without reaching the merits of plaintiff's contentions.

[1] The Courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the Courts disapprove or, upon their own initiative, find to be in conflict with the Constitution. The Courts and the Legislature are coordinate branches of the State government and neither is superior to the other. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401 (1969). Speaking for our Supreme Court in that case, Justice Lake said (p. 447):

> "The authority of this Court to declare an act of the Legislature unconstitutional arises from, and is an incident of, its duty to determine the respective rights and liabilities or duties of litigants in a controversy brought before it by the proper procedure. To do so, this Court, in the event of a conflict between two rules of law, must determine which is the superior rule and, therefore, the rule governing the rights and liabilities or duties of the parties to the controversy before the Court. If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation."

[2] Moreover, "[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights." *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). "The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley, Edwards, Henderson v. Dept. of Conservation & Development,* 284 N.C. 15, 28, 199 S.E. 2d 641, 650 (1973). "It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores v. Tucker,* 263 N.C. 710, 717, 140 S.E. 2d 370, 375 (1965).

[3] Here, plaintiff has alleged he is a citizen and taxpayer of the State. As such, he has no more than a "general interest common to all members of the public" in the questions he seeks to have determined in this litigation. He has neither alleged nor offered proof that he occupies with respect to those questions

any status legally different from that of all other citizens and taxpayers of the State. That he is an attorney at law actively practicing his profession in this State is not sufficient to give him standing such as to authorize the court to interpret for him or to determine the validity of any statute which he may choose to question.

In the leading case of *Schieffelin v. Komfort,* 212 N.Y. 520, 106 N.E. 675 (1914), the New York Court of Appeals was confronted with a case in which, as in the case now before us, the validity of a statute leading to changes in the State Constitution was involved. In that case the plaintiff, a citizen, resident elector, and taxpayer of New York, sought an injunction to restrain the Secretary of State and others from taking steps preliminary to the nomination and election of delegates to a constitutional convention. Plaintiff contended that the act of the New York Legislature under which the people of the State had voted to call the convention was itself unconstitutional and void. The lower New York courts found plaintiff had standing to raise the question but found the challenged act to be constitutional and valid. The Court of Appeals held that plaintiff had no standing and therefore affirmed the order denying an injunction without reaching or passing on the constitutional questions which plaintiff sought to raise. Justice Chase, speaking for the New York Court of Appeals, said (106 N.E. at pp. 677, 678):

> "We are of the opinion that there is no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights or to enjoin, redress, or punish wrongs affecting the individual life, liberty, or property of one or more of the litigants. The court has no inherent power to right a wrong unless thereby the civil, property, or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.
>
> The rights to be affected must be personal as distinguished from the rights in common with the great body of people. Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government. The jurisdiction to declare an act of the Legislature unconstitutional arises because it is the province and duty of the judicial department of government to de-

clare the law in the determination of the individual rights of the parties.

The assumption of jurisdiction in any other case would be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the Constitution itself. *Matter of Guden,* 171 N.Y. 529, 64 N.E. 451.

Jurisdiction, being the power to hear and determine, is not given to the courts as guardians of the rights of the people generally against illegal acts of the executive or legislative branches of government. When a controversy arises between litigants, in which controversy the Constitution and an act of the Legislature are each invoked and they are in conflict, it is necessary to follow the Constitution, which is the supreme law, and ignore the act of the Legislature, and thus incidentally and necessarily the courts pass upon an act of a co-ordinate and independent department of government. That is the extent of the power of the judiciary over the legislative branch of government."

We find the reasoning of the New York Court of Appeals both persuasive and in harmony with the views many times expressed by our own Supreme Court.

[4] Because the courts possess only judicial power, they may not decide mere differences of opinion between citizens, or between citizens and the State, concerning the validity of a statute. Exercise of the judicial power is properly invoked only when it is necessary to determine the respective rights and liabilities or duties of litigants in an actual controversy properly brought before the court. It is not appropriate merely to determine questions of general public interest. Plaintiff here has shown only such interest as is shared generally by all residents, citizens, and taxpayers of the State. He has failed to show that individual interest which is requisite for standing in court.

Nothing in this opinion should be construed as an intimation that if the court had jurisdiction in a case properly presented by a party having standing to do so, it would deem the challenged Acts of the General Assembly, or the votes of the people taken thereunder, to be invalid. We hold only that the

plaintiff in the present action has no standing to maintain it. The judgment dismissing plaintiff's action is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

U.S.I.F. WYNNEWOOD CORP. v. W. G. SODERQUIST AND WIFE, OSCELA SODERQUIST

No. 7528SC518

(Filed 3 December 1975)

1. **Evidence § 43— testimony as to mental condition**

A party may testify as to what his mental condition was at a particular time.

2. **Evidence § 44— source of depression — purpose for drugs — lay testimony**

In a hearing on a motion to set aside a default judgment, the trial court did not commit prejudicial error in permitting the male defendant to testify as to the source of his depression and the purpose for which certain drugs were prescribed for him, although the witness was not a medical expert, since the hearing was before the court without a jury and the court was presented with the facts upon which the witness based his opinion.

3. **Evidence § 40— receipt of service of process — no opinion on question of law**

In a hearing upon a motion to set aside a default judgment, testimony by the femme defendant that she had not received service of the summons and complaint did not constitute an expression of opinion on a question of law and was properly admitted.

4. **Judgments § 25— excusable neglect — incompetency of defendant**

Finding of excusable neglect was supported by the court's factual determination that the male defendant, who was served with process, was not of sound mind at the time of service and was incapable of taking intelligent action on his own defense. G.S. 1A-1, Rule 60(b).

5. **Judgments § 29— meritorious defense — mitigation of damages**

A *prima facie* meritorious defense was available to defendants in an action for breach of a lease where plaintiff was given a default judgment for the entire contract price without reduction for the fair rental value of the premises since defendant would be entitled to mitigate the damages by showing the fair rental value for the term of the lease.

APPEAL by plaintiff from *Grist, Judge.* Order entered 3 April 1975 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 October 1975.

Plaintiff filed a complaint in which it sought to recover monetary damages for breach of a lease. A civil summons was thereafter issued and served upon the male defendant by personally delivering to him copies of the complaint and civil summons and upon the female defendant by leaving copies thereof at her dwelling house with the male defendant. The defendants made no response by answer or otherwise, and a judgment by default was entered in superior court.

The defendants later moved to set aside the judgment by default pursuant to G.S. 1A-1, Rule 60(b). At the hearing defendants offered evidence attempting to substantiate their defense of excusable neglect. The testimony tended to establish that Mr. Soderquist was mentally ill, suffering from involuntary depression. He was hospitalized for 23 days and was under the influence of sedative drugs which substantially affected his behavior. As a result of his taking the drugs Mr. Soderquist was uncommunicative and his memory was bad.

Mr. Soderquist testified that he did not recall being served with the civil summons and that he did not communicate to Mrs. Soderquist that he had been served. Mr. Soderquist first recalled mentioning the civil summons to his wife when he received notice by mail that the judgment by default had been entered. Mr. Soderquist knew that he was behind in his rent and he thought he was being sued for past rent due.

The trial court made findings of fact substantially in accordance with the evidence offered by the defendants, and held that the defendants had stated a meritorious defense. From the order setting aside the default judgment, plaintiff appeals to this Court.

Patla, Straus, Robinson and Moore, P.A., by Victor W. Buchanan, for plaintiff appellant.

McGuire, Wood, Erwin and Crow, by William F. Walcott III, for defendant appellees.

ARNOLD, Judge.

[1] Plaintiff contends that the trial court erred in allowing Mr. Soderquist, the male defendant, to testify regarding his

mental and physical condition. Plaintiff objects to the testimony because it was self-serving. This contention is rejected. A party may testify as to what his own mental condition was at a particular time. See *State v. Nall*, 211 N.C. 61, 188 S.E. 637 (1936).

[2] Plaintiff's next assignment of error relates to the trial court's ruling permitting Mr. Soderquist to testify regarding the source of his depression, and as to the purpose for which certain drugs were prescribed for him. Plaintiff argues that the witness was neither tendered as an expert witness nor qualified to be an expert witness, and that the testimony should not have been admitted.

The contested testimony was as follows:

"COURT: What are those drugs that you are on prescription for?

WITNESS: They are for my nervous system."

The primary purpose of the opinion rule is to protect the jury from being unfairly swayed by the thought process of the witness. Where the facts can be intelligently presented to the jury, and the witness is no better qualified than the jury to form an opinion from the facts, the jury, as ultimate trier of fact, should be allowed to draw its own opinion from the facts without risk of prejudice from the witness's opinion of the facts. Stansbury, North Carolina Evidence, Brandis Revision, § 123, p. 386.

It should be noted that this hearing on defendant's motion to set aside the default judgment was before the presiding judge of the Superior Court of Buncombe County sitting without a jury. The danger of prejudice to the jury did not exist in this case. The trial judge was sitting as the trier of fact, and he reviewed the factual evidence upon which the witness made his opinion. The following testimony of Mr. Soderquist came immediately after the statement, "They are for my nervous system."

> "One is Librium, which I take in the morning and at bedtime, and one is Presamine, which I take twice a day. There is another one, but I can't think of the name of that. These slow me down; and if I do not take them I'm in a high nervous state and in such a condition, I'm hardly able to do anything now. I have a twenty percent service connected disability."

The trial judge was presented with the facts upon which the witness based his opinion, and we cannot say that he committed prejudicial error in admitting the witness's opinion into evidence.

[3] Plaintiff's third assignment of error alleges that the trial court committed prejudicial error in permitting Mrs. Soderquist, the female defendant, to testify that she had not received the notice or service of process or summons. Plaintiff argues that the witness's response was an expression of opinion as to a question of law which was not within the competency of the witness. We cannot agree.

Mrs. Soderquist was asked factual questions within her personal knowledge and the trial judge did not err in permitting the witness to answer. Defendant's counsel was seeking to determine if Mrs. Soderquist physically received or had possession of the summons and complaint served on Mr. Soderquist, the male defendant. Counsel was not attempting to have Mrs. Soderquist establish the legal sufficiency or insufficiency of the service.

Plaintiff next contends that the trial court erred in prohibiting plaintiff from cross-examining the male defendant regarding other civil actions. Plaintiff argues that he has been denied the opportunity to impeach the male defendant.

While the court did restrict cross-examination concerning other civil actions pending against defendant, plaintiff was allowed to introduce the pleadings of these other actions. Also, the court, sitting without a jury, found as a fact that the defendant had employed attorneys to represent him on a regular basis, and that they represented him in another cause. There was no prejudice to the plaintiff by the trial court's limitation on cross-examination.

Finally, plaintiff argues that the trial court erred in entering its order under which the judgment by default was set aside. In order to set aside a judgment by default pursuant to G.S. 1A-1, Rule 60(b) defendant must show that his neglect is excusable and that he has a meritorious defense to the action of the plaintiff. *Moore v. WOOW, Inc.*, 250 N.C. 695, 110 S.E. 2d 311 (1959). It is the duty of the judge presiding at the hearing on the motion to make findings of fact and upon those facts to determine as a matter of law whether there is a showing of excusable neglect and of a meritorious defense. *Johnson v. Sid-*

bury, 225 N.C. 208, 34 S.E. 2d 67 (1945); *Electric Service v. Granger,* 16 N.C. App. 427, 192 S.E. 2d 19 (1972). The trial judge's findings of fact are conclusive on appeal when supported by competent evidence. However, the conclusions of law made by the judge upon the facts found are reviewable on appeal. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507 (1954); *Highfill v. Williamson,* 19 N.C. App. 523, 199 S.E. 2d 469 (1973).

[4] The trial court's findings of fact establish that the male defendant was "deficient in his usual mental processes." It was further found that the "defendant was not capable of handling his affairs to the extent required in a matter of this serious nature and that he was incapable of taking intelligent action in his own defense." The trial court's findings of fact are based on competent evidence.

The North Carolina courts have repeatedly held that persons of sound mind cannot obtain relief from the statute when they fail to give litigation the attention which a man of ordinary prudence usually gives his important business. *Pierce v. Eller,* 167 N.C. 672, 83 S.E. 758 (1914). However, the trial court based its finding of excusable neglect on its factual determination that Mr. Soderquist was not of sound mind. We find no error in the court's conclusion.

Even in situations when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless the defendant has a meritorious defense. *Doxol Gas v. Barefoot,* 10 N.C. App. 703, 179 S.E. 2d 890 (1971). "Unless the Court can now see reasonably that defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?" *Glisson v. Glisson,* 153 N.C. 185, 188, 69 S.E. 55, 56 (1910).

[5] At the hearing on the motion to set aside a judgment it is not necessary that a meritorious defense be proved, but only that a *prima facie* defense exists. *Carolina Bank, Inc. v. Finance Company,* 25 N.C. App. 211, 212 S.E. 2d 552 (1975). It can reasonably be seen that a *prima facie* defense is available to defendant in the case at bar.

The measure of damages in an action for breach of a lease contract is generally the difference between the contract price and the fair rental value of the premises for the term of the lease. *Weinstein v. Griffin,* 241 N.C. 161, 84 S.E. 2d 549 (1954);

Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928). Plaintiff was given a judgment for the entire contract price without reduction for the fair rental value of the premises. In this action for breach of the lease agreement defendant would be entitled to pursue the question of mitigation.

We find no error in the trial court's order setting aside the judgment by default.

Affirmed.

Judges BRITT and VAUGHN concur.

CLARENCE BATTLE v. MAJOR CLANTON, MAY LENA JOYNER AND RAYMOND STALLINGS

No. 757SC469

(Filed 3 December 1975)

1. **Rules of Civil Procedure §§ 12, 56— motion for judgment on pleadings — treatment as motion for summary judgment**

A motion for judgment on the pleadings was inappropriate where the complaint was not fatally defective and matters outside the pleadings were presented to and considered by the court; under such circumstances the motion for judgment on the pleadings must be treated as a motion for summary judgment. G.S. 1A-1, Rule 12(c).

2. **Torts § 7— release of all parties — effect on parties not named in release**

In an action arising from a collision between an automobile and a motorcycle on which plaintiff was a passenger, a release executed by plaintiff which specifically named the automobile driver and owner and "all other persons, firms, or corporations who are or might be liable, from all claims of any kind or character" included defendant motorcycle driver and his insurer, though they were not named specifically in the release.

3. **Torts § 7— release — entry of default judgment**

Entry of default against defendant Stallings made on 17 February 1975 was discharged by plaintiff's release of all parties from all claims executed on 6 March 1975.

APPEAL by plaintiff from *Godwin, Judge.* Order entered 25 March 1975, Superior Court, NASH County. Heard in the Court of Appeals 22 September 1975.

In his Complaint, plaintiff alleged that he was a passenger on a motorcycle operated by defendant Stallings; that defendant Clanton was driving a car jointly owned by him and defendant Joyner; that the motorcycle and car approached an intersection from opposite directions; that he was injured in the collision when the car turned left into the path of the motorcycle; and that both drivers were negligent.

The defendant Clanton responded to plaintiff's interrogatories and, along with defendant Joyner, filed an answer denying negligence, asserting contributory negligence, and cross-claiming for contribution based upon Stallings' concurrent negligence.

Default was entered against defendant Stallings on 17 February 1975, but judgment by default was never entered.

Nationwide Mutual Insurance Company, insurer for defendant Stallings, then moved to intervene and to vacate the entry of default against Stallings, filed answer denying negligence on behalf of Stallings, responded to the cross-claim of defendants Clanton and Joyner against Stallings, and moved for judgment on the pleadings on behalf of Stallings.

Thereupon, defendants Clanton and Joyner settled with plaintiff by paying him their liability policy limits of $15,000, and dismissed their cross-claim. Plaintiff and his attorney executed a release. The pertinent terms of the release are set out in the opinion.

Nationwide renewed its motion for judgment on the pleadings and sought discovery of the release. Plaintiff provided a copy of the release but resisted Nationwide's intervention and attempt to vacate the entry of default against defendant Stallings. Upon receipt of the release, Nationwide amended Stallings' answer to assert the release as a bar to any further claim against Stallings and moved for summary judgment based upon the release.

All outstanding motions were heard and the court entered an order on 25 March 1975. This order allowed Nationwide to intervene and to defend on behalf of defendant Stallings, ordered that the "default judgment by the plaintiff against Raymond Stallings individually shall not be used as a basis for the plaintiff to obtain Judgment against Nationwide," allowed judgment on the pleadings on the basis of defendant Clanton's

negligence being the sole proximate cause of the accident, and allowed summary judgment on the basis of the release. On the same day plaintiff moved to be allowed to amend his complaint so as to allege other acts of negligence by the defendant Stallings, but the motion was denied.

From the foregoing order, the plaintiff appealed.

Hubert H. Senter for plaintiff.

Battle, Winslow, Scott and Wiley, P.A., by J. B. Scott for defendant Stallings.

CLARK, Judge.

[1] A judgment on the pleadings was inappropriate. The complaint was not fatally defective, and it appears that matters outside the pleadings were presented to and considered by the court. Under these circumstances the motion for judgment on the pleadings must be treated as a motion for summary judgment. G.S. 1A-1, Rule 12(c).

[2] Summary judgment for the defendant Stallings was entered by the trial court on the basis of the release filed by the plaintiff and his attorney in consideration of the payment of the policy limits of $15,000 made by the insurer of the defendants Clanton and Joyner. This release specifically named defendants Clanton and Joyner and *"all other* persons, firms, or corporations who are or might be liable, from *all* claims of *any kind* or character which I have or might have against it, him or them, and especially because of all damages, losses or injuries . . . [arising out of subject accident] and I hereby acknowledge full settlement and satisfaction of *all* claims of whatever kind or character which I or my heirs, executors, administrators, successors or assigns may have against it, him or them by reason of the above-mentioned damages, losses or injuries."

Plaintiff urges that the release applied only to claims against defendants Clanton and Joyner, who were specifically referred to therein; that it was not intended to release any claims against the others; and that the words "all claims of whatever kind or character" are mere surplusage.

G.S. 1B-4 provides:

> *"Release or covenant not to sue.*—When a release or a covenant not to sue or not to enforce judgment is given

in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability . . . unless its terms so provide; . . . "

G.S. 1B-4 is a part of the Uniform Contribution Among Tortfeasors Act which became effective January 1, 1968, in North Carolina. It is the intent of draftsmen of such uniform acts that as much as possible, they be given uniform interpretation among those states where they are in force. *Bonar v. Hopkins,* 311 F. Supp. 130, 131 (1969), dealt with a release containing the following language:

" ' . . . sole consideration of . . . in hand paid by Valletta Inclan have released and discharged . . . and all other persons, firms or corporations from all claims . . . resulting . . . from an accident . . . . ' "

The court determined that this language was all inclusive and released even those who paid no consideration for the release. "[W]here, from the terms of the release, it must be apparent to the claimant that its execution forecloses further compensation from any source, the result is one voluntarily accepted by the claimant himself." Bonar, *supra,* at 134. By its terms, the release in the case at bar released all other persons, the latter term reasonably including the defendant, Stallings.

Other authorities are in accord with the proposition that a general release to all whomsoever bars further suits against other entities involved in the occurrence which produced the settlement with one participant that led to the release. In *Peters v. Butler,* 253 Md. 7, 251 A. 2d 600 (1969) decided under the Uniform Act adopted in Maryland, it was held that a release given to an automobile driver who struck a low brick wall marking the boundary of an apartment house parking lot, causing it to collapse on plaintiff's leg, also released the apartment owner which maintained the wall on its grounds, even though the owner paid nothing for the release and was not expressly named therein, since the instrument also released, as in the present case, " ' all other persons, firms or corporations liable or who might be claimed to be liable . . . on account of all injuries, known and unknown . . . which have resulted or may in the future develop' from the accident," and further provided, as in the present case, "that it was executed 'for the

express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.' " 251 A. 2d at 601.

In *Panichella v. Pennsylvania Railroad Co.*, 268 F. 2d 72 (3rd Cir. 1959), *cert. denied*, 361 U.S. 932 (1960), the railroad directed its employee to go to a restaurant, eat breakfast, and bring back lunch for other employees. While en route the employee slipped and fell on an icy sidewalk abutting Warner Brothers' property. Warner Brothers' insurance company negotiated a settlement with the employee, and the latter released Warner Brothers and all other persons, firms and corporations of and from any and all claims, etc., arising by reason of the accident. The court held that the release barred the employee's F.E.L.A. claim against the railroad, although it was not named in the release and had no knowledge of the settlement or of the release until over a month after its execution. Commenting upon this case in *Canillas v. Joseph H. Carter, Inc.*, 280 F. Supp. 48, 53 (S.D. N.Y. 1968), Judge Bryan, in discussing the three rules as to joint tortfeasors—the common law rule that a release to one releases others, the Restatement rule that a release to one releases all unless there is a reservation of right, and the Uniform rule that the release of one does not discharge others from liability unless the release so provides—said of the *Panichella* release: "There, the release . . . expressly provided for the discharge of all other persons, firms and corporations from liability, and thus was a bar under any of the three rules which have been mentioned."

In *Hasselrode v. Gnagey*, 404 Pa. 549, 172 A. 2d 764 (1961), also decided under the Uniform Act, Hasselrode sustained injuries when Carnegie's automobile, in which he was a passenger, collided with a dairy company truck. Hasselrode executed a release to Carnegie discharging him and "any and all other persons . . . from any and every claim" resulting from the collision. In holding that the quoted language also released the dairy company, the court stated: "The intent of the parties must be gleaned from the language of the release: such language clearly and unequivocally shows the intent of the parties that Hasselrode was releasing his claims not only against Carnegie but against 'any and all' persons, including the Dairy Company, involved in the accident of August 24, 1956." 172 A. 2d at 765. In commenting on this case, Corbin states: "All such persons enjoy the benefits of a release for which they gave nothing, and of which they knew nothing, as third party donee

beneficiaries. And this rule was adopted and applied in a jurisdiction (England) that even today denies that any one not in 'privity' can be a third party beneficiary of any contract." 4 Corbin, Contracts, § 931, p. 254, n. 54 (Supp. 1971).

A similar covenant not to sue, containing much the same language as the release in this case, was construed in *Sell v. Hotchkiss,* 264 N.C. 185, 186, 141 S.E. 2d 259, 260 (1965): " . . . the undersigned . . . does hereby covenant and agree to forever refrain from instituting . . . any claim or suit against . . . *and* . . . all other persons, firms and corporations for whose acts and to whom they or any of them might be liable, . . . " Further in the agreement appears the phrase on which the *Sell* decision rests, and which distinguishes the case at bar: "that all rights which the undersigned may have to proceed against all parties other than said parties are expressly reserved; . . . " Applying this language to G.S. 1B-4 would mean that the "terms so provide" that there is a reservation of rights to sue.

We hold that the subject release, by its express terms, provided for the discharge and release of all other tortfeasors from all other claims resulting from the subject release on 10 August 1974, including both the defendant Stallings and his insurer, Nationwide Mutual Insurance Company.

[3] The order appealed from provided that the court took no action with respect to the entry of default (erroneously referred to as default judgment) against the defendant Stallings, but added that the default entry "shall not be used as a basis . . . to obtain judgment against Nationwide Mutual Insurance Company." An entry of default was made by the Clerk of Superior Court on 17 February 1975. The release was executed by the plaintiff and his attorney on 6 March 1975. An entry of default under G.S. 1A-1, Rule 55(a) is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter. Shuford, N. C. Civil Practice and Procedure, § 55-3 (1975). The defendant had the right to notice of hearing under Rule 55(b)(2) before default judgment, and the judge could set aside the default entry under Rule 55(d) for good cause shown. At most, the effect of the entry of default was a finding of liability; at least, the defendant Stallings had the right to appeal and defend on the yet undetermined issue of damages. Therefore, at the time of executing the release, the plaintiff had a claim for damages against the defendant Stallings and this claim was discharged by the

release. And though the trial court in its order found that it was taking no action with respect to the entry of default, the order thereafter rendered summary judgment in favor of both the defendant Stallings and Nationwide Mutual Insurance Company and dismissed the action against them.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DAVID WILLIAM WISE

No. 7510SC583

(Filed 3 December 1975)

1. **Safecracking— use of tools to open safe — sufficiency of evidence**

The State's evidence in a prosecution for safecracking was sufficient to raise an inference that the safe in question was forced open by the use of tools where it tended to show that a pickax was found in the office from which the safe was removed; a truck stolen at the same time as the safe, and found near the safe, contained a variety of tools; the safe when found was badly battered with damage and scratches on its top; and the door of the safe had been ripped off.

2. **Criminal Law § 86— defendant's testimony as to deal with officer — another charge — no impeachment**

Where defendant testified on direct examination that he had a deal with a police officer regarding another charge, the trial court properly allowed the district attorney to clarify the matter on cross-examination.

3. **Criminal Law § 169— exclusion of testimony — absence of answers in record**

Defendant failed to show that he was prejudiced by the exclusion of testimony where the record fails to show what the testimony would have been had the witness been allowed to answer the questions propounded.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 12 February 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 22 October 1975.

The defendant, David William Wise, was charged in separate bills of indictment, proper in form, with safecracking in violation of G.S. 14-89.1, and the felonious larceny of a 1974 Ford truck belonging to Mimsco Co., Inc.

The jury found defendant guilty as charged in both bills of indictment. From judgments imposing a prison sentence of twelve (12) to eighteen (18) years on the charge of safecracking and five (5) years on the charge of felonious larceny, the prison sentences to run consecutively, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Ralf F. Haskell and Associate Attorney Sandra M. King for the State.

Weaver, Noland & Anderson by William Anderson for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the denial of his motion for judgment as of nonsuit in the case charging him with safecracking. The evidence, when considered in the light most favorable to the State, tends to show the following:

The defendant, David Wise, worked for Mimsco Company, Inc. (Mimsco) occasionally as a "laborer," the last time being Saturday, 16 November 1974. At the end of that day, he was paid out of the petty cash box along with several other laborers. They stood outside the office in a room where keys to Mimsco's trucks were kept. There was also visibility from that room through a doorway into the office where the safe was kept. After all the laborers were paid that day, the safe was secured along with the building, and the Mimsco employees went home.

Otis Edmundson, owner of the Person Street Grill, testified that he and defendant were "right good friends" and that defendant was a regular customer of his. On 17 November 1974 at about 6:30 p.m., defendant was in the Person Street Grill. He wanted to rent Edmundson's car for $50.00 but Edmundson refused. Defendant told Edmundson he wanted the car so he could "get a safe." When Edmundson refused to rent his car, defendant responded: "Okay, so I will go steal me one." Defendant then left.

At about 8:30 or 9:00 p.m., defendant returned and told Edmundson that he had stolen a '74 truck. He then showed Edmundson the truck parked outside the back door of the Grill. It was a white Ford truck with bins on the side of it. There were pipes and other things sticking out the back of the truck.

On Monday, 18 November 1974, Edmundson again talked with defendant. Defendant told him that "him and some more guys got a safe" Sunday night. Defendant said there was over $1,500.00 in the safe and that he had bought a car with $200.00 of the money. Edmundson described the car as a white Oldsmobile.

Donald Bryant, vice president of Mimsco, testified that when he came to work on Monday, 18 November 1974, a white '74 Ford truck with bins on the side was missing. The truck was a fully equipped electrician's truck, containing drills, hand tools, hammers, bending equipment, pliers, screwdrivers, and other equipment. In addition, the safe in the office had been ripped off the stand connecting it to the floor and was likewise gone. The office was in a "shamble" and there was a "pickax" sitting on the floor. Bryant also found on the floor a piece of carbon paper with a heel mark imprinted on it which he turned over to the police.

On Wednesday, 20 November 1974, defendant came to the police station looking for Detective McLamb. Defendant was intoxicated at the time and said he had information about a truck. Detective Ausley informed defendant that McLamb was on a hunting trip but that he was also working on that same case. After some discussion, Ausley and defendant drove out to the Neuse River in defendant's car. Defendant and Ausley went down a dirt road, where defendant showed Ausley the white '74 Ford truck which had been stolen from Mimsco. Scattered around the area was a large amount of debris, and tools were lying about in and around the truck. Mimsco's safe was lying down an embankment between the truck and the river. The safe was "badly battered." The door had been ripped off and there were "places around the top of the safe where it had been apparently damaged and scratched up."

When Ausley and defendant returned to the police station, Ausley removed defendant's shoes. Subsequent analysis by an expert from the State Bureau of Investigaiton revealed that the right shoe was the same shoe which had made the heel mark on the carbon paper found in Mimsco's office.

The State offered, in addition, testimony of Loy Etheridge, an employee of Sir Walter Chevrolet Company. He testified that on Monday, 18 November 1974, defendant had purchased a 1960 white Oldsmobile, paying $131.25 in cash.

[1] Defendant argues that the evidence was insufficient to raise an inference that the safe in question was forced open "by the use of explosives, drills, or tools." We do not agree. The evidence tending to show that a "pickax" was found in the office from which the safe was taken; that a truck stolen at the same time as was the safe, and found near the safe, contained a variety of tools; that the safe when found was "badly battered" with damage and scratches on its top; and that the door had been ripped off, in our opinion, is sufficient to raise an inference that the safe was forced open by the use of tools. The evidence is sufficient to require the submission of the case to the jury and to support the verdict.

Defendant's remaining assignments of error relate to the admission and exclusion of testimony. First, defendant contends the court erred in "admitting into evidence the incriminating statements obtained from the defendant prior to the Miranda warnings." All of the exceptions upon which this contention is based relate to findings of fact and conclusions of law made by the trial judge after a voir dire hearing to determine the admissibility of the testimony of Detective W. E. Ausley regarding defendant's coming to the police station to tell the officer that he had some information as to the whereabouts of the stolen truck. These exceptions raise the question of whether the evidence adduced at the voir dire hearing is sufficient to support the facts found and whether such facts support the conclusions of law made by the trial judge. Defendant does not argue either of these questions. However, the record is replete with evidence supporting the facts found, and these facts support the conclusion that all of the statements made by defendant were voluntary. There is nothing in the record to suggest that defendant was in custody or under any type of restraint or that he was even under investigation. Furthermore, none of the statements attributed to him could be said to be incriminating. Although the question is not properly presented, we hold the testimony the defendant has attempted to challenge by this assignment of error was clearly admissible.

[2] Next, citing *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), and *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1971), defendant contends the court erred in overruling defendant's objections to a question on cross-examination. The record discloses that on direct examination defendant testified: "I was going to see Mr. McLamb. On account of a deal that we

had going between us on another charge. It was a deal to furnish him information that would bust Billy Ray West." In response to the district attorney's cross-examination with respect to the charge resulting in the deal with Officer McLamb, defendant testified:

> "It was supposed to be a B and E [breaking and entering]. Mr. McLamb caught me inside the Person Street Tavern. And he told me that if I would help him out, that he would suggest to the District Attorney's office that I be allowed to plead to a misdemeanor in that case instead of a felony."

Clearly defendant opened the door to the question complained of. We think it would have been grossly unfair to allow defendant to suggest on direct examination that he had a "deal" with a police officer regarding another charge and not permit the district attorney to clarify the matter by cross-examination. In any event, we do not agree as argued by defendant that "[t]he question here propounded to the defendant . . . was one specifically prohibited by the above case law." This assignment of error is overruled.

[3] Finally defendant contends "[t]he Court erred in sustaining the State's objections to defendant's questions of Detective Ausley as to whether he was familiar with a letter from or communication with Detective McLamb seeking Mr. Wise's assistance . . . . " We have examined the two questions to which objections were sustained. The first seeks to elicit a response concerning the contents of a letter. The second question uses the more general term "communication" rather than "letter," but it likewise is designed to have Detective Ausley testify to the verity of the contents of a communication to which he was not privy. There is nothing in the record to indicate what Ausley's testimony would have been had he been allowed to answer the questions propounded. Thus, the defendant has failed to show that he was prejudiced by the court's sustaining the State's objections to the two questions. This assignment of error is not sustained.

We hold defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. CLEVELAND ABRAMS

No. 7510SC599

(Filed 3 December 1975)

1. **Criminal Law § 163— failure to except to charge or request instructions — no error shown**

The trial court did not err in instructing the jury in a kidnapping and assault case; moreover, defendant did not object to the trial court's review of the evidence at trial, nor were there any requests for additional instructions regarding defendant's contentions.

2. **Assault and Battery § 16— assault with deadly weapon charged — instruction on simple assault proper**

In a prosecution for kidnapping and assault with a deadly weapon, any confusion that might have arisen because the court at one point in its charge failed to state that one of the possible verdicts was "guilty of simple assault" was removed when in response to a question from the jury the court clearly declared and explained the difference between assault with a deadly weapon and simple assault, as it related to the charge of assault in this case, and the court specifically instructed the jury that it might return a verdict of guilty of simple assault.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 18 April 1975 in Superior Court, WAKE County. Heard in the Court of Appeals 23 October 1975.

The defendant was charged in a three-count bill of indictment, proper in form, with kidnapping Cathy Lynn Ray, kidnapping Daniel Sam Boney, and assaulting Daniel Sam Boney with a deadly weapon inflicting serious injury. The defendant pleaded not guilty to each charge and a trial was held before a jury.

The State's evidence tended to show: On Saturday night around 9:00 or 9:30 p.m., 21 December 1974, Daniel Boney and Cathy Lynn Ray, ages eighteen and sixteen respectively, were parked in Boney's car in "a little cul de sac" off Morningside Drive. Morningside Drive intersects with Blue Ridge Road and is in a development called Meredith Woods just outside Raleigh. They had been sitting in Boney's car talking for about 20 to 30 minutes when Boney looked out his window and saw the defendant walking toward the car. The defendant identified himself as a security guard and asked to see Boney's driver's license. Boney cracked the window, turned on the inside light, and showed his license to the defendant. Defendant gave the license

back and asked Boney to drive him to his patrol car. When Boney refused, the defendant broke a beer bottle on the side of the car, opened the door, and held the broken bottle against Boney's side. Defendant then reached over and unlocked the back door and got in the back seat. At that point Boney agreed to take defendant to his car if defendant would put down the bottle. The defendant dropped the bottle outside the car. As they began to drive off, the defendant "shuffled and mentioned that his pistol in his back pocket hurt him."

Boney drove the car out onto Blue Ridge Road. When they came to a small dirt road, defendant told Boney to turn, but Boney refused. Instead he drove past the dirt road and pulled over to the side of Blue Ridge Road, saying, "This is as far as we are going; we're not going to go any further." Defendant grabbed Cathy Ray and held something to her throat, saying it was a knife. Boney then agreed to drive down the dirt road. When they came to a large mud puddle in the road, Boney stopped. Boney turned toward Cathy, asking the defendant to let her go; and the defendant hit Boney in the face with his fist. Boney climbed into the back seat and fought with defendant who had a pair of needle-nose pliers he had taken out of Boney's tool box. Cathy tried to take the pliers away, but defendant hit her and hit Boney and finally succeeded in pinning Boney on the seat. He instructed Cathy to get into the driver's seat and the defendant got into the front seat. The defendant grabbed Cathy again and Boney brought his feet around and kicked the defendant. Cathy ran from the car and the defendant fled. In the struggle, Boney had been cut and bruised on the face and had received a gash on his leg from the needle-nose pliers which required stitches.

The defendant introduced two witnesses who testified that on the day of the events described, the defendant was with them. Mary Williams testified that defendant had helped her do some odd jobs around her house during the day and that he had left around dark. Daniel Booker testified that the defendant came to his house just before dark and stayed there all night, attending Booker who was disabled because of arthritis and lung problems.

The jury returned verdicts of guilty of false imprisonment of Boney, guilty of assault on Boney with a deadly weapon, and guilty of false imprisonment of Ray. From judgments imposing

consecutive prison sentences of two years in each case, defendant appealed.

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

Edward S. Finley, Jr., for defendant appellant.

HEDRICK, Judge.

[1] Defendant's arguments I, II, & IV all relate to the trial judge's review of the evidence in his charge to the jury. Specifically, the defendant contends that the judge erred by "misstating material facts," by "failing in its recapitulation of evidence to mention any of the specific evidentiary points that might lead the jury to conclude that the State had failed to prove defendant's guilt beyond a reasonable doubt," and by "articulating the contentions of the State and failing to articulate the contentions of the defendant," and that as a result, the trial judge inadvertently expressed an opinion on the evidence in violation of G.S. 1-180.

We note at the outset that there were no objections to the judge's review of the evidence at trial nor were there any requests for additional instructions regarding defendant's contentions. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973). Furthermore, we have examined each of the exceptions upon which these assignments of error are based and find them to be without merit. A comparison of the instructions by the judge with the testimony given at trial shows no misstatement of material facts but rather a fair and accurate recapitulation of the evidence. Moreover, the judge is not required to review all the evidence or to "mention specific evidentiary points that *might* lead the jury to conclude that the State had failed to prove defendant's guilt beyond a reasonable doubt." His duty is only to charge the jury on all substantive features of the case arising on the evidence. *State v. Hornbuckle,* 265 N.C. 312, 315, 144 S.E. 2d 12, 14 (1965) ; *State v. Everette, supra.*

Finally, the record shows that the defendant's only evidence was brief testimony from two witnesses as to an alibi. The fact that more time was devoted to the State's evidence than to that of the defendant's was to be expected since the State presented more evidence. *State v. Grant,* 19 N.C. App. 401, 413, 199 S.E. 2d 14, 22 (1973) ; *cert. denied* 284 N.C. 256, 200

S.E. 2d 656 (1973). Under the requirements of G.S. 1-180, the trial judge fairly, correctly, and adequately instructed the jury on the essential features of the case. This assignment of error is overruled.

[2] In defendant's argument V, he contends the trial court erred "in giving conflicting instructions on the possible verdicts to the charges of assault with a deadly weapon inflicting serious injury" as to the assault on Daniel Boney. It is true, that at one point in his charge, the judge instructed the jury that with respect to the charge of assault with a deadly weapon inflicting serious injury on Boney, the jury could return a verdict of guilty of assault with a deadly weapon inflicting serious injury or guilty of assault with a deadly weapon or not guilty. However, at all other places in the charge, the court correctly declared and explained the law arising on the evidence given in the case as it related to the charge of assault with a deadly weapon inflicting serious injury on Boney and all the lesser included offenses of that charge including the lesser included offense of simple assault. Assuming, without deciding, that it was necessary for the court to instruct the jury on the lesser included offense of simple assault in the case, any confusion that might have arisen because the court at one point in its charge failed to state that one of the possible verdicts was "guilty of simple assault" was clearly removed when in response to a question from the jury, the court clearly declared and explained the difference between assault with a deadly weapon and simple assault, as it related to the charge of assault on Boney. The judge also specifically instructed the jury that it might return a verdict of guilty of simple assault as to the charge of assault on Boney. This argument is without merit.

Next defendant contends the court erred in sustaining the State's objections to a series of questions asked by defendant's counsel on cross-examination of Officer Brinson regarding the witness' interrogation of the defendant. While some of the questions put to Officer Brinson on cross-examination might have been relevant, the answers are not in the record; and defendant has failed, therefore, to show that he was in any way prejudiced by the rulings complained of. These exceptions are overruled.

The defendant has additional assignments of error which he has brought forward and argued in his brief. We have ex-

amined all of the assignments of error and find the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

ROBERT L. SWANEY INDIVIDUALLY AND ROBERT L. SWANEY AS GUARDIAN AD LITEM FOR JANE C. SWANEY, MINOR v. WILLIAM A. SHAW

No. 7526SC511

(Filed 3 December 1975)

Animals § 2— child bitten by dog — statute requiring confinement of vicious animals — failure to instruct

In an action to recover damages and medical expenses for injuries received by minor plaintiff when she was bitten by defendant's dog, the trial court erred in failing to instruct the jury with respect to the statute requiring the confinement or leashing of vicious animals, G.S. 106-381, where plaintiff's evidence tended to show that the dog had previously bitten other children, that the dog would bark and growl at persons going near it, that persons going to defendant's home were afraid to get out of their car because of defendant's dogs, that defendant knew of the vicious propensities of the dog, and that the dog was not confined by a fence or tied but was allowed to roam freely.

APPEAL by plaintiffs from *Chess, Judge.* Judgment entered 6 February 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 October 1975.

This is a civil action wherein the plaintiffs, Robert L. Swaney, individually and as guardian ad litem for Jane C. Swaney, his minor daughter, are seeking to recover damages and medical expenses from the defendant, William A. Shaw, allegedly resulting from the minor plaintiff having been bitten by defendant's dog. Plaintiffs requested a jury trial. From a verdict in defendant's favor and judgment entered that plaintiffs recover nothing, plaintiffs appealed.

Winstein, Sturges, Odom, Bigger and Jonas by T. LaFontine Odom for plaintiff appellants.

Caudle, Underwood & Kinsey by C. Ralph Kinsey, Jr., and Lloyd C. Caudle, for defendant appellee.

HEDRICK, Judge.

The only question requiring discussion raised by the plaintiffs' assignments of error is whether the court sufficiently declared and explained the law arising on the evidence given in the case as provided in G.S. 1A-1, Rule 51(a).

In their complaint the plaintiffs, in pertinent part, alleged:

"3. On January 17, 1971, and prior thereto, defendants were the owners and keepers of two German Shepherd dogs, known as Duchess and Fritz on and about their premises on Garrison Road in the County of Mecklenburg, State of North Carolina.

4. On January 17, 1971, and prior thereto, defendants knew or in the exercise of due care, should have known that said dogs had on many occasions prior to January 17, 1974, growled at children in the defendants' neighborhood on or about Garrison Road, had barked at children in the neighborhood, and had chased children who were on foot and on bicycles in their neighborhood, had been allowed to go about unrestrained and allowed to roam freely in the neighborhood, had on many occasions engaged in fights with other dogs in the neighborhood, had tried to bite children on many occasions, and in fact, had bitten children prior to January 17, 1971.

5. On January 17, 1971 and prior thereto, defendants knew from their dogs' past conduct, that said dogs and each of them were likely, if not restrained, to inflict personal injuries to a child or other person in their neighborhood; the defendants on January 17, 1971, and prior thereto, knew that their two dogs, and each of them, was dangerous, vicious, mischievous and ferocious; said defendants were familiar with said dogs' vicious propensity, character and habits.

6. On January 17, 1971, and prior thereto, the defendants with knowledge of the said two dogs' vicious propensities, and with knowledge of said dogs' unrestrained freedom creating a menace to the public health, continued to harbour such dogs and continued to permit said dogs to leave the defendants' premises without being on a leash and in the care of a responsible person, all in violation of N.C.G.S. 106-381.

* * *

9. On January 17, 1971, plaintiff, Robert L. Swaney, was the father of Jane C. Swaney, a minor who was born April 19, 1963.

10. On January 17, 1971, Jane C. Swaney was playing in a neighbor's yard on Garrison Road, Mecklenburg County, State of North Carolina, with her older brother and another boy; on said occasion, Jane C. Swaney, walked or ran, within about 10 feet, by one of the defendants' dogs as heretofore described, when suddenly and without warning and without any provocation, said dog, belonging to the defendants, lunged at Jane C. Swaney, knocked her to the ground, repeatedly bit her on and about her face and other parts of her body, tearing away portions of her facial tissues, fracturing her left cheekbone, nose and portions of the interior of her mouth, inflicting serious and permanent injuries to the person of Jane C. Swaney."

At trial the plaintiffs offered evidence tending to show the following:

The plaintiffs and defendant live on Garrison Road, in a residential section of Mecklenburg County. On 17 January 1971, the minor plaintiff, Jane Swaney, seven years of age, was playing with her brother Doug and Dale Rushing in the Rushings' yard, which is also on Garrison Road, approximately a quarter to a half mile up from the Shaws and eight hundred yards down from the Swaneys. The defendant owned two German Shepherd dogs, Fritz and Astor. On 17 January, Fritz had followed one of the defendant's children, Rocky, into the Rushings' yard, and was "laying down near the house." There were several other children playing at the Rushings on their basketball court. Jane, Doug, and Dale had been playing "keep away" about fifteen feet from the dog when Jane stopped playing and started to go into the house to get some water. She was about ten feet from Fritz when the dog, without warning, attacked her. Jane had not done anything to Fritz. Fritz knocked Jane down and straddled her. He bit her on the face inflicting severe lacerations over the face, torn tissues and a fracture of the nose. Jane's brother Robby, who was playing on the basketball court, heard Jane's screams and ran over to her. He had to pull Fritz off of her. Because of her wounds, she was hospitalized and later had to undergo plastic surgery.

Plaintiffs offered, in addition, testimony by Grady Dale Rushing that, prior to 17 January, one of the Shaws' two dogs had bitten him once and torn his pants leg. He testified that when he went to the Shaws' house the dogs "would bark and growl" at him and "nip" at him. When he went with people in an automobile to the Shaws' house, no one would get out of the car for fear of the dogs. Instead, they would blow the horn and wait for someone to come out of the house.

Doug Swaney testified that prior to 17 January the dogs chased him on his bike and once Fritz had nipped his leg and torn his pants. When he was in a car which was driven to the Shaws, he likewise would blow the horn and wait for someone to come out because of fear of the dogs.

Eva Swaney, the minor plaintiff's mother, testified that the bite on Doug's leg had broken the skin and she had called and talked with Mr. Shaw about the dog bite and had inquired whether the dogs had been vaccinated. Also prior to 17 January, she had complained on several occasions to the Shaws' son, Rocky, about the dog, and had asked him to not let the dog come up the street to their house. Fritz often fought other dogs around the Swaneys' home, and the Swaneys feared that someone would get hurt.

Rocky Shaw testified that his father had no fence in which to contain the dogs, either before or after the incident on 17 January, nor had he ever seen his father tie up Fritz. Instead Fritz had been free to roam and would follow Rocky when he went off up the street.

While the judge correctly undertook to declare and explain the law arising on the evidence given in the case with respect to the common law rule of keeping and maintaining a domestic animal which the defendant knew, or by the exercise of ordinary care should have known, was of vicious propensity, we need not discuss the adequacy of this instruction, since a more significant and prejudicial error is apparent in the court's failure and refusal to instruct the jury with respect to G.S. 106-381, which provides:

> *Confinement or leashing of vicious animals.*—When an animal becomes vicious or a menace to the public health, the owner of such animal or person harboring such animal shall not permit such animal to leave the premises on

which kept unless on leash in the care of a responsible person.

"The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se*, unless the statute, itself, otherwise provides . . . . " *Ratliffe v. Power Co.*, 268 N.C. 605, 610, 151 S.E. 2d 641, 645 (1966). *Accord, Gray v. Clark*, 9 N.C. App. 319, 176 S.E. 2d 16 (1970), *cert. denied* 277 N.C. 351 (1970).

"[W]here a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty, he is liable to those for whose protection or benefit it was imposed for any injuries or damage of the character which the statute or ordinance was designed to prevent, and which was proximately produced by such neglect, provided the injured party is free from contributory negligence." *Carr v. Transfer Co.*, 262 N.C. 550, 553, 138 S.E. 2d 228, 231 (1964).

It seems clear that G.S. 106-381 was enacted for the specific purpose of protecting the public from dogs which have become vicious or a menace to public health. When the evidence in the present case is considered in the light most favorable to the plaintiffs, it is sufficient, in our opinion, to raise an inference that the defendant violated the statute by letting his dog, Fritz, which had become vicious or a menace to the public health, to leave the premises on which kept, without being on a leash and in the care of a responsible person, and that as a direct and proximate result of the defendant's violation of the statute, the defendant's dog, Fritz, attacked and bit the minor plaintiff causing the injuries and damages herein complained of.

Because the court failed to declare and explain the law arising on the evidence given in the case with respect to the evidence tending to show that the defendant violated G.S. 106-381, the plaintiffs are entitled to a new trial.

New trial.

Chief Judge BROCK and Judge CLARK concur.

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

No. 7512SC579

(Filed 3 December 1975)

1. **Criminal Law § 144— judgment — modification in session proper**

During the session a judgment is *in fieri*, and the trial court has power prior to the expiration of the trial session to modify, amend or set aside the judgment; however, it is the general rule that the trial court loses jurisdiction to modify or amend a judgment after the adjournment of the trial session.

2. **Criminal Law § 144— court adjourned sine die — modification of judgment erroneous**

The trial court's instruction to the bailiff to adjourn court *sine die* terminated the session, and the trial judge was without authority to modify the judgment he had already rendered which changed defendant's term of imprisonment from 20 to 30 years.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 28 March 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 22 October 1975.

Defendant was tried upon a bill of indictment charging him with the felony of murder and upon a bill of indictment charging him with felonious breaking or entering and felonious larceny. The jury returned a verdict of not guilty on the murder indictment, but found defendant guilty as charged of the felonious breaking or entering and of the felonious larceny. Judgment of imprisonment was entered on the two guilty verdicts.

Attorney General Edmisten, by Associate Attorney David S. Crump, for the State.

Cherry & Grimes, by Sol G. Cherry, for the defendant.

BROCK. Chief Judge.

The only question raised on this appeal pertains to the manner and time in which final judgment was entered. Although the evidence has no bearing upon this appeal, defense counsel has caused it to be included in the record on appeal, and the district attorney made no objection to its inclusion. The evidence takes up 114 pages of the printed record on appeal. This unnecessary printing cost of approximately $188.10 will have to be paid by the State because the defendant is indigent.

This type of irresponsible inclusion of unnecessary matter in the record on appeal is largely responsible for the provision in our new rules allowing such costs to be taxed personally against counsel. However, the provisions of the new rules are effective for cases in which notice of appeal is given on or after 1 July 1975. Notice of appeal in this case was given prior to that effective date.

We now turn to the only question presented by this appeal. After the jury returned its verdicts of guilty of felonious breaking or entering and guilty of felonious larceny, the trial judge, after a determination that defendant would not benefit from treatment and supervision as a committed youthful offender, dictated a judgment on 28 March 1975 providing for imprisonment for a term of ten years on the felonious breaking or entering conviction and a successive term of ten years on the felonious larceny conviction (a total of 20 years).

Defendant gave notice of appeal, and the trial judge appointed appellate counsel to perfect the appeal. This Court takes notice that 28 March 1975 was a Friday.

The agreed record on appeal next shows the following: "The presiding judge then instructed the bailiff to adjourn Court *sine die* which the bailiff then did. Thereafter, within approximately ten minutes the following occurred."

The trial judge dictated the following entry:

> "Let the record show that in the presence of Mr. Sol Cherry, attorney for Tommy Edward Jones, alias Tom Bryant, and the District Attorney, that the Court has been informed that the defendant now has a case on appeal to the Court of Appeals of North Carolina, in which a term of imprisonment of ten years was imposed. The Court is going to commence the term of imprisonment, imposed as relates to the two counts, the ten years term of imprisonment in count one in the bill of indictment, 74-CR-39361, to commence at the expiration of this ten year term of imprisonment imposed in this case 74-CR-16797. The ten year term of imprisonment for felonious larceny, as charged in the bill of indictment is to commence at the expiration of the ten years imposed as to the first count in the bill of indictment 74-CR-39361, in which the defendant was convicted of felonious breaking and entering as charged in the bill of indictment.

EXCEPTION: This constitutes
DEFENDANT'S EXCEPTION NO. 7

"Now, the Court has also been informed that this offense occurred while the defendant was out on bond in Case Number 74-CR-16797. The Court is also aware of the fact that the defendant, upon being transferred to the North Carolina Department of Corrections for safekeeping in connection with these cases which have just been tried, attempted to escape, and at which time one of the co-defendants was killed and the defendant, Tommy Jones, was shot. And for that reason the Court sets the Appearance Bond at $50,000.00."

Thereafter a judgment was signed on 28 March 1975 by the trial judge providing that the ten-year sentence in the felonious breaking or entering conviction shall commence "at the expiration of the ten (10) year term of imprisonment imposed in 74-CR-16797 which is presently on appeal to the North Carolina Court of Appeals, if same is affirmed," and providing that the ten-year sentence for the felonious larceny conviction shall commence at the expiration of the sentence for the felonious breaking or entering (a total of 30 years).

[1] During the session a judgment is *in fieri,* and the trial court has power prior to the expiration of the trial session to modify, amend or set aside the judgment. *State v. Godwin,* 210 N.C. 447, 187 S.E. 560 (1936); 5 Strong, N. C. Index 2d, Judgments, § 6. However, it is the general rule that the trial court loses jurisdiction to modify or amend a judgment after the adjournment of the trial session. *State v. Duncan,* 222 N.C. 11, 21 S.E. 2d 822 (1942); 5 Strong, N. C. Index 2d, Judgments, § 6.

[2] This case will be resolved by a determination of when the trial session terminates or adjourns. Clearly a trial session terminates or adjourns by expiration of the time set for the session by the Chief Justice, unless properly extended by order. In other instances our cases hold that when the judge finally leaves the bench at any session of court, the session terminates or adjourns whether the time originally set for the session has expired or not. *See Green v. Insurance Co.,* 233 N.C. 321, 64 S.E. 2d 162 (1951); *State v. Duncan, supra; State v. McLeod,* 222 N.C. 142, 22 S.E. 2d 223 (1942); *State v. Godwin, supra; Dunn v. Taylor,* 187 N.C. 385, 121 S.E. 659 (1924); *Cogburn*

v. Henson, 179 N.C. 631, 103 S.E. 377 (1920); *May v. Insurance Co.*, 172 N.C. 795, 90 S.E. 890 (1916). In our opinion the orderly administration of justice requires that a trial session shall terminate or adjourn upon the announcement in open court that the court is adjourned *sine die*, as was done in this case. The term *sine die* means "without assigning a day for a further meeting or hearing. . . . a final adjournment." Black's Law Dictionary, 4th Ed.

The trial judge could have announced a recess to enable him to determine if the work of the session was complete, but this he did not do. He instructed the bailiff to announce adjournment *sine die*. In our opinion this announcement terminated the session, and the trial judge was without authority to materially modify or amend the judgment he had already rendered. Obviously the amendment or modification which changed the term of imprisonment from a total of 20 to a total of 30 years was a material amendment or modification.

The judgment appealed from is vacated, and this cause is remanded to the Superior Court, Cumberland County, for entry of judgment and commitment in accordance with the judgment announced by Judge Brewer before the adjournment *sine die*.

Vacated and remanded.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM HERSEY AUTRY AND JAMES ROLAND SHELLEY

No. 7512SC633

(Filed 3 December 1975)

1. **Criminal Law § 92— consolidation proper**

Defendant was not prejudiced by the consolidation of his case with that of another who was charged with the same crime.

2. **Criminal Law § 163— broadside assignment of error to charge**

Where defendant assigned error to the additional instructions by the trial judge advising the jury of the consequences of a failure to reach a verdict, but defendant did not indicate the exact portion of the instructions to which exception was taken, the assignment of error was broadside and ineffective.

State v. Autry

APPEAL by defendants from *Winner, Judge.* Judgments entered 27 February 1975 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 November 1975.

Defendants were charged in bills of indictment (1) with the felonious breaking or entering of the Taco Bell Restaurant on Bragg Boulevard, Fayetteville, on or about 31 October 1975, and (2) with the felonious larceny therefrom of currency and coins.

Charges of conspiracy to commit felonious larceny (Cumberland County Nos. 74CR42496 and 74CR42497) were dismissed by the trial judge. In charges of safecracking (Cumberland County Nos. 74CR37826 and 74CR37827) the jury returned verdicts of not guilty.

The jury found each defendant guilty of felonious breaking or entering and guilty of felonious larceny. Judgments of imprisonment were entered as to each defendant.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Brown, Fox and Deaver, by Bobby G. Deaver, for William Hersey Autry.

John A. Decker, Assistant Public Defender, for James Roland Shelley.

BROCK, Chief Judge.

Autry's Appeal

[1] Defendant Autry assigns as error that the charges against him were consolidated, over his objections, with the charges against defendant Shelley for trial. "Ordinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s)." *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972).

Autry's objection to the consolidation and his argument upon this appeal are that the State relied upon his association and friendship with Shelley for a showing of guilt by association. He further argues that Shelley's close association with an accomplice who testified for the State would implicate Shelley

and that Autry's association with Shelley would implicate Autry. Thus he argues that the State sought only to show Autry's guilt by association. This is a specious argument. The testimony of the accomplice indicated a closer association between the accomplice and Autry than between the accomplice and Shelley. But be that as it may, the testimony of the accomplice clearly put Autry on the scene of the offense, aiding and abetting in every aspect. This entire argument against consolidation is without merit.

Defendant Autry next assigns as error that the trial judge began to sentence Shelley in the presence of the jury while the jury was still in the process of deliberating upon its verdict as to Autry. Autry argues that this would somehow signify the judge's approval of the conviction of Shelley and unduly encourage the jury to find Autry guilty as well. While the argument is somewhat innovative, we do not need to consider it. The record on appeal affirmatively shows that this assignment of error and argument are not supported by the facts.

The jury returned to the courtroom and announced that it had reached verdicts upon the charges against Shelley but not upon the charges against Autry. The clerk took the verdicts of guilty of felonious breaking or entering, guilty of felonious larceny, and not guilty of safecracking upon the charges against Shelley. Immediately thereafter the judge instructed the jurors that they were excused for the evening recess, gave them instructions upon the duties during the recess, and instructed them to return at 9:00 a.m. the next day to resume their deliberations. The record on appeal then contains the following statement:

"THE JURY EXCUSED FOR THE EVENING RECESS."

The court announced that it would hear motions, and counsel for Shelley made several motions which were denied. Then the judge asked counsel for Shelley if he would like to be heard on the question of sentencing, but hearing on the question was postponed. This is the first mention of sentencing, and obviously the jurors had been excused for the evening recess for some time. Actually Shelley was not sentenced until after the verdicts were returned against Autry. This assignment of error is without merit.

[2] Last, defendant Autry assigns as error the further instructions by the trial judge to the jury advising them of the

consequences of a failure to reach a verdict. In this assignment of error defendant has failed to indicate by brackets, parentheses, or any other identifying markings the exact portion of the instructions to which exception is taken. For this reason the assignment of error is a broadside attack on the charge and is ineffective. However, if we consider the assignment of error to be properly addressed to the entire additional instructions, we see no prejudice to defendant. It is clear that the trial judge told the jurors that none of them was to return a verdict against his or her conscientious belief. Although we do not approve of the verbosity of the additional instruction, we think the disposition of this assignment of error is governed by the opinion in *State v. Fuller*, 2 N.C. App. 204, 162 S.E. 2d 517 (1968).

Shelley's Appeal

The defendant Shelley's appeal presents the face of the record for review. We have reviewed the face of the record and find no prejudicial error.

As to each defendant, we find

No error.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. CALDWELL SPINKS AND ESTER WALTER CASSIDY

No. 7520SC474

(Filed 3 December 1975)

1. **Criminal Law § 66— identification of persons in courtroom — defendants not identified — absence of voir dire**

In a common law robbery case, the two defendants were not prejudiced by the court's failure to conduct a *voir dire* hearing to determine the admissibility of testimony by the victim identifying some of the men in the courtroom as being present at the crime where the record fails to show that defendants were identified by the victim as participants in the crime.

2. **Robbery § 4— common law robbery — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution of two defendants for common law robbery of a store proprietor where it tended to show that both defendants traveled to the store in the

same automobile with other participants in the crime, both defendants were present at the scene when the proprietor was struck over the head and robbed of $170 and fled the scene with the others in one defendant's car, and defendants shared equally with the others in the fruits of the crime.

3. **Criminal Law § 76— confessions — voir dire — sufficiency of findings**

Where only an officer testified at a *voir dire* hearing to determine the admissibility of defendants' in-custody statements and no contradictory evidence was presented, the trial court's findings that the facts were as the witness testified, that *Miranda* warnings were given to defendants and that they voluntarily waived their rights to counsel were sufficient to support admission of the statements in evidence.

APPEAL by defendants from *Winner, Judge.* Judgment entered 27 March 1975 in Superior Court, MOORE County. Heard in the Court of Appeals 23 September 1975.

This is a criminal prosecution wherein the defendants, Caldwell Spinks and Ester Walter Cassidy, were charged in a single bill of indictment, proper in form, with the common law robbery of Henry Brower of one hundred and seventy dollars ($170.00). The defendants pleaded not guilty and the cases were consolidated for trial.

The State offered evidence tending to show the following: On 19 October 1974, the defendant Cassidy was driving his car in which the defendant Spinks and three other persons, Paul Everett Chisholm, Sam Womble, and Junior Spinks, were riding. At approximately 7:00 p.m., they stopped to get cigarettes at a store owned and operated at that time by Henry Brower. It was dark and Brower was closing up, but the lights were still on inside the store. Defendant Spinks, Womble, and Junior Spinks entered the store followed soon after by Chisholm. One of the four asked for a pack of cigarettes; and as Brower bent down behind the counter to get it, one of them hit him over the head. He fell and hollered; and they took two billfolds from him containing $170.00. They ran out of the store, and Brower saw them leave in a hurry in Cassidy's car.

Chisholm, who testified for the State, said that Cassidy remained at the wheel and drove the car as it left. They rode to Pleasant Hill and divided the money equally, each getting $34.00. Chisholm did not know who had the billfolds.

Testimony by each of the defendants tended to show that they were riding around in Cassidy's car with the others on 19 October 1974. Cassidy testified that while he stayed in the car

the other four entered the store; but after about one minute, defendant Spinks came running out saying: "Let's go. All of them are in there trying to rob him." Cassidy tried to drive off, but the others came out and grabbed at the antenna and door handles. Cassidy then stopped, they all got into the car, and Cassidy drove off. Chisholm was counting the money as they drove off. Later, when they divided the money, Cassidy at first refused any money but finally took a share under pressure from the others. He later tried to give the money back to Brower, but Brower refused to take it.

Spinks' testimony was substantially the same as Cassidy's except that he testified Chisholm was the one who grabbed Brower. Spinks also took his share under protest and later tried to give it back to Brower. Both testified that there was never any plan to rob Brower and that it had not been discussed in the car at any time.

The jury returned a verdict of guilty as charged. From a judgment that defendants be imprisoned for not less than five (5) nor more than ten (10) years, they appealed.

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

Smith & Thigpen, by Dock G. Smith, Jr., and J. Stephen Gaydica III, for defendant appellants.

HEDRICK, Judge.

[1] At trial, the prosecuting witness undertook to identify some of the men in the courtroom as being present at the crime. It is not clear from the record who was ever identified or whether either of the defendants was pointed to by the witness, but counsel for defendants objected to the identification, which objection was overruled. On appeal, they argue that the court should have conducted a voir dire inquiry as to the basis of the witness's identification. Since the record before us fails to disclose that the defendants were identified at trial by Brower as participants in the crime, we do not perceive how the defendants could have been prejudiced by the court's failure to conduct a voir dire hearing to determine the admissibility of such testimony. This assignment of error is overruled.

[2] Both defendants assign as error the denial of their motions for judgment as of nonsuit. The evidence in the light most favor-

able to the State tends to show that both defendants came to the scene in the same automobile with the other participants in the crime; that both defendants were present when Brower was struck over the head and robbed of $170.00; that they fled the scene together with the others in Cassidy's automobile; and that they shared equally with the others in the fruits of the crime. In our opinion, this evidence is sufficient to require the submission of the case to the jury as to both defendants and to support the verdict. *State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (1973). These assignments of error are overruled.

[3] At trial, before Deputy Sheriff Watkins was allowed to testify as to certain "out of court" statements allegedly made by the defendants, the court conducted a voir dire to determine the admissibility of such statements, when Officer Watkins testified as to advising the defendants of their constitutional rights and the defendants executing a written waiver of those rights. At the conclusion of the voir dire, the trial court made the following findings and conclusions:

> "The Court finds the facts to be what the witness has said that they are and concludes as a matter of law that the rights required by the case of Miranda against State of Arizona were read to the defendants; that they understood the rights and they voluntarily waived any right they had to counsel before they made any statement. Whatever statements they made afterwards are admissible in the trial of this cause."

Based on an exception to the findings and conclusions, the defendant contends: "The court erred by failing to make adequate findings of fact in ruling on admissions of in-custody statements as to waiver of the defendant's rights." While more detailed findings might have been preferable, since only Officer Watkins testified on voir dire and there was no contradictory evidence presented on voir dire as to the defendants having been advised of their constitutional rights, and their execution of a written waiver of those rights, the findings and conclusions made by the trial court are sufficient. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). This assignment of error is not sustained.

The defendants have additional assignments of error which we have carefully considered and find them to be without merit. The defendants had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

GAIL ADAMS SPEARS v. SERVICE DISTRIBUTING COMPANY

No. 7529SC389

(Filed 3 December 1975)

1. **Negligence § 37— instructions unsupported by evidence**

In an action to recover for injuries plaintiff received when she was struck in the face by a water hose nozzle at defendant's car wash after she placed the nozzle under pressure back in its holster, the trial court's instruction that defendant was negligent if there was too much pressure on the hose was unsupported by the evidence, and the court's instruction that defendant was negligent if "the equipment was not in proper working order" was too broad and did not limit jury consideration to negligence supported by the evidence, where the evidence was sufficient to support jury findings that defendant was negligent only in (1) failing to post operating instructions in the stall used by plaintiff and (2) failing to provide a water pressure control switch in the stall.

2. **Damages § 16— scars affecting appearance — instructions unsupported by evidence**

The trial court erred in instructing the jury that in awarding damages it might consider any blemishes or scars which tend to mar plaintiff's appearance where the evidence showed only that plaintiff had a laceration of the eye which required three stitches, but there was no evidence that a scar or blemish tending to mar her appearance resulted therefrom.

APPEAL by defendant from *Friday, Judge.* Judgment entered 28 January 1975, in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 17 October 1975.

Plaintiff seeks to recover for personal injuries sustained when struck about the face by the nozzle of a water hose after washing her car at defendant's car wash.

On 23 September 1972, the plaintiff took her automobile into one of the stalls at defendant's car wash. She had washed her car at other similar self-service car wash facilities but never at this particular one. Before placing any money in the slot, she looked for instructions but found none. She also could not find a water control switch. When she put the quarter in the slot, she

did not have the spray nozzle in her hand; under water pressure it flew out of the holster and lodged under the wheel of her car. She picked it up and began to wash her car. Unable to find a control switch, she replaced the hose in the holster under pressure where it remained briefly, then "flew out and started beating her over the head." It struck her in the right eye breaking her glasses and cutting her eye. This injury required several stitches, caused her to miss work, and created doctor and hospital expenses.

Plaintiff called as her witness an employee of the defendant who testified that there were no operating instructions in the stall used by the plaintiff but that there were such instructions in the other stalls which directed that the switch be turned off before inserting the coin in the slot and that the switch be turned off before replacing the spray nozzle in the holster; and that there was a water control switch in good working condition located near the nozzle holster.

The jury found negligence by the defendant, no contributory negligence, and awarded $5,000 in damages. From judgment entered on this verdict, the defendant appeals.

Hamrick and Hamrick by J. Nat Hamrick for plaintiff appellee.

Morris, Golding, Blue and Phillips by Steven Kropelnicki, Jr., for defendant appellant.

CLARK, Judge.

The defendant maintained, in connection with his motor vehicle service station, a coin-operated car wash for profit. Those who entered and used the premises for the purpose of washing vehicles were invitees; to them defendant owed the duty to use ordinary care to maintain the premises in a condition reasonably safe for use in the washing of their cars; and it had the duty to warn them against dangers, which it knew or should have discovered, and which were not readily apparent to such observation as the invitees reasonably expected. *Hedrick v. Tigniere,* 267 N.C. 62, 147 S.E. 2d 550 (1966).

In the final mandate relating to the first issue, the trial court instructed the jury that "if the plaintiff . . . has satisfied you by the greater weight of the evidence that at the time and place complained of that the defendant was negligent in that, as the plaintiff contends to you, there was a duty on his part to

give her some instructions in this car wash No. 1 when she drove in to wash her car or that there was too much pressure on the hose for her on this day in question and this pressure caused her to be stricken in the eye by this nozzle and that the equipment was not in proper working order, . . . "

[1] The defendant assigns as error this instruction, contending that the judge did not explain the law arising on the evidence as to a material aspect of the case in compliance with G.S. 1A-1, Rule 51. In our opinion there was error in two aspects of this instruction. First, the evidence was not sufficient to support a finding that defendant was negligent in using too much water pressure on the hose. Obviously, there had to be sufficient water pressure for the customers to effectively wash their cars. Plaintiff had no trouble in controlling the hose under pressure when it was in her grasp. The spray nozzle jumped out of its holster under pressure only because it was not designed or intended to be placed in the holster under pressure. In the exercise of reasonable care the defendant should have instructed its customers to remove the spray nozzle from its holster before switching on the water and to switch off the water after washing and before placing it back in the holster. Defendant failed to do this in the stall used by the plaintiff. Second, the instruction that the jury could find negligence in that "the equipment was not in proper working order" is so broad and general in scope that it does not properly limit jury considerations to the negligence which is supported by the evidence. The plaintiff offered evidence which tended to show that there was no switch in the stall for cutting off the water pressure. We find that the evidence would support jury findings of negligence in that the defendant (1) failed to post operating instructions in the stall used by plaintiff, and (2) failed to provide a water pressure control switch in the stall. The instruction to the jury on the first issue should have been so limited and so applied to the evidence in the case.

[2] Defendant also assigns as error the instruction of the court that in awarding damages the jury might consider any blemishes or scars which tend to mar the plaintiff's appearance. This instruction is not supported by the evidence. Though plaintiff's evidence tended to show that she had a laceration of the eyeball which required three stitches, there was no evidence that a scar or blemish tending to mar her appearance resulted therefrom. Instructions on elements of damages are not proper

if the evidence does not reveal a basis for such an award. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40 (1964); and *Brown v. Neal,* 283 N.C. 604, 197 S.E. 2d 505 (1973).

For prejudicial error as indicated, we order a

New trial.

Judges BRITT and PARKER concur.

ELLIOTT S. SHUGAR v. H. B. REAL PROPERTY, INC.

No. 755DC476

(Filed 3 December 1975)

Landlord and Tenant § 13— lease with option to renew — contract to sell premises — landlord no longer owner — no breach of lease

Where a lease providing for rental of the barber shop section of a resort hotel for the 1972 "Season" also provided that " . . . Lessee shall have the option of rental for the 1973 season at the same rate should the present owners still own this property at that time," the trial court properly determined that defendant had not breached the lease, though defendant refused to renew the lease for the 1973 season, since defendant had entered into a contract to sell the hotel and therefore did not own the premises during the year 1973.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 9 January 1975 in District Court, NEW HANOVER County. Heard in the Court of Appeals 23 September 1975.

On 10 February 1972, plaintiff knowing that defendant was contemplating the sale of his rental property, nonetheless entered into a lease agreement for the rental of the barber shop section in what was then defendant's resort hotel at Carolina Beach. In pertinent part the lease provided for rental of the shop for the 1972 "Season" and that " . . . Lessee shall have the option of rental for the 1973 season at the same rate should the present owners still own this property at that time."

Under this agreement, plaintiff occupied and utilized the property for his wig shop business and on or about 4 September 1972 attempted to renew the lease and pursuant thereto tendered part of his 1973 season rental charge. Defendant refused plaintiff's tender, explaining again to plaintiff that the hotel was

presently listed for sale and that several potential purchasers had indicated serious interest in the property. Prior to 25 September 1972, defendant appointed Franklinton Real Estate Company its exclusive agent to sell the hotel. In December 1972 defendant entered into a contract with Harold Herring providing that if Franklinton did not sell the hotel within the period granted, defendant would sell the property to Herring. On 1 January 1973, Herring paid defendant $1,000 as a deposit on the purchase price. On 17 January 1973, he made an additional payment of $12,500. Plaintiff again tried to pay defendant the rental fee for the 1973 season in January 1973 and was advised that defendant already had executed a "lease-purchase" contract for the sale of the hotel and that any subsequent leasing negotiations should be pursued through the buyer, a Mr. Harold Herring. Plaintiff's subsequent contact with Herring proved fruitless; Herring had already rented the space for the next season.

Under the January 1973 "lease purchase" agreement between defendant and Herring, the latter leased the hotel and had the option to purchase the property if the Franklinton Real Estate Company failed to sell the hotel property within the time allotted to them by the defendant. When the period lapsed without Franklinton having made a sale, defendant and other interested parties executed a deed to Herring in March of 1973 which was duly recorded several months later in October of 1973.

Hearing the case without a jury, the trial court found that defendant had not breached the lease ". . . in that it [*i.e.* the defendant] had entered into a contract to sell the premises and therefore did not own the premises during the year 1973." From said judgment for defendant, plaintiff appealed.

Goldberg & Anderson, by Frederick D. Anderson, for plaintiff appellant.

Roland C. Braswell for defendant appellee.

MORRIS, Judge.

Plaintiff contends that the trial court failed to find facts sufficient to support its conclusion that defendant did not breach the lease agreement. Specifically, plaintiff maintains that the

trial court erred in its finding that defendant had relinquished ownership prior to the 1973 "Season." Plaintiff, noting that an option contract is not a sale, argues that defendant was the "owner" at the time plaintiff attempted to exercise his renewal option. We disagree.

Essentially, the issue presented for our consideration is what in fact constitutes the loss of ownership of realty ". . . within [the] purview of [a] clause in [a] lease making renewal . . . inoperative in [the] event of such contingency." 15 A.L.R. 2d, Renewal of Lease in Case of Sale, p. 1040.

In an analogous case, the plaintiff and defendant had entered into a seven-year lease arrangement whereby the " '[f]irst party (lessor) grants to second party [*i.e.* lessee] the right to renew this lease at its expiration for a like period upon like terms; providing, however, that this renewal clause shall be inoperative in event first party shall sell said building at the expiration of this lease.' " *Fox v. Adrian Realty Co.*, 327 Mich. 89, 41 N.W. 2d 486, 487, 15 A.L.R. 2d 1037, 1039 (1950). Prior to the expiration of the lease, the original lessor contracted for the sale of the particular building to plaintiff under a "land contract" and conveyed the property by deed to the plaintiff after the expiration of the then outstanding lease agreement with defendant lessee. The Michigan Supreme Court, though recognizing the general rule that a vendor retains legal title under a "land contract," held that under the facts presented, an executory land contract constitutes a "sale" and thus rendered the renewal clause under the prior lease inoperative. *Id.* at 488.

We consider the reasoning in *Fox* persuasive in this case and note that "[i]t seems settled by well-reasoned authority that the execution of an enforceable contract for the sale of leased premises is sufficient to terminate the rights of the lessee under a lease covenant granting the privilege of renewal if the lessor shall not sell, or abrogating the privilege in the event of a 'sale.' " 15 A.L.R. 2d, supra, at 1040-1041. Moreover, this rule is applicable where there is no evidence, as in this case, of anything less ". . . than a good-faith transfer of ownership or title embracing the entire premises." *Id.* at 1042.

Here the plaintiff knew when he executed the lease in 1972 that defendant was contemplating listing his hotel property for sale and knew or should have known that a sale would effectively abrogate and nullify the basic renewal provisions under their lease.

Indeed, the renewal clause in this case clearly reflected this potentiality and was obviously designed to give defendant the necessary flexibility in any future sales negotiations. We are of the opinion and so hold that the language "should the present owners still own this property at that time" contemplated a contract for sale as well as a completed sale and conveyance of the property.

No error.

Judges HEDRICK and ARNOLD concur.

EARLIN ROY LEWALLEN, EMPLOYEE v. NATIONAL UPHOLSTERY COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 7518IC607

(Filed 3 December 1975)

1. **Master and Servant § 93— workmen's compensation — denial of motion to remand for further testimony**

The Industrial Commission did not abuse its discretion in denying plaintiff's motion to set aside a workmen's compensation award and to remand the cause to the hearing commissioner for the purpose of taking further medical and lay testimony to clarify plaintiff's position.

2. **Master and Servant § 72— workmen's compensation — findings as to disability**

There was sufficient evidence in this workmen's compensation proceeding to support the Industrial Commission's determination that plaintiff was temporarily totally disabled, that he now has a 15% permanent partial disability of his right leg as a result of the injury by accident, and that he is entitled to compensation at the rate of $56 per week for 30 weeks.

APPEAL by plaintiff from the decision and award of the Full Commission of the North Carolina Industrial Commission filed 18 April 1975. Heard in the Court of Appeals 23 October 1975.

This is a proceeding under the Workmen's Compensation Act.

A claim was made by Earlin Roy Lewallen, employee of defendant National Upholstery Company, for compensation un-

der G.S. 97-2(6) for injuries sustained by accident arising out of and in the course of his employment. This case was originally heard on 7 November 1974 before Deputy Commissioner Denson who filed an Opinion and Award which allowed some benefits for total disability. However, the Commissioner terminated these on the basis that the employee refused surgery, and then awarded compensation for 15% permanent partial disability of the right leg. Thereafter, plaintiff appealed to the Full Commission and moved to set aside the award on the basis of a mistake in the medical evidence which was discovered after the award was filed. The Full Commission overruled the motion and adopted as its own the Opinion and Award of the Deputy Commissioner. Facts sufficient for an understanding of the questions raised by this appeal are set forth in the following pertinent portions of the Opinion and Award of the Commission:

"FINDINGS OF FACT

1. On May 15, 1972, plaintiff was pulling a pack of sofa bed frames, consisting of metal and wooden parts, from a stack when a frame fell and struck him from behind on his right leg between his thigh and calf of that leg. Plaintiff was knocked down and a few minutes later had an upset stomach and was feeling pain and went home.

2. Plaintiff, presently 62 years old with a fourth grade education, was out of work from the date of the injury to June 5, 1972. He saw Dr. Robert C. Johnson of High Point on May 17, 1972, who found no swelling or deformity but found tenderness on the lateral side of the knee. Dr. Johnson treated with medication and advised him to stay off his feet.

3. Dr. Eulyss R. Troxler of Greensboro saw the plaintiff on August 14, 1972. Dr. Troxler found some bowing of the right leg at the knee and tenderness over the knee. Dr. Troxler advised plaintiff to avoid unnecessary stooping and squatting, to use a cane if necessary but to continue work.

4. Plaintiff was seen by Dr. Hugh T. Wallace of High Point on September 29, 1972; by Dr. M. B. Hussey of High Point on February 16, 1973; by Dr. Johnson again on February 21, 1973; and by Dr. Ben L. Allen of Duke

University Medical Center on May 23, 1973 and July 18, 1973.

5. Plaintiff was examined and treated by Dr. Robert W. Gaines, Jr., of Duke University Medical Center on July 26, 1973, August 15, 1973 and September 14, 1973. Dr. Gaines indicated that plaintiff had two problems: (1) severe degenerative disease at the lumbosacral spine and (2) moderately severe degenerative arthritis of the right knee—a condition aggravated by his injury.

6. Plaintiff was scheduled for surgery on his knee on August 24, 1973, but decided not to have surgery. Dr. Gaines therefore gave him a disability rating on the September 14, 1973, visit of 25 per cent of his back based on the degenerative disease of the lumbosacral spine and 15 percent permanent partial disability of the right leg as a result of the arthritic condition aggravated by the injury.

7. Plaintiff has not worked since June 29, 1973, because of his physical condition. Dr. Gaines noted at the time he saw plaintiff that he was totally disabled from working. Plaintiff was therefore temporarily totally disabled from June 29, 1973, until he declined surgery and was rated by Dr. Gaines.

8. Plaintiff was examined by Dr. Blaine S. Nashold, Jr., of the Duke University Medical Center on August 15, 1973. Dr. Nashold testified as a stipulated medical expert in neurosurgery. Dr. Nashold's neurological findings in examining plaintiff's back and legs were normal.

The above Findings of Fact and Conclusions of Law engender the following additional

CONCLUSIONS OF LAW

1. On May 15, 1972, plaintiff sustained an injury by accident arising out of and in the course of his employment. G.S. 97-2(6).

2. As a result of the injury by accident giving rise hereto plaintiff was temporarily totally disabled from May 16 to June 5, 1972, and from June 30, 1973 to September 14, 1973, and he is entitled to compensation at the rate of $56.00 per week for such period. G.S. 97-29.

3. Plaintiff has a 15 percent permanent partial disability of his right leg as a result of the injury by accident and is entitled to compensation at the rate of $56.00 per week for 30 weeks beginning September 14, 1973. G.S. 97-31(15).

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned enters the following. . . ."

From the Opinion and Award of the Full Commission, plaintiff appealed.

Harold I. Spainhour, for plaintiff appellant.

Lovelace & Gill, by James B. Lovelace, for defendant appellees.

MARTIN, Judge.

[1] Plaintiff contends that a mistake in the medical evidence which was presented to the Deputy Commissioner was prejudicial to him. Further, he contends that the failure of the Full Commission to receive further evidence in its discretion to clarify the claimant's position was error. The Commission, upon an appeal to it from an opinion and award of the hearing commissioner, has the discretionary authority to receive further evidence regardless of whether it was newly discovered evidence. G.S. 97-85. We hold that the Commission did not abuse its discretion and did not commit error in denying plaintiff's motion to set aside the Opinion and Award and to remand to the hearing commissioner for the purpose of taking further medical and lay testimony. *See Harris v. Construction Co.*, 10 N.C. App. 413, 179 S.E. 2d 148 (1971).

Plaintiff further contends that there was not competent evidence in the record to support the Opinion and Award by the Full Commission.

> "The findings of fact of the Industrial Commission are conclusive and binding on appeal if supported by competent evidence in the record even though the record contains evidence which would support a contrary finding. (Citations). The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part or reject a part. (Citations). The Commission has the duty and authority to resolve conflicts in

the testimony of a witness or witnesses. If the findings made by the Commission are supported by competent evidence, they must be accepted as final truth." *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971).

[2] After considering all of the testimony in the record in the light of the foregoing well established principles of law, it is our opinion that there is sufficient competent evidence in the record to support the Commission's finding and concluding that plaintiff was temporarily totally disabled, that he now has a 15% permanent partial disability of his right leg as a result of the injury by accident, and that he is entitled to compensation at the rate of $56.00 per week for thirty weeks.

The Opinion and Award of the North Carolina Industrial Commission dated 18 April 1975 is affirmed.

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT LEE BURRIS

No. 7526SC693

(Filed 3 December 1975)

1. **Criminal Law § 26— assault with deadly weapon — discharging firearm into occupied building — two separate offenses**

Where defendant fired a shot at an individual who was standing on the porch of the house, the victim fell back into the house which was occupied by several adults and several children, and defendant then fired the shotgun at the house two or three more times, there were two separate, punishable offenses committed: discharging a firearm into an occupied building and assault with a deadly weapon with intent to kill.

2. **Weapons and Firearms— discharging firearm into occupied building — instruction improper**

In a prosecution for discharging a firearm into an occupied building, the trial court's instruction which equated knowledge of occupancy of the building with wilful and wanton conduct was erroneous.

APPEAL by defendant from *Briggs, Judge.* Judgments entered 8 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 November 1975.

In case No. 74CR42046 defendant was charged in a bill of indictment with the felony of discharging a firearm into an occupied building. In case No. 74CR42047 defendant was charged with the felony of assault with a deadly weapon with intent to kill, inflicting serious injury. The cases were consolidated for trial. Defendant was found guilty of discharging a firearm into an occupied dwelling and found guilty of assault with a deadly weapon.

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

Barry M. Storick, for the defendant.

BROCK, Chief Judge.

[1] Defendant argues that his conviction of both offenses constitutes double jeopardy because both charges grew out of the same events. The State's evidence tends to show that defendant first fired the shotgun at Willie Ray Moore who, along with his brother, was standing on the porch of Alonzo Moore's residence. Pellets from the first shot fired struck Willie Ray Moore, and he fell back into the house. Several adults and several children were in the house. Thereafter defendant fired the shotgun at the Alonzo Moore residence two or three times. The assault offense had been completed when defendant fired the shotgun two or three more times at the residence without legal justification or excuse, with knowledge that the residence was occupied by one or more persons, or when defendant had reasonable grounds to believe the residence might be occupied by one or more persons. We hold that the two offenses constituted separate, punishable offenses under the evidence in this case. *See State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971). This assignment of error is overruled.

[2] Although defendant has failed to set out with the clarity provided by the rules of appellate procedure his exception to the charge of the court, we do find the instruction of which he complains to be erroneous. The trial judge instructed the jury as follows:

> "Now, I charge that for you to find the defendant, Robert Lee Burris, guilty of discharging a firearm into occupied property, that is a house occupied by Willie Ray Moore, the State must prove three things beyond a reasonable doubt. [First, that the defendant intentionally discharged

a shotgun into the residence of Willie Ray Moore, Jr.'s father on Kenny Street, occupied by Willie Ray Moore, Jr. Second, that such property was occupied at the time that the gun was discharged and third, that the defendant, Robert Lee Burris, *acted willfully, wantonly which means that he had knowledge* that the residence of Willie Ray Moore's father was occupied by one or more persons or *that he had reasonable grounds to believe* that said property might be occupied by one or more persons."

The foregoing instruction is almost identical to the instructions in *State v. Williams,* 21 N.C. App. 525, 204 S.E. 2d 864 (1974), and in *State v. Tanner,* 25 N.C. App. 251, 212 S.E. 2d 695 (1975), both of which were disapproved by this Court. Although the foregoing instruction was taken from "Pattern Jury Instructions for Criminal Cases, North Carolina, 208.90," we hold it erroneous because it equates knowledge of occupancy of the building with wilful and wanton conduct and vice versa. The charge as given condensed two separate elements of the offense into one. We pointed out in the *Williams* case and in the *Tanner* case that a correct charge would provide that the accused would be guilty if he intentionally, without legal justification or excuse, discharged a firearm into an occupied building with knowledge that the building was then occupied by one or more persons, or when the accused had reasonable grounds to believe that the building might be occupied by one or more persons. General Statute 14-34.1 was construed to the same effect in *State v. Williams,* 284 N.C. 67, 199 S.E. 2d 409 (1973).

Because of this error in the charge, defendant is entitled to a new trial on the charge of discharging a firearm into an occupied building. We note that the sentence imposed upon the conviction of this offense under G.S. 14-34.1 exceeds the maximum allowable by law for such conviction; however, since there will be a new trial, this error is of no consequence.

We find no error in case No. 74CR42047 wherein defendant was found guilty of assault with a deadly weapon.

No error in case No. 74CR42047 (assault with a deadly weapon).

New trial in case No. 74CR42046 (discharging a firearm into an occupied building).

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. STANLEY B. FOGLER

No. 754SC598

(Filed 3 December 1975)

1. **Constitutional Law § 31; Criminal Law § 80— denial of request to examine witness's notes — absence of prejudice**

Defendant was not prejudiced by the denial of his request to examine the notes of a police officer who testified for the State where there is no evidence of what type of notes defendant sought to inspect or who prepared them, and the record does not show that the witness used the notes in his testimony or to refresh his recollection.

2. **Constitutional Law § 31; Criminal Law § 79— informing jury of codefendant's guilty plea — consent by defendant**

Defendant cannot complain of the court's statement to the jury that a codefendant and his counsel were absent from the defense table because the codefendant had entered a plea of guilty where defendant consented to the court's explanation of the absence of the codefendant.

APPEAL by defendant from *Martin (Perry), Judge.* Judgment entered 13 February 1975 in Superior Court, ONSLOW County. Heard in the Court of Appeals 23 October 1975.

Defendant and Clettis Wilbanks were each charged with felonious larceny and with conspiracy to commit felonious larceny. Without objection the cases were consolidated for trial. After the State presented its evidence, each defendant testified in his own behalf. Prior to arguments to the jury, defendant Wilbanks changed his pleas of not guilty to guilty of both charges. The court dismissed the conspiracy charge against defendant Fogler, and the case against Fogler was submitted to the jury only upon the felonious larceny charge. The jury returned a verdict of guilty of felonious larceny, and judgment of imprisonment for not less than six nor more than ten years was entered.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

Edward C. Bailey, for the defendant.

BROCK, Chief Judge.

[1] Defendant assigns as error that the trial judge denied defense counsel the right to examine notes of a State's witness, Officer Sam Hudson. At the conclusion of defense counsel's

cross-examination of Officer Hudson, counsel requested permission to inspect Officer Hudson's notes. The request was denied by the trial judge. The record on appeal is barren of evidence that Officer Hudson used notes in his testimony or that he used notes to refresh his recollection. There is no evidence of what type of notes counsel sought to inspect, and there is no evidence of who prepared the notes to which counsel referred. Under these circumstances it cannot be shown that the denial of counsel's request was prejudicial error. This assignment of error is overruled.

[2] Defendant assigns as error the explanation of the trial judge to the jury for the absence of co-defendant Wilbanks and his counsel. At the close of all the evidence, in the absence of the jury, co-defendant Wilbanks entered pleas of guilty to the charges against him. After the jury returned to the courtroom to receive instructions from the trial judge, the following instruction was given:

> "THE COURT: 'Ladies and gentlemen, by agreement of the District Attorney and counsel for the defendant, after consulting with the Court, have agreed that I should advise the jury why the defendant, Wilbanks, is not now seated at the defense table with his attorney and that the only defendant seated at the defense table is Mr. Fogler with his attorney, Mr. Mercer and while you were out Mr. Wilbanks entered a plea of guilty and what I do in that regard is a question of punishment for the Court. So you are not concerned with the case against Mr. Wilbanks anymore. You may be concerned with it, but it is not for you to decide for he has already entered a plea of guilty and in your absence, also, I dismissed the charge of felonious conspiracy against Mr. Fogler. Therefore, the case will go to the jury against Mr. Fogler only on the question of felonious larceny.' "

It seems obvious to us that defendant requested, or at least consented to, the explanation of the absence of Wilbanks. Apparently at that time defendant considered the explanation to be advantageous. He should not now be heard to complain. This assignment of error is overruled.

The remaining assignments of error brought forward and argued in defendant's brief are addressed to four phases of the trial judge's charge to the jury. We have considered each of

these, and in our opinion error prejudicial to the defendant has not been shown. In our opinion the parts of the charge addressed by these assignments of error do not constitute such error as was pointed out in *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210 (1969); *State v. Beamon,* 2 N.C. App. 583, 163 S.E. 2d 544 (1968); and *State v. Watson,* 1 N.C. App. 250, 161 S.E. 2d 159 (1968), which are relied upon by defendant. The assignments of error to the charge are overruled.

No error.

Judges HEDRICK and CLARK concur.

EQUITABLE LEASING CORPORATION v. KINGSMEN PRODUCTIONS, INC., AND ELDRIDGE L. FOX

No. 7528DC627

(Filed 3 December 1975)

Appeal and Error § 6; Rules of Civil Procedure § 54— no adjudication of all claims — premature appeal

Purported appeal from a judgment allowing plaintiff's motion for summary judgment on its claim and denying plaintiff's motion for summary judgment on defendant's counterclaim is dismissed as premature since the judgment appealed from adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties and the trial court made no finding that there was no just reason for delay. G.S. 1A-1, Rule 54(b).

APPEAL by defendants from *Weaver, Judge.* Judgment entered 27 March 1975 in District Court, BUNCOMBE County. Heard in the Court of Appeals 13 November 1975.

This is a civil action wherein the plaintiff, Equitable Leasing Corporation, seeks to recover from the defendants, Kingsmen Productions, Inc., and Eldridge L. Fox, $2,387.30 and attorney fees in the amount of $358.00 allegedly due on a contract whereby plaintiff leased to defendants a 1972 Cadillac automobile at a monthly rental of $246.43. In what appears to be an unverified complaint, plaintiff alleged that defendants "defaulted" in the monthly payments on 11 April 1974 and plaintiff took possession of the automobile, which it sold for $4,000.00, leaving a balance due on the contract of $2,387.30.

The defendants filed what appears in the record to be an unverified answer admitting execution of the contract but denying all the other material allegations of the complaint. In addition, the defendants filed a counterclaim against the plaintiff alleging that in this action the plaintiff wrongfully attached certain personal property of the defendants, and

> "[t]hat the attachment action by the plaintiff was brought without probable cause and with malice; that property of the defendant was seized as a result of the plaintiff's action and the defendant suffered damages."

On their alleged counterclaim the defendants sought to recover $2,500.00 for loss of business and injury to reputation; $5,000.00 for mental suffering; $1,500.00 for expenses to defend the action; $15,000.00 punitive damages; and such further relief as the court might deem proper.

Plaintiff, on 28 February 1975, moved "for entry of Summary Judgment in his favor on the claim for relief stated in his Complaint against the defendant, and for Summary Judgment against the Counterclaim of the defendants." In support of its motion for summary judgment, plaintiff filed an affidavit of an officer of the corporation, certain exhibits, and the deposition of the defendant, Eldridge Fox.

In opposition to plaintiff's motion, defendants filed a paper writing styled "affidavit and answer to plaintiff's motion for summary judgment" which according to this record was signed

> "GUDGER and MCLEAN
> s/ William A. Parker
> Attorneys for Defendant"

Likewise, defendants filed an affidavit of Juanita Fox and a paper writing styled "affidavit of Carolyn Geraldine Robinson," which, according to the record, was unsigned.

On 27 March 1975, the court made findings of fact from "the verified Complaint of the plaintiff, the verified Answer and Counterclaim of the defendants, Affidavits of Dowell Ricker, Juanita J. Fox, and Carolyn Geraldine Robinson, and the Deposition of Eldridge Fox," and concluded, among other things:

> "3. That there are no material issues of fact remaining to be decided in reference to the plaintiff's claim.

4. That there remains question of fact to be determined at trial in reference to the defendants' counterclaims."

and entered summary judgment for plaintiff on its claim of $2,387.30 and attorney fees, and denied plaintiff's motions for summary judgment as to defendants' counterclaim.

Defendant appealed.

Michael Edward Vaughn for plaintiff appellee.

Gudger & McLean by William A. Parker for defendant appellants.

HEDRICK, Judge.

This appeal is subject to dismissal, because the judgment from which the appeal is taken purportedly "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and the trial court did not find there was "no just reason for delay." G.S. 1A-1, Rule 54(b); *Rorie v. Blackwelder,* 26 N.C. App. 195, 215 S.E. 2d 397 (1975); *Durham v. Creech,* 25 N.C. App. 721, 214 S.E. 2d 612 (1975); *Arnold v. Howard,* 24 N.C. App. 255, 210 S.E. 2d 492 (1974).

Under the circumstances here presented, summary judgment for plaintiff is not a final judgment, and it may be revised by the trial court at any time before the entry of a final judgment adjudicating defendant's counterclaim. *Durham v. Creech, supra;* Rule 54(b).

With respect to the propriety of a directed verdict or summary judgment for the party having the burden of proof where the credibility of such party's witnesses is at issue, see *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), and *Shearin v. Indemnity Co.,* 27 N.C. App. 88, 218 S.E. 2d 207 (1975).

For the reasons stated, this appeal is dismissed and the cause is remanded to the District Court for further proceedings.

Appeal dismissed.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. ALBINE ARRINGTON

No. 753SC628

(Filed 3 December 1975)

1. **Criminal Law § 84— weapons found in car — admissibility**

A shotgun and rifle which police removed from the car in which defendant was riding when arrested for armed robbery were properly admitted in defendant's trial for that crime.

2. **Criminal Law § 76— confession — waiver of rights — findings supported by evidence**

The court's findings that defendant was given the *Miranda* warnings and freely, knowingly and voluntarily waived his rights were supported by the evidence on *voir dire* and are binding on appeal.

APPEAL by defendant from *Lee, Judge.* Judgment entered 13 March 1975 in Superior Court, CRAVEN County. Heard in the Court of Appeals 12 November 1975.

Defendant was tried on a bill of indictment charging him with armed robbery. Evidence presented by the State tended to show:

At around 8:30 p.m. on 20 November 1974, three black males, with masks over their faces, entered the EZ Food Store located on Highway 70 near the western edge of the City of New Bern. One of the men was armed with a rifle and another with a double-barreled shotgun. At gunpoint, the two employees of the store were required to lie on the floor. The robbers took both drawers of a cash register containing approximately $700 and left the store. Two customers approaching the store saw the men run to, and drive off toward New Bern in, a 1963 or 1964 dark colored Chevrolet. After entering the store, one of the customers called the New Bern Police Department and reported the robbery. The dispatcher at the police department issued a radio bulletin regarding the robbery and advised officers to be on the lookout for a dark colored Chevrolet Impala occupied by three black males.

A few minutes after receiving the radio bulletin, Officer Kepler of the New Bern Police Department, while patrolling in a police car, observed a 1964 or 1965 Chevrolet Impala with four black males in it. He stopped the Chevrolet, ordered the occupants out, and radioed for help. Two of the occupants ran but the other two, one of whom was defendant, remained and they

were placed under arrest. A rifle and shotgun were found in the Chevrolet. Defendant and the other person arrested were carried in a patrol car to police headquarters where they were interrogated and defendant admitted participation in the robbery. He stated that his part of the money was concealed in the police car that brought him to headquarters and soon thereafter the money was found in the police vehicle.

Defendant offered no evidence. A jury found him guilty as charged and from judgment imposing prison sentence of not less than 15 nor more than 20 years, he appealed.

Attorney General Edmisten, by Associate Attorney George J. Oliver, for the State.

Beaman, Kellum & Mills, by Norman B. Kellum, Jr., for defendant appellant.

BRITT, Judge.

Defendant contends first that the court erred in allowing Officer Schoch to testify as to what was found in the Chevrolet and allowing said evidence to be admitted. We find no merit in the assignment.

[1] This contention relates primarily to the shotgun and rifle which police removed from the Chevrolet and which were admitted as evidence. We think the evidence was admissible under authority of *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971), and no useful purpose would be served in restating the principles set forth in that opinion. Furthermore, we note that while defendant objected to testimony given by Officer Schoch regarding the search, he did not object to similar, if not identical, testimony given by Officer Ringer. It is settled that ordinarily the admission of testimony over objection is harmless when testimony of the same import is theretofore, or thereafter, admitted without objection. 3 Strong, N. C. Index 2d, Criminal Law, § 169.

[2] Defendant's other contention is that the court erred in holding that he waived his constitutional rights as declared in *Miranda* and admitting into evidence incriminating statements which he allegedly made to police. This contention has no merit.

Before evidence relating to defendant's alleged statements was admitted, the court conducted a voir dire in the absence of the jury. Following the voir dire, the court found facts with

respect to defendant being fully advised of and waiving his rights and concluded that he freely, knowingly and voluntarily waived his rights. Since the court's findings are supported by competent evidence, they are binding on appeal. *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972). The findings of fact fully support the court's conclusion of law.

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

No error.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. VAL DORIS MARTIN

No. 7521SC497

(Filed 3 December 1975)

Criminal Law § 143— violation of probation conditions — sufficiency of evidence

Where the evidence tended to show that defendant, after being placed on probation, entered a plea of guilty to a charge of giving worthless checks and defendant failed to report to her probation officer, such evidence was sufficient to show that defendant wilfully violated the conditions of her probation.

APPEAL by defendant from *Walker, Judge.* Judgment entered 1 May 1975 in Superior Court, FORSYTH County. Heard in the Court of Appeals 19 September 1975.

On 11 July 1974, defendant entered a plea of guilty to a charge of misdemeanor larceny. The 12 months sentence was suspended and she was placed on three years probation and as one of the conditions of probation, defendant agreed to "report to the Probation Officer as directed . . . [and] violate no penal law of any state or the Federal Government and be of general good behavior."

Within a year of the beginning of the period of probation defendant was brought to court for violation of the conditions of probation. It was alleged that on 3 April 1975 she had entered a plea of guilty to a charge of giving worthless checks. The District Court on 16 April 1975 revoked probation and

ordered activation of the 11 July 1974 sentence, modified to six months.

Defendant appealed to the Superior Court where Probation Officer Luna P. Hollett testified that defendant had entered a guilty plea to giving worthless checks in Forsyth County District Court on 3 April 1975 and had also failed to report to her probation officer. Assistant District Attorney Howard Cole read into the record other violations alleged by the Probation Officer since her probation began in July of 1974.

Defendant's attorney tendered defendant to the court and apparently advised the court of a statement from her doctor "which I think will explain part of the problem." However, the record contains no such statement. Finally, defendant's attorney told the court that in his own opinion defendant did not have ". . . enough judgment to know what she is supposed to be doing."

The Superior Court revoked defendant's probation and activated the sentence, as modified by the District Court. From this judgment of the Superior Court, defendant appealed.

Attorney General Edmisten, by Associate Attorney William H. Guy, for the State.

Badgett, Calaway, Phillips and Davis, by Richard G. Badgett, for defendant appellant.

MORRIS, Judge.

Defendant contends that the Superior Court erred in revoking defendant's probation because of a lack of evidence to support the court's finding that she willfully violated the conditions of her probation. Moreover, defendant contends that the court should have made a finding with respect to whether the failure to comply with the probation rules was without lawful excuse. We find no merit in defendant's contention.

Former Chief Justice Parker, speaking for our Supreme Court, carefully reviewed the law with respect to probation revocation and stated that "all that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation *or* that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." (Emphasis

supplied.) *State v. Hewett,* 270 N.C. 348, 353, 154 S.E. 2d 476 (1967); *State v. Sawyer,* 10 N.C. App. 723, 179 S.E. 2d 898 (1971). Here the evidence is plenary that defendant in fact willfully violated the conditions of her probation and the Superior Court so found. *State v. Bryant,* 11 N.C. App. 208, 180 S.E. 2d 457 (1971).

We have considered defendant's other contentions and find them also to be without merit.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. MURITNELL SLIGH

No. 7511SC694

(Filed 3 December 1975)

1. **Criminal Law § 114— recapitulation of evidence — no expression of opinion**

The trial judge did not express an opinion on the evidence in violation of G.S. 1-180 when he stated during recapitulation of the evidence that one of the defendant's alibi witnesses testified on cross-examination that he and defendant were friends.

2. **Criminal Law § 138— sentence exceeding that of codefendant**

The trial court did not err in imposing a sentence against defendant for common law robbery which was greatly in excess of the sentence given his codefendant under the codefendant's plea bargaining arrangement with the State.

3. **Criminal Law § 102— influence on testimony of defense witness by district attorney — refusal to hold voir dire**

The trial court did not err in refusing to conduct a *voir dire* hearing to determine whether the district attorney had talked with defense witnesses and improperly influenced their testimony.

APPEAL by defendant from *Hall, Judge.* Judgment entered 13 May 1975 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 21 November 1975.

Defendant was originally tried with codefendant Andrea Tinsley upon a charge of armed robbery at the February, 1975 Session of the Superior Court in Johnston County. At the close

of the State's evidence, defendant made a motion for judgment as of nonsuit as to armed robbery which motion was allowed. The jury being unable to agree upon a verdict as to the charge of common law robbery, the first trial ended in a mistrial. A second trial was held at the May, 1975 Session of Superior Court and defendant pleaded not guilty. The State presented testimony of witnesses Vann and Gilbert who testified that, on the night of 11 December 1974, they were working at Byrd's Drive-In in Selma, North Carolina, when defendant and Andrea Tinsley entered and robbed them of about $55. Andrea Tinsley, testifying for the State, related how he and defendant carried out the robbery. Defendant introduced testimony of five witnesses to establish his alibi for the night of the robbery. He also presented the testimony of the administrative assistant to the district attorney, who heard Tinsley's original confession, and court records relating to Tinsley.

The jury returned a verdict finding defendant guilty of the offense of common law robbery and defendant received a prison sentence for a term of not less than seven and not more than nine years. From this judgment defendant appealed.

Attorney General Edmisten by Assistant Attorney General Charles J. Murray for the State.

L. Austin Stevens for defendant appellant.

PARKER, Judge.

[1] Defendant assigns as error the trial judge's recapitulation of evidence in which he stated that Bobby Sneed, Jr., one of defendant's alibi witnesses, testified on cross-examination that he and the defendant were friends. Defendant maintains this statement by the trial judge violated G.S. 1-180 in that it could have intimated to the jury that the Court did not find this witness's testimony to be worthy of belief. We find no error. The trial judge was merely recapitulating correctly the evidence as it is set out in the record.

[2] Defendant contends that the trial court committed reversible error in entering a judgment imposing a sentence against defendant which was greatly in excess of the sentence given his codefendant, Andrea Tinsley, under Tinsley's plea bargaining arrangement with the State. Defendant received a prison sentence for a term of not less than seven and not more than

nine years, a permissible term under G.S. 14-2. "The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge." 3 Strong, N. C. Index, 2d, Criminal Law § 138; *State v. Taborn*, 268 N.C. 445, 150 S.E. 2d 779 (1966).

[3] Defendant maintains the Court committed reversible error in refusing to conduct a voir dire hearing to determine whether the District Attorney had talked with defense witnesses and improperly influenced their testimony. We find no showing in the record indicating any abuse of the trial court's discretion in not inquiring into an assertion of undue influence over these witnesses by the District Attorney. Neither the record nor defendant's brief indicates in what manner, if any, defendant contends the testimony of the witnesses may have been affected by their discussions with the district attorney.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM LOGAN

No. 7526SC543

(Filed 3 December 1975)

Criminal Law § 87— redirect examination — evidence unrelated to cross-examination — admissibility

The trial court has discretion to admit evidence on redirect examination unrelated to the witness's cross-examination which, through oversight, has not been elicited on direct examination.

APPEAL by defendant from *Falls, Judge.* Judgment entered 8 April 1975 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1975.

Defendant was indicted and tried for distribution of heroin. The State's evidence tended to show that Larry Reid Snyder, a Charlotte policeman, went to defendant's home on 11 June 1973 and asked defendant if he "had gotten any of the good junk in that he had told me about several days prior." Defendant

"told him that he did not have any new junk in but that he had some of the old junk in." Snyder purchased two tinfoil containers from defendant and paid him $24.00.

On cross-examination Snyder testified that he had first talked to defendant on 31 May 1973. On redirect examination Snyder testified that on 6 June 1973 he "purchased two tinfoil containers and one bag of vegetable material" from defendant and that "[a]t this time the defendant told me that this junk was not really that good but that in a couple of days that he would get some more junk that was better. . . . "

The State also offered evidence that the two tinfoil containers of "junk" purchased by Snyder from defendant on 11 June were analyzed and found to contain heroin.

Defendant testified that he had not seen Snyder or sold any heroin to him on 11 June 1973. He denied seeing Officer Snyder on 31 May 1973.

From a verdict of guilty of unlawful distribution of a controlled substance, heroin, and judgment pronounced thereon, defendant appealed.

Attorney General Edmisten, by Associate Attorney Claudette Hardaway, for the State.

Olive, Downer, Williams and Price, by Paul J. Williams, for defendant appellant.

MARTIN, Judge.

Defendant contends in his first assignment of error that the State should not have been allowed to introduce evidence on redirect examination concerning his sale of illegal drugs to Officer Snyder on 6 June 1973, because this evidence had no relation to anything brought out during his cross-examination of Officer Snyder.

The trial court has discretion to admit evidence on redirect examination unrelated to the witness's cross-examination which, through oversight, he has failed to elicit on direct examination. McCormick on Evidence, 2d ed., § 32; 1 Stansbury, N. C. Evidence, § 36 (Brandis Rev. 1973). The evidence in question was relevant and admissible to show intent, motive, and guilty knowledge. *State v. Logan,* 22 N.C. App. 55, 205 S.E. 2d 558 (1974). This assignment of error is overruled.

Defendant's remaining assignment of error is directed to a portion of the court's charge to the jury. In our opinion the charge considered as a whole was free of prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES C. FLETCHER

No. 7520SC574

(Filed 3 December 1975)

Criminal Law § 26; Robbery § 6— armed robbery — assault with deadly weapon — conviction of both offenses — arrest of assault judgment

Defendant could not be convicted of armed robbery and the lesser included offense of assault with a deadly weapon where both offenses arose out of the same act or occurrence, and judgment on the charge of assault with a deadly weapon must be arrested.

APPEAL by defendant from *Long, Judge.* Judgment entered 9 April 1975 in Superior Court, RICHMOND County. Heard in the Court of Appeals 21 October 1975.

Defendant was tried upon a bill of indictment charging him with the felony of assault with a deadly weapon with intent to kill resulting in serious bodily injuries not resulting in death and with armed robbery. Both charges arose out of the same occurrence. Defendant entered a plea of not guilty to each charge. The cases were consolidated for trial, and the jury returned as its verdict guilty of assault with a deadly weapon and guilty of armed robbery. From judgment imposing a prison sentence in each case, defendant appealed.

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

Leath, Bynum, Kitchin & Neal, by Henry L. Kitchin, for defendant appellant.

MARTIN, Judge.

We have carefully reviewed the assignments of error brought forward and argued by defendant in Case No. 75CR0304

(armed robbery) and find them to be without merit. The defendant was afforded a fair trial free from prejudicial error.

Although defendant has not raised the question, an error in Case No. 75CR0302 (assault with a deadly weapon) appears on the face of the record proper and, on our own motion, we arrest judgment in that case. The defendant was convicted of armed robbery and assault with a deadly weapon. Since both offenses of which he was convicted arose out of the same occurrence, the latter is a lesser included offense of the former. " 'An indictment for robbery with firearms will support a conviction of a lesser offense such as common law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault if a verdict for the included or lesser offense is supported by the evidence on the trial. (Citations).' " *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970). The defendant, having been convicted of armed robbery, could not be convicted of the lesser offense of assault with a deadly weapon where, as here, both offenses arose out of the same act or occurrence. The judgment on the verdict of guilty of assault with a deadly weapon should have been arrested.

The verdict of guilty of assault with a deadly weapon (No. 75CR0302) is set aside and the judgment arrested.

Armed robbery charge (No. 75CR0304)—no error.

Judges MORRIS and PARKER concur.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY v. PETTY COMMUNICATIONS, INC. AND BILLY R. TUCKER

No. 7518DC620

(Filed 3 December 1975)

Appeal and Error § 42— evidence omitted from record — presumption

When the evidence is not included in the record, it will be presumed that the evidence was sufficient to support the findings of fact.

APPEAL by defendant from *Kuykendall, Judge*. Judgment entered 22 April 1975 in District Court, GUILFORD County. Heard in the Court of Appeals 12 November 1975.

Plaintiff instituted this action to recover $1,234.80 balance allegedly due on a telephone bill. In its complaint, plaintiff alleges that the telephone service was rendered to the corporate defendant and that payment for the service was guaranteed in writing by defendant Tucker.

The corporate defendant did not answer and default judgment was rendered against it in the amount prayed. Defendant Tucker filed answer in which he denied liability for the indebtedness.

Jury trial was not requested and, following a trial without a jury, the court entered judgment in which it made findings of fact and conclusions of law consistent with plaintiff's contentions and adjudged that plaintiff recover of defendant Tucker the sum of $1,234.80, plus interest and costs. Defendant Tucker appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by W. Erwin Fuller, Jr., for plaintiff appellee.

Defendant Billy R. Tucker, in propria persona.

BRITT, Judge.

All of appellant's exceptions relate to the findings of fact set forth in the judgment but the record on appeal does not contain the evidence presented at trial. It is well settled that when the evidence is not included in the record, it will be presumed that the evidence was sufficient to support the findings of fact. *Mt. Olive v. Price,* 20 N.C. App. 302, 306, 201 S.E. 2d 362, 364 (1973); *Cobb v. Cobb,* 10 N.C. App. 739, 741, 179 S.E. 2d 870, 871 (1971); 1 Strong, N. C. Index 2d, Appeal and Error, § 42 at p. 185.

The findings of fact support the trial court's conclusions of law and adjudication that plaintiff is entitled to recover from appellants the amounts provided in the judgment.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. HAYWOOD JACKSON

No. 7519SC591

(Filed 3 December 1975)

1. **Constitutional Law § 30— speedy trial — trial nine months after arrest**

Defendant was not denied his constitutional right to a speedy trial on an armed robbery charge where he was tried nine months after his arrest, defendant made no motion for a speedy trial, and there was no showing that the delay was purposeful or oppressive or that it could have been avoided by reasonable effort on the part of the State.

2. **Robbery § 5— armed robbery — error in failure to charge on common law robbery**

The trial court in an armed robbery case erred in failing to charge on the lesser offense of common law robbery where the robbery victim was not sure whether defendant actually had a weapon and there was no other evidence of a weapon.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 27 February 1975 in Superior Court, ROWAN County. Heard in the Court of Appeals 22 October 1975.

Defendant was tried on an indictment charging armed robbery. Woodrow W. Oates, owner-manager of Woody's Food Store, testified for the State. Mr. Oates' testimony tended to establish that on 29 May 1974 the defendant, dressed as a woman and accompanied by a man, came into Woody's Food Store and purchased a soft drink. Later after the store was closed, defendant and his companion came to the door of the store and asked Mr. Oates could they come into the store in order to buy "some sugar and some lard." Mr. Oates recognized the couple as the persons who had just left the store and let them in. Once in the store the defendant and his companion told Mr. Oates, "We want all the money in that register, this is a stickup." Oates testified that the defendant had "something under a towel that looked like a pistol or sawed off shotgun." On cross-examination Oates stated that he did not know what kind of weapon defendant had or whether it was a weapon because it was covered with a towel.

Defendant offered evidence tending to establish that he was at Piedmont Drag Strip at the time of the robbery. The jury returned a verdict of guilty of armed robbery. From a judgment imposing a prison sentence, defendant appealed to this Court.

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

William G. Pfefferkorn and Beirne Minor Harding for defendant appellant.

ARNOLD, Judge.

[1] We reject defendant's argument that he was denied his constitutional right to a speedy trial. His trial was almost nine months following arrest. He made no motion for a speedy trial, and there is no showing that any delay was purposeful or oppressive, or that it could have been avoided by reasonable effort on the part of the State. *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973).

[2] Defendant contends that the trial court erred in failing to charge the jury on the lesser included offense of common law robbery. We agree. In an armed robbery prosecution where there is no other evidence of a weapon, and the robbery victim is not sure whether defendant actually had a weapon, it is error for the trial judge to fail to charge on the lesser offense of common law robbery. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809 (1971); *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954); *State v. Smith,* 24 N.C. App. 316, 210 S.E. 2d 266 (1974).

Since the case goes back for a new trial we need not consider the remaining assignments of error.

New trial.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. EDDIE RAY PIERCE

No. 759SC680

(Filed 3 December 1975)

Criminal Law § 148— plea of guilty or nolo contendere — no appeal

There is no right of appeal from a plea of guilty or *nolo contendere.* G.S. 15-180.2.

APPEAL by defendant Eddie Ray Pierce from *Clark (Giles R.), Judge.* Judgment entered 14 May 1975 in Superior Court,

PERSON County. Heard in the Court of Appeals 19 November 1975.

Attorney General Edmisten by Associate Attorney Elisha H. Bunting, Jr., for the State.

Ramsey, Jackson, Hubbard & Galloway by Charles E. Hubbard and Mark Galloway for defendant appellant.

HEDRICK, Judge.

Defendant purports to appeal from a judgment entered on his plea of guilty to the 5 February 1975 armed robbery of Roland Dickerson. There is no right of appeal from a plea of guilty or nolo contendere. G.S. 15-180.2; *State v. Carr*, 27 N.C. App. 39, 217 S.E. 2d 714 (1975).

Appeal dismissed.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES LEE SUSWELL

No. 7526SC519

(Filed 3 December 1975)

APPEAL by defendant from *Falls, Judge.* Judgment entered in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1975.

Pursuant to Indictment No. 74CR60769, defendant was charged with felonious breaking and entering and felonious larceny. From a plea of not guilty as to both counts, the jury returned a guilty verdict. From judgment sentencing him to a term of imprisonment, defendant appealed.

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

Michael P. Carr for defendant appellant.

MORRIS, HEDRICK and ARNOLD, Judges.

No error.

NATHAN AMOS HUNT, JR. v. COUNTY OF RANDOLPH AND WESLEY ELVIN WRIGHT

No. 7519SC587

(Filed 3 December 1975)

APPEAL by plaintiff from *Crissman, Judge.* Order entered 21 April 1975. Heard in the Court of Appeals 21 October 1975.

Ottway Burton and Millicent Gibson, for plaintiff appellant.

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

MORRIS, PARKER, and MARTIN, Judges.

Affirmed.

FORREST PASCHAL MACHINERY COMPANY v. HAROLD J. MILHOLEN, WILLIAM F. MILHOLEN, AND BASIC MACHINERY COMPANY

No. 7518SC454 and No. 7518SC582

(Filed 17 December 1975)

1. **Master and Servant § 11— covenant not to compete — requirements for validity**

By G.S. 75-1, contracts in restraint of trade are made illegal in N. C.; however, in this State a covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy.

2. **Master and Servant § 11— covenant not to compete — execution after initial employment — covenant unenforceable**

Evidence was sufficient to support the trial court's conclusion that the covenant not to compete executed by defendant William Milholen and plaintiff was not enforceable where such evidence tended to show that defendant was first employed by plaintiff on a permanent basis on 1 February 1966, the contract containing the covenant not to compete was executed on or about 23 July 1966, and defendant received no promotion or increase in salary at the time of the execution of the covenant not to compete.

3. Master and Servant § 11— covenant not to compete — execution after initial employment — compensation given — covenant enforceable

Evidence was sufficient to support the trial court's conclusion that a covenant not to compete between defendant Harold Milholen and plaintiff was enforceable, though not executed at the time of defendant's initial employment, since the evidence tended to show that defendant was promoted from acting general manager to general manager and given a two year term of employment at the same time the covenant not to compete was entered into.

4. Master and Servant § 11— covenant not to compete — time and territory restrictions reasonable

The trial court properly interpreted a covenant not to compete to mean that defendant would not himself engage in a business in competition with plaintiff nor would he engage to be employed by anyone in a business competing with plaintiff within a radius of 350 miles of plaintiff's home office for a period of two years from the termination of his employment with plaintiff, and such restrictions as to time and territory were reasonable.

APPEAL by plaintiff and defendants from *Crissman, Judge.* Judgment entered 15 April 1974 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 October 1975.

This is an action for injunctive relief and damages upon plaintiff's allegations that defendants have breached certain covenants not to compete, have divulged and are divulging certan confidential information and trade secrets relating to plaintiff's business, and have conspired to damage and destroy plaintiff's business.

Plaintiff is a corporation which manufactures and sells machinery and equipment used in the brick industry. It also acts as a sales respresentative for other companies which manufacture equipment and machinery used in the rock crushing business.

Defendants Harold J. Milholen (hereinafter referred to as Harold) and William F. Milholen (hereinafter referred to as William) are former employees of plaintiff. Basic Machinery Company is a corporation formed by Harold in 1975 after he left plaintiff's employ, and he and William are its principal stockholders. Defendants have entered into agreements with at least two of plaintiff's competitors to represent them as sales representative—one in all states east of the Mississippi as well as Oklahoma and Texas, and the other throughout the United States. In the national market for the manufacture and sale of the type of equipment manufactured by plaintiff, there are only

four major competitors, including plaintiff. The sales activities of these four major manufacturers, as well as various smaller manufacturers, are all oriented toward a single national market—brick production.

For clarity and ease of understanding we deem it appropriate to trace the factual history of employment and contracts with respect to Harold and William separately.

William: Plaintiff's verified complaint and affidavits show that on or about 23 July 1966 plaintiff and William entered into an employment contract which contained a covenant not to compete for a period of five years after termination of employment. The covenant was restricted to "A. Ceramic Plants including brick, tile, sewer pipe, wall tile, pottery, etc. B. Fans for industrial air conditioning trade. C. Machinery and equipment for the aggregate, lightweight aggregate, and mineral industries" and applied to "the territory covered by the northeast, the southeastern, and southwestern United States but do not apply to any other portions." William reserved the right to sell to other industries not specifically listed and to sell in other parts of the United States. William further covenanted that "all information or knowledge that he may attain as a result of said relationship shall be of the utmost secrecy and nature and that the undersigned shall not reveal to any person such knowledge or information or use the same for himself which shall be either to the benefit of the undersigned or to the detriment of Forrest Paschal Machinery Company."

William subsequently became chief engineer for plaintiff and, while serving in that capacity, acquired full knowledge of the design and method of production of all equipment and machinery produced by plaintiff. In August 1974, William became vice-president of plaintiff in charge of sales. In this position he became thoroughly acquainted with the list of customers of plaintiff and the needs and purchasing habits of the customers.

On 18 February 1975, William notified plaintiff of his resignation which became effective 28 February 1975.

William's affidavit shows that he was first employed by plaintiff in 1957 on a part-time basis involving drafting work done at his home. On 1 February 1966, he went with plaintiff as a draftsman on a full-time basis at an annual salary of $6500. At that time, there was no written agreement of any

kind. Very shortly after his employment he was placed on an hourly basis and was paid $2.72 per hour, with his duties remaining unchanged. In July 1966, he was told by Mr. Forrest Paschal that the plaintiff had entered into a licensing agreement with Bason and Sons of England to manufacture some of its machinery and one of the requirements imposed upon plaintiff was a covenant not to compete. Mr. Paschal advised William that everyone in plaintiff's employ would have to sign a covenant not to compete as a condition of continued employment. William did sign a form dated 23 July 1966 which was handed him by plaintiff's bookkeeper. He was not working as a sales representative then, but as a draftsman. There was no change in his duties, title, compensation, or working facilities or arrangement. No benefits were given or promised. Mr. Paschal was killed on 7 November 1972, and some changes were made in the company necessitated by the death of the person who had previously had personal control over all company operations. In August 1974, William was made director of sales at an increased salary of $19,000. In December 1974, he was made a vice-president and his salary was increased to $20,000. However, things were so unsatisfactory that he handed in his resignation on 17 February 1975. At that time he did not know where his next employment would be, but he had several possibilities. He had made no definite arrangements with his brother Harold, but later decided to go with the corporate defendant after he learned that the corporate defendant would be representing Pearne & Lacy (a competitor of plaintiff). The designs and means and methods of production of plaintiff are not trade secrets. The machiney and equipment manufactured can be seen by almost anyone at plaintiff's plant or at any plant where the machinery or equipment has been installed or at trade shows. Other manufacturers of equipment and machinery for the brick industry know all there is to know about the Paschal equipment and machinery. While with plaintiff and since leaving plaintiff's employ, he has not given any information of any type or kind to anyone regarding Paschal's machinery or equipment or any designs thereof or any production thereof, nor has he attempted to induce any of plaintiff's employees to leave plaintiff and become associated with the corporate defendant.

Harold: Plaintiff's verified complaint and affidavits show: On or about 25 January 1964, Harold and plaintiff entered a written contract of employment pursuant to which Harold

became a sales representative of plaintiff. The contract contained a covenant not to compete restricted to the ceramic industry, quarries and mineral plants, and fans for industrial air conditioning applicable to the territory covered by the southeastern United States. On or about 7 December 1972, plaintiff and Harold entered into a second contract of employment pursuant to which Harold assumed the duties of general manager of plaintiff. That contract contained the following provision:

> "THIRD: The party of the second part further agrees that he will not on the termination for any cause whatsoever of his employment with the employer engage in the same line of business as now carried on by his employers or engage to work for any individual, firm or corporation, within a radius of 350 miles of the Town of Siler City, North Carolina, for a period of two years from the time the employment of employee under this contract ceases; the employee further agrees that he will not during the period of his employment or any time thereafter furnish to any individual, firm, or corporation, other than the employer any list or list of customers or information of any kind or nature pertaining to the business of the employer."

As general manager, Harold was the chief operating officer and in charge of all facets of the plaintiff's business.

In October 1974, Harold was made executive vice-president in charge of international operations.

On 1 February 1975, Harold tendered his resignation effective 15 February 1975. Prior to his resignation, Harold, with his brother William, attempted to induce other employees to leave plaintiff's employ and go into his employ in competition with plaintiff. Harold and William individually and through their corporation have solicited plaintiff's customers and plaintiff has lost business to corporate defendant because of these solicitations.

Defendant Harold's affidavit shows: His first job was as a floor sweeper for Hadley Peoples Manufacturing Company. He worked up to general overseer and then went into sales. In October 1963 he made an agreement with Mr. Forrest Paschal to go with plaintiff at an annual compensation of 15% commission plus insurance, bonus, travel expense and profit sharing. There was no written contract, but Mr. Paschal did give him his notes on their agreement. These handwritten notes do not include any reference to a covenant not to compete. The

first covenant not to compete was signed three months after the employment began and was required by Mr. Paschal as a condition of further employment. There were no changes in the employment until 1968 at which time Harold was taken off commissions and placed on an annual salary of $14,000 plus a guaranteed bonus. In 1969 or 1970 he was made vice-president in charge of sales. Until his death on 7 November 1972, Forrest Paschal was in complete charge of all company operations. After the death of Forrest Paschal and on 11 November 1972, Harold was requested by plaintiff's attorney to go to Mrs. Paschal's home for a conference. At that meeting he was asked to become acting general manager of plaintiff at a salary of $25,000 per year. Accordingly, as of 13 November 1972, he became acting general manager of plaintiff; Southern Buildings Company, an affiliate of plaintiff from which Harold was already receiving an additional $2,000 annually; Paschal Machinery PTY, Ltd., a subsidiary company in Australia; Bason Pasco, a subsidiary company in England; Pasco Industrial Fabricating Company; and Delta Corporation. On 7 December 1972, he received a call from plaintiff's counsel advising that Mrs. Paschal wanted him to sign a contract. On 12 December 1972 he did sign a contract. There was no change in his duties, compensation, responsibilities, or any other circumstances of his employment, and he signed the contract because he was afraid he would lose his job if he didn't. The contract contained a covenant not to compete and an agreement that the employment would continue until 8 November 1974, unless sooner terminated by mutual consent. At the meeting of the board of directors in early 1973, he was made general manager and executive vice-president, again with no change in duties, compensation, etc. Although the contract contained a provision providing for $2,000 annual payment to him by Southern Buildings Company, this was not paid after August 1974. On 17 October 1974, he was fired as general manager and one Aubrey Highfill was president of plaintiff. The position of general manager was eliminated, and Harold was retained as a vice-president and placed in charge of international business. There was very little to do in that position and Harold felt that he was being eased out and resigned on 31 January 1975 effective 14 February 1975. However, when Mr. Highfill received the letter of resignation he told Harold that plaintiff desired no further services from him and asked that he leave as of that date. This Harold did, taking nothing with him but personal belongings.

Defendants offered several affidavits substantiating their position that they had not attempted to arrange for business while employed by plaintiff, that customer lists were available generally and not secret, and that there are no trade secrets and no confidential information regarding the equipment and machinery operated and used in brick plants.

The court found facts and concluded that the covenant not to compete executed by William and the first covenant not to compete executed by Harold are not enforceable because not entered into at the time of employment and not supported by substantial consideration; that the agreements with respect to disclosure of information are enforceable and that even without such an agreement, they could be barred from divulging confidential information and trade secrets; that the contract of 7 December 1972 signed by Harold was supported by consideration, was reasonable as to time and territory and enforceable. Upon the conclusions made, the court entered an order restraining Harold and the corporate defendant in accord with the terms of the contract and further restraining all defendants from disclosing certain information pertaining to plaintiff obtained by them while employed by plaintiff. Defendants appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr., and John L. Sarratt, for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by Stephen P. Milliken, Richard W. Ellis and Miles Foy, for defendants.

MORRIS, Judge.

Although both plaintiff and defendants docketed separate records and filed briefs with respect to the questions presented by each of the appeals, we deem it practical to address all questions raised in each appeal in one opinion.

The order from which defendants and plaintiff appeal restrains defendant from competing with plaintiff pending trial of the cause on its merits, and is, therefore, interlocutory. Generally, an appeal from an interlocutory order is premature. However, the appeal may be considered by appellate courts if a substantial right of the appellant would be affected adversely by continuing the effectiveness of the injunction pending trial on the merits. G.S. 1-277, *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975) and cases there cited: *Industries, Inc. v. Blair*, 10 N.C.

App. 323, 178 S.E. 2d 781 (1971) and cases there cited; *Cablevision v. Winston-Salem,* 3 N.C. App. 252, 164 S.E. 2d 737 (1968). Here, we think that the order entered restraining defendants from engaging in business in the particulars set forth therein affects a substantial right of defendants. We therefore consider their appeal. *Industries, Inc. v. Blair, supra.* See also *U-Haul Co. v. Jones,* 269 N.C. 284, 152 S.E. 2d 65 (1967); *Exterminating Co. v. Griffin and Exterminating Co. v. Jones,* 258 N.C. 179, 128 S.E. 2d 139 (1962); and *Wilmar, Inc. v. Liles* and *Wilmar, Inc. v. Polk,* 13 N.C. App. 71, 185 S.E. 2d 278 (1971), cert. denied 280 N.C. 305 (1772). See also G.S. 1A-1, Rule 62(a) and (c).

[1] By G.S. 75-1, contracts in restraint of trade are made illegal in North Carolina. See also G.S. 75-2 and G.S. 75-4. This State, however, has long recognized the rule that a covenant not to compete is enforceable in equity if it is "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *Exterminating Co. v. Griffin and Exterminating Co. v. Jones, supra,* at 181, and cases there cited.

[2] The court found as facts that William was first employed by plaintiff on a permanent basis on 1 February 1966 and that the contract containing the covenant not to compete was executed on or about 23 July 1966. The court further found that he did not receive any promotion or increase in salary at the time of the execution of the covenant not to compete and that thereafter he remained in plaintiff's employ for some 8½ years, received numerous increases in salary and was promoted to the positions of director of engineering, director of sales, and vice-president. There was ample evidence before the court to support these findings. It is clear that, based upon the findings of fact, the covenant not to compete executed by William on 23 July 1966 was not ancillary to a contract of employment nor was it supported by substantial consideration. The court correctly concluded that the covenant not to compete executed by William and plaintiff is not enforceable.

[3] The covenant not to compete entered into by plaintiff and Harold on or about 25 January 1964 is also unenforceable for the same reasons which make William's covenant invalid. However, the contract entered into between plaintiff and Harold

dated 7 December 1972 falls into a different category. Harold's affidavit stated that he was made *acting* general manager on or about 13 November 1972 and that when he signed the contract of employment containing a covenant not to compete some three weeks later, there were no changes in his duties, responsibilities, or compensation. The contract provides "that for the purpose and subject to the terms and conditions hereinafter set forth said parties of the first part [Forrest Pascal Machinery Company and Southern Buildings Company], do hereby employ said party of the second part (Harold) and said party of the second part hereby accepts such employment." It further provides "that the duties to be performed by the party of the second part are as follows: Shall act as *General Manager* for Forrest Paschal Machinery Company, Southern Buildings Company, Delta Corporation, Pas-Co Industrial and Fabricating Company, PTY Ltd., and Bason & Company Ltd.;" (Emphasis supplied) Harold's affidavit concedes that he was made general manager by the contract but states that there were no changes in his duties or compensation. The contract further provides that "[T]his employment and the compensation therefor shall begin as of the 8th day of November 1972, (sic) unless sooner terminated by mutual consent of both parties, shall exist and continue until the 8th day of November 1974." Harold concedes that the contract did provide for guaranteed two years employment. There is no evidence that this term was discussed at the 7 November conference when Harold was made acting general manager. We think the evidence is sufficient to support the court's finding that "On or about December 7, 1972, a written contract was entered into between plaintiff and defendant Harold J. Milholen, pursuant to which Mr. Milholen was promoted to General Manager of Forrest Paschal Machinery Company for a period of two years." Upon the findings the court concluded that the covenant was supported by consideration, superseded the earlier covenant, and was reasonable both as to time and territory. We agree. While it may be questionable as to whether the covenant was actually ancillary to employment, Harold was promoted from *acting* general manager to general manager and given a two-year term of employment as general manager. In *Greene Co. v. Kelley,* 261 N.C. 166, 168, 134 S.E. 2d 166 (1964), Justice Higgins, speaking for a unanimous Court, said:

> "It is generally agreed that mutual promises of employer and employee furnish valuable considerations each to the other for the contract. However, when the relationship of

> employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. *Kadis v. Britt, supra.* Therefore, the employer could not call for a covenant not to compete without compensating for it."

We think the evidence here brings the contract between plaintiff and Harold within the ambit of *Greene Co. v. Kelley.*

[4] Defendants argue further that the covenant was not reasonable in that it provided that Harold could not accept any kind of employment for any individual, firm, or corporation within a radius of 350 miles of Siler City, North Carolina. This is a strained interpretation of the agreement which reads: "The party of the second part further agrees that he will not on the termination for any cause whatsoever of his employment with the employer *engage in the same line of business as now carried on by his employers or engage to work for any individual, firm, or Corporation,* within a radius of 350 miles of the Town of Siler City, North Carolina, for a period of two years from the time the employment of employee under this contract ceases;". (Emphasis supplied.) The punctuation employed in the covenant, it seems to us, makes it quite clear that the parties intended the contract to mean that Harold would not himself engage in a business in competition with plaintiff nor would he engage to be employed by anyone in a business competing with plaintiff within a radius of 350 miles of plaintiff's home office for a period of two years from the termination of his employment with plaintiff. This is the interpretation the court gave to the contract, and nothing in the evidence indicates that Harold interpreted it any differently. In our opinion, the court correctly interpreted the contract in its order. Nor does the evidence disclose anything which would indicate that the restrictions with respect to time and territory are unreasonable. On the contrary, the record is replete with evidence of the fact that plaintiff does business over almost all the United States and even beyond its boundaries. Under the facts of this case, we cannot say that two years is an unreasonable time within which Harold may not compete with plaintiff within a radius of 350 miles of Siler City.

Defendants concede that even absent an agreement, former employees may be restrained from divulging confidential information acquired while an employee, but they contend that

there is evidence that no information acquired by defendants was confidential; that if they did acquire confidential information, they haven't divulged it; and that no restraining order should lie until and unless defendants use information obtained as an employee to the detriment of plaintiff. There is evidence that within weeks after the cessation of employment with plaintiff, defendants formed a corporation for the purpose of acting as sales respresentative for plaintiff's competitors and had obtained a contract to represent a California competitor. By their own statement, defendants had, between the date of termination of their employment relationship with plaintiff and the date of the hearing, visited 20 to 25 brick manufacturing plants and made known to those plants that they would be acting as sales representative for Pearne & Lacy, Industrial Metal Flame Sprayers, and Star Engineering Company. Pearne & Lacy is a major competitor of plaintiff and Star Engineering Company and Industrial Metal Flame Sprayers are minor competitors of plaintiff. Each of these companies competes directly with plaintiff throughout the United States. The corporation formed by defendants was for the express purpose of competing with plaintiff. Obviously, the individual defendants could only have acquired their knowledge of the business of plaintiff while employed by it. Neither came to plaintiff from a similar business and each rose to positions of trust and confidence in executive capacities while employed by plaintiff. There is evidence that at the time of the visits referred to, sales proposals for plaintiff were still outstanding to at least six of the plants. While we do not discuss in seriatim the separately enumerated areas of restraint with respect to divulging information, we are of the opinion that there was evidence before the court to justify each of them.

Further, we are of the opinion that the evidence is sufficient to sustain the court's conclusion that there is probable cause to conclude that "the plaintiff will be able, following a trial on the merits, to enjoin Harold Milholen, both individually and through the corporate form of Basic Machinery Company, from violating the covenant not to compete contained in his contract of December 7, 1972 and that it will be able to enjoin both of the individual defendants from revealing information concerning the business of plaintiff which they learned while in plaintiff's employ" and that "there is reasonable apprehension of irreparable loss to the plaintiff unless injunctive relief is

granted." *Conference v. Creech* and *Teasley v. Creech and Miles*, 256 N.C. 128, 123 S.E. 2d 619 (1962).

On plaintiff's appeal—Affirmed.

On defendants' appeal—Affirmed.

Judges HEDRICK and ARNOLD concur.

PAUL BILLINGS v. JOSEPH HARRIS COMPANY, INC.

No. 7523SC596

(Filed 17 December 1975)

1. **Uniform Commercial Code § 15— disclaimer of liability — requirements for validity**

A disclaimer of liability serves to limit liability by reducing instances where a seller may be in breach, while a limitation or modification is a restriction on available remedies in event of breach; to be valid under G.S. 25-2-316(2), a disclaimer provision must be stated in express terms, mention "merchantability" in order to disclaim the implied warranty of merchantability, and be conspicuously displayed.

2. **Uniform Commercial Code § 4— "conspicuousness" defined**

G.S. 25-1-201(10) defines "conspicuousness" as that which is so written that a reasonable person against whom it is to operate ought to have notice of it, and determination of conspicuousness is a question of law for the court.

3. **Agriculture § 9.5; Uniform Commercial Code § 15— purchase of cabbage seed — disclaimer and limitation clause — conspicuousness**

Defendant's disclaimer and limitation clause on a purchase order for cabbage seed was conspicuous and complied with G.S. 25-2-316(2) where the clause was set off from other provisions on the form, was titled "NOTICE TO BUYER," appeared in bold face, all capital print, and stated that defendant seller " . . . makes no warranties, express or implied, of merchantability, fitness for purpose, or otherwise, . . . and in any event its liability for breach of any warranty or contract with respect to such seeds or plants is limited to the purchase price of such seeds or plants."

4. **Agriculture § 9.5; Uniform Commercial Code § 15— disclaimer of liability — sale of seeds — limitation of remedy to return of purchase price**

A merchant seller may disclaim all liability under G.S. 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under G.S. 25-2-314 and G.S. 25-2-315, substituting in place thereof the limitations of G.S. 25-2-719(1)(a); and given the inherent element of risk present in all agricultural enterprises, such a clause,

valid under G.S. 25-2-316(2) and G.S. 25-2-719, may operate to limit a buyer's remedy to a return of purchase price.

5. **Uniform Commercial Code § 15— limitation of liability — commercial loss — no unconscionability**

There is no presumption of unconscionability as to any disclaimer or limitation of liability in cases of commercial loss, and determination of unconscionability is a question of law for the court. G.S. 25-2-719(3); G.S. 25-2-302(1).

6. **Agriculture § 9.5; Uniform Commercial Code § 15— seed purchase — liability limited to cost of seed — no unconscionability**

A provision in a purchase order for cabbage seed limiting defendant's liability to the purchase price of the seeds was not unconscionable.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 14 April 1975 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 22 October 1975.

In this action plaintiff seeks to recover $50,000 for damages allegedly sustained because of defective cabbage seed sold him by defendant. In his complaint, filed 1 July 1971, he alleges:

Plaintiff is engaged in farming in Alleghany County, North Carolina, and for many years was engaged in the business of growing and harvesting cabbage on a commercial basis. On or about 5 January 1971, plaintiff placed an order with defendant for the seed to plant 50 acres of cabbage and pursuant to the order defendant shipped the seed to plaintiff. Plaintiff sowed the seed in plant beds and thereafter transplanted plants grown from the seeds to 50 acres of land properly prepared to grow cabbage. Although plaintiff exercised due care in planting, fertilizing, and cultivating his crop, all of the cabbage rotted before time for harvesting. The rot was caused by a seed borne disease known as "Black Leg" or *Phoma Lingam.* The crop was a total loss.

On the ground of diversity jurisdiction, defendant had the action removed to U. S. District Court for the Western District of North Carolina. Defendant then filed answer denying material allegations of the complaint and in a further answer alleged:

In August of 1970, plaintiff purchased from defendant 28 pounds of Harris Market Prize cabbage seed at a cost of $20 per pound, a total of $560.00. In December following, plaintiff, in writing, changed the order to three pounds of Harris

Market Prize seed and 20 pounds of King Cole cabbage seed for a total cost of $440.00. The written order signed by plaintiff and constituting the contract of sale between the parties specifically disclaimed all warranties and limited defendant's liability to no more than the purchase price of the seed.

After filing answer, defendant submitted interrogatories to plaintiff and questioned him through deposition. Among other things, plaintiff admitted signing the purchase order. The document, attached as an exhibit to the record, is a printed form with defendant's name and address at the top; immediately thereunder are lines on which are written the buyer's name, address, order date, and shipping date. Below that, set out in regular and bold type as indicated, appears the following:

> NOTICE TO BUYER: Joseph Harris Company, Inc. warrants that seeds and plants it sells will conform to the label description as required under State and Federal Seed Laws. IT MAKES NO WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR PURPOSE, OR OTHERWISE, WHICH WOULD EXTEND BEYOND SUCH DESCRIPTIONS, AND IN ANY EVENT ITS LIABILITY FOR BREACH OF ANY WARRANTY OR CONTRACT WITH RESPECT TO SUCH SEEDS OR PLANTS IS LIMITED TO THE PURCHASE PRICE OF SUCH SEEDS OR PLANTS.
>
> JOSEPH HARRIS COMPANY, INC. FURTHER LIMITS TO THE PURCHASE PRICE ANY LIABILITY OF ANY KIND ON ACCOUNT OF ANY NEGLIGENCE WHATSOEVER ON ITS PART WITH RESPECT TO SUCH SEEDS OR PLANTS.
>
> By acceptance of the seeds or plants herein described the buyer acknowledges that the limitations and disclaimers herein described are conditions of sale and that they constitute the entire agreement between the parties regarding warranty or any other liability.

Below the quoted statements are vertical lines and horizontal lines on which are written in the quantity, brand, unit price and total cost of the seed purchased. Thereunder, on one of the lines is plaintiff's signature.

Plaintiff moved for summary judgment in Federal District Court. Following a hearing that court concluded, among other things, the following:

> It affirmatively appears on the face of the contract for sale of the seed that the seller conspicuously excluded

any implied or express warranties of merchantability. The plaintiff offered no evidence to show that the contractual exclusion of warranties by the defendant was inoperable due to subsequent agreement or other reason. In fact, plaintiff continues to rely upon pre-Uniform Commercial Code decisions of the North Carolina Supreme Court relating to an implied warranty of merchantability and ignores defendant's reliance upon North Carolina General Statute Sec. 25-2-316(2).

It appears to a legal certainty that the plaintiff cannot recover a verdict in excess of $10,000, exclusive of interests and costs, and, therefore, federal jurisdiction is lacking under 28 USC Sec. 1332. The action is remanded to the State Court from whence it came, pursuant to 28 USC Sec. 1447(c).

Plaintiff did not appeal from the federal court order. Thereafter, defendant moved for summary judgment in the superior court. Following a hearing, that court entered a judgment concluding as a matter of law that, construed liberally, the complaint states a claim for relief based upon breach of warranty but upon no other legal theory; that defendant's disclaimer was conspicuous, was communicated to plaintiff, and formed a part of the contract; that the disclaimer effectively excluded any implied or express warranties of merchantability or fitness for purpose; that the only warranty made by defendant to plaintiff with regard to the seeds in question was that they conformed to the label descriptions as required by State and Federal Seed Laws; that defendant effectively limited its liability for breach of warranty to the amount of the purchase price of the seed, $440.00; that to a legal certainty, plaintiff cannot recover in excess of $440.00 from defendant in this action.

From partial summary judgment limiting defendant's liability to a maximum of $440.00, plaintiff appealed.

Arnold Young and John E. Hall for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and George L. Little, Jr., for defendant appellee.

BRITT, Judge.

Did the trial court err in entering partial summary judgment in favor of defendant? We hold that it did not.

While defendant argues that the order of the federal court, from which no appeal was taken, is *res judicata* as to the issues presented on this appeal, we do not decide that question. We affirm the judgment appealed from on the ground that defendant, by the disclaimer set forth on the order blank which plaintiff signed, limited its maximum liability to return of the purchase price of the seed.

Plaintiff entered into a contract with defendant by signing the order form described above. Construction of the contract is governed by the Uniform Commercial Code as set forth in Chapter 25 of our General Statutes. On the face of the one page order form appears, in pertinent part, the following disclaimer and limitation styled, "NOTICE TO BUYER:"

> "Joseph Harris Company, Inc., ... MAKES NO WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR PURPOSE, OR OTHERWISE, . . . AND IN ANY EVENT ITS LIABILITY FOR BREACH OF ANY WARRANTY OR CONTRACT WITH RESPECT TO SUCH SEEDS OR PLANTS IS LIMITED TO THE PURCHASE PRICE OF SUCH SEEDS OR PLANTS."

This clause is set off from other provisions on the form and appears in bold face, all capital print. The clause also contains additional provisions for disclaimer of negligence liability as well as a merger clause rendering the form the "entire agreement between the parties regarding warranty or any other liability."

[1] Disclaimers of express and implied warranties are governed by G.S. 25-2-314 and G.S. 25-2-316. Limitation or modification is subject to the provisions of G.S. 25-2-719. A disclaimer of liability serves to limit liability by reducing instances where a seller may be in breach, while a limitation or modification is a restriction on available remedies in event of breach. To be valid under G.S. 25-2-316(2), a disclaimer provision must be stated in express terms, mention "merchantability" in order to disclaim the implied warranty of merchantability, and be conspicuously displayed. *Bulliner v. General Motors Corp.*, 54 F.R.D. 479 (E.D.N.C. 1971); *see, e.g., Tennessee Carolina Transportation Inc. v. Strick Corp.*, 16 N.C. App. 498, 192 S.E. 2d 702 (1972), *rev'd other grounds*, 283 N.C. 423, 196 S.E. 2d 711 (1973). *Compare, Zicari v. Joseph Harris Co.*, 33 A.D. 2d 17, 304 N.Y.S. 2d 918 (S.Ct. 1969),

appeal dismissed, 26 N.Y. 2d 610, 309 N.Y.S. 2d 1027 (1970), where a similar disclaimer was overturned in similar litigation over a similar fungus infestation due to absence of the critical term "merchantability" in one of defendant's order forms. *See generally* J. White and R. Summers, Uniform Commercial Code §§ 12-2, 12-5, 12-9 (1972).

[2, 3] G.S. 25-1-201(10) defines "conspicuousness" as that which is "so written that a reasonable person against whom it is to operate ought to have notice of it." Determination of conspicuousness is a question of law for the court. Judge Wood determined that defendant's disclaimer and limitation clause were conspicuous; we think his determination was correct and, after examining the record and exhibits, we agree that the proofs establish defendant's compliance with G.S. 25-2-316(2).

[4] Having established the validity of defendant's disclaimer, we next focus our inquiry on the limitation of remedy substituted by defendant. G.S. 25-2-719(1)(a) sanctions such contractual modification and limitation of remedy in event of breach of warranty.

> "[T]he agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by *limiting the buyer's remedies to the return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts;* . . . . (Emphasis added.)

Taken together, G.S. 25-2-316(2) and G.S. 25-2-719(1)(a) provide for limitation and substitution of remedies. A merchant seller may thereby disclaim all liability under G.S. 25-2-316(2) stemming from any breach of warranties of merchantability and fitness under G.S. 25-2-314 and G.S. 25-2-315, substituting in place thereof the limitations of G.S. 25-2-719(1)(a). We feel that given the inherent element of risk present in all agricultural enterprises, such a clause, valid under G.S. 25-2-316(2) and G.S. 25-2-719, may operate to limit a buyer's remedy to a return of purchase price. *U. S. Fibres Inc. v. Proctor & Schwartz Inc.,* 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd* 509 F. 2d 1043 (6th Cir. 1975). *See, e.g.,* 3 Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers § 7.03[2] (Matthew Bender & Co. 1975). The official commentary to G.S. 25-2-719(3) is instructive:

> "3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages . . . *such terms are merely an allocation of unknown or undeterminable risks.* The seller in all cases is free to disclaim warranties in the manner provided in Section 2-316." (Emphasis added.)

[5] If a part of the contract such a clause would serve to limit plaintiff's recovery to $440.00, as determined by the trial judge and bar further recovery of any consequential damages. The viability of this provision is subject however to the unconscionability provision of G.S. 25-2-719(3):

> "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitations of consequential damages for injury to the person in case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Unconscionability relates to contract terms that are oppressive. It is applicable to one-sided provisions, denying the contracting party any opportunity for meaningful choice. *Collins v. Uniroyal Inc.*, 126 N.J. Super. 401, 315 A. 2d 30 (1973), *aff'd*, 64 N.J. 260, 315 A. 2d 16 (1974); *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965) (Precode decision with heavy reliance on Code provisions as analogous persuasive authority). *See, e.g.*, G.S. 25A-43(c) defining "unconscionability" under Retail Installment Sales Act as " . . . totally unreasonable under all of the circumstances."

[6] This section gives injured party plaintiffs in personal injury actions a prima facie presumption of unconscionability as to any disclaimer or limitation of liability. No similar presumption is provided in cases of commercial loss, thus putting the burden on plaintiff to show otherwise. Under G.S. 25-2-302(1) determination of unconscionability is a question of law for the court. We note that G.S. 25-2-302 was not a part of the Uniform Commercial Code as originally enacted by the General Assembly in 1965. However, given the unconscionability provision of G.S. 25-2-719(3) which was originally a part of Chapter 25, we elect to treat the 1971 amendment adding G.S. 25-2-302 as persuasive authority even though by express terms the act is effective to transactions and events occurring on and after 1 October 1971. *See* Session Laws 1971, c. 1055, s. 3. We feel this matter was sufficiently covered at hearing on defendant's motion for summary judgment, and after a review of the

record and exhibits hold that the provision in question was not unconscionable.

We agree that summary judgment is a drastic remedy, one to be approached with caution. Evidence before the trial judge may consist of pleadings, answers to interrogatories, depositions and presumptions where applicable. Under G.S. 1A-1, Rule 56(c) the trial judge does not sit as fact finder as is true under G.S. 1A-1, Rule 52. His function is to examine the materials, determine what facts are established, and conclude whether there is a genuine issue as to any material fact and if a party is entitled to judgment as a matter of law. *Koontz v. Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972), *rehearing denied,* 281 N.C. 516 (1972); *Kessing v. National Mortgage Corp.,* 278 N.C. 523, 180 S.E. 2d 823 (1971). *See generally,* Gordon, *The New Summary Judgment Rule in North Carolina,* 5 Wake Forest L. Rev. 87 (1969), W. Shuford, North Carolina Civil Practice and Procedure §§ 56-3 thru 56-10 (1975).

Thus, we have treated the judge's "findings of fact" as surplusage and conducted our own examination of the record and exhibits. We conclude that the admitted facts before the judge established defendant's compliance with the provisions of G.S. 25-2-316(2), and agree with his determination that to a legal certainty there exists no genuine issue as to any material fact, thus limiting plaintiff to recovery of purchase price of the seed.

Plaintiff contends that this case is not governed by the provisions of G.S. 25-2-316 but would rely on the decision in *Gore v. George J. Ball Inc.,* 279 N.C. 192, 182 S.E. 2d 389 (1971), and the North Carolina Seed Law, G.S. 106-277, et seq. This reliance is not persuasive in view of the logic and countervailing policy evinced by Article 2 of the Uniform Commercial Code. We note that by express provision G.S. 25-2-102 states that Article 2 in no way repeals or alters any statute regulating sales to farmers. The North Carolina Seed Law is aimed at protecting farmers by strict labeling, quality control inspections and branding regulations. The Seed Law has no effect on a nonconflicting disclaimer which governs activity beyond its scope. Indeed, G.S. 106-277.11 appears to recognize disclaimers such as defendant's which are beyond the parameters of the Seed Law.

The opinion in *Gore* was handed down before the effective date of Chapter 25 and applies precode law. The problem in

Gore was squarely within the labeling provisions of the Seed Law, G.S. 106-277.4 thru 106-277.7, and revolved around total failure of consideration. *Gore v. George J. Ball Co., supra* at 199, 182 S.E. 2d at 393. Thus *Gore* does not rule out the effectiveness of a properly drafted disclaimer which comports with the provisions of the Seed Law. Defendant specifically incorporates both state and federal seed laws as exceptions to its disclaimer and limitation clause. This case is further distinguished from *Gore* in that here defendant shipped the precise seed ordered by plaintiff, complying with plaintiff's request for a change in brands made four months after placement of the original order.

Plaintiff further contends that he ought not to be bound by the provisions of the Uniform Commercial Code as he is illiterate. It is admitted that he signed the order form. The law appears well settled in this State that, in the absence of fraud, duress or undue advantage tending to mislead a party, when a person affixes his signature to a document he is bound thereby. *Dorrity v. Building & Loan Ass'n,* 204 N.C. 698, 169 S.E. 640 (1933); *Davis v. Davis,* 256 N.C. 468, 124 S.E. 2d 130 (1962); *Sexton v. Lilley,* 4 N.C. App. 606, 167 S.E. 2d 467 (1969). There was no showing of fraud, duress or undue advantage tending to mislead plaintiff.

The extensive nature of plaintiff's enterprise is impressive. As stated in his complaint and established by the evidence, the scope of his operation was of such caliber as to be essentially commercial as opposed to bare minimal subsistence agriculture. Thus, we feel that plaintiff is subject to the standards of the marketplace wherein he sought to operate. *Sierens v. Clausen,* 60 Ill. 2d 585, 328 N.E. 2d 559 (1975); *Ohio Grain Co. v. Swisshelm,* 40 Ohio App. 2d 203, 69 Ohio Ops. 2d 192, 318 N.E. 2d 428 (1973); *cf., Cook Grains Inc. v. Fallis,* 239 Ark. 962, 395 S.W. 2d 555 (1965); *Loeb & Company, Inc. v. Schreiner,* 10 A.B.R. 41, 17 U.C.C. Rep. 897 (1975).

In our opinion this case is beyond the ambit of the Seed Law and is squarely within the parameters of Article 2 of the Uniform Commercial Code. The language and placement of defendant's clause was in accord with the requirements of G.S. 25-2-316(2) and not subject to the unconscionability provisions of G.S. 25-2-719(3). Thus, we hold that defendant effectively disclaimed liability for breach of warranty and substituted limitations reducing the extent of liability to return of pur-

chase price of the seed as concluded by the trial judge in his grant of partial summary judgment.

For the reasons stated, the judgment is

Affirmed.

Judges VAUGHN and ARNOLD concur.

CAVIN'S, INC. v. ATLANTIC MUTUAL INSURANCE COMPANY

No. 7510DC488

(Filed 17 December 1975)

1. **Insurance § 79— liability insurance — personal injury from malicious prosecution — nonapplicability to punitive damages**

An insurance policy obligating the insurer to pay on behalf of the insured such sums as the insured shall become legally obligated to pay as damages "because of personal injury" arising out of malicious prosecution and providing that the insurance afforded is "only with respect to personal injury" did not afford coverage against punitive damages in a malicious prosecution suit.

2. **Damages § 11— punitive damages**

Punitive damages are not awarded as compensation but are awarded as a punishment for the defendant's intentional wrong.

3. **Insurance § 6— construction of insurance contract**

The rule that insurance contracts will be construed most strongly against the insurer and most liberally in favor of the insured applies only where the language used is ambiguous or is susceptible of more than one construction and does not authorize the court to rewrite the policy, either by striking out language which it contains or by adding clauses which it does not have.

4. **Insurance § 6— terms of policy — contradiction by agent's representations**

The terms of an insurance policy providing liability coverage for compensatory damages arising out of malicious prosecution could not be contradicted by evidence of representations by the insured's agent that the policy would provide coverage for punitive as well as actual damages.

APPEAL by plaintiff from *Winborne, Judge.* Judgment entered 28 February 1975 in District Court, WAKE County. Heard in the Court of Appeals 24 September 1975.

In this civil action plaintiff, as named insured, seeks to recover under a "Special Multi-Peril Policy" issued to it by defendant Insurance Company. The policy contained a "Personal Injury Liability Insurance Endorsement," which insofar as pertinent to this appeal provides as follows:

"In consideration of the payment of the premium . . . and subject to all the terms of this endorsement, the Company agrees with the named insured as follows:

SCHEDULE

The insurance afforded is only with respect to personal injury arising out of an offense included within such of the following groups of offenses as are indicated by specific premium charge or charges:

Groups of Offenses

A. False Arrest, Detention or Imprisonment, or Malicious Prosecution ..... Included.

* * * * *

I. COVERAGE—PERSONAL INJURY LIABILITY

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called 'personal injury') sustained by any person or organization and arising out of one or more of the following offenses:

Group A— false arrest, detention or imprisonment, or malicious prosecution.

* * * * *

. . . . . and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury . . . .

* * * * *

IV. AMENDED DEFINITION

When used in reference to this insurance:

'damages' means only those damages which are payable because of personal injury arising out of an offense to which this insurance applies."

On 9 April 1971, while the policy was in force, one Emory brought suit against plaintiff-insured, Cavin's, Inc., and against

Wade L. Cavin, its sole stockholder, alleging they were guilty of malicious prosecution for which Emory sought recovery of actual damages of $30,000.00 and punitive damages of $500,000.00. Cavin's, Inc. gave due notice to defendant Insurance Company of the institution of that suit. On 23 April 1971 defendant Insurance Company notified Cavin's, Inc. that, as construed by the Insurance Company, the policy provided coverage for actual damages but no coverage for punitive damages, a position which the Insurance Company has continued to maintain throughout this matter. Ultimately, the suit for malicious prosecution brought by Emory was settled by agreement of the parties to that suit, concurred in by defendant Insurance Company, by the payment to Emory of $8,000.00. It was agreed between Cavin's, Inc., Wade L. Cavin, and defendant Insurance Company that the settlement represented payment of actual damages in the amount of $3,500.00 and payment of punitive damages in the amount of $4,500.00 "as if a jury verdict had been returned in favor of Emory" for $3,500.00 in actual damages and $4,500.00 in punitive damages. Pursuant to this agreement, defendant Insurance Company paid the $3,500.00 which represented payment of actual damages, and Cavin's, Inc. paid the $4,500.00 which represented payment of punitive damages, it being agreed that these payments would not prejudice any of the parties in a subsequent determination by the court as to whether the insurance policy provided coverage for punitive damages.

After the Emory suit for malicious prosecution was settled in the foregoing manner, Cavin's, Inc., brought this action against defendant Insurance Company, alleging that the insurance policy provided coverage against punitive damages and seeking recovery of $4,500.00, the amount it had paid as punitive damages in settling Emory's suit. Defendant Insurance Company filed answer denying that the policy provided coverage for payment of punitive damages. Based on the pleadings and stipulated facts, both parties filed motions for summary judgment. The court denied plaintiff's motion, allowed defendant's motion, and dismissed plaintiff's action. Plaintiff appealed.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by Josiah S. Murray III and Robert B. Glenn, Jr. for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr. for defendant appellee.

PARKER, Judge.

In the policy sued upon, defendant Insurance Company did not agree to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, . . . arising out of . . . malicious prosecution." Had the policy read in that fashion, plaintiff would be entitled to prevail. Such an agreement, however, can be read into the policy only by ignoring the words omitted from the foregoing quoted portion of the policy and by ignoring as well other clearly expressed policy provisions. This, we have no right to do.

[1] What the policy did provide was that defendant Insurance Company will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages *because of injury (herein called 'personal injury') sustained by any person or organization and* arising out of . . . malicious prosecution." (Emphasis added.) In the opening sentence after the word *"Schedule"* on the policy endorsement with which we are here concerned, it is expressly stated that "[t]he insurance afforded is *only with respect to personal injury* arising out of an offense included within [the policy coverage]," and in a separate paragraph entitled *"Amended Definition"* the word "damages" is specifically defined as meaning *"only* those damages which are payable *because of personal injury* arising out of an offense to which this insurance applies." (Emphasis added.) Thus, the policy makes it as clear as language can make it that the insurance company is bound to pay on behalf of the insured only such sums as the insured shall become legally obligated to pay as damages *"because of personal injury"* and that the insurance afforded is *"only with respect to personal injury."* The question presented by this appeal, therefore, is whether the sum of $4,500.00 which plaintiff insured became legally obligated to pay to Emory as punitive damages was payable as damages "because of personal injury" and "only with respect to personal injury." We agree with the trial court that it was not and therefore plaintiff is not entitled to recover in this action.

[2] Punitive damages, as the descriptive name clearly implies, are awarded as a punishment. They are never awarded as compensation. "They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case affords

the court to inflict punishment for conduct intentionally wrongful." *Transportation Co. v. Brotherhood,* 257 N.C. 18, 30, 125 S.E. 2d 277, 286 (1962). Punitive damages are never awarded merely because of a personal injury inflicted nor are they measured by the extent of the injury; they are awarded because of the outrageous nature of the wrongdoer's conduct. Being awarded solely as punishment to be inflicted on the wrongdoer and as a deterrent to prevent others from engaging in similar wrongful conduct, punitive damages can in no proper sense be considered as being awarded "only with respect to personal injury" or as damages "which are payable because of personal injury." Compensatory damages, which are awarded to compensate and make whole the injured party and which are therefore to be measured by the extent of the injury, are the only damages which are payable "because of personal injury."

[3] In its brief on this appeal, plaintiff contends that "[e]ven if the defendant did not intend to provide coverage for punitive damages, it used terminology which was subject to two different interpretations," and "[t]he interpretation which was chosen by the plaintiff was that the policy covered all damages for which it may become legally obligated to pay as damages if it was involved in a suit for malicious prosecution." We find no such ambiguity as plaintiff asserts. The interpretation chosen by the plaintiff can be arrived at only by completely ignoring and reading out of the written policy language which it in fact contains. The rule that insurance contracts will be construed most strongly against the insurer and most liberally in favor of the insured does not extend so far as to authorize the court to rewrite the policy, either by striking out language which it contains or by adding clauses which it does not have. That rule applies only where the language used is ambiguous or is susceptible of more than one construction. However, it is generally held, certainly in this State, "that where the language of an insurance policy is plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms." *Walsh v. Insurance Co.,* 265 N.C. 634, 639, 144 S.E. 2d 817, 820 (1965). Both parties joined in making the policy definition of "damages" as "only those damages which are payable because of personal injury" a part of their contract. "One alone cannot remove or change it." *Duke v. Insurance Co.,* 286 N.C. 244, 248, 210 S.E. 2d 187, 189 (1974). "The parties having thus agreed, so shall they be bound." *Walsh v. Insurance Co., supra,* p. 640.

[4] As an alternative argument, plaintiff contends that summary judgment for defendant was improper because there exists a genuine issue of material fact. In support of this position plaintiff points to the allegations in its complaint, which are denied in defendant's answer, that prior to purchasing the policy plaintiff made specfic inquiry, and "defendant's agent expressly represented to the plaintiff that the subject insurance policy applied for and subsequently issued obligated the defendant-insurer to make payment of any punitive damages, as well as actual damages, for which the insured, plaintiff herein, should become legally obligated to pay resulting from or occasioned by or arising out of any offense of malicious prosecution." In its brief plaintiff contends that "[t]he disputed representations by the defendant's agent are evidence which would establish the existence of the ambiguity in the policy terminology," from which plaintiff argues that summary judgment was improper "as there existed an ambiguity in the contract which demanded interpretation only after consideration of all the surrounding circumstances including the disputed fact of whether or not representations were made, with authority by the defendant's agent." However, the disputed representations, if made, would establish no ambiguity; they would directly contradict the written policy. Under long established precedent, this may not be done. In *Floars v. Insurance Co.*, 144 N.C. 232, 235, 56 S.E. 915, 916 (1907), our Supreme Court said:

> "[I]t is also accepted doctrine that when the parties have bargained together touching a contract of insurance and reached an agreement, and in carrying out, or in the effort to carry out, the agreement, a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instrument; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties.
>
> Like other written contracts, it may be set aside or corrected for fraud or for mutual mistake; but, until this is done, the written policy is conclusively presumed to express the contract it purports to contain."

Here, plaintiff has alleged neither fraud nor mutual mistake, only that he reasonably relied on representations made by de-

fendant's agent. Not seeking reformation, plaintiff has brought suit and declared upon the policy itself. The rights of the parties must be determined by its terms as written.

Finding, as we do, that the insurance policy now before us does not provide the coverage for which plaintiff contends, we do not reach the question, ably argued in the briefs of both parties, of whether a policy provision purporting to provide liability insurance protection against punitive damages would in any event be void as against public policy. For decisions from other jurisdictions on this question, see the cases collected in Annot., 20 A.L.R. 3rd 343, § 3 (1968).

The judgment appealed from is

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. COMMIE LESTER BUNTON

No. 7522SC463

(Filed 17 December 1975)

1. **Automobiles § 126— breathalyzer test results — admissibility**

In a prosecution for driving under the influence of intoxicating liquor, the trial court did not err in admitting into evidence the results of a breathalyzer test, though the arresting officer refused to take defendant to the hospital after the test was administered for the purpose of having a doctor give him a blood test, since the officer was required by G.S. 20-139.1 only to assist defendant in contacting a qualified person to give him a blood test, which the officer did, and under G.S. 20-139.1(d), the failure or inability of defendant to obtain an additional test does not preclude admission of results of a test given at the direction of the arresting officer.

2. **Criminal Law § 99— questioning of witness by court — limitation of cross-examination — no error**

The trial court did not err in asking a State's witness questions designed simply to clarify the witness's previous testimony, nor did the court unduly restrict defendant's cross-examination of the arresting officer.

3. **Automobiles § 129— driving under influence, third offense — submission of lesser offense — no error**

In a prosecution for driving under the influence, third offense, any error of the trial court in submitting as a permissible verdict

defendant's guilt of first offense of driving under the influence was favorable to defendant.

4. **Automobiles § 129— driving under the influence — instruction on statutory inference proper**

Where defendant was tried at the 13 January 1975 session of superior court for an offense occurring on 28 November 1974, the trial court properly instructed the jury concerning the permissible inference created by G.S. 20-139.1(a) with respect to breathalyzer test results as that statute was in effect prior to 1 January 1975, though that statute had been rewritten at the time of defendant's trial.

5. **Automobiles § 129— driving under the influence — instructions proper**

In a prosecution for driving under the influence, third offense, the trial court did not err in instructing the jury that if they had a reasonable doubt "as to one or more of" the elements of driving under the influence of intoxicating liquor, second offense, they should then proceed to consider whether defendant was guilty of driving under the influence of intoxicating liquor (first offense).

6. **Automobiles § 130— driving under the influence — sufficiency of verdict**

The verdict was sufficient to support the judgment in a prosecution for driving under the influence.

APPEAL by defendant from *Seay, Judge.* Judgment entered 14 January 1975 in Superior Court, IREDELL County. Heard in the Court of Appeals 22 September 1975.

Defendant was charged in a warrant with the offense of operating a motor vehicle on 28 November 1974 on a public highway in Iredell County while under the influence of intoxicating liquor, having been convicted of two similar offenses in the District Court in Statesville on 28 June 1970 and on 20 September 1972. After trial, conviction, and sentence in the District Court, defendant appealed, and was tried de novo on his plea of not guilty at the 13 January 1975 Session of Superior Court held in Iredell County.

The State introduced evidence to show the following. At approximately 12:25 a.m. on 28 November 1974 Patrolman Smith, a Statesville police officer, saw defendant driving an automobile on West Front Street. Defendant was two to three feet over the center line and the officer had to swerve to the shoulder of the road to avoid hitting defendant's vehicle. The officer stopped defendant and detected a moderate odor of alcohol on his breath. On the back seat there was a bag containing two six-packs of beer with two beers missing. There was a passenger sitting on the passenger side in the front seat and

defendant was under the wheel. At the officer's request, defendant stepped out of the car and took performance tests. When he walked he staggered, and while performing the finger to nose test he completely missed with the finger of his left hand. Officer Smith took defendant to the Police Department, where at about 1:00 a.m. Officer Burton, after informing defendant of his rights, administered a breathalyzer test. The test showed that defendant had .21 percent by weight of alcohol in his blood. Officers Smith and Burton each testified that in his opinion defendant was under the influence of some intoxicating liquor.

Defendant stipulated that Officer Burton was educated in the use of the breathalyzer, that he held a valid license to administer breathalyzer tests, that he went through the necessary procedures in checking out the machine in preparation for giving the test to the defendant, and that the machine was operating properly. Defendant also stipulated that on 20 September 1972 he had been convicted in the District Court in Iredell County of driving under the influence.

Defendant did not testify or offer any evidence before the jury. The jury returned verdict finding defendant guilty of driving under the influence of intoxicating liquor. The court entered judgment on the verdict sentencing defendant to prison for a term of six months, and defendant appealed.

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

Collier, Harris, Homesley, Jones & Gaines by Wallace W. Dixon for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the admission in evidence over his objection of the result of the breathalyzer test. He does not contend that the test was improperly administered or that he was not correctly informed of his rights. At the trial he stipulated to the contrary. He contends he was entitled to have the result of the breathalyzer test excluded from evidence solely because the arresting officer, after the test was administered, refused to take him to the hospital for the purpose of having a doctor give him a blood test.

Prior to ruling on the admissibility of evidence as to the result of the breathalyzer test, the court conducted a voir dire

examination at which defendant testified that after he took the breathalyzer test, he didn't believe the reading and told Officer Smith he wanted to take a blood test. Defendant testified:

> "He did not call anybody for me. I did all the calling myself. The first thing I called my brother to go on my bond and called Dr. Pressly and told him I wanted a blood test. He told me to go to the hospital. I had the jailer call Officer Smith to see if he could get Officer Smith to come back and tell him I would be out on bond and wanted to go get a test. In the meantime, I had called Dr. Pressly and he said to go to the hospital. The jailer told me Officer Smith wasn't coming back and I told my brother to take me to the hospital and I would have a blood test myself. When I got to the hospital about a quarter to three they told me a blood test would be no good without the arresting officer being there."

At the voir dire hearing defendant further testified on cross-examination:

> "I did not ask the officer to call a doctor for me. I told him I wanted a blood test. Mr. Smith told me he couldn't transport me but he would help me contact somebody. I was not able to get a blood test but I did go to the hospital."

At the conclusion of the voir dire examination the court made findings, concluded that all of defendant's rights were fully protected, and overruled defendant's objection to introduction of the result of the breathalyzer test. In this we find no error.

Subsection (d) of G.S. 20-139.1 provides that a person who has been given a breathalyzer test "may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law-enforcement officer," and further provides that "[a]ny 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." (Emphasis added.) Here, defendant's own testimony discloses that Officer Smith told him "he would help (defendant) contact somebody," and it is apparent that defendant was able to contact the doctor of his choice without undue delay. All that the statute required of the arresting officer was

that he assist defendant in contacting the doctor; he was not required in addition to transport defendant to the doctor. On this record we find no denial of defendant's statutory rights. Even had this not been the case, the statute itself expressly negates the exclusionary rule for which defendant contends. G.S. 20-139.1(d) states 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 the law-enforcement officer." There was no error in admitting the result of the breathalyzer test into evidence.

[2] Defendant assigns as error certain questions asked by the trial judge of the State's witness, Officer Burton, during the trial. Defendant contends that by asking these questions, the judge violated G.S. 1-180. We do not agree. It is entirely proper, and sometimes necessary, that the trial judge ask questions of a witness for purposes of clarifying the witness's testimony and in order that the truth may be laid before the jury. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). In so doing, the judge must, of course, exercise care to avoid prejudice to either party. Here, insofar as the record discloses only three questions were asked by the judge, and all of these were clearly designed simply to clarify the witness's previous testimony and were reasonably necessary for that purpose. This assignment of error is overruled.

Defendant assigns as error that the court unduly restricted his cross-examination of the arresting officer by interposing objections without request of the district attorney. We find no error. In the first place, it is not entirely clear from the record that the objections were not in fact interposed by the district attorney rather than by the court on its own initiative. More importantly, the questions to which objections were sustained were asked when the witness was recalled for that purpose after having been previously cross-examined and re-cross-examined. It was within the discretion of the trial judge to permit or refuse a further cross-examination, 1 Stansbury's N. C. Evidence (Brandis Revision) § 36, and clearly the trial judge here did not abuse that discretion. The questions to which objection was sustained were either argumentative or were unduly repetitious. Defendant's right of cross-examination was not unduly restricted and this assignment of error is overruled.

[3] Defendant, pointing to his stipulation at trial that he had been previously convicted in the District Court on 20 September

1972 of the offense of driving while under the influence of intoxicating liquor, contends it was error for the court to submit as a permissible verdict in this case his guilt of first offense driving under the influence of intoxicating liquor. If so, the error was favorable to defendant and he has no just cause to complain. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972); *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525 (1968); *State v. Chase,* 231 N.C. 589, 58 S.E. 2d 364 (1950).

[4] The court correctly instructed the jury in conformity with the opinion of our Supreme Court in *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967) concerning the permissible inference created by G.S. 20-139.1(a) as that statute was in effect prior to 1 January 1975. Defendant, pointing to the amendment effected by Ch. 1081 of the 1973 Session Laws which became effective 1 January 1975, contends that at the time defendant was tried in Superior Court the statutory presumption arising from a showing that a person's blood contained 0.10 percent or more by weight of alcohol was no longer in effect. For this reason, defendant contends that it was error in this case for the court to instruct the jury concerning the statutory presumption. We do not agree. Ch. 1081 of the 1973 Session Laws, ratified 2 April 1974, contains four sections. Section 1 amends G.S. 20-138 to create a new substantive offense by adding a provision making it unlawful for a person to operate a vehicle upon any highway when the amount of alcohol in such person's blood is 0.10 percent or more by weight. Section 2 rewrites G.S. 20-139.1(a) to make it applicable also to the new offense created by Sec. 1 and to abolish the presumption that previously arose under the statute from a breathalyzer reading of 0.10 percent or more. Secton 3 is not relevant to the present case. Section 4 provides: "This act shall become effective January 1, 1975." That the statute was made effective on a specified date subsequent to ratification is in itself an indication that it was intended to apply prospectively only. *State v. Hart,* 287 N.C. 76, 213 S.E. 2d 291 (1975). Moreover, Section 1 of the statute, which creates a new offense, is clearly prospective only. Ch. 1081 of the 1973 Session Laws is a single statute directed toward a single problem, and it is not logical to suppose that the General Assembly intended for one section to apply prospectively only and for another section to apply retroactively to pending prosecutions, thus making convictions easier to obtain in some cases and more difficult to obtain in others. Instead, it is ap-

parent that the General Assembly intended all sections of Ch. 1081 to take effect at the same time and in the same way, and this legislative intent should be given effect. We hold that the court in this case properly instructed the jury concerning the statutory presumption contained in G.S. 20-139.1(a) as that statute existed when the offense charged in this case was committed and when the present prosecution was commenced.

[5] Defendant contends the court incorrectly instructed the jurors that if they had a reasonable doubt "as to one or more of" the elements of driving under the influence of intoxicating liquor, second offense, they should then proceed to consider whether defendant was guilty of driving under the influence of intoxicating liquor (first offense). Defendant contends this instruction was erroneous because if the jurors had a reasonable doubt as to any element of the offense other than the previous conviction, they should return a verdict of not guilty. The instruction given by the court, however, could not possibly have been prejudicial. If the jurors had a reasonable doubt as to any element of the offense other than the previous conviction, then, following the court's instruction, they would have proceeded to consider the question of defendant's guilt of driving under the influence of intoxicating liquor (first offense) and would have immediately acquitted the defendant thereof, because the State would likewise have failed to establish all of the elements of that offense. In this case the court correctly charged the jury concerning the offense of which he was found guilty.

[6] Finally, citing *State v. Medlin,* 15 N.C. App. 434, 190 S.E. 2d 425 (1972), defendant moves this court to arrest judgment, contending that a defect appears on the face of the record in that the jury's verdict "attempted to but did not spell out the conviction." The record before us fails to disclose any exception taken to the court's action in accepting the verdict and there is no assignment of error directed either to the acceptance of the verdict or to the form in which it was rendered. No error appears on the face of the record. A verdict is to be interpreted in the light of the evidence and of the charge of the court, *State v. Jones,* 211 N.C. 735, 190 S.E. 733 (1937); 7 Strong, N. C. Index 2nd, Trial, § 42. The verdict in the present case, unlike the verdict disclosed in the record in *Medlin,* fails to disclose any discrepancy between the verdict as returned by the jury and as recited in the judgment entered. There was no ambiguity in the verdict in the present case, and, when interpreted

in the light of the evidence and the court's instructions to the jury, we find it sufficient to support the judgment.

No error.

Judges BRITT and CLARK concur.

ROBERT EARL TAYLOR v. TRIANGLE PORSCHE-AUDI, INC., A NORTH CAROLINA CORPORATION

No. 7515SC555

(Filed 17 December 1975)

1. **Rules of Civil Procedure § 7; Judgments § 32— motion to set aside default judgment — amendment — allegation of rule number**

The trial court did not abuse its discretion in permitting defendant to amend its motion to set aside a default judgment by including the rule number under which it was proceeding.

2. **Appearance § 1; Judgments § 14; Rules of Civil Procedure § 55— service agent's letter to clerk — appearance — notice of hearing on default judgment**

A letter from defendant's registered service agent to the clerk of court denying that he was still defendant's service agent constituted an appearance by defendant under Rule 55(b)(2); therefore, plaintiff was required to give defendant at least three days' notice of a hearing before a judge of an application for default judgment, and the default judgment must be vacated where plaintiff gave defendant no notice of the hearing.

3. **Judgments § 2— time of default judgment — entry out of session and out of county — absence of defendant's consent**

Default judgment was not entered in open court where the court directed plaintiff's attorney to take notes and incorporate them in a judgment and the only entry in the clerk's minutes was a notation that plaintiff's attorney was to prepare the judgment, and default judgment signed by the special judge out of session and out of county was void since defendant did not consent thereto. G.S. 1A-1, Rule 58; G.S. 7A-45(c).

4. **Fraud § 13; Unfair Competition — sale of car — misrepresentation of model year — rescission — treble damages**

Plaintiff was not entitled to treble damages under G.S. 75-16 where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented by the seller.

5. Judgments § 19; Rules of Civil Procedure § 60— motion to vacate default judgment — allegation of mistake, surprise, excusable neglect — vacation for irregularities

Although defendant's motion to vacate a default judgment stated as grounds therefor mistake, surprise and excusable neglect, the trial court properly based his order vacating the default judgment on irregularities in its rendition which were revealed to the court by the pleadings and records and by plaintiff's counsel. G.S. 1A-1, Rule 60(b)(6).

APPEAL by plaintiff from *Alvis, Judge.* Judgment entered 4 April 1975 in Superior Court, ORANGE County. Heard in the Court of Appeals 17 October 1975.

In his Complaint filed 3 February 1975, plaintiff alleges that he purchased an automobile from the defendant on 14 August 1974; that defendant misrepresented the vehicle as a 1971 Porsche when in fact it was a 1970 model; that he relied on the representation and purchased the car for the sum of $4,600; that he suffered actual damages in the sum of $4,600 and prays that this sum be trebled because it was a deceptive trade practice under G.S. 75-1.1; and that he recover the total sum of $13,800.

Summons was served upon Stewart Wallace, registered service agent for defendant, on 7 February 1975. In a verified letter to the Clerk of Superior Court on 12 February 1975, Wallace denied being defendant's service agent any longer though his name was still registered in the Secretary of State's office as defendant's service agent.

On 14 March 1975, entry of default was made by the clerk; on the same day plaintiff filed an application for default judgment and served a copy of the same upon defendant's registered agent, Stewart Wallace. At the March 17, 1975 Session of Superior Court, Presiding Judge Donald L. Smith held a hearing on the application on 20 March 1975 at which time it appears from the record that plaintiff offered evidence and made argument; thereupon Judge Smith, in open court, advised counsel for plaintiff to make notes and incorporate the notes into a judgment to be sent to him at his residence address in Wake County; that the judgment was drawn and mailed to Judge Smith on 21 March; that thereafter Judge Smith signed the Judgment and returned it to counsel for plaintiff. Though dated 20 March 1975, it was filed with the Court on 28 March 1975. In this judgment the court found actual damages in the sum of

$4,600, adjudged that this sum be trebled pursuant to G.S. 75-16 and that plaintiff recover of the defendant the sum of $13,800; and it was further ordered that upon satisfaction of the judgment, the plaintiff tender to defendant the 1970 Porsche automobile.

On 24 March 1975 defendant filed Answer and a motion to set aside the default judgment on the grounds of mistake, surprise and excusable neglect. Supporting the motion was the affidavit of Stewart Wallace; that he sold his interest in defendant corporation in 1974 and thought that upon sale he was no longer its process agent; and that he did not inform defendant of the service and process upon him until 20 March. The motion was heard before Judge Jerry Alvis in session on 4 April 1975. The Court allowed defendant to amend its motion to include the rule number under which it was proceeding and, after a hearing, ordered the default judgment set aside. From this order, plaintiff appeals.

Winston, Coleman and Bernholz by Steven A. Bernholz for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson by Robert B. Glenn, Jr., and E. C. Bryson, Jr., for defendant appellee.

CLARK, Judge.

The order appealed from concluded that (1) the letter from Stewart Wallace, registered service agent, to the Clerk on 12 February 1975, constituted a general appearance under G.S. 1A-1, Rule 55, and defendant was entitled to notice of hearing of at least three days; (2) that the default judgment was void in that it was not entered with the consent of defendant and was not entered in open court under G.S. 1A-1, Rule 58; and (3) that there was nothing to support the award of treble damages pursuant to G.S. 75-16.

Plaintiff in his assignments of error takes the position that, first, Judge Alvis erred in considering defendant's motion to set aside the default judgment because the motion did not set out the rule number under which it was proceeding and in allowing defendant to amend to set out the rule number; and, second, that the default judgment was not void and Judge Alvis had no authority to set it aside.

[1] In its motion to set aside the default judgment, defendant stated as ground therefor, as required by G.S. 1A-1, Rule 7(b)(1), mistake, inadvertence, and excusable negligence, but defendant did not state the rule number under which it proceeded as required by Rule 6, General Rules of Practice for the Superior and District Courts. It is noted that Rule 1 of the General Rules, *supra,* provides: "These rules . . . shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them." The Rules of Civil Procedure achieve their purpose of assuring a speedy trial by providing for and encouraging liberal amendments to the pleadings under Rule 15. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972). The philosophy of Rule 15 should apply not only to pleadings but also to motions where there is no material prejudice to the opposing party. In interpreting Federal Rule 60 in a case involving a motion to vacate a judgment, the United States Supreme Court stated that a trial judge abuses his discretion when he refuses to allow an amendment unless justifying reasoning is shown. *Foman v. Davis,* 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962). The trial judge not only has broad discretion in allowing amendments, but also has wide latitude in the manner of allowing the same. Shuford, N. C. Practice and Procedure, § 15-5, p. 136 (1975). In this case, the trial judge averted a decision on the basis of a mere technicality in allowing the defendant to amend his motion to set out the rule number under which it was proceeding and his action in so doing was in keeping with the spirit of the rules and was not an abuse of his discretion.

We turn now to consideration of the defects in the default judgment which Judge Alvis found in his order vacating the default judgment.

Entry of default was made by the Clerk on 14 March 1975. Entry of default under G.S. 1A-1, Rule 55(a) is the first step of a two-step process for obtaining judgment by default. The Clerk is required to make the entry if default is made to appear by affidavit or by any other appropriate proof, which may consist only of the record.

Default judgment by the Clerk is provided for by Rule 55(b)(1), is subject to the jurisdictional proofs required by G.S. 1-75.11, and is still controlled by G.S. 1-209(4) which em-

powers the Clerk to enter "all judgments by default and default and inquiry as are authorized by Rule 55 . . . . " Rule 55 does not provide for judgments by "default and inquiry" *per se* and in any event the rule authorizes the Clerk to enter only those judgments which would have been designated formerly as "default final." The entry of default and entry of default judgment by the Clerk may be simultaneous and can be contained in the same document. In this case, plaintiff did not seek a "default final" before the Clerk but instead sought in effect a "default final" from the Judge on the theory that his claim was for a sum certain.

[2] Default judgment by the Judge is governed by both Rule 55(b) (2) and the jurisdictional proofs required by G.S. 1-75.11. If the party against whom default judgment is sought has appeared in the action, the party entitled to default judgment must apply to the Judge, and there must be service with written notice of the application for judgment at least three days before hearing. Did the defendant *appear,* within the meaning of Rule 55(b) (2), in this action? A party may appear without pleading. *Crawford v. Bank of Wilmington,* 61 N.C. 136 (1867). Negotiations between parties after institution of an action may constitute an appearance. *Highfill v. Williamson,* 19 N.C. App. 523, 199 S.E. 2d 469 (1973). The federal courts have interpreted the same provision in the Federal Rules broadly. See 6 Moore's Federal Practice, Para. 55.05(3) (1972) and cases cited, including *Dalminter, Inc. v. Jessie Edwards, Inc.,* 27 F.R.D. 491, 4 F.R. Serv. 2d 55 b. 21 (S.D. Tex. 1961) which held that a letter from defendant's officer to plaintiff indicating that his corporation was not in existence constituted an appearance. We hold that the letter from defendant's registered agent constituted an appearance under Rule 55(b) (2) and that as therein provided plaintiff was required to give at least three days' notice of the hearing on the application for default judgment. The failure to provide the notice of hearing requires that the default judgment be vacated. *Miller v. Belk,* 18 N.C. App. 70, 196 S.E. 2d 44 (1973).

Courts applying Federal Rule 55(b) (2), or state rules or statutes based thereon, are not in agreement as to the effect of a failure to give the required three-day notice of application for judgment by default. In some cases, such judgments have been held void as working a deprivation of due process; in other cases, such judgments have been viewed as irregular and voidable. Annot., 51 A.L.R. 2d 837 (1957).

[3] If the default judgment was not entered in open court pursuant to Rule 58 after hearing on 20 March, but was entered when filed on 28 March after being signed by Judge Smith out-of-session and out-of-county, then he as a special judge was without authority to sign the judgment without the consent of the parties, and the judgment is void. G.S. 7A-45(c). *Shepard v. Leonard,* 223 N.C. 110, 25 S.E. 2d 445 (1943); *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576 (1942); 2 McIntosh, N. C. Practice and Procedure, § 1624, p. 64 (Supp. 1970). The only pertinent facts in the record on appeal relative to entry of the default judgment appear in the order appealed from wherein Judge Alvis found that "upon the conclusion of the hearing the presiding judge in open court . . . advised counsel for plaintiff to make notes and incorporate the notes into a Judgment to be prepared by counsel and to be sent to the judge out of session . . . which counsel did on March 21, 1975 . . . . " If we assume that the judge rendered judgment in open court, there was no entry of judgment because Rule 58 requires the judge to direct the clerk as to what notation shall be made, and the making of that notation constitutes the entry of judgment. If the clerk, though directed by the judge to do so, fails to make the entry of judgment, there is no final judgment from which an appeal will lie. *Sears v. Austin,* 282 F. 2d 340 (9th Cir. 1960). The only entry in the clerk's minutes is as follows: *"Taylor v. Triangle Porsche-Audi, Inc.* S. Judgment granted. S. Bernholz to prepare Judgment. Bernholz has court file to prepare Judg." There is nothing in the record on appeal to show that the judge directed the foregoing entry in the minutes; and the entry does not qualify as a notation of the court's decision constituting the entry of judgment within the meaning of Rule 58. We, therefore, conclude that the default judgment was not entered in session, and that the judge had no authority to thereafter sign it and direct entry. The judgment was irregular. *Menzel v. Menzel,* 250 N.C. 649, 110 S.E. 2d 333 (1959).

[4] The order appealed from concluded that the pleadings did not support the award of treble damages. The complaint in substance alleges only a misrepresentation of the year model of the car, his reliance on it and purchase of the car, and damages in the sum of $4,600, trebled to $13,800 by G.S. 75-16. The default judgment provided for recovery of $13,800, and further provided that upon satisfaction of the judgment the plaintiff tender to the defendant the 1970 Porsche automobile. It is clear that plaintiff is seeking to rescind the sales contract and recover the

sales price of $4,600. He was not damaged, nor injured within the meaning of G.S. 75-16 so as to warrant treble damages, in the sum of $4,600.

> "When a person discovers that he has been fraudulently induced to purchase property he must choose between two inconsistent remedies. He may repudiate the contract of sale, tender a return of the property, and recover the value of the consideration with which he parted; or, he may affirm the contract, retain the property, and recover the difference between its real and its represented value. He may not do both. Once made, the election is final. . . . " *Bruton v. Bland,* 260 N.C. 429, 430, 132 S.E. 2d 910, 911 (1963).

In a recent case involving fraudulent representation in the sale of an automobile where the plaintiff elected to retain the car and recover as damages the difference between the real and represented value, treble damages under G.S. 75-16 was awarded. *Hardy v. Tolar,* 288 N.C. 303, 218 S.E. 2d 342 (1975).

A default judgment which grants plaintiff's relief in excess of that to which they are entitled upon the facts alleged in the verified complaint is irregular. 5 Strong, N. C. Index 2d, Judgments, § 19, p. 39 (1968).

[5] In the motion to vacate the default judgment, defendant stated as grounds therefor mistake, surprise and excusable neglect under Rule 60(b)(1). However, in the hearing on the motion other grounds were revealed to the court by the pleadings and records and by plaintiff's counsel relative to rendition and entry of the default judgment. Rule 60(b)(6) provides for relief from a default judgment for "any other reason justifying relief . . . . " Under the broad power of this clause an erroneous judgment cannot be attacked, but irregular judgments, those rendered contrary to the cause and practice of the court, come within its purview. Shuford, N. C. Practice and Procedure, § 60-11, p. 512 (1975). And although Rule 60 says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. 3 Barron and Holtzoff, § 1322, p. 281 (Supp. 1972). *Sub judice,* Judge Alvis properly recognized the obvious irregularities in the default judgment and based his

order vacating the default judgment on these irregularities rather than on the ground of surprise and excusable neglect.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ROGER GREENE

No. 7523SC485

(Filed 17 December 1975)

1. **Larceny § 7— disappearance of boggs from field — possession by defendant shortly thereafter — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a larceny prosecution where it tended to show that boggs were last seen attached to a tractor in a field on 15 May 1974, defendant sold a set of boggs to one Pierce on 22 May 1974, and on 4 October 1974 the owner of the boggs saw them at Pierce's and identified them as his own.

2. **Larceny § 7— disappearance of boggs and tractor — sufficiency of evidence of larceny of tractor**

Although the evidential fact or circumstance of defendant's unexplained possession of a set of boggs permits an inference that he stole the boggs, that circumstance, standing alone, does not permit the further inference that defendant took the tractor to which the boggs were attached and which disappeared at the same time as the boggs; however, additional evidential circumstances, including the fact that boggs are usually moved by a tractor, a tractor is ordinarily used to raise boggs if they are loaded onto another conveyance, the boggs were very heavy and difficult to load or move without a tractor, and the boggs had no utility without a tractor, were sufficient to allow the jury to consider whether defendant also took the tractor when he took the boggs.

Judge MARTIN dissenting.

APPEAL by defendant from *Wood, Judge.* Judgment entered 18 February 1975 in Superior Court, WILKES County. Heard in the Court of Appeals 24 September 1975.

Defendant was indicted for larceny of a Ford Diesel tractor and a set of Long brand boggs. It was alleged that the property had a value of $3500.00 and was owned by Newland Welborn and Herschel Greene. The larceny is alleged to have occurred on or about 16 May 1974.

In the light most favorable to the State the evidence tends to show the following facts.

Newland Welborn lives in Watauga County and owns a Ford tractor. Herschel Greene lives in Wilkes County and owns a set of disc boggs. The brand name of the boggs was Long, the manufacturer. Welborn rented some corn land in Wilkes County and borrowed the set of boggs from Herschel Greene.

On the night before they were "taken" or "got gone," 15 May 1974, the tractor and boggs were left on the farm of Harold Blackburn in Wilkes County. Herschel Greene saw the tractor and boggs there about 8:30 p.m. and at that time the boggs were attached to the tractor by pins to a three-point hitch. Welborn has not seen his tractor since that time.

On 22 May 1974, defendant sold a set of boggs to Larry Pierce for $125.00. On 4 October 1974, Herschel Greene saw those boggs at Pierce's and identified them as the ones he loaned to Welborn.

Herschel Greene valued his boggs at $400.00. Larry Pierce said they were worth between $125.00 and $175.00. Welborn valued his tractor at $4,000.00.

Defendant offered no evidence. The judge instructed the jury that it might return a verdict of either guilty of felonious larceny, nonfelonious larceny or not guilty. The verdict was guilty of felonious larceny and judgment imposing a prison sentence was entered.

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

McElwee, Hall & McElwee, by John E. Hall, for defendant appellant.

VAUGHN, Judge.

[1] Upon the evidence presented the jury could have found that the boggs described in the indictment were stolen on or after the night of 15 May 1974 and that they were the same boggs in the unexplained possession of defendant and by him sold to Pierce on 22 May 1974. From the foregoing circumstances the jury could infer that defendant had stolen the boggs.

Some of the State's evidence was that the value of the boggs was sufficient to make the larceny thereof a felony. Other

State's evidence tended to show that the boggs were worth less than $200.00. Under the charge of the court the jury was also permitted to find that defendant also stole the missing tractor. If the evidence was insufficient to go to the jury on the question of whether defendant stole the tractor, there must be a new trial, because it cannot be said that the jury did not consider the value of the tractor when it considered whether defendant was guilty of felonious larceny or misdemeanor larceny.

Does the inference that is permitted by reason of defendant's possession of the stolen boggs soon after their theft, permit the additional inference that defendant also took the tractor that was last seen at the same place from which the stolen boggs were taken?

This Court has said:

> "Where it is shown that a number of articles of property have been stolen at the same time and as a result of the same breaking and entering of the same premises, evidence that a defendant charged with the crimes has possession of one of such articles tends to prove, not only that he stole that particular article, but also that he participated in the breaking and entering *and in the larceny of the remaining property. State v. Blackmon,* 6 N.C. App. 66, 75, 169 S.E. 2d 472, 478. (Emphasis added.)

The case now before us, however, does not involve a breaking or entering. The Supreme Court of this State appears to have made a distinction between when separate items are taken after a breaking or entering and when they are merely taken from the same premises at or near the same time.

In *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62, defendant was charged with and convicted of felonious breaking or entering and felonious larceny.

Evidence in the record on appeal filed in that Court discloses that the operator of a service station testified as follows:

> "On January 1, 1966, I operated a Phillips 66 Service Station consisting of a one-story building with five rooms, including a grease bay, wash bay, and three rooms. On January 1, 1966, *I had in this building* tires, *battery charger,* tools, cigarettes, a few canned goods, polishes, and washes.

I left this building at 7:30 o'clock on the night of December 31st, completely locked. All the windows were down and fastened and all the doors were closed and fastened. I came back to the service station at 15 minutes of 2:00 o'clock on the morning of January 1st, 1966. The *grease bay door*, a big 10-foot wide door that enters the building, *was rolled up* about eighteen inches. *It was down* when I left there at 7:30 the night before. A glass about 16 x 19 in the big door was *broken* out and was scattered all over the floor inside the building. A small door that goes into my display room had a hole, about 8 x 10, broken in it and a small glass in the corner of the door was broken out. The door was not unlocked. The shattered glass from that was inside the building. That door had not been opened. It could not be unlocked by sticking a hand through that broken hold.

* * *

I discovered six Phillips '66' tires were missing. Two were 775x14 Deluxe action tread, wrap around tread. Two were 825x14 premium action tread, white wall. Two were 775x15 safety action tread, black wall. Four were white wall and two were black wall. The Deluxe and premium were white walls. There was also missing approximately a half dozen cartons of cigarettes, mostly Winstons. When I left the night before, the tires were in the storeroom, right straight on through the display room. There is a wooden door to this room, but I don't think it was closed the night before when I left.

A small amount of change in a cigar box in the counter under the cash register, community flower money, at least a $1.00, maybe a little more, was missing.

I then went over in my *grease bay* and *found my battery charger* was missing. It was a used battery charger, I'm not sure about the name of it because it had been repainted. It was white with red trim. When I left the night before, it was *inside the lube bay door*. I do not believe there was anything else missing." (Emphasis added.)

The battery charger was worth $75.00 and the six tires were valued at more than $200.00.

There was other evidence tending to show that shortly thereafter defendant was in possession of the stolen battery

charger and tires which fit the general description of those taken from the service station. The Supreme Court concluded that the evidence was insufficient to identify the tires as being the ones taken from the station and that consequently, "the rule of recent possession of stolen property cannot apply to these six automobile tires." The Court held that there was ample evidence that the battery charger found in defendant's possession was the one taken from the station but was of the opinion that "no breaking and entering was involved in taking this electric battery charger."

The Court then held that a judgment of nonsuit should have been entered on the breaking or entering charge. Since the Court found there was no evidence defendant took the tires and other items taken at the same time and from the same premises as the battery charger, the judgment of guilty of felonious larceny was vacated and the case was remanded for proper judgment for larceny of the battery charger (valued at less than $200.00), a misdemeanor. The Court said

> "The evidence of the State tends strongly to show that the defendant is guilty of the larceny of the electric battery charger stolen from the grease pit of Floyd Hinson, the property of Floyd Hinson, but there is no evidence that he was guilty of the larceny of the six automobile tires and the six cartons of cigarettes specified in the second count in the indictment, and there is no evidence that defendant is guilty of breaking and entry as charged in the first count in the indictment." *State v. Foster, supra.*

Our consideration of the facts in *Foster* leads us to conclude that there was, indeed, some evidence that a breaking and entering was involved in the taking of the battery charger. That the Supreme Court reached a contrary conclusion on the facts does not alter the control that the law of that case must have on the case before us.

In *Foster,* the State's evidence puts defendant in possession of tires which were "of the same size, tread design and in the same order" as those taken from the same premises and on the same night that the battery charger (also found in defendant's possession) was taken. In the case before us the State's evidence does not put a tractor of any description in defendant's possession. *Foster* held that defendant's possession of the battery charger was no evidence that he was guilty of larceny of the

tires in his possession even though they fit the description of the State's items. In light of the foregoing, we feel compelled to hold that although the evidential fact or circumstance of defendant Greene's unexplained possession of the boggs permits the inference that he stole the boggs, that circumstance, standing alone, does not permit the further inference that he took the still missing tractor.

[2] There are, however, additional evidential circumstances to be considered by the jury. The additional circumstances relate to the very nature of the stolen property. When last seen the tractor was attached to the boggs and disappeared at or about the same time. Ordinarily boggs are moved by a tractor. Ordinarily the lift of a tractor is used to raise boggs if they are loaded onto another conveyance. The disc boggs were very heavy (heavier than a disc harrow) and are difficult to load and move without a tractor. The boggs have no utility without a tractor. We think these additional evidential circumstances allow us to distinguish the present case from *Foster* and hold that the jury was properly allowed to consider whether defendant also took the tractor when he took the boggs.

We have reviewed defendant's other assignments of error and they are overruled.

We find no prejudicial error in defendant's trial.

No error.

Chief Judge BROCK concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

Defendant's principal assignment of error challenges the sufficiency of the evidence to go to the jury and sustain the verdict.

Upon the evidence presented in the present case, the jury could have found that the boggs described in the indictment were stolen on or after the night of 15 May 1974 and that they were the same boggs in the unexplained possession of defendant and by him sold to Pierce on 22 May 1974. Basing its finding on the facts presented and on the "recent possession doctrine,"

the jury could infer that the defendant stole the boggs. However, the court instructed the jury that it could consider the "recent possession doctrine" and circumstantial evidence in arriving at its verdict with respect to both the boggs *and* the tractor.

In order for the "recent possession doctrine" to apply in a particular case, there must be proof of these things: "(1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt." *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62 (1966). "The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. 'It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence' (Citation omitted), and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief." *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920 (1944).

The evidence in the present case does not fix the defendant with possession of the tractor as is required before the presumption can apply. "The identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not an aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery." *State v. Jones,* 227 N.C. 47, 40 S.E. 2d 458 (1946). The doctrine has no application in the present case in respect to the still missing tractor.

Further, there are no additional circumstances which significantly bolster the State's case. There was no evidence that the tractor was ever in the possession of defendant or under his control. There were no incriminating circumstances linking defendant with the still missing tractor except that at one time the boggs were hitched to the tractor.

Thus, although defendant Greene's unexplained possession of the boggs permits the inference that he stole the boggs, it does

not permit the further inference that he took the still missing tractor. " 'A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption. (Citations).' " *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428 (1966).

For the reasons stated, there should be a new trial at which time the jury may find defendant guilty of felonious larceny of the boggs, misdemeanor larceny of the boggs, or not guilty.

W. E. GARRISON GRADING COMPANY v. PIRACCI CONSTRUCTION CO., INC.

No. 7514SC490

(Filed 17 December 1975)

1. **Contracts § 18— written contract — modification by parol agreement**

The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived; therefore, the trial court could properly find that a contract between the parties which provided that no extra work would be paid for unless authorized in writing was modified by a subsequent oral agreement between plaintiff and defendant concerning the unit prices of borrow and mucking excavation and by defendant's conduct since work was performed at the request and under the supervision of defendant's engineer.

2. **Contracts § 20— failure of plaintiff to perform contract — performance prevented by defendant**

In an action for breach of contract to grade a building site, defendant's contention that the quantity of excavation for which plaintiff is entitled to compensation should be based solely on cross-section calculations as prescribed by the parties' contract is without merit where defendant, by changing stake-outs as the work progressed and by failing to provide requisite engineering, made it impossible to measure accurately the amount of excavation by the cross-section method.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 20 February 1975 in Superior Court, DURHAM County. Heard in the Court of Appeals 24 September 1975.

This appeal stems from a civil action brought by plaintiff for breach of contract.

Plaintiff's evidence tends to show the following: W. E. Garrison, president and owner of W. E. Garrison Grading Company, is an experienced grading contractor who works principally in the Raleigh area. Defendant, Piracci Construction Co., Inc., owned property in the Research Triangle and was employed to construct the National Air Pollution Control Administration Building thereon. In June of 1969 Garrison and a representative of defendant entered negotiations concerning the grading requirements for the building project. During the summer plaintiff prepared two proposals based on site plans furnished by the defendant. The unit prices of various types of grading work were the same in each proposal:

a. Clearing — $350.00 per acre;

b. Topsoil stripped — 30¢ per yard;

c. Ripped excavation — $1.05 per yard;

d. General excavation — 45¢ per yard;

e. Borrow needed — 65¢ per yard;

f. Shaping site — $7,000.00.

In early September, pursuant to defendant's instructions, plaintiff began clearing the construction site with the understanding that it would proceed with the grading work once a final plan was approved. At a 10 September 1969 meeting in Baltimore, Maryland, the parties agreed that plaintiff would perform the remainder of the site work according to a final site plan. The plan embodied plaintiff's earlier suggestion that the elevations in the first proposed plan be lowered one foot to create a "balance" between excavation and filling operations and, in effect, eliminate the need for waste and borrow operations. It was also agreed that excavation would be based on cut rather than fill and that the work performed by plaintiff would conform to the following estimates:

a. Clearing — 26 acres at $350.00 per acre;

b. Stripping — 29,400 cubic yards of topsoil at 30¢ per cubic yard;

c. General excavation — 120,000 cubic yards at 45¢ per cubic yard;

d. Ripped excavation — 36,000 cubic yards at $1.05 per cubic yard;

e. Shaping site — a lump sum of $7,000.00.

Thereafter plaintiff commenced the grading operations under the supervision of defendant's employees. Plaintiff periodically billed defendant for work performed through 11 December 1969, and defendant promptly paid the first three invoices. Meanwhile plaintiff encountered unexpected borrow work and extensive mucking operations and erroneously listed 34,000 cubic yards of borrow excavation as general excavation at 45¢ per cubic yard in the 11 December invoice. In order to obtain the full 65¢ per cubic yard price for borrow excavation, plaintiff added 20¢ per cubic yard for the 34,000 cubic yards previously billed as general excavation to the next invoice dated 31 December. Defendant refused to pay the 31 December invoice because of questions regarding the amount and price of the borrow and mucking work. By letter dated 2 January 1970 plaintiff attempted to explain the reason for the overruns, and defendant paid the 11 December invoice at the end of January. During the interim period plaintiff signed a standard form contract, dated 5 January, at the request of defendant. The unit prices for clearing, stripping, general excavation, ripped excavation, and grading set forth in the written agreement were identical to the rates of the September agreement. The contract did not specify a unit price for borrow or mucking operations. Furthermore, the contract contained the following provisions:

"NO EXTRA WORK SHALL BE PAID FOR UNLESS AUTHORIZED IN WRITING FROM OWNER'S OFFICE. VERBAL AUTHORIZATION SHALL NOT BE RECOGNIZED.

. . . .

"Owner shall furnish a qualified engineer for all required line and grade, surveys and levels as necessary. *Contractor shall prepare all required cross-sections and calculations, verify and check with job representative for purposes of evaluating quantities of various materials involved.* Contractor will review with Superintendent and determine quantities for requisition purposes." (Emphasis added.)

Plaintiff continued to perform borrow and mucking work in excess of the original estimates due to defendant's substantial deviation from the final site plan. At a 7 February 1970 meet-

ing the parties verbally agreed that plaintiff would be paid $2.50 per yard for mucking and $.65 per yard for borrow operations and that general excavation over 86,000 yards would be considered borrow for payment purposes. Defendant promptly paid plaintiff for the borrow and mucking work set forth in the 31 December invoice and subsequently paid a 15 July invoice for similar operations. Although plaintiff continued to perform work for defendant until the end of October, defendant refused to make further payments.

Defendant's evidence tends to show that it did not agree to pay plaintiff 65¢ per cubic yard for borrow excavation at the 7 February meeting. The focus of that meeting was limited to the extra work billed in the 31 December invoice. The executive of Piracci Construction Co., Inc., who met with plaintiff testified, " . . . I am not sure whether I agreed to compensating that day or take it under advisement and think about it, but I definitely can state that I had no intention of establishing a new unit price for borrow excavation." At most defendant agreed to pay 20¢ per yard for the borrow excavation reflected in the 31 December invoice.

At the pretrial conference the parties agreed to the following stipulations:

> " . . . the primary difference or differences between the parties hereto revolves around the quantities of materials to be paid for. The plaintiff contends that it has been underpaid for materials moved under its contract or contracts with the defendant and the defendant contends that the plaintiff has been overpaid for materials moved under a contract or the contract.
>
> "The defendant contends that there is a discrepancy in the billings but the plaintiff contends that the final billing and the final amount is correct except as will be amended during the course of the trial.
>
> "The primary matters to be decided by the court are as follows:
>
> "1. What contracts, if any, existed between the parties?
>
> "2. The volume of materials moved by the plaintiff on the construction project;

"3. The price of the materials moved by the plaintiff on the project."

The case was tried without a jury, and judgment in the amount of $80,109.25 was rendered for plaintiff. Defendant appeals.

Nye, Mitchell & Bugg, by Charles B. Nye, for plaintiff.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for defendant.

BROCK, Chief Judge.

To quote from defendant's brief, "All of the error which the Defendant assigns relates to this fundamental question: What was the contract between the parties, and did the Plaintiff prove liability under that contract?" In particular defendant contends that the presiding judge erred by not limiting its liability to excavation work performed by plaintiff which was (1) authorized by written change order and (2) measured by the cross-section method in accordance with the express terms of the 5 January contract. The essence of defendant's argument is that the 5 January contract exclusively governs its liability to plaintiff.

[1] The presiding judge found that the written order procedure of the 5 January contract was modified by the subsequent oral agreement between plaintiff and defendant concerning the unit prices of borrow and mucking excavation. This finding is supported by competent evidence. Furthermore, it is apparent that the so-called "extra" borrow and mucking work was performed at the request and under the supervision of defendant's engineer. "The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. . . . This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. (Citations omitted.)" *Graham and Son, Inc. v. Board of Education,* 25 N.C. App. 163, 212 S.E. 2d 542 (1975). Applying this principle to the facts in this case, we hold that the presiding judge properly found defendant liable as a result of its oral agreement with plaintiff and its subsequent conduct.

[2] Even if deemed liable for borrow and mucking operations, defendant argues that the quantity of excavation for which

plaintiff is entitled to compensation should be based solely on cross-section calculations as prescribed by the 6 January contract. Again this argument is a casualty of the court's findings of fact:

"28. Upon the completion of work, the parties attempted to arrive at agreed quantities and in this connection jointly approved a final survey or cross-section of the completed works. [The parties could not agree that the final cross-section was an adequate measure or basis to determine the amount or quantity of work performed by comparing it with the original cross-section made before work was commenced, and the Court finds as a fact that the final cross-section of the completed work could not and would not be a proper basis of measurement for the work actually performed by the plaintiff in part because of:

"a. The final approved cross-section made after the completion of all work would not reflect the shrinkage in the fill areas after compaction.

"b. A comparison between the original and final cross-section in the fill areas would not correctly reflect the amount of top soil replaced in the fill areas and would not reflect accurately the mucking or top soil operations. Neither would a comparison of the cross-sections have any bearing on the materials in the fill areas which had to be removed more than once as borrow operations. Neither would the two cross-sections reflect or measure the amount of work required by the constant restaking of the project and changing of grades made by the defendant during the period that the construction work was being performed.

"Therefore, based upon all the testimony and evidence, the Court finds as a fact that the measurement of the actual quantities of material moved by the plaintiff must be based on some other method of measurement other than by use of a comparison of the original and final cross-sections of the plaintiff's work because of the foregoing and because there was no interim engineering work for evaluating quantities.]

"[29. That the plaintiff offered uncontested testimony and evidence that the only reasonable and prudent way to determine the quantities or volume of materials moved by the plaintiff on the construction project was, in the last

analysis, based on load counts which the plaintiff kept on a daily basis during the construction of the project; that the plaintiff's evidence and testimony reflects the fact that all of its billings from start to finish concerning general and borrow excavation were based on load counts and the evidence tends to show, and the Court finds as a fact, that from the inception of the contract until its completion, the majority of its billings, if not all billings, were based on load count due to lack of engineering on behalf of the defendant; that the Court further finds it a fact that measurements made by load count are reasonably correct, are accepted in the trade as being reasonably certain and are a proper basis for determining the quantities of work performed by the plaintiff on the subject project because of the lack of interim engineering performed by the defendant and because of the plaintiff's being forced into an unbalanced project because of the defendant's failure to stake out the project properly on numerous occasions.]"

In summary, due to changes in the stake-outs as the work progressed and defendant's failure to provide the requisite engineering, it was not possible to accurately measure the amount of excavation by the cross-section method. "It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the non-performance. (Citations omitted.)" *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971).

Defendant assigns error to the relief granted to plaintiff on the grounds that it is based upon *quantum meruit.* The presiding judge's conclusions of law clearly indicate that plaintiff's relief is derived not from *quantum meruit* principles but from "its contracts and agreements with the defendant under the conditions of the contracts and agreements or under the conditions of the contracts and agreements as waived or under the conditions as ratified and affirmed by the defendant. . . ." This assignment of error is overruled.

In the pleading stage of the trial defendant answered with a counterclaim to the effect that the cross-sections taken after the grading work had been completed indicate that plaintiff

was overpaid. During trial defendant's attorney made the following statement to the trial judge:

> "Your Honor, as I indicated before the luncheon recess, Mr. Rupp has asked to speak, or maybe before he begins his testimony with reference to the counterclaim. We have discussed it during lunch and I have told him that in our written contract, specifically paragraph 9.7.5 the statement is made 'The making of final payment shall constitute a waiver of all claims by the owner except those arising from . . .' various matters that are not at issue here, and that in view of our position in this case that final payment has been made, that it would be both inconsistent and right that we not put in evidence of our counterclaim, and so that is the decision of the defendant consistent with its view of the contract, and therefore I would not introduce any evidence through Mr. Rupp of the counterclaim."

Defendant assigns error to the court's finding that defendant voluntarily agreed to the dismissal of its counterclaim. If we should determine that the trial judge erroneously found that defendant voluntarily dismissed its counterclaim, it would afford defendant no relief. At best, the difference between defendant's statement to the trial court and a voluntary dismissal of the counterclaim is technical. Most outstanding, however, are the pretrial stipulations of the questions to be resolved by the trial court. Each of these questions was resolved upon the evidence offered at trial. None of them is affected by the existence or non-existence of defendant's counterclaim. We fail to see prejudicial error, if error exists, in the recitation in the judgment that defendant had voluntarily stipulated that its counterclaim be dismissed. Defendant had the burden of proof upon its counterclaim, but by its own election it offered no evidence to substantiate its claim. Under such circumstances we fail to see how defendant can suggest that its counterclaim still exists.

Affirmed.

Judges VAUGHN and MARTIN concur.

APPENDIXES

ADDITIONS TO
RULES OF APPELLATE PROCEDURE

AMENDMENTS TO RULES
OF THE JUDICIAL STANDARDS COMMISSION

REVIEW OF
JUDICIAL STANDARDS COMMISSION
RECOMMENDATIONS

ADDITIONS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

The following subdivision shall be added to Rule 30:

(e) Decision of Appeal Without Publication of an Opinion.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

Done by the Court in Conference on December 18, 1975.

EXUM, J.

For the Court

AMENDMENTS TO RULES OF THE JUDICIAL STANDARDS COMMISSION

RULE 10

Formal Hearings. Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal hearing before it concerning the charges. The hearing shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 8.

At the date set for the formal hearing, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in support of the charges. Counsel shall be sworn to preserve the confidential nature of the proceeding.

The hearing shall be recorded by a reporter employed by the Commission for this purpose. The reporter shall also be sworn to preserve the confidential nature of the proceeding.

RULE 13

Rights of Respondent. In formal hearings involving his censure, removal, or retirement, a judge shall have the right and opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, which shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the hearings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 14

Evidence. At a formal hearing before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence.

RULE 18

Record of Proceedings. The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal hearings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation.

This is to certify that the foregoing amendments to Rules 10, 13, 14 and 18 are the amendments duly adopted by the Judicial Standards Commission this the 12th day of December, 1975.

WALTER E. BROCK

Chairman, Judicial Standards Commission

RULES FOR SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

RULE 1

DEFINITIONS

In these rules, unless the context or subject matter otherwise requires:

(a) **Commission** means the Judicial Standards Commission.

(b) **Judge** or **respondent** means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) **Court** means the Supreme Court of North Carolina. **Clerk** means the Clerk of the Supreme Court.

(d) **Commission's attorney** means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) **Service** of a document required to be served means either mailing the document by U. S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N. C. Rules of Civil Procedure.

RULE 2

PETITION FOR HEARING

(a) **Notice to Judge.** When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U. S. certified mail, return receipt requested, to the respondent named therein.

(b) **Petition for Hearing.** The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate show-

ing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and, upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) **Failure to File Petition.** If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) **Briefs.** Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) **Oral Argument.** After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

RULE 3

DECISION BY THE COURT

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk as a part of the record of the proceeding.

RULE 4

REPRODUCTION OF RECORD AND BRIEFS

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

RULE 5

COSTS

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

Duly adopted by the Court in Conference this 25th day of September, 1975.

Exum, J.

For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ADVERSE POSSESSION

§ 5. Continuity of Possession

Plaintiff's claim of title by adverse possession was not defective as a matter of law because of her absence from the property to serve prison sentences on two occasions. *Helton v. Cook,* 565.

§ 25. Sufficiency of Evidence

Petitioners' evidence as to adverse possession was insufficient to be submitted to the jury. *Mizzell v. Ewell,* 507.

AGRICULTURE

§ 9.5. Actions or Counterclaims for Defective Seed

A provision in a purchase order for cabbage seed limiting defendant's liability to the purchase price of the seeds was proper. *Billings v. Harris Co.,* 689.

ANIMALS

§ 2. Liability of Owner for Injuries Inflicted by Domestic Animals

In a prosecution to recover for injuries received by a minor bitten by defendant's dog, trial court erred in failing to instruct the jury on the statute requiring confinement or leashing of vicious animals. *Swaney v. Shaw,* 631.

APPEAL AND ERROR

§ 6. Orders Appealable

Appeal from an order dismissing fewer than all of plaintiffs' claims is premature. *Mozingo v. Bank,* 196; *Newton v. Insurance Co.,* 168; *Leasing Corp. v. Productions, Inc.,* 661.

Order enjoining withdrawal of funds from savings accounts pending trial of an action for alimony and divorce and joining the banks as defendants was interlocutory and not appealable. *Guy v. Guy,* 343.

§ 7. Parties Who May Appeal

Defendant had no standing to appeal from an order finding her son in contempt of court as a result of his testimony in a child custody action. *Boone v. Boone,* 153.

§ 14. Appeal and Appeal Entries

Appeal is dismissed where appeal was not taken within 10 days after rendition of the judgment appealed from. *S. v. Harold,* 588; *Clark v. Wallace,* 589.

§ 16. Jurisdiction and Powers of Lower Court After Appeal

Trial court had jurisdiction to set aside summary judgment for defendant after plaintiff had given notice of appeal since the proceedings before the trial court constituted an adjudication that plaintiff's appeal had been abandoned. *Reavis v. Campbell,* 231.

§ 26. Exception to Signing of Judgment

Exception to the signing of the judgment presents the face of the record for review. *Modica v. Rodgers,* 332.

ASSAULT AND BATTERY — Continued

§ 13. Competency of Evidence

Felonious assault victim was properly permitted to display bullet wound to the jury. *S. v. Clay*, 118.

Trial court properly excluded testimony of prior threats made by the victim and of the victim's reputation as a violent and dangerous fighting man. *S. v. Lewis*, 426.

§ 14. Sufficiency of Evidence

State's evidence was sufficient for jury in prosecution for felonious assault. *S. v. Hargrove*, 36.

Evidence in a prosecution for assault with a deadly weapon was sufficient to be submitted to the jury where it tended to show that defendant attacked a fellow inmate with a knife. *S. v. Maddox*, 58.

State's evidence was sufficient for the jury in a prosecution for felonious assault of defendant's husband. *S. v. Lewis*, 426.

§ 15. Instructions

The trial court did not err in failing to define serious injury in a felonious assault case. *S. v. Pearson*, 157.

Trial court erred in failing to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury. *S. v. Girley*, 388.

Trial court properly refused to charge on self-defense in a felonious assault case. *S. v. Lewis*, 426.

Trial court's instructions were proper in a prosecution for assault on a female. *S. v. Thompson*, 576.

§ 16. Necessity of Submitting Lesser Degrees of the Offense

In a prosecution for assault with a deadly weapon, any error in the failure of the court to include guilty of simple assault as a permissible verdict in its final mandate was cured by the court's further instructions. *S. v. Abrams*, 627.

§ 17. Verdict and Punishment

Imposition of the maximum sentence of imprisonment upon defendant's conviction for assault with a deadly weapon did not constitute cruel and unusual punishment. *S. v. Cross*, 335.

ATTORNEY AND CLIENT

§ 7. Compensation and Fees

Where this cause was heard upon plaintiff's motion for an increase in child support payments and upon defendant's motion for a modification of the child custody order, trial court's award of attorney fees did not have to be supported by a finding that the defendant had refused to provide adequate support. *Fellows v. Fellows*, 407.

Trial court erred in ordering defendant to pay temporary alimony and counsel fees without making findings of fact as to whether plaintiff qualified for relief under G.S. 50-16.3. *Hill v. Hill*, 423.

Trial court properly awarded plaintiff attorney fees in an action for support of plaintiff's illegitimate child. *Tidwell v. Booker*, 435.

AUTOMOBILES

§ 3. Driving After Suspension of License

Due process requirement of notice of the suspension of defendant's driver's license was met when the Dept. of Motor Vehicles mailed notice to defendant at her address shown on the Department's records. *S. v. Atwood,* 445.

Defendant was afforded a meaningful hearing before the suspension of her driver's license for two offenses of speeding when she was charged and convicted of the speeding offenses. *Ibid.*

§ 5.5. Motor Vehicle Franchises

Where a motorcycle manufacturer gave plaintiff dealer notice of its intention to grant a new motorcycle franchise in plaintiff's trade area on or before 1 September 1973, but the manufacturer did not grant such a franchise by that date, failure of plaintiff to request a hearing by the Commissioner of Motor Vehicles within 30 days after receipt of such notice did not give the manufacturer the right to grant a new franchise at any time in the future without giving plaintiff further notice. *Cycles, Inc. v. Alexander,* 382.

§ 40. Pedestrians

Plaintiff did not have a special status as a worker on the highway which required a higher degree of care on the part of defendant motorist than that owed to an ordinary pedestrian. *Brooks v. Smith,* 223.

§ 58. Turning and Hitting Turning Vehicle

Conflicting testimony at a prior trial introduced at the hearing on a motion for summary judgment presented issues of fact as to whether defendant was negligent in colliding with an oncoming car while attempting to make a left turn. *Reavis v. Campbell,* 231.

§ 62. Striking Pedestrian

Plaintiff pedestrian's evidence was insufficient to show negligence on the part of defendant driver and established her own contributory negligence as a matter of law. *Clark v. Bodycombe,* 146.

§ 83. Pedestrian's Contributory Negligence

Plaintiff was contributorily negligent when he left his place of work along the side of the highway and collided with the side of defendant's car while crossing the highway. *Brooks v. Smith,* 223.

§ 90. Instructions in Automobile Accident Cases

In an action for wrongful death of a minor bicyclist, trial court did not err in failing to refer specifically to G.S. 20-141(c). *McDougald v. Doughty,* 237.

Trial court's statement in its instructions that plaintiff was trying "to beat the truck to the driveway" was unsupported by evidence and was prejudicial to plaintiff. *Horne v. Wall,* 373.

Trial court erred in failing to declare and explain the law arising on evidence that defendant's truck was 349 feet away when plaintiff fell onto the road from his bicycle. *Ibid.*

AUTOMOBILES — Continued

§ 126. Competency and Relevancy of Evidence in Prosecutions Under G.S. 20-138

The officer who administered a breathalyzer test to defendant was fair and impartial, and warnings given defendant prior to the test were sufficient. *S. v. Green,* 491.

Trial court properly allowed into evidence results of breathalyzer test though the arresting officer refused to take defendant to the hospital after the test was administered for another blood test. *S. v. Bunton,* 704.

§ 127. Sufficiency of Evidence in Prosecutions Under G.S. 20-138

Evidence was sufficient for the jury in a prosecution for drunken driving after defendant was discovered asleep on the front seat of a car parked partly on a public highway. *S. v. Griggs,* 159.

§ 129. Instructions in Prosecutions Under G.S. 20-138.

Court's instruction in a drunken driving case did not permit the jury to determine guilt or innocence based on defendant's condition at the time a breathalyzer test was administered rather than at the time he was operating his automobile on the highway. *S. v. Taylor,* 38.

Trial court erred in failing to require the jury to find that the offense of drunken driving was committed "upon a highway." *S. v. Griggs,* 159.

Instructions on inference from breathalyzer results were proper. *S. v. Bunton,* 704.

AVIATION

§ 2. Liabilities in Operation of Airport

Plaintiff was not contributorily negligent as a matter of law in failing to maintain an area beyond a runway or in radioing landing instructions to defendant pilot. *Flying Services v. Thomas,* 107.

§ 3.5. Damage to or Loss of Plane

Evidence was sufficient to permit a jury finding that defendant was negligent in approaching and landing plaintiff's aircraft. *Flying Services v. Thomas,* 107.

BANKS AND BANKING

§ 4. Joint Accounts

An administratrix was not entitled to set aside a savings account joint survivorship agreement signed by intestate and his sister on the ground that the intestate's sister did not correctly understand the nature of the agreement. *Johnson v. Bank,* 240.

BASTARDS

§ 1. Elements of the Offense of Wilful Refusal to Support Illegitimate Child

Determination of defendant's paternity in a prosecution for nonsupport was not a judicial admission in a subsequent civil action for child support. *Tidwell v. Booker,* 435.

CONTRACTS

§ 4. Consideration

Defendant's alleged promise to purchase all of plaintiffs' land at a foreclosure sale upon plaintiffs' agreement to give defendant a portion of the property so purchased was unsupported by consideration. *Britt v. Allen,* 122.

§ 18. Modification

A contract between the parties which provided that no extra work would be paid for unless authorized in writing was modified by a subsequent oral agreement between the parties. *Grading Co. v. Construction Co.,* 725.

§ 20. Impossibility of Performance as Excusing Nonperformance

Defendant's contention that the quantity of excavation for which plaintiff was entitled to compensation should be based solely on calculations as prescribed by the parties' contract is without merit where defendant made it impossible by its actions to make such calculations. *Grading Co. v. Construction Co.,* 725.

§ 27. Sufficiency of Evidence and Nonsuit

Trial court should have granted defendant's motion for directed verdict where plaintiff subcontractor's evidence showed that he was paid according to contract provisions. *Hoffman v. Clement Brothers Co.,* 548.

CORPORATIONS

§ 29. Authority of Receivers

A receiver of a corporation had no power to exercise control over land claimed by respondents. *Milling Co. v. Hettiger,* 76.

COSTS

§ 3. Taxing of Costs in Discretion of Court

Court's order ruled only on motion for impoundment of a carburetor and not on motion for compensation of a commissioner and court reporter, and the clerk and superior court thereafter had authority to enter an order awarding fees for the commissioner and court reporter to be taxed as part of the costs. *Hall v. General Motors Corp.,* 202.

COURTS

§ 9. Jurisdiction After Orders of Another Judge

Court's order ruled only on motion for impoundment of a carburetor and not on motion for compensation of a commissioner and court reporter, and the clerk and superior court thereafter had authority to enter an order awarding fees for the commissioner and court reporter to be taxed as part of the costs. *Hall v. General Motors Corp.,* 202.

CRIME AGAINST NATURE

§ 2. Prosecutions

Evidence was sufficient to be submitted to the jury in a prosecution for attempted crime against nature with a 12 year old boy. *S. v. Wright,* 263.

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxication

Trial court was not required to give an instruction as to intoxication of defendant. *S. v. Respass,* 137.

§ 7. Entrapment and Compulsion

The defense of entrapment was not available to defendant where an officer observed the drunken defendant in a restaurant but subsequently arrested him for driving under the influence. *S. v. Green,* 491.

Trial court was under no duty to charge on the doctrine of coercion where the evidence tended to show that defendant was an aider and abettor. *S. v. Kearns,* 354.

§ 9. Aiders and Abettors

State's evidence was insufficient to support a jury finding that defendant aided and abetted her boyfriend in the killing of her husband. *S. v. Lewis,* 426.

§ 10. Accessory Before the Fact

Defendant could be guilty at most of being an accessory before the fact to a felonious breaking and entering where defendant was not present or situated where he could give advice, aid or encouragement to the perpetrators of the break-in. *S. v. Murray,* 130.

§ 24. Plea of Not Guilty

Defendant's plea of not guilty to first degree murder included all lesser included offenses embraced in the bill of indictment. *S. v. Mulwee,* 366.

§ 26. Plea of Former Jeopardy

Trial of defendant for both possession and sale of the same heroin did not place defendant in double jeopardy. *S. v. Anderson,* 72.

Defendant could properly be charged with the two separate offenses of assault with a deadly weapon and discharging a firearm into an occupied building. *S. v. Burris,* 656.

Defendant could not be convicted of armed robbery and the lesser included offense of assault with a deadly weapon. *S. v. Fletcher,* 672.

§ 29. Suggestion of Mental Incapacity to Plead

Where defendant failed to raise the question of his mental capacity to stand trial, the trial court was not required on its own motion to make such an inquiry. *S. v. Fuller,* 249.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Evidence of defendant's guilt of a subsequent offense was improperly admitted in a prosecution for possession of heroin. *S. v. Little,* 211.

Testimony that defendant committed another crime other than the one with which he was charged was invited by defendant. *S. v. Austin,* 395.

Trial court in a prosecution for possession and sale of marijuana erred in allowing the prosecuting attorney to ask defendant if anyone else besides the State's witness had ever approached him about buying marijuana. *S. v. Dietz,* 296.

CRIMINAL LAW — Continued

§ 40. Evidence at Former Trial or Proceeding

Defendant was not entitled to a court reporter at his preliminary hearing or to a free transcript of that proceeding. *S. v. Harris,* 15.

§ 42. Articles and Clothing Connected With the Crime

Trial court in an assault case did not err in allowing into evidence a knife allegedly used in the commission of the crime. *S. v. Maddox,* 58.

Trial court properly allowed evidence as to a rifle taken in a breaking or entering and a coat worn by defendant. *S. v. Little,* 467.

Items taken in an armed robbery were properly admitted into evidence. *S. v. Henderson,* 452.

§ 60. Evidence in Regard to Fingerprints

Chain of custody of a fingerprint lifted from the crime scene was sufficiently established to permit testimony based upon examination of the print. *S. v. Burrell,* 61.

Evidence was sufficient to permit jury finding that defendant's fingerprint at crime scene could have been impressed only at time of the offense. *Ibid.*

Trial court did not err in permitting two deputy sheriffs to testify that they fingerprinted defendant at the county jail 12 days after the crime was committed. *Ibid.*

Trial court properly admitted opinion testimony as to the length of time a fingerprint had been on a cigar box. *S. v. Samuel,* 562.

§ 62. Lie Detector Tests

A stipulation rendered the results of a polygraph test admissible in evidence. *S. v. Steele,* 496.

§ 66. Evidence of Identity by Sight

Trial court was not required to conduct a voir dire concerning identification of defendant. *S. v. Silvers,* 155; *S. v. Fuller,* 249.

Trial court was not required to conduct a voir dire to determine admissibility of the victim's testimony identifying men in the courtroom as being present at the crime where defendants were not identified by the victim as participants in the crime. *S. v. Spinks,* 642.

A rape victim's in-court identification of defendant was based solely on what she observed on the afternoon of the rape. *S. v. Caldwell,* 323.

Lineup identification was not inadmissible on the ground that the form used to advise defendant of his rights was usually used for in-custody interrogation. *S. v. Hodge,* 502.

In-court identifications were of independent origin and not tainted by any illegal pretrial identification procedure. *S. v. Hunter,* 534.

In-court identifications of defendant based on observation at the crime scene were properly admitted. *S. v. Henderson,* 452.

§ 70. Tape Recordings

A proper foundation was laid for admission of a tape recording. *Levi v. Justice,* 511.

Trial court did not err in exclusion of testimony by the court reporter that a tape was difficult to hear and understand when it was played at a previous trial. *Ibid.*

CRIMINAL LAW — Continued

§ 73. Hearsay Testimony

Where the declarant is available for cross-examination, there is no reason to invoke the hearsay rule. *S. v. Satterfield,* 270.

§ 75. Voluntariness of Confession and Admissibility

Evidence was sufficient to support trial court's conclusions that defendant voluntarily signed a waiver of rights, the waiver was mislaid, and defendant's confession was voluntary. *S. v. Monroe,* 405.

Confession obtained during custodial interrogation is inadmissible unless defendant has signed a written waiver of his rights or orally stated that he waives his rights. *S. v. Harris,* 412.

Trial court in an armed robbery case did not err in admission of a confession to a robbery made after defendant stated he wanted an attorney present during interrogation about thefts of radios from vehicles. *S. v. Hodge,* 502.

Statements given by defendant to law enforcement officers who interrogated him after his arrest were admissible where defendant was given full Miranda warnings and then waived his constitutional rights. *S. v. Pressley,* 581.

A minor has the capacity to make a voluntary confession without the presence or consent of counsel or other responsible adult. *In re Mellott,* 81.

Trial court did not err in allowing into evidence an admission of defendant. *S. v. Fuller,* 249.

§ 76. Determination and Effect of Admissibility

Trial court's findings were sufficient to support admission of in-custody statements. *S. v. Spinks,* 642.

Court's findings that defendant was given the Miranda warnings and voluntarily waived his rights were supported by evidence and binding on appeal. *S. v. Arrington,* 664.

§ 79. Acts and Declarations of Codefendants

Defendant cannot complain of the court's statement to the jury that a codefendant had entered a plea of guilty where defendant consented to such explanation. *S. v. Fogler,* 659.

§ 80. Records and Private Writings

Defendant was not prejudiced by denial of his request to see a statement of a State's witness. *S. v. Edwards,* 369.

§ 81. Best Evidence Rule

Introduction of oral testimony to show defendant signed a written waiver of his rights was not precluded by the best evidence rule. *S. v. Monroe,* 405.

§ 84. Evidence Obtained by Unlawful Means

Defendants had no standing to object to the search of a police patrol car in which they rode after their arrest. *S. v. Young,* 308.

A shotgun and rifle removed from the car in which defendant was riding were properly admitted in an armed robbery case. *S. v. Arrington,* 664.

CRIMINAL LAW — Continued

§ 86. Credibility of Defendant

Trial court properly allowed the district attorney to clarify on cross-examination defendant's testimony that he had a deal with a police officer regarding another charge. *S. v. Wise*, 622.

§ 87. Direct and Redirect Examination of Witnesses

Trial court properly admitted evidence on redirect examination which was unrelated to the witness's cross-examination. *S. v. Logan*, 670.

§ 88. Cross-examination

Defendant was not bound by the answer of a State's witness on cross-examination that no promises had been made to him concerning his testimony. *S. v. Murray*, 130.

Trial court properly sustained objection to questions on cross-examination calling for conclusions by the witness. *S. v. Lewis*, 426.

§ 91. Continuance

Trial court did not err in denying defendant's motion for continuance because of court's commendation of prosecutor for taking nol pros in another case. *S. v. Courson*, 268.

Trial court did not err in denial of defendant's motion for continuance made during pretrial arraignment so that defendant could cross-examine the State's identifying witness. *S. v. Edwards*, 369.

Trial court properly denied defendant's motion for continuance made on the ground of absence of a witness. *S. v. Mitchell*, 313.

Trial court did not err in allowing a surprise witness to testify without first granting a continuance. *S. v. Spinks*, 571.

§ 92. Consolidation of Charges

Trial court properly consolidated robbery charges against two defendants. *S. v. Hunter*, 534; *S. v. Samuel*, 562; *S. v. Spinks*, 571.

§ 96. Withdrawal of Evidence

Defendant was not prejudiced where the trial court withdrew hearsay testimony. *S. v. Satterfield*, 270.

Trial court's withdrawal of testimony concerning a witness's and defendant's prior conviction did not cure the prejudice to defendant. *S. v. Foster*, 531.

§ 98. Presence of Defendant

Defendant waived his right to be present at rendition of the verdict. *S. v. Harris*, 15.

Defendant waived his right to be present at trial in a case in which the prosecutor reduced a charge of first degree murder to second degree murder during defendant's absence. *S. v. Mulwee*, 366.

§ 99. Conduct of Court and Expression of Opinion

Trial court did not sustain its own objections or cross-examine defendant and make comments about her credibility. *S. v. Lewis*, 426.

§ 102. Argument and Conduct of Counsel or District Attorney

Defendant was not prejudiced by the presence of a pistol which was not introduced in evidence on the district attorney's table throughout the trial. *S. v. Tomlin*, 68.

CRIMINAL LAW — Continued

§ 128. Mistrial

Trial court in narcotics case did not err in denial of defendant's motion for a mistrial when a State's witness, in response to a question as to why she was working with an undercover agent, stated she "got real sick of a lot of (her) friends dying." *S. v. Anderson*, 72.

State's examination of a witness as to his "rabbit hunting" experience was not grounds for mistrial. *S. v. Smith*, 568.

In a prosecution for assault with intent to rape, trial court did not err in denying motion for mistrial when the prosecutrix testified defendant had come to her home on a prior occasion with the intention of raping her. *S. v. Bradshaw*, 485.

§ 131. New Trial for Newly Discovered Evidence

Motion for a new trial for newly discovered evidence is addressed to the discretion of the trial court. *S. v. Gleason*, 587.

§ 134. Requisites of Judgment or Sentence

Before sentencing a youthful offender under any other applicable penalty provision, the judge must expressly state that he finds defendant will not derive benefit from commitment as a committed youthful offender. *S. v. Worthington*, 167.

Trial court was without authority to direct that a portion of a fine imposed as a special condition of probation be used by a city vice squad rather than by the county school fund. *S. v. Walker*, 295.

§ 137. Conformity of Judgment to Verdict

Recitations in judgments which were inconsistent with the verdicts were surplusage and therefore stricken. *S. v. Little*, 467.

§ 138. Severity of Sentence and Determination Thereof

Defendant's sentence was not invalid on ground the State presented a petition signed by persons living in defendant's community stating that defendant had been corrupting teenagers in the community. *S. v. Hodge*, 502.

Sentence must be vacated where the record shows the severity of the sentence was based on the 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. *Ibid.*

Trial court properly imposed sentence against defendant in excess of sentence given his codefendant under the codefendant's plea bargaining arrangement. *S. v. Sligh*, 668.

§ 139. Sentence to Maximum and Minimum Terms

Trial court erred in imposing a minimum as well as a maximum sentence on a youthful offender. *S. v. West*, 247; *S. v. Satterfield*, 270.

Trial court did not err in sentencing defendant to prison for a term of not less than 30 years without specifying a minimum term since the maximum punishment for armed robbery is 30 years. *S. v. Lipscomb*, 416.

CRIMINAL LAW — Continued

§ 140. Concurrent and Cumulative Sentences

Trial court's judgment clearly reflected an intent to make sentences run consecutively with other sentences imposed on defendant. *S. v. Jackson*, 393.

§ 142. Suspended Sentences

One year active sentence plus three years probation imposed upon revocation of defendant's probation was not cruel and unusual punishment. *S. v. Hogan*, 34.

§ 143. Revocation of Suspension of Sentence

The probationary judgment does not have to be formally introduced into evidence at a probation revocation hearing. *S. v. Hogan*, 34.

Evidence was sufficient to show that defendant wilfully violated the conditions of her probation. *S. v. Martin*, 666.

§ 144. Modification and Correction of Judgment in Trial Court

Trial court's modification of a judgment to increase the time of imprisonment made after the court had been adjourned sine die was improper. *S. v. Jones*, 636.

§ 148. Judgments Appealable

There is no right of appeal from a plea of guilty or nolo contendere. *S. v. Carr*, 39; *S. v. West*, 247; *S. v. Pierce*, 676.

§ 154. Case on Appeal

Inclusion of post-verdict testimony in the record on appeal was a discretionary matter for the trial judge. *S. v. Little*, 467.

§ 155.5. Docketing Record in Court of Appeals

Trial court had no power to extend time for docketing record on appeal for any period exceeding 150 days from date of the judgment appealed from. *S. v. McCall*, 13.

Purported extension of time to docket appeal entered by the trial judge after expiration of the original 90 days was ineffective to extend the time for docketing. *S. v. Pearson*, 83.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

Appeal is dismissed for failure of appellants to bring forward a record that will enable the appellate court to decide the question raised on appeal. *S. v. Norton*, 248.

Where the search warrant and supporting affidavit were not brought up as a part of the record on appeal or as an exhibit, the court on appeal will not pass on their validity. *S. v. Alston*, 327.

Defendant failed to show error in the admission of a photograph into evidence where the photograph did not appear as part of the record on appeal. *S. v. Samuel*, 562.

§ 162. Necessity for Objection

Defendants could not complain of testimony on appeal where they failed to object at trial. *S. v. Moore*, 284.

CRIMINAL LAW — Continued

§ 163. Exceptions and Assignments of Error to Charge

Defendant's assignment of error to the trial court's charge was broadside and ineffective. *S. v. Autry,* 639.

Objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires. *S. v. Hargrove,* 36.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Where the question prompting an objectionable response did not appear in the record, it is presumed that the response was responsive. *S. v. Stephens,* 282.

DAMAGES

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Trial court did not err in refusing to allow evidence of medical treatment and expenses where there was no evidence to show the necessity for medical treatment and reasonableness of the medical expenses. *Taylor v. Boger,* 337.

§ 16. Instructions on Measure of Damages

Trial court erred in instructing the jury that in awarding damages it might consider any blemishes or scars which tend to mar plaintiff's appearance. *Spears v. Distributing Co.,* 646.

DEEDS

§ 20. Restrictive Covenants as Applied to Subdivision Developments

A board of education which purchases property for a valid school purpose cannot be enjoined to comply with restrictive covenants limiting use of the property to residential purposes. *Mills, Inc. v. Board of Education,* 524.

Restrictive covenants were valid and binding on owners of lots in a subdivision where the deeds to all lot owners incorporated by reference the restrictions imposed by the recorded agreement although the agreement was recorded by a corporation which never acquired any interest in the subdivision. *Rodgerson v. Davis,* 173.

Restrictive covenant prohibiting the construction of "more than one single unit family residence" on lots in a subdivision precluded the construction of duplexes in the subdivision. *Ibid.*

Both plaintiffs and defendants waived set-back restrictive covenants by violating the restrictions. *Ibid.*

Subdivision developer's disapproval of defendant's house plans pursuant to restrictive covenant requiring plans to be submitted to and approved by the developer was unreasonable. *Boiling Spring Lakes v. Coastal Services Corp.,* 191.

DISORDERLY CONDUCT

§ 1. Nature and Elements of the Offense

Statute making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrator or his representative is constitutional. *S. v. Strickland,* 40.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

A wife could maintain an action against her husband for alimony based on indignities and for child custody while still living in the same house with him. *Jenkins v. Jenkins,* 205.

§ 18. Alimony Pendente Lite

Trial court erred in ordering defendant to pay temporary alimony and counsel fees without making findings of fact as to whether plaintiff qualified for relief under G.S. 50-16.3. *Hill v. Hill,* 423; *Guy v. Guy,* 343.

Trial court did not abuse its discretion in awarding plaintiff a lump sum of $3000 in addition to subsistence pendente lite. *Ibid.*

Trial court's findings were insufficient to support an award of alimony pendente lite. *Travis v. Travis,* 575.

§ 19. Modification of Decrees

Trial court erred in changing an alimony award two years after the judgment was entered. *Vandooren v. Vandooren,* 279.

§ 22. Procedure in Custody Case

Defendant cannot complain that an award of custody was made without notice to him where he participated in the hearing and personally testified with respect to custody and support. *Guy v. Guy,* 343.

§ 23. Child Support

Trial court erred in holding that the parties to a separation agreement were bound by the amount of child support provided for in the agreement. *Wyatt v. Wyatt,* 134.

Where this cause was heard upon plaintiff's motion for an increase in child support payments and upon defendant's motion for a modification of the child custody order, trial court's award of attorney fees did not have to be supported by a finding that the defendant had refused to provide adequate support. *Fellows v. Fellows,* 407.

EJECTMENT

§ 7. Presumption and Burden of Proof

The Real Property Marketable Title Act applies only against nonpossessory interests and not to a claim against a party in present possession. *Taylor v. Johnston,* 186.

ELECTRICITY

§ 4. Care Required

Violation of the National Electrical Code by defendant in its pump house was negligence per se. *Ward v. Swimming Club,* 218.

EVIDENCE — Continued

§ 40. Nonexpert Opinion Testimony in General

Testimony by defendant that she had not received service of summons and complaint did not constitute an expression of opinion on a question of law. *Wynnewood Corp. v. Soderquist,* 611.

§ 44. Nonexpert Opinion Evidence as to Physical Ability and Health

Trial court properly permitted defendant to testify as to the source of his depression and the purpose for which drugs were prescribed for him. *Wynnewood Corp. v. Soderquist,* 611.

§ 50. Expert Medical Testimony

Trial court did not err in refusing to allow plaintiff's expert witness to answer a hypothetical question based on facts not in evidence. *Taylor v. Boger,* 337.

§ 51. Blood Tests

Results of blood grouping tests were admissible to rebut the presumption of legitimacy of a child born while the mother was married. *Wright v. Gann,* 45.

EXECUTION

§ 13. Title and Rights of Purchasers

There was a missing link in plaintiff's chain of title where plaintiff introduced a sheriff's deed but failed to establish the existence of the judgment and execution giving the sheriff authority to convey the property. *Taylor v. Johnston,* 186.

FORGERY

§ 2. Prosecution and Punishment

Forgery indictment sufficiently alleged instrument was apparently capable of effecting a fraud where the indictment alleged the instrument was a check drawn on the purported maker's bank account. *S. v. Treadway,* 78.

Instruction that if jury found defendant not guilty of forgery it would not consider the charge of uttering, while disapproved, was not prejudicial to defendant. *Ibid.*

FRAUD

§ 13. Damages

Plaintiff was not entitled to treble damages where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented. *Taylor v. Triangle Porsche-Audi, Inc.,* 711.

FRAUDS, STATUTE OF

§ 7. Contracts to Convey or Devise

An option to purchase land granted plaintiffs by defendants was void for uncertainty since the description of the land was insufficient. *Watts v. Ridenhour,* 8.

GAMBLING

§ 3. Lotteries

Trial court in a prosecution for possession of lottery tickets erred by placing the burden of proof on defendant. *S. v. Mayo*, 336.

HOMICIDE

§ 19. Evidence Competent on Question of Self-Defense

Trial court did not err in excluding evidence of the victim's character since defendant presented no evidence as to the necessity of self-defense. *S. v. Allmond*, 29.

§ 20. Photographs as Demonstrative Evidence

Trial court did not err in allowing into evidence five photographs of deceased. *S. v. Allmond*, 29.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence of defendant's guilt of involuntary manslaughter was sufficient for the jury. *S. v. Tomlin*, 68.

Evidence was sufficient to be submitted to the jury in a second degree murder prosecution where it tended to show that defendant shot deceased. *S. v. Hines*, 376.

State's evidence was sufficient for the jury to find that defendant aided or abetted his brother in the crime of manslaughter. *S. v. Spencer*, 301.

State's evidence was insufficient to support a jury finding that defendant aided and abetted her boyfriend in the killing of her husband. *S. v. Lewis*, 426.

§ 28. Instructions on Defenses

Trial court erred in giving the jury instruction that one who voluntarily enters a fight is an aggressor and in failing to instruct that one is not an aggressor if he voluntarily enters a fight in defense of his brother. *S. v. Spencer*, 301.

§ 30. Submission of Lesser Degrees of the Crime

Trial court's withdrawal of second degree murder from consideration by the jury and submission of the lesser offense of involuntary manslaughter inured to the benefit of defendant. *S. v. Tomlin*, 68.

§ 31. Verdict and Sentence

Imposition of a sentence of 30 years imprisonment for conviction of voluntary manslaughter was excessive. *S. v. Allmond*, 29.

INFANTS

§ 10. Commitment of Minors for Delinquency

A youthful offender is a person under the age of 21 at the time of conviction. *S. v. Worthington*, 167.

Statute rendering an SBI laboratory report of an analysis of matter to determine whether it contained a controlled substance admissible in district court does not deprive a juvenile of the right of confrontation and cross-examination. *In re Arthur*, 227.

INJUNCTIONS

§ 11. Injunctions Against Public Boards

Plaintiffs were not entitled to injunction prohibiting the State Board of Transportation from removing the remaining portion of an old causeway which is plaintiffs' only means of vehicular access to their property. *Frink v. Board of Transportation,* 207.

INSANE PERSONS

§ 5. Claims Against the Estate

Statutes requiring mental patients to pay the actual costs of their care in State institutions apply to the criminally insane and are not unconstitutional when so applied. *Hospital v. Davis,* 479.

INSURANCE

§ 79. Liability Insurance

Insurance against damages "because of personal injury" arising out of malicious prosecution did not afford coverage against punitive damages in a malicious prosecution suit. *Cavin's, Inc. v. Insurance Co.,* 698.

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards

Evidence was sufficient to permit revocation of a permit where it tended to show that petitioner sold whiskey in a social establishment and that petitioner's bartender had control over members' lockers. *American Legion v. Board of Alcoholic Control,* 266.

§ 12. Competency and Relevancy of Evidence

By seeking ABC permits, the permittee waived its Fourth Amendment rights as to searches and seizures to the limited extent of inspection by officers for violations of State ABC regulations. *Elks Lodge v. Board of Alcoholic Control,* 594.

JUDGMENTS

§ 2. Time and Place of Rendition

Judgment was entered when the court announced the judgment in open court and the clerk made a notation of the judgment in the minutes, not when the court thereafter signed the written judgment. *Story v. Story,* 349.

Default judgment was not entered in open court where the only entry in the clerk's minutes was a notation that plaintiff's attorney was to prepare the judgment, and default judgment signed by a special judge out of session and out of the county was void since defendant did not consent thereto. *Taylor v. Triangle Porsche-Audi, Inc.,* 711.

§ 6. Modification of Judgment in Trial Court

Trial court erred in changing an alimony award two years after the judgment was entered. *Vandooren v. Vandooren,* 279.

JUDGMENTS — Continued

JUDICIAL SALES

JURY

§ 1. Right to Trial by Jury

Defendants did not waive their right to jury trial on the issue of determining the location of the true boundary line between the lands of the parties. *Mathias v. Brumsey*, 558.

§ 6. Examination of Jurors

Trial court did not err in denying defendant the opportunity to question jurors with respect to self-defense during voir dire where the trial judge himself questioned the jurors. *S. v. Girley*, 388.

Trial court in a homicide case did not err in permitting the district attorney to question prospective jurors regarding their prejudices against homosexuality. *S. v. Edwards*, 369.

LABORERS' AND MATERIALMEN'S LIENS

§ 9. Priorities of Lien

Trial court properly directed payment of three second-tier contractors on a pro rata basis. *Distributors, Inc. v. Promac, Inc.*, 418.

LANDLORD AND TENANT

§ 13. Expiration of Term, Renewals and Extensions

Defendant landlord did not breach a lease with an option to renew by refusing to renew where defendant had entered into a contract to sell the premises. *Shugar v. Property, Inc.*, 649.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to invoke the principle of possession of recently stolen property. *S. v. Little*, 467; *S. v. Crawford*, 414.

Evidence was sufficient to be submitted to the jury in a prosecution for larceny of boggs and a tractor from a field. *S. v. Greene*, 718.

§ 8. Instructions

Court's statement that buildings broken into were owned by a specified person did not constitute an expression of opinion on larceny charge. *S. v. Respass*, 137.

§ 9. Verdict

Verdict will be considered as finding of guilty of misdemeanor larceny where indictment alleged larceny of property of a value of more than $200 but court instructed only on larceny as the result of a breaking and entering. *S. v. Respass*, 137.

§ 10. Judgment and Sentence

Trial court did not abuse its discretion by imposing the maximum sentence upon defendant's conviction of felonious larceny. *S. v. Harris*, 385.

MASTER AND SERVANT

§ 11. Agreements Not to Compete

A covenant not to compete executed by one defendant and plaintiff was not enforceable where it was executed after defendant was first em-

MASTER AND SERVANT — Continued

ployed on a permanent basis and defendant received no promotion or increase in salary at the time of the execution of the covenant, but a similar covenant between another defendant and plaintiff was enforceable where that defendant was given a promotion and a two year term of employment. *Machinery Co. v. Milholen*, 678.

§ 65. Workmen's Compensation—Back Injury

A checker-clerk in a grocery store did not sustain an injury by accident when she picked up a 20 pound bag of charcoal from a customer's grocery cart and suffered a back injury. *Beamon v. Grocery*, 553.

§ 66. Preexisting Physical Conditions

Where plaintiff's preexisting condition was aggravated by a subsequent injury in defendant's plant, the Industrial Commission erred in concluding that plaintiff's compensation should be based on the percentage of disability attributable to the injury sustained in defendant's plant. *Pruitt v. Publishing Co.*, 254.

§ 72. Partial Disability

Evidence was sufficient to support a finding that plaintiff had a 15% permanent partial disability of his right leg. *Lewallen v. Upholstery Co.*, 652.

§ 85. Nature and Extent of Jurisdiction of Industrial Commission

The Industrial Commission acted within its authority in keeping plaintiff's case open after its award to allow plaintiff another opportunity to gather and present missing evidence as to medical treatment. *Conklin v. Freight Lines*, 260.

§ 90. Notice to Employer of Accident

Plaintiff's workmen's compensation claim was properly denied where he failed to give written notice to his employer. *Pierce v. Block Corp.*, 276.

§ 91. Filing of Compensation Claim

Evidence was sufficient to require a finding of fact with respect to estoppel of defendant to plead the lapse of time between the date of plaintiff's receipt of his last payment for temporary total disability and his request for a hearing before the Industrial Commission to determine his disability arising out of the accident in question. *Smith v. Construction Co.*, 286.

§ 93. Prosecution of Claim and Proceedings Before Commission

Industrial Commission did not err in refusing to remand cause for the purpose of taking further medical and lay testimony. *Lewallen v. Upholstery Co.*, 652.

MORTGAGES AND DEEDS OF TRUST

§ 39. Actions for Damages for Wrongful Foreclosure

Evidence was sufficient for the jury in an action for wrongful foreclosure of a deed of trust brought against the trustee, the secured party, and the secured party's manager. *Sloop v. London*, 516.

MUNICIPAL CORPORATIONS

§ 26. Special Assessments

A city was entitled to recover interest on delinquent assessments from the date the property was annexed by the city. *City of Greensboro v. Harris,* 585.

§ 31. Review of Orders of Municipal Zoning Boards

Findings by the board of adjustment were insufficient to enable the reviewing court to determine whether the board erred in the denial of a building permit for the construction of apartments where the board failed to make findings as to petitioner's contention that he had acquired a vested right to construct the apartments on the property. *Rentals, Inc. v. City of Burlington,* 361.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

Defendant could not be convicted of both possession and possession with intent to sell the same heroin. *S. v. Smith,* 568.

§ 3. Competency and Relevancy of Evidence

Chain of custody of heroin purchased by defendant from an undercover agent was sufficiently shown to permit its admission in evidence. *S. v. Anderson,* 72.

Statute rendering an SBI laboratory report of an analysis of matter to determine whether it contained a controlled substance admissible in district court does not deprive a juvenile of the right of confrontation and cross-examination. *In re Arthur,* 227.

Evidence of various exhibits found in defendant's apartment was relevant to show the element of intent to distribute in a prosecution for possession of marijuana with intent to distribute. *S. v. Mitchell,* 313.

§ 4. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for possession of MDA. *S. v. Wells,* 144.

Evidence was sufficient for the jury in a prosecution for possession of marijuana. *S. v. Hughes,* 164; *S. v. Silvers,* 155.

State's evidence was sufficient for the jury to find that marijuana seized from defendant was of the statutorily proscribed Cannabis Sativa L variety. *S. v. Mitchell,* 313.

Evidence was sufficient to be submitted to the jury in a prosecution for possession of a hypodermic syringe and needle. *S. v. Alston,* 327.

§ 4.5. Instructions

Trial court properly instructed the jury that intent to distribute could be inferred from defendant's possession of more than one ounce of marijuana. *S. v. Mitchell,* 313.

Trial court's instructions on possession in a prosecution for possession of amphetamines were proper. *S. v. Davis,* 341.

Trial court's failure to instruct on constructive possession was not error. *S. v. Wells,* 144.

NARCOTICS — Continued

§ 5. Verdict and Punishment

Trial of defendant for both possession and sale of the same heroin did not place defendant in double jeopardy. *S. v. Anderson*, 72.

Trial court erred in imposing a sentence in excess of five years for felonious possession of heroin where the indictment did not charge defendant with a prior conviction of that offense. *S. v. Moore*, 245.

NEGLIGENCE

§ 2. Negligence Arising from Performance of a Contract

Plaintiffs' evidence was sufficient for the jury in an action against a mobile home manufacturer based on negligence in the construction and installation of a mobile home, but was insufficient for the jury in an action against a mobile home dealer. *Sims v. Mobile Homes*, 25.

§ 29. Sufficiency of Evidence of Negligence

Evidence was sufficient to support a finding that defendant was negligent in failing to comply with the National Electrical Code and that such negligence was a proximate cause of plaintiff's intestate's death. *Ward v. Swimming Club*, 218.

§ 37. Instructions on Negligence

In an action to recover for injuries received at a car wash, the court's instructions did not limit the jury to negligence supported by the evidence. *Spears v. Distributing Co.*, 646.

PARENT AND CHILD

§ 1. Relationship Generally

Results of blood grouping tests were admissible to rebut the presumption of legitimacy of a child born while the mother was married. *Wright v. Gann*, 45.

Trial court in a paternity action erred in permitting the mother to testify she had obtained a divorce from her husband on the ground of separation since this constituted evidence of nonaccess by the wife. *Ibid.*

PARTITION

§ 12. Partition by Exchange of Deeds

There was a missing link in petitioner's chain of title where petitioner introduced an 1835 report of a division allotting the land in question but introduced no evidence to show that deeds were ever exchanged by the intestate's heirs. *Taylor v. Johnston*, 186.

PARTNERSHIP

§ 9. Dissolution of Partnership

A "milk base" owned by defendant and used by a dairy partnership was a contribution to the partnership property for which defendant was entitled to be repaid upon dissolution of the partnership. *Halsey v. Choate*, 49.

PLEADINGS

§ 32. Motions to be Allowed to Amend

Trial court did not err in refusing to allow plaintiff administratrix to amend her complaint to assert a claim completely different from that alleged in the original complaint. *Johnson v. Bank,* 240.

§ 38. Motion for Judgment on the Pleadings

Judgment on the pleadings was inappropriate notwithstanding attorneys for both parties consented to judgment on the pleadings. *Cline v. Seagle,* 200.

PRINCIPAL AND AGENT

§ 7. Undisclosed Agency

Defendant was liable for cost of a septic tank system installed on a third party's land by plaintiff at defendant's request where there was no showing that plaintiff knew defendant was acting as agent for the third party. *Staley, Inc. v. Realty Co.,* 541.

§ 8. Knowledge of Agent as Knowledge of Principal

Notice to defendant's employee of the unsafe conditions in defendant's pump house was notice to defendant employer. *Ward v. Swimming Club,* 218.

PROCESS

§ 7. Personal Service on Resident Individuals

A house in this State owned by defendant and his wife as tenants by the entirety qualified as defendant's "dwelling house or usual place of abode" for purposes of substituted service of process although defendant and his wife also owned a house in S. C. in which defendant resided while working in that state. *Van Buren v. Glasco,* 1.

Trial court properly found that defendant's 15 year old son was a person of suitable age and discretion with whom to leave process at defendant's dwelling house or usual place of abode. *Ibid.*

RAPE

§ 3. Indictment

Allegations in the bill of indictment were sufficient to charge defendant with second degree rape. *S. v. Caldwell,* 323.

§ 18. Prosecutions

Trial court in a prosecution for assault with intent to commit rape properly refused to submit lesser offense of misdemeanor assault. *S. v. Bradshaw,* 485.

RECEIVING STOLEN GOODS

§ 6. Instructions

Trial court erred in giving instructions which assumed goods had been stolen. *S. v. White,* 198.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3. Actions

Trial court properly found that plaintiff was a congregational church in respect to its property and that a conveyance of property by the trustees was unauthorized. *Church v. Church,* 127.

ROBBERY

§ 1. Nature and Elements of the Offense

Defendant could be convicted of both armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Kearns,* 354.

Defendant could not be convicted of armed robbery and the lesser included offense of assault with a deadly weapon. *S. v. Fletcher,* 672.

§ 4. Sufficiency of Evidence and Nonsuit

Testimony of a co-conspirator constituted sufficient evidence to be submitted to the jury in a prosecution for conspiracy to commit armed robbery. *S. v. Alston,* 11.

State's evidence was sufficient for the jury in a prosecution for armed robbery of a motel night clerk. *S. v. Young,* 308.

Evidence was sufficient for the jury in a prosecution for attempted armed robbery. *S. v. Harris,* 520.

Evidence was sufficient to be submitted to the jury in a prosecution for common law robbery. *S. v. Haynes,* 578; *S. v. Spinks,* 642.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Trial court's instruction on the felonious intent element of armed robbery was sufficient where the court instructed that it must find that defendant "intended to rob" the victim and "knew that he was not entitled to take the property." *S. v. Webb,* 391.

Trial court in an armed robbery prosecution did not err in failing to submit to the jury the lesser included offense of simple assault. *S. v. Jackson,* 393.

Trial court in an armed robbery case erred in failing to charge on the lesser offense of common law robbery where the robbery victim was not sure whether defendant actually had a weapon. *S. v. Jackson,* 675.

§ 6. Verdict and Sentence

Trial court did not err in sentencing defendant to prison for a term of not less than 30 years without specifying a minimum term since the maximum punishment for armed robbery is 30 years. *S. v. Lipscomb,* 416.

RULES OF CIVIL PROCEDURE

§ 4. Service of Process

A house in this State owned by defendant and his wife as tenants by the entirety qualified as defendant's "dwelling house or usual place of abode" for purposes of substituted service of process although defendant and his wife also owned a house in S. C. in which defendant resided while working in that state. *Van Buren v. Glasco,* 1.

Trial court properly found that defendant's 15 year old son was a person of suitable age and discretion with whom to leave process at defendant's dwelling house or usual place of abode. *Ibid.*

RULES OF CIVIL PROCEDURE — Continued

§ 6. Time

Defendant was not prejudiced by the fact that he received less than five days' notice of a motion to dismiss his appeal. *Story v. Story*, 349.

Defendant was not prejudiced by failure of plaintiff to give him five days' notice of hearing for alimony pendente lite and child custody. *Jenkins v. Jenkins*, 205.

§ 7. Pleadings Allowed; Form of Motion

Trial court properly permitted defendant to amend its motion to set aside a default judgment by including the rule number under which it was proceeding. *Taylor v. Triangle Porsche-Audi, Inc.*, 711.

§ 20. Permissive Joinder of Parties

Insurer who paid part of insured's claim was a proper and not a necessary party to an action brought by insured against tortfeasor. *Industries, Inc. v. Railway Co.*, 331.

§ 36. Admission of Facts

Determination of defendant's paternity in a prosecution for nonsupport was not a judicial admission in a subsequent civil action for child support. *Tidwell v. Booker*, 435.

§ 54. Judgments

Appeal from an order dismissing fewer than all of plaintiffs' claims is premature. *Mozingo v. Bank*, 196; *Newton v. Ins. Co.*, 168; *Oestreicher v. Stores, Inc.*, 330; *Builders, Inc. v. Felton*, 334; *Leasing Corp. v. Productions, Inc.*, 661.

§ 55. Default Judgment

A letter from defendant's registered service agent to the clerk of court denying he was still defendant's service agent constituted an appearance by defendant, and plaintiff was required to give defendant three days' notice of a hearing of an application for default judgment. *Taylor v. Triangle Porsche-Audi, Inc.*, 711.

§ 56. Summary Judgment

Trial court properly denied plaintiff's oral motions to continue summary judgment hearing and to suppress a deposition offered by defendant. *Brooks v. Smith*, 223.

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. *Shearin v. Indemnity Co.*, 88.

Summary judgment for plaintiff was premature where defendant had filed no answer and defendant still had 20 days after notice of the denial of its Rule 12(b)(6) motion to dismiss in which to file answer. *Village, Inc. v. Financial Corp.*, 403.

Motion for judgment on the pleadings was treated as a motion for summary judgment. *Battle v. Clanton*, 616.

SAFECRACKING

State's evidence was sufficient to raise inference that a safe was forced open by the use of tools. *S. v. Wise*, 622.

SCHOOLS

§ 6. School Property

A board of education which purchases property for a valid school purpose cannot be enjoined to comply with restrictive covenants limiting use of the property to residential purposes. *Mills, Inc. v. Board of Education,* 524.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers' search of defendant's person as an incident to arrest was legal. *S. v. Hughes,* 164.

Arrest of defendants without a warrant was lawful and evidence obtained pursuant thereto was not tainted and inadmissible. *S. v. Young,* 308.

Defendants had no standing to object to the search of a police patrol car in which they rode after their arrest. *Ibid.*

Officers' taking of a stereo from defendant's home was not an unlawful search where defendant voluntarily relinquished the stereo. *S. v. Raynor,* 538.

By seeking ABC permits, the permittee waived its Fourth Amendment rights as to searches and seizures to the limited extent of inspection by officers for violations of State ABC regulations. *Elks Lodge v. Board of Alcoholic Control,* 594.

§ 2. Consent to Search Without Warrant

Search of a dwelling with consent of the owner-occupant was constitutional and defendant, a visitor, had no standing to contest such consent. *S. v. Little,* 54.

§ 3. Requisites and Validity of Search Warrant

Affidavit was sufficient to support issuance of a warrant to search defendant's suitcase for narcotics. *S. v. Hansen,* 459.

Failure of a search warrant specifically to name defendant did not vitiate a search of defendant's suitcase under the warrant. *Ibid.*

An affidavit was sufficient to support a search warrant for methamphetamine. *S. v. English,* 545.

§ 4. Search Under the Warrant

Search of a vehicle under a warrant which authorized a search of defendant's premises was proper. *S. v. Logan,* 150.

Search pursuant to a warrant was not rendered illegal because of the failure of the officer to deliver a copy of the warrant to defendant or because the warrant was never filed with the clerk of superior court. *S. v. Hansen,* 459.

TORTS

§ 7. Release from Liability

A release executed by plaintiff included defendant driver and his insurer though they were not named specifically in the release. *Battle v. Clanton,* 616.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

The Real Property Marketable Title Act applies only against nonpossessory interests and not to a claim against a party in present possession. *Taylor v. Johnston,* 186.

§ 4. Sufficiency of Evidence

There was a missing link in plaintiff's chain of title where plaintiff introduced a sheriff's deed but failed to establish the existence of the judgment and execution giving the sheriff authority to convey the property. *Taylor v. Johnston,* 186.

TRIAL

§ 3. Motions for Continuance

Trial court did not err in denial of a motion for continuance of alimony pendente lite hearing made on ground that plaintiff's regular attorney was engaged in a trial in superior court. *Jenkins v. Jenkins,* 205.

§ 8. Consolidation of Actions for Trial

The trial judge is not required to follow the decision of another judge ordering separate trials on separate claims of two plaintiffs presented jointly in an earlier action. *Maness v. Bullins,* 214.

§ 36. Expression of Opinion on Evidence in Instructions

Trial court's instruction "as in this case" a resulting trust arises under certain conditions did not constitute an expression of opinion on the evidence. *Strange v. Sink,* 113.

§ 38. Request for Instructions

Plaintiff was not prejudiced where the jury was informed that an instruction was given at a party's request. *McDougald v. Doughty,* 237.

§ 51. Setting Aside Verdict

Trial court did not abuse its discretion in denial of plaintiff's motion to set aside the verdict in this action to recover for injuries received in a rear-end collision. *Montgomery v. Wrenn,* 32.

§ 54. New Trial for Defective Verdict

Jury verdict finding defendant negligent and the minor plaintiff not contributorily negligent and awarding the minor plaintiff nothing but plaintiff father an amount for sums expended for medical treatment furnished his son was inconsistent and a compromise. *Maness v. Bullins,* 214.

TROVER AND CONVERSION

§ 2. Procedure and Damages

Plaintiff's complaint was sufficient to state a claim for damages for wrongful conversion of a prisoner's silver dollars and pistol by a sheriff and a county manager. *Gallimore v. Sink,* 65.

Defendant repairer did not wrongfully refuse to release plaintiff's truck where plaintiff failed to pay the repair bill. *Enterprises, Inc. v. General Motors Corp.,* 94.

TRUSTS

§ 5. Construction and Operation of Trust

The language of a trust implied that the beneficiary's income but not his separate estate was to be considered in accomplishing the trust purpose. *Trust Co. v. Shearin,* 358.

§ 13. Creation of Resulting Trusts

Defendant's alleged promise to acquire plaintiffs' land at a foreclosure sale and reconvey some or all of the property to plaintiffs did not give rise to a parol trust where defendant never acquired the property. *Britt v. Allen,* 122.

§ 19. Sufficiency of Evidence of Resulting Trust

Resulting trust arose where plaintiff and her husband conveyed entirety property to defendant who agreed orally to convey the property to plaintiff upon her request after a planned divorce of plaintiff and her husband. *Strange v. Sink,* 113.

UNFAIR COMPETITION

Plaintiff was not entitled to treble damages where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented. *Taylor v. Triangle Porsche-Audi, Inc.,* 711.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Defendant's disclaimer and limitation clause on a purchase order for cabbage seed was valid. *Billings v. Harris Co.,* 689.

VENDOR AND PURCHASER

§ 1. Validity and Construction of Contracts and Options for Sale of Land

Defendant's alleged oral promise to purchase a quantity of land from plaintiffs was unenforceable. *Britt v. Allen,* 122.

Pleadings raised issues of fact as to whether clauses in an offer to purchase which conditioned the contract on the ability of the buyer to obtain financing constituted a part of the contract since they contained unfilled blank spaces. *Cline v. Seagle,* 200.

§ 3. Description and Amount of Land

An option to purchase land granted plaintiffs by defendants was void for uncertainty since the description of the land was insufficient. *Watts v. Ridenhour,* 8.

WEAPONS AND FIREARMS

Trial court in a prosecution for wilfully discharging a firearm into an occupied dwelling erred in equating wilful conduct with knowledge that the house in question was occupied. *S. v. Leeper,* 420; *S. v. Burris,* 656.

WITNESSES

§ 1. Competency of Witness

A nine year old crime against nature victim was competent to testify. *S. v. Courson,* 268.

WORD AND PHRASE INDEX

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COMMERCIAL PRINTING COMPANY, INC.
RALEIGH, NORTH CAROLINA